

WAIKATO LAW REVIEW

TAUMAURI

VOLUME 15, 2007



The Evolution of Treaty Jurisprudence

The Hon Justice David Baragwanath

***Improving the Quality of Legislation –The Legislation Advisory Committee,
the Legislation Design Committee and What Lies Beyond?***

Rt Hon Sir Geoffrey Palmer

The Winds of Change Hit the Legal Profession

Professor John H Farrar

Where There is a Will, There is a Way– A New Wills Act for New Zealand

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Property Law in the South Island High Country – Statutory, Not Common Law Leases

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***An Examination of Medical and Legal Issues in the Struggle of New Zealand Sawmill Workers
and ACC Cover for PCP Poisoning***

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Durgeshree D. Raman

Book Review: Electronic Evidence: Disclosure, Discovery & Admissibility

Brenda Midson



THE UNIVERSITY OF
WAIKATO

Te Whare Wānanga o Waikato

Cover Photograph: Te Matariki

The sculpture, Te Matariki, was commissioned by the Law School in 1994, using funds donated by Dame Catherine Tizard when the Law School was first established. The sculpture was designed and constructed by Brett Graham.

Te Matariki is star-shaped with seven points. It is based on Matariki (the Pleiades Group), a star cluster significant to Māori that appears on the flag of the Queen Te Atairangikaahu. Matariki was venerated by Māori; its arrival in June marked the start of the New Year. The seven points symbolise the seven stars in the group and also the seven attributes: he mana, he tika, he aroha, he mohio, he kaha, he pai and he oranga.

The Waikato Law Review cherishes the goal of biculturalism, which carries with it a commitment to advancing and encouraging the Māori dimension in the legal system. The Māori title of the Review, Taumauri, means 'to think with care and caution, to deliberate on matters constructively and analytically'. This title both encapsulates and symbolises the values and goals of the Review.

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EDITOR'S INTRODUCTION

Welcome to the fifteenth edition of the *Waikato Law Review*. This edition marks my first year as editor and I am proud to have been invited to take on the role to continue the work commenced by the previous editor, Professor Barry Barton and his predecessor, Professor Peter Spiller.

In this fifteenth edition of the *Review* we are pleased to present a diverse and interesting mixture of articles. The prestigious Harkness Henry lecture was given this year by the Honourable Justice Baragwanath and was entitled *The Evolution of Treaty Jurisprudence*. He describes as a 'privilege and a challenge' the task of updating the Harkness Henry address delivered by Sir Robin Cooke (as he was) in 1994, entitled *The Challenge of Treaty of Waitangi Jurisprudence* in which he tackled that part of our jurisprudence which deals with its treatment of the indigenous people of New Zealand. Justice Baragwanath rose to the challenge. The lecture was very well received by an appreciative audience and we thank him for his contribution. The School of Law is also grateful to Harkness Henry for its continued support.

Other papers represent the research of scholars from New Zealand and overseas, some of whom have achieved eminence in their fields, and some of whom are in the earlier stages of their careers. I would like to thank them all for their work.

It is also important to acknowledge all those to whom submissions were sent for peer review, whose efforts often go unseen. I would also like to acknowledge with gratitude the assistance of Janine Pickering, whose organizational skills are second to none. I would also like to thank Sonja Stanier for all her help with the references and formatting of the papers and Amanda Colmer from Waikato Print for her accuracy in typesetting and her good-natured efficiency.

This year we asked authors to use the Australian Guide to Legal Citation and I would like to take this opportunity to thank the University of Melbourne for establishing the AGLC and for giving their permission for us to use it.

Sue Tappenden
Editor

THE HARKNESS HENRY LECTURE

THE EVOLUTION OF TREATY JURISPRUDENCE*

DAVID BARAGWANATH*

I. INTRODUCTION

In his Harkness Henry address in 1994 *The challenge of Treaty of Waitangi jurisprudence*¹ Sir Robin Cooke tackled that part of our jurisprudence which deals with its treatment of the indigenous people of New Zealand, in which he had played a dominant role. To be asked to provide an update of that address, effectively from the time of Lord Cooke's unprecedented move to the House of Lords, and to do so before this audience in the heart of Tainui, is a privilege and a challenge.²

II. *CANDIDE*

In *Candide* Voltaire commented on human nature:

All is for the best in the best of all possible worlds.³

We tend to assume that the fundamentals of our jurisprudence are so well-settled that they can be taken for granted as sound. Yet the Law Commission's *Juries* research, undertaken by Dr Warren Young and his colleagues, established that while the institution of trial by jury was essentially sound, as practised it contained deep-seated flaws.⁴ To achieve justice it required substantial change, on a continuing basis, of how we use it. Whether some review of Treaty jurisprudence is

* Harkness Henry lecture University of Waikato, Hamilton 24 September 2007.

* High Court, Auckland.

1 R Cooke, 'The challenge of Treaty of Waitangi jurisprudence' [1994] *Waikato Law Review* 1.

2 1995 marked the end of Lord Cooke's term as President of the Court of Appeal of New Zealand. For the next decade he continued to preside in the Court of Appeal of Samoa and also as a Non-Permanent member of the Final Court of Hong Kong as well as hearing the occasional Privy Council appeal from his own country. Uniquely, as a member of the House of Lords, he was concurrently responsible for testing the law of the United Kingdom against both the Treaty of Rome and the European Convention on Human Rights. It is interesting to consider what he would have made of our jurisprudence over the past 13 years.

3 Voltaire, *Candide* (1759) Ch 1 'Dans ce meilleur des mondes possibles...tout est aux mieux'.

4 New Zealand Law Commission R69 *Juries in Criminal Trials* (2001).

needed is a topic I have touched on in earlier papers.⁵ Tonight I seek to place our developments in something of a comparative perspective.

A. *The Maori reality*

In *Vikings of the Sunrise* Sir Peter Buck wrote of the first great globalisers: the Polynesian navigators who opened up the Pacific as far as Hawaii and Easter Island and who are believed to have sailed as far west as Madagascar. Anne Salmond followed him using, in *The Trial of the Cannibal Dog*, David Lewis's account of how Cooke's interpreter, Tupaia, was himself a member of that elite group, with special privileges, who maintained the skills of ocean navigation without compass, sextant or chronometer let alone GPS. Tainui's tradition of its arrival by great canoe is maintained today, as anyone knows who has visited the marae at Kawhia. The Maori fisheries renaissance, which has followed the restoration of fishing rights removed from Maori during the colonial process, is a partial restoration of the mastery of the trade graphically recounted by the 18th century French navigators cited in the *Muriwhenua Fishing Report* of the Waitangi Tribunal.

In *The New Zealand Wars* Jamie Belich showed that our traditions had got history back to front. The military elite who repeatedly defeated greater numbers and came close to throwing superior numbers of British troops into the sea had receded from sight. Only recently has a truer picture been seen, thanks to historians such as Dame Evelyn Stokes in her *Wiremu Tamehana*.

More generally, it has taken the brainchild of Matiu Rata and the careful work of Justice Durie and his colleagues in the Waitangi Tribunal to bring home to non-Maori New Zealanders the gap between the promise of the Treaty of Waitangi and its performance.

III. THESIS

My thesis this evening is that the problem of denial of indigenous values and achievement has not escaped the field of jurisprudence in New Zealand any more than it has internationally; that there is need to link that event with the otherwise inexplicable phenomenon of Maori social disadvantage and the offending which is a symptom of it; and that in New Zealand as elsewhere the law needs to heed Antony Anghie's lesson, that insofar as public international law is built on Vitoria's theory of how Spain could justify its seizure of Indian possessions in South America, it is a colonist's rationalisation that cannot resist analysis. Conferring on indigenous people the fundamental human right of dignity may be expected to contribute seriously to reversal of the unhappy social trends of which we see so much evidence in the criminal courts.

A. *The unknown jurisprudence*

It tends to be overlooked that New Zealand is more than simply a British colony, settled by colonists from *Home* who somehow or other acquired the right to rule the country. That there is any

5 One delivered to the New Zealand police available at <<http://www.police.govt.nz/events/2005/ngakia-kia-puwai/baragwanath-on-the-treaty-and-the-police.pdf>>; a second to mark the 20th anniversary of the Law Commission available at <<http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/9ffdc559-a5f9-40ed-84eb-a355023613cb/Law%20Com%20Anniversary%20Address%20Baragwanath.pdf>>; and a third to the University of Otago on the 20th anniversary of the decision in the *Māori Council* case (*New Zealand Maori Council v A-G* [1987] 1 NZLR 687) *A perspective of counsel* in Jacinta Ruru ed *The Treaty of Waitangi in law 20 years on: A reflection on Aotearoa/New Zealand's landmark Treaty of Waitangi Court of Appeal case* New Zealand Law Foundation and University of Otago (forthcoming)).

more to it was not evident during the legal education of the current elder members of the profession. For us the Judicature Acts and the English Laws Act 1908⁶ brought as much of the law of England as seemed necessary to operate the judicial system. I was personally oblivious to anything more.

The reason is that of Dr Johnson, replying to an enquiry why his Dictionary contained an error: 'Ignorance Madam, sheer ignorance'. A greater effort to find the authorities by which New Zealand courts other than the Supreme Court are bound would have thrown up authority requiring a deeper analysis. I mention in passing *Nireaha Tamaki v Baker*⁷ and *Wallis v Solicitor-General*,⁸ cases familiar to modern law students, where the Privy Council first chided and then castigated the New Zealand authorities for failure to give effect to Māori rights. Professor Frame has drawn to attention another case whose practical utility was seen in a recent judgment of the Court of Appeal of Samoa, about the need in a succession case to examine the common law of that state.⁹ In *Arani v Public Trustee of New Zealand*¹⁰ non-statutory adoption under Māori custom was recognised by the Privy Council as effective under the New Zealand Adoption Act 1895. That form of adoption was rejected by the Adoption Act 1956, which created much anguish for natural mothers who were separated for life from their child. But, following a report of the Law Commission in 2000,¹¹ Parliament enacted the Care of Children Act 2004 which has gone far to restore the option, always recognised by Maori, of open adoption which had been excluded from our statute law for half a century.

B. Foreshore and seabed

The common law's determination to protect interests recognised 'according to native custom or usage' is seen in the recent analysis by Fogarty J in *Minister of Conservation v Maori Land Court* endorsing a finding by Judge Mair, better known as Major William Gilbert Mair, who had been:

...brought up in the Bay of Islands among Maori. They were fluent in Maori [having] an intimate understanding of Maori custom [and] held in the highest regard by Maori tribes.¹²

He held that certain mudflats near Nelson claimed by the Crown constituted Maori freehold land.

That approach had been adopted in 2003, in *Attorney-General v Ngati Apa*,¹³ where the Court of Appeal reinstated the principle, settled by decisions of the Privy Council and accepted by the Supreme Courts of the United States and Canada, the Constitutional Court of South Africa and the High Court of Australia, that indigenous custom forms part of the common law of the state.

But, following the Orewa speech, that decision was in significant part set aside by the Foreshore and Seabed Act 2004. That provides:

6 See now the Imperial Laws Application Act 1988.

7 *Nireaha Tamaki v Baker* (1901) NZPCC 371.

8 *Wallis v Solicitor-General* (1903) NZPCC 23.

9 *Tai Devoe v A-G* [2007] WSCA 5, [14].

10 *Arani v Public Trustee of New Zealand* (1919) NZPCC 1 (PC).

11 New Zealand Law Commission R65 *Adoption and its Alternatives: a Different Approach and a New Framework* (2000).

12 *Minister of Conservation v Maori Land Court* [2007] 2 NZLR 542.

13 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

Section 33 High Court may find that a group held territorial rights

The High Court may...make a finding that [a] group...would, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown by section 13(1), have held territorial customary rights to a particular area of the public foreshore and seabed at common law.

Section 38 No redress other than that given by Crown

- (1) No claim may be made in respect of a finding made under section 33 other than redress-
 - (a) that the Crown may give; or
 - (b) provided in accordance with ss 40-43 [relating to the creation of foreshore and seabed reserves]

...

- (3) No Court has any jurisdiction to consider the nature or the extent of any matter that the Crown proposes, offers, or gives for the purpose of any redress of the kind described in subsection (1).

It may be contrasted with a decision the previous year of the Constitutional Court of South Africa *Alexor Ltd. and the Government of the Republic of South Africa v. Richtersveld community*¹⁴ about diamond bearing land. It upheld a decision of Supreme Court of South Africa that concluded:

The effect of the state policy was that the [indigenous] Richtersfeld people were treated as if they had no rights in the subject land. Their disposition resulted from a racially discriminatory practice, in that it was based upon and proceeded from the premise that due to their lack of civilisation...the Richtersfeld people had no rights in the subject land.

The claim by the inhabitants of Richterfeld to all rights in the land was sustained.

In *Arani* at p 6 the Privy Council suggested the possibility, which has occurred in Canada, that:

...the old custom as it existed before the arrival of Europeans... [which] has developed, and become adapted to the changed circumstances of the Māori race of to-day

might be recognised by law.

This is not the occasion to discuss such questions. Rather my focus is on the narrower point of how, without considering whether or to what extent Maori customary law is itself part of New Zealand law, the evolving common law of New Zealand should respond to the distinctiveness and dignity of Maori. While the role and status of Māori in New Zealand are by any standard special, the lessons learned may have relevance to how we should treat New Zealanders of non-indigenous racial and cultural background.

C. Others' perspectives

Like the English language, the common law at its best is an inveterate borrower of other people's ideas which allow it to retain and increase its capacity to deal with new challenges. It may be called the evolution of the constitution through difference. In *Sixty-year views*¹⁵ David Arnold has written:

If democracy began its career 2,500 years ago in Athens, it has since assumed such different contexts and disparate forms that... "history can no longer be written coherently from within the terms of the west's own historical experience."

¹⁴ *Alexor Ltd. and the Government of the Republic of South Africa v. Richtersveld Community* CCT 19/03, 2003.

¹⁵ D Arnold, 'Sixty-year views' *Times Literary Supplement* August 24 page 10.

To do justice to indigenous values a wider view must be taken than that of the European Enlightenment. To see our recent Treaty jurisprudence in perspective it is convenient to begin with what has happened elsewhere.

1. *Some history*

I have mentioned Vitoria. His contribution to international law was to recognise that the Indians did have some right to legal recognition. His deficiency, as a man of his times, was to patronise them as lesser people who were therefore entitled only to lesser rights. *Imperialism, Sovereignty and the Making of International Law* by Antony Anghie¹⁶ is a sustained critique of Vitoria and his legacy. It allows one to examine the colonial process dispassionately, recognising both the benefits (in New Zealand they included the end of the disastrous Musket Wars) and the detriments. Its message is of a self serving Western arrogance, fuelled by indigenous abuses both perceived and actual such as in New Zealand cannibalism and widow suicide,¹⁷ having the economic effect of passing indigenous resources to the colonist.

Anghie does not stand alone. The Indian scholar Ranabir Samaddar has recently written:¹⁸

... while Montesquieu, Kant, and Burke each in their own way were promoting the spirit of the laws, on the other side of the world a more significant history of law making was being enacted in order to defend a particular type of rule and a particular type of government... [T]he colonial history of law making was essential to the entire legal culture and tradition of the Euro-American world. The colonial history left a permanent legacy on constitutionalism everywhere; it had taught the rulers that governing by law making was not to be a pure process, rule of law had to be mixed appropriately with rule of men and rule by orders. The other legacy was again something that again neither Kant nor Burke wrote of – it was that constitutionalism was to be built on the principle of difference. Race, gender, caste, communal identity, and locality – all, and most fundamentally race, built this principle of difference. Constitutionalism and law making did not invent difference; they only gave them formal shape in the light of the principle of governing on the basis of principle of difference. At times, constitutionalism also took away the right to be different also, in the sense that everyone had to subscribe to the homogeneity that the legal order was creating. Thus exclusions and inclusions evolved as the two strategies of rule, playing on the fundamental reality of difference.

Nor did that process of convenient rationalisation stand alone. It was mitigated to a degree in New Zealand by the work of the Evangelicals, not least James Stephen of the Colonial Office who I have suggested was the true force behind the Treaty of Waitangi. An overlapping influence was that, from the time of the Enlightenment, there were strenuous attempts to improve on the so-called ‘natural law’ and its relation the Canon law which ascribed divine provenance to the sovereign as God’s earthly representative. The process reached its zenith in the 20th century with the positivism – authority comes from the ruler – that resulted in the Führerprinzip and the denial of moral content in the law. The perversity of the result led post-war to the human rights movement and its International Conventions – on Civil and Political Rights and many other topics. Their prime achievement is to underpin the human right to individual dignity. But sight has tended to be lost of a different right: to be part of a community.¹⁹

16 A Anghie *Imperialism, Sovereignty and the Making of International Law* (2005). He is Australian and now of the University of Utah. I am indebted for the reference to Judge’s Clerk Claire Nielsen and to the Chief Justice from whom I received it on successive days.

17 J R Elder, *Marsden’s Lieutenants* (1934), 76.

18 (2006) Number 212 Volume 53 Issue 4 *Diogenes* published under the auspices of the International Council for Philosophy and Humanistic Studies page 6. I owe the reference to Professor Colin Anderson, Massey University.

19 A point emphasised by Dr Yash Ghai in his Robb lecture at the University of Auckland on 2 October 2007.

D. Why?

The human rights movement has achieved much and it has further fields to conquer. Discrimination law is, rightly, developing apace. The Women's Convention, the Child Convention have much further work to do. I have discussed elsewhere what on 13 September 2007 the UN General Assembly adopted as the Declaration on the Rights of Indigenous Peoples, to which New Zealand, Australia, Canada and the USA have declined to accede. Another newcomer is the International Criminal Court, whose establishment I greeted with enthusiasm (and still support, in its essence).

But Antony Anghie has persuaded me that my approach to the ICC has been over-simple. To explain why requires mention of what are at first sight disparate topics.

Why in *The Trial on the Cannibal Dog* did Anne Salmond view James Cook's arrival in Polynesia from the standpoint of the indigenous people?

Richard Goldstone is a jurist of such eminence that the South African Constitution was changed to allow him to move for a time from the Constitutional Court to serve as initial Prosecutor in the Hague. Why did he endorse in his own country the inconsistent model of the Truth and Reconciliation Commission?

Why did the Guatemalan Nobel laureate Rigoberta Menchú attach such importance to the fact that in the state adjoining hers:

From the time of its establishment in 1917 the Constitution of Mexico was written only in Spanish. But in November 2006 the Supreme Court – the highest court in the land – rectified that injustice. With the consent of the civil authorities the Constitution is to be translated into 26 other languages?²⁰

Among them are her own Mayan language. The President of the Supreme Court, Marino Azuela Güitrón stated that in future Mexicans will be able to defend their rights in the language of their ancestors. One might add a reference to Maori TV and the struggle to secure it, beginning with the Te Reo Claim to the Waitangi Tribunal.

Why did Lord Cooke give judgment in Samoa endorsing a judgment of banishment, something now inconceivable in English law?

Examples can be multiplied, as they are by Antony Anghie, to dissect the unthinking assumption of many of the West, myself included, that underlies the constitution of the International Criminal Court - that in human rights one size fits all.

My own exposure to this occurred in November 1986, on the Te Reo Mihi Marae at Te Hapua in the Far North, appearing before the Waitangi Tribunal for the tribes of Muriwhenua in support of their fisheries claim. The case burgeoned into what became a challenge to the State Owned Enterprises Bill which was the key element of the policies of the Fourth Labour Government. I found myself, like Alice in the first chapter, in my own country but in a wholly unfamiliar environment where settled assumptions proved unjustified and there was a way of doing things, unlike in Wonderland, with complete logic, pattern and order, of a kind I had never encountered.

In preparing my response to your challenge I came to realise that a rather different approach is needed from simply listing the statutes and cases since 1994. What at first sight seems a ragbag of unrelated things has assumed what I suggest are part of a clear pattern - the events at Te Hapua in the Far North in 1986; discussion in Geneva with Justice Richard Goldstone; reading Rigoberta Menchú, Antony Anghie and Anne Salmond; sitting in Samoa. The uniform theme is that *what*

20 *Courrier International* Hors-Série Juin-Juillet, Août 2007 *Fiers d'être indiens* 37.

*matters is the opinion of the people affected.*²¹ And it requires more than a narrowly domestic focus. The thesis is that Treaty jurisprudence, and indeed all jurisprudence, should be viewed as the child viewed the Emperor, without preconception and in recognition that there may be other assessments than the conventional. In this case also the suggested additional perspective, while very simple and indeed obvious, is uncomfortably unfamiliar: that of the other parties involved.

With his great experience of the East Kipling expressed the point with clarity:

There are nine and sixty ways of constructing tribal lays,

And-every-single-one-of-them-is-right!²²

JB Phillips' best known book on theology, *Your God is too small: a guide for sceptics and others*, requires a jurisprudential equivalent.

Each of us is familiar with the part of the law that affects us. There are the statutes enacted by decision of Parliament, with its plenary authority to make whatever law commends itself to a majority of members. We even know that we are evolving a common law of New Zealand. It includes the basic constitutional rules: that what Parliament enacts by statute is the law; that criminal guilt must be proved by the prosecution and beyond reasonable doubt; that the legality of all conduct (save that of the Sovereign in her personal capacity) may be examined by judicial review;²³ what are the elements of an effective contract; what constitutes an actionable tort; when equity will intervene.

But what this misses is the law of the minority, something shown up on a recent visit to Samoa.²⁴ The effect of the successive foreign rulers – most recently German and New Zealand – is etched deep in Samoan culture.²⁵ The contribution of the German settlers is reflected in more than the names of their descendants: there remain the relict of German land law, the architecture of the old courthouse where we sat and, crucially, the genetic evidence within that vital society. Also evident is the benign legacy of New Zealand law and administration from the end of World War I until independence; but also the scars of the Mau episode. These and more go to make up what Samoa is. Of particular present interest is the indigenous element of current Samoan law and practice. Notable are the Village Fonau Act, recognising specifically the role in local government of village communities and institutions; authoritative advice that only 1 per cent of crime occurs within the close-knit village communities whose cohesion is protected by the authority of matai leadership; the melding of statute law, derived essentially from New Zealand; common law and equity which together with basic human rights are protected by an entrenched Constitution; and indigenous law by which, in accordance with the tenets of English colonial law, custom forms part of the common law of Samoa.

21 See likewise Professor William Schabas: 'If an international criminal tribunal is seen as something being imposed from outside it is unlikely societies or governments will fully cooperate in its workings and even go so far as to feel that their people are being unjustly prosecuted' in 'Regions, Regionalism and International Criminal Law' (2007) *New Zealand Yearbook of International Law*, 42.

22 R Kipling, *In the Neolithic Age* (1893).

23 *Mihos v A-G* [2007] High Court Wellington CIV 2004–485–1399 (Unreported, Baragwanath J, 7 June 2007), [59].

24 The links at that sitting with the Waikato included Salmon J who won the *Tainui* coal case (*Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513) in the New Zealand Court of Appeal and Paterson J who practised as a silk in Hamilton.

25 Mention must also be made of the 300 year period of Tongan presence, hence the frisson experienced in the recent World Cup game between Samoa and Tonga.

The Samoan experience has more in common with that of New Zealand than those of us with merely European ancestry are sometimes ready to acknowledge.

What this has to do with the Treaty of Waitangi is the evolution of the constitution through difference.

E. The legal status of the Treaty

1. Crown rights

There is now no doubt that at international law the Treaty of Waitangi was a true treaty of cession. Previous doubts were put to rest by the essay of Sir Edgar Williams²⁶ who cited the three Imperial statutes of George III and George IV²⁷ recognising Maori as a sovereign people.²⁸ In point of both international law and New Zealand domestic law there is no doubt that the effect of the treaty was to confer sovereignty on the British Crown. That was the legal effect of Article 1 taken with the other events summarised by Somers J in *New Zealand Māori Council v Attorney-General*.²⁹

2. Crown responsibilities

But the principle that the rind must accompany the fruit is one of common decency. Since the Crown continues to enjoy the benefit of Article 1 of the Treaty, and those of us who in Durie J's terms are *tangita tiriti* in terms of the Preamble have full entitlement to claim to be New Zealanders, what of Māori claims to the rights promised under Articles 2 and 3?

While there is binding authority that the Treaty cannot be sued upon as part of New Zealand domestic law,³⁰ it by no means follows that the Treaty is without legal significance.

3. The role of the courts

(a) Courts to construe law as confirming with treaty obligations

It is settled constitutional law that the courts, as one limb of the Crown, will endeavour to construe New Zealand law as conforming rather than as conflicting with the treaties entered into by the Executive as a second limb of the Crown.³¹ It is unnecessary in such cases for there to be endorsement by the third – lawmaking – limb, Parliament.³²

Moreover it is the constitutional responsibility of the Crown to protect its subjects; that responsibility being reciprocal to the subject's obligation of loyalty to the Crown.³³ That common law obligation is the subject of express confirmation in Article 3. It may be thought fundamental that the Executive, when considering how to act in relation to matters that bear upon the rights of

26 T Williams, 'James Stephen and British Intervention in New Zealand 1838–40' (1941) XII (I) *Journal of Modern History* 19, 22. Williams, an Oxford historian, married a New Zealander, was Montgomery's intelligence officer from Alamein until the end of the war and was later Warden of Rhodes House, Oxford.

27 57 Geo III, c 53; 4 Geo IV, c 96 sec 3; and 9 Geo IV, c 83, sec 4.

28 Hence Busby's offer to Maori of a range of flags and their selection of the new Confederation flag which on 20 March 1834 was accorded the 21-gun British naval salute due to a sovereign state.

29 *New Zealand Māori Council v A-G* [1987] 1 NZLR 641 (CA), 690.

30 As Sir Geoffrey Palmer's White Paper proposing a Bill of Rights had proposed. See *Hoani Te Heuheu Tukino v Aotea District Land Board* [1941] AC 308 (PC).

31 For list see Mark Gobbi, 'Treaty Action and Implementation' in (2007) *New Zealand Yearbook of International Law* 350–1.

32 In recent times care has been taken by Executive and Legislature to avoid speaking with different voices. See New Zealand Law Commission R45 *The Treaty Making Process: Reform and the Role of Parliament* (1997).

33 Recognised by Sir Edward Coke in *Calvin's Case* (1609) 7 Co Rep 1a.

Maori as citizens and as the beneficiaries of the undertaking in Article 2, would take care to comply with the obligations assumed by the Crown as the price of sovereignty.³⁴

It may also be thought fundamental that the Courts, which strive to give effect to other treaty obligations when construing legislation and performing their role of interstitial development of our law consistently with legislation, would strive no less hard to ensure that they do not put New Zealand in breach of the obligations that are the foundation of their and its existence.

(b) Courts' role to warn

New Zealand courts do not claim the power exercised by courts in virtually every other jurisdiction³⁵ of setting aside legislation as unconstitutional. But they do claim the right, akin to that of the Sovereign and her Governor-General, to warn the decision-makers. That is a sound claim, for two reasons. One is that the Courts are the limb of government responsible for declaring what the law is and for applying it to the disputes brought before them by citizens rather than taking matters into their own hands. We are the retailers of what Parliament and the Executive handle as manufacturers and wholesalers. We are in a position to see whether there is asperity and injustice. The other, as Palmer and Palmer observe in *Bridled Power*,³⁶ is that the conventions are part of our constitution. It is the task of all elements of society, not least its judges, to understand and help sustain those conventions which are an important part of what gives cohesion to our society. That is not to say that conventions may not be changed. But as the Law Lords made clear in *Pierson, Simms and Daly*,³⁷ those who wish to alter settled principle must make their intention to do so wholly clear so as to accept publicly the consequences. That is why the Court of Appeal in *Quilter*,³⁸ and more recently the Supreme Court in *Belcher*,³⁹ have asserted the right possessed by the Courts of England to make declarations of breach of the Bill of Rights.

4. Such role possessed by other non-New Zealand agencies

That authority is possessed by the Committee on the Elimination of all Forms of Racial Discrimination (see recent report (CERD/C/NZL/CO/17) which noted two concerns relating to the Tribunal: that its decisions are not binding and that only a small proportion of recommendations are followed).

The UN Human Rights Committee claims similar authority to comment on New Zealand's human rights performance.

(a) New Zealand Maori Council case 2007

In the 4 May 2007 *New Zealand Maori Council v Attorney-General*⁴⁰ the High Court exercised that authority in relation to breach of the Treaty of Waitangi, in respect of an alleged breach of the settlement effected following the original *Maori Council* case ([1987] 1 NZLR 687).

34 Compare the problems identified by the Waitangi Tribunal with the procedures adopted by the Office of Treaty Settlements in relation to cross-claims: *Tāmaki Makaurau Settlement Process Report* (Wai 1362) at 56, 86 and 94.

35 Former exceptions, the United Kingdom and Israel, have in the former case legally (see *R v Secretary of State for Transport ex parte Factortame Ltd (No 5)* [2000] 1 AC 524 (HL)) and in the second case virtually (since the Basic Law of Dignity and Freedom (1992)), joined the majority.

36 (4th ed 2004) page 5.

37 *Pierson, Simms and Daly* [1995] AC 539, [2000] 2 AC 115 and [2001] 2 AC 532.

38 *Quilter v A-G* [1998] 1 NZLR 523 (CA).

39 *Belcher* [2007] NZSC 54.

40 *New Zealand Maori Council v A-G* High Court Wellington CIV 2007-485-000095 (Unreported, Gendall J, 4 May 2007).

I have recently commented on the latter case and do not propose to interpolate an opinion on the merits at a stage between the decision of the Court of Appeal ([2007] NZCA 269), that the High Court was wrong to do so, and the Supreme Court to which an appeal is pending. But in terms of procedure it may be ventured that if the common law is resourceful enough to permit a *Quilter* declaration in respect of breaches of the Bill of Rights, it might well consider that such declaration is the way forward from the stilted wartime decision in *Hoani Te Heuheu Tukino v Aotea Land Board* on which Lord Cooke commented with a degree of asperity in *Maori Council 1*.

IV. CONTINUING SIGNIFICANCE OF THE TREATY

In my view the greatest continuing significance of the Treaty is its standing status as an icon of where New Zealand comes from. The Treaty should, like any other treaty, be a mandatory consideration when it is relevant to decision-making including adjudication. It is not simply a protection for Maori; it has been used by the High Court to protect a Dutch New Zealander from having to carry the burden of Treaty breach that should be spread more widely.⁴¹ Rather it is an expression of the rule of law: a statement that Western norms do not exhaust the values of society; that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.

Professor Pratt has pointed out that

...in a Mood of the Nation report in 2004, New Zealanders were surveyed about which of 17 professions they trusted the most; the judges came 9th⁴²

Are we failing to perform? Are we failing to communicate? Confidence in the judges is a component of confidence in the rule of law. Unless Maori (and other minorities) feel that the legal system is *their* legal system the estrangement of many from the law will continue and perhaps accentuate. That at least is the apprehension of distinguished speakers who have recently addressed the Auckland judges under Chatham House rules.

An advance of real importance is the issue in June 2007 by Te Matahauariki Research Institute within this University of Te Matapunga, the compendium of Māori concepts by Māori and non-Māori scholars which, unlike any dictionary, illustrates by example the values lying beneath the words. At its launch the thought was ventured:

Like the role of great literature for the Western world, Te Matapunga shows to Maori what they have done, what they can do, and indeed what they are. Its account of Maori achievement will add to the confidence, self-esteem and vision of the young Maori whose sense of full participation in all that is good in New Zealand society is so crucial to its future and to theirs.

But we lawyers must play our part in lifting the hopes, aspiration and confidence of all members of our community.⁴³ Until Maori feel that our laws and institutions value them, the deep-seated problems in our society cannot heal. Our approach to the Treaty and to the human dignity of

41 *Ngati Maru Ki Hauraki Inc v Kruitof* [2005] NZRMA 1.

42 J Pratt, *Punishment, Politics and Public Opinion: the Sorcerer's Apprentice Revisited* (2006) available at <<http://www.rethinking.org.nz/images/PDF/2006%20Conference/9%20John%20Pratt.pdf>>.

43 The roles of others include those of Crown agencies and of religion, discussed by the Reverend Professor James Haire in his Ferguson Lecture *Should we do it in public? Public theology in the Asia-Pacific Region* delivered at the University of Auckland 1 August 2007 and by David Martin 'Split religion' review of John Gray *Black Mass* Allen Lane *Times Literary Supplement* August 10 2007, 3.

Maori, within this country we claim to share with them, is a vital measure of what its future of our country and that of our children will be.

We need constantly to strive for improvement, recognising that the best evolution of the constitution will be through appreciation of difference and what it can offer.⁴⁴

44 I thank Megan Crocket for research and Claire Nielsen for a valuable discussion.

IMPROVING THE QUALITY OF LEGISLATION – THE LEGISLATION ADVISORY COMMITTEE, THE LEGISLATION DESIGN COMMITTEE AND WHAT LIES BEYOND?

RT HON SIR GEOFFREY PALMER*

I. INTRODUCTION¹

I said last year that in New Zealand's legal system, statute law is not merely King; it is Emperor.² However, not all those who love the common law would agree with that proposition. The inductive method of the common law, as opposed to the more deductive method of policy analysis appeals greatly to many lawyers, judges and legal academics. In a recent seminar at the Law Commission, Dr Matthew Palmer provided some interesting insights in the differences between legal thinking and policy thinking.³ He noted that common law legal analysis is paradigmatically inductive; it reasons from specific disputes to general rules. It is inherently grounded in the context of specific fact situations. By contrast, policy analysis is deductive. It reasons from general objectives to more specific policy recommendations. It is more abstracted from fact situations than the inductive method of the common law.

Legal academics prefer to write analyses of judicial decisions rather than to analyse the policies, drafting and implications of new statutes. Not for them the ambitions of statutory schemes designed from principle deductively. Although, it must be admitted that many statutes have a reactive and ad hoc appearance to them. It seems to me that to focus primarily on case law at the expense of legislation is misplaced and misguided. The main source of new law comes from legislation. Real change comes from the legislature, not the courts.

Legislation is not much taught in our law schools, although there are some honourable exceptions. I am convinced that legislation requires much more attention from lawyers, judges and academics than it has had. I am fortified in this belief by what has been said generations ago by great common lawyers whose wisdom we do not seem yet to have absorbed.

The first book on legislation that I studied was American, published in 1964, entitled *Legislation*. It was by Charles B Nutting and Sheldon D Elliott, and was part of the American Casebook series published by the West Publishing Company. It was designed for law school teaching. It contained some most interesting accounts of the place of legislation in our legal system: pungent, direct and correct. Let me give you a sample. The famous Dean of the Harvard Law School,

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1 I am most grateful for comments from my colleagues Dr Warren Young and Professor John Burrows QC on an earlier version of this speech.

2 Geoffrey Palmer 'Law Reform and the Law Commission after 20 Years: We Need to Try a Little Harder' (Address to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006) 20.

3 Matthew Palmer 'Thinking about Law and Policy: Lessons for Lawyers' (Seminar to the Law Commission, Wellington, 23 November 2006).

Roscoe Pound, who hailed from that eminently sensible state of Nebraska, (it has a unicameral legislature) said this in 1908:

Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers. Text-writers who scrupulously gather up from every remote corner the most obsolete decisions and cite all of them, seldom cite any statutes except those landmarks which have become a part of our American common law, or, if they do refer to legislation, do so through the judicial decisions which apply it.⁴

Ten years later another American great Professor Ernst Freund said this:

Leaving then aside the formulation of principles in statutory form, a science of legislation as a distinctive branch of jurisprudence is concerned mainly with tasks for which the upbuilding of the common law furnishes no precedents or standards; with those aspects of statutes, in other words, that find no analogy in principles developed by judicial reasoning. *The special province of the science of legislation must be to carry the development of the law beyond what the processes of the unwritten law can possibly do for it.*⁵

Nor is the point confined to Americans. The British Professor of Jurisprudence Professor T E Holland said before the turn of the twentieth century:

Legislation tends with advancing civilization to become the nearly exclusive source of new law. It may be the work not only of an autocrat or of a sovereign Parliament, but also of subordinate authorities permitted to exercise the function.⁶

Harlan Fiske Stone (then an Associate Justice of the Supreme Court, later to be its Chief Justice, and a former Dean of the Columbia Law School) in an article in the Harvard Law Review in 1936 made an observation that seems to me to apply accurately to contemporary New Zealand:

It is the fashion in our profession to lament both the quantity and quality of our statute-making, not, it is true, without some justification. But our role has been exclusively that of destructive critics, usually after the event, of the inadequacies of legislatures. There has been little disposition to look to our own shortcomings in failing, through adaptation of old skills and the development of new ones, to realize more nearly than we have the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.

The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of common law. Notwithstanding their genius for the generation of new law from that already established, the common-law courts have given little recognition to statutes as starting points for judicial lawmaking comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded.⁷

Now, it must be admitted that the common law world has come a long way since 1936. Purposive interpretation is now well established, particularly in New Zealand. Sir Ivor Richardson was influential in the establishment of the purposive approach with his insistence that courts look at the

4 Roscoe Pound 'Common Law and Legislation' (1908) 21 Harvard Law Review 383.

5 Ernst Freund 'Prolegomena to a Science of Legislation' (1918) 13 Illinois Law Review 264, 269 (emphasis in the original).

6 TE Holland *Jurisprudence* (1 ed, United States, 1896) 62 cited in Charles B Nutting and Sheldon D Elliot *Legislation: American Casebook Series* (3 ed, West Publishing Co, St Paul, Minnesota, 1964) 249.

7 Harlan F Stone 'The Common Law in the United States' (1936) 50 Harvard Law Review 2, 12.

scheme of the statute when it is being construed.⁸ But I am not sure that the older attitude to the common law exemplified in the quoted passages is yet dead in New Zealand.

Having established the importance of statute law, I come now to some remarks on its quality. If statute law is as important as I say it is then quality control of legislation must be essential. Unfortunately, there seems to be little literature on this question. Indeed, I can find none. The quality of a statute seems, like beauty, to be in the eye of its beholder. Yet there are clearly some statutes that are better than others; that work better than others; that are more easily understood than others; or that exhibit superior policy frameworks to others. How do we know how to make better statutes? New Zealand has made some attempts in this area but we are a long way from success and much more needs to be done. I turn now to a discussion of the efforts we have made.

Let me dispose of one issue at the outset. We now have plain English drafting. The Law Commission did a lot of work on this and that work has been adopted.⁹ The expectation now is that new Acts will be drafted in a plain English style. However, this is not to say that the whole of the New Zealand statute book is plainly, clearly and succinctly worded. There remain many older pieces of legislation on the books that do not meet the new standards. But, that notwithstanding, I am here to say that plain English drafting alone is not enough to produce a high quality statute book. More is required.

The Legislation Advisory Committee is now more than 20 years old. When the Law Commission was established in 1985, the Law Reform Committees that had previously been the main focus of law reform activity outside the Department of Justice were abolished. But one, the Public and Administrative Law Reform Committee, was revived in a modified form and re-named the 'Legislation Advisory Committee'. The literature on this committee is slender but worth reading.¹⁰

II. THE LEGISLATION ADVISORY COMMITTEE

The Legislation Advisory Committee's greatest contribution has been the formulation, publication and revision of the Legislation Advisory Committee Guidelines. These are adopted by Cabinet and the Cabinet manual requires that they be followed in the production of Government Bills.

First produced in 1987, the Guidelines have gone through many iterations and improvements. They are now considerably longer than they began. They are available on the Department of Justice website and have recently been revised.¹¹

The Minister to whom the Legislation Advisory Committee reports is the Attorney-General. Up until relatively recently it was the Minister of Justice but it was thought that the Committee's

8 He wrote that '[t]he twin pillars on which our approach to statutes rests are the scheme of the legislation and the purpose of the legislation' Sir Ivor Richardson 'Appellate Court Responsibilities and Tax Avoidance' (1985) 2 Australian Tax Forum 3, 8.

9 Law Commission *A New Interpretation Act: To Avoid 'Prolixity and Tautology'* (NZLC R17, Wellington, 1990); Law Commission *The Format of Legislation* (NZLC R27 Wellington, 1993).

10 Sir George Laking, Chairperson, Legislation Advisory Committee 'The work of the Legislation Advisory Committee' in Law Commission 'Legislation and its interpretation: Discussion and Seminar papers' (NZLC PP8, Wellington, 1988); KJ Keith 'The New Zealand Legislation Advisory Committee; choreographer or critic?' (1990) PLR 290; Walter Isles QC 'The Responsibilities of the New Zealand Legislation Advisory Committee' (1992) 13 Stat LR 11. The New Zealand Committee has also been discussed in Dawn Oliver 'Improving the Scrutiny of Bills: the Case for Standards and Checklists' [2006] PL 219.

11 *Legislation Advisory Committee Guidelines* available at <<http://www.justice.govt.nz/lac/index.html>> (last accessed 12 February 2007).

concern with legal and constitutional principle made the Attorney-General the more appropriate Minister.

The Terms of Reference of the Legislation Advisory Committee are as follows:

- To provide advice to the Departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office.
- To report to the Minister and the Legislation Committee of Cabinet on Public Law aspects of legislative proposals that the Minister or Legislation Advisory Committee refers to it.
- To advise the Minister on any other topics and matters in the fields of public law that the Minister from time to time refers to it.
- To scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues.
- To improve the quality of law making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the Legislation Advisory Committee Guidelines, and discouraging the promotion of unnecessary legislation.

While the Committee now reports to the Attorney-General, it is still serviced by the Ministry of Justice, which provides it with secretarial services.

The membership of the Committee comprises a mix of government lawyers, academic lawyers, and lawyers in private practice. It also has two economists on it as well as a sitting judge and a retired judge. It is a big committee and this is deliberate because the people on it are busy and they cannot always all get to every meeting. The membership contains a wide range of high level legal experience.¹²

The Committee has had in recent years three main activities. The first is the design, revision and promulgation of the Legislation Advisory Committee Guidelines. This is a major activity requiring a great deal of time and effort from a lot of committee members who are often busy in other activities. Much of this work is supported by Parliamentary Counsel Office and it is currently under the stewardship of Professor John Burrows QC who chairs the subcommittee of the Legislation Advisory Committee dealing with this topic.

The Committee also advises agencies on the development of legislation. Sometimes government agencies are wise enough to come and consult the Committee before deciding the shape of their legislative proposals. In 2006, for example, the Committee was consulted on the development of new Fire Service Legislation, the rewriting of the Social Security Act and the Ministry of Economic Development's Review of the Regulatory Framework.¹³ This practice of involving the Committee at the early stages of a Bill's development has a number of advantages. The Commit-

12 Membership of the Legislation Advisory Committee. Sir Geoffrey Palmer, President of the Law Commission (Chairperson); Mr John Beaglehole, Legal Advisor, Department of Prime Minister and Cabinet; Guy Beaton, Counsellor (Economic) New Zealand High Commission in Canberra; Andrew Bridgman, Deputy Secretary, Ministry of Justice; Graeme Buchanan, Deputy Secretary, Legal Department of Labour; Professor John Burrows QC, University of Canterbury and now Law Commissioner; Professor John Farrar, Dean of Law, University of Waikato; Andrew Geddis, Associate Professor, University of Otago; Jack Hodder, Partner, Chapman Tripp, Barristers & Solicitors; Ivan Kwok, Treasury Solicitor; Grant Liddell, Crown Counsel; Hon Justice Robertson, Judge of the Court of Appeal; Mary Scholtens QC, Wellington Barrister; George Tanner QC, Chief Parliamentary Counsel; Dr John Yeabsley, Senior Fellow NZ Institute of Economic Research, Rt Hon Sir Ivor Richardson, former President of the Court of Appeal; Dr Warren Young, Deputy President of the Law Commission.

13 Legislation Advisory Committee *Annual Report* (Wellington, 2006) available at <<http://www.justice.govt.nz/lac/pubs/2006/2006-annual-report.html#1>> (last accessed 12 February 2007).

tee can assist with the legislative design. It can query whether the approach suggested is sound. It can cut off unnecessary legislation.

The Committee also engages in substantial education activity. In order to ensure that the Legislation Advisory Committee Guidelines are known and understood, each year the Committee runs a seminar programme that is well attended by public servants. In 2006 it held seminars on the Guidelines and the legislative process in the House of Representatives. These were so well attended that they had to be repeated. It also held a seminar on the Guidelines for private law practitioners from the Wellington District Law Society. These seminars were held in the Legislative Council Chamber and hosted by Madam Speaker. There is clearly a need for continuing efforts to ensure adequate education within the government system on the legislative process, the practicalities of designing and passing legislation and the importance of the Legislation Advisory Committee Guidelines.

For every government Bill that is introduced to the Parliament, the Law Commission provides a report to the Committee on compliance with the Legislation Advisory Committee Guidelines. This process ensures the systematic examination of every government Bill to identify any anomalies. If the Committee decides having looked at the Law Commission's report that further action should be taken then it does so. The action that the Committee takes varies according to the particular circumstances. It may take the matter up with the Minister. Or it may make suggestions to the Parliamentary Counsel Office. Or it can and does attend Select Committee hearings and make a submission to the Select Committee. Or it may go and see the officials responsible for the Bill and make its point of view known in that way.

The Committee has had particular concerns in recent times with delegated legislation. It has made a lengthy submission to the Regulations Review Committee of Parliament and attempts to keep in touch with that committee's thinking in relation to the control and scrutiny of delegated legislation.¹⁴

The Committee has also made submissions to the Standing Orders Committee on how to change the legislative process in order to assist non-controversial law reform measures.

Professor Dawn Oliver of the Faculty of Law of the University College of London has looked at the work of the Committee and found it to have value. She has written concerning the Legislation Advisory Committee's Guidelines that they 'provide a model from which the United Kingdom could learn in the development of scrutiny standards and checklists for use by parliamentary scrutiny committees.'¹⁵ As both its founder and current Chair, I am not as sanguine as she is about the impact of the Committee's work on the quality of New Zealand legislation. It seems to me to be benign, but peripheral. Indeed the experience of the Committee over 20 years has led to the conclusion that most of the problems with legislation occur early in its design phase. It is often too late to perform major surgery on a Bill after it has been introduced.

Remodelling a Bill is difficult. The work needs to go into the original design. In New Zealand, almost all Bills go to Select Committee for public scrutiny and submissions, and the Select Committees alter the details of the legislation extensively in light of the submissions. However, wholesale revisions to the architecture of a Bill, while not unprecedented, are difficult to accomplish.

14 Briefing for the Regulations Review Select Committee from the Legislation Advisory Committee (Wellington, March 2006).

15 Dawn Oliver 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] PL 219, 235.

There is no doubt that the Legislation Advisory Committee has done useful work during its more than 20-year existence. It has contributed positively to the quality of new legislation. The Guidelines do seem to be of enduring value. But they are not always followed. And the Committee is not at the centre of the legislative process. Many Members of Parliament have only a hazy understanding about the Committee and its work. Probably public servants that deal with legislation in government departments have a better understanding of its work, since they are required to use the Guidelines, but even among them knowledge and use of the Guidelines are patchy.

The Guidelines contain a checklist of factors to be considered when drawing up legislation that gives an idea of the range of matters that needs to be considered with any legislative proposal. These matters are summarised now according to the current chapters of the Guidelines, but drawing on only some of the key questions they ask:

Means of achieving policy objective

- Has the policy been clearly defined?
- Has consideration been given to achieving the policy objective other than by legislation?
- Have those outside the government who are likely to be affected by the legislation been consulted?

Understandable and accessible legislation

- Has sufficient time and consideration been given to the preparation of the legislation?
- Have the lawyers as well as the policy makers been fully involved (many a clever policy proposal has foundered on legal rocks never considered until the end of the process)?
- Has the draft of the legislation implemented the policy faithfully – can it be understood and will it work?

Basic principles of New Zealand's legal and constitutional system

- Does the legislation comply with fundamental common law principles?
- Have vested rights been altered? If so, can compensation measures be included?
- Is the legislation retrospective and does it impose a detriment on some people?
- Does the legislation impose a tax or levy?

Statutory interpretation

- Have the rules of statutory interpretation been considered?
- Has the Interpretation Act 1999 been considered?

New Zealand Bill of Rights Act 1990 and Human Rights Act 199.

- Is the legislation consistent with these key pieces of Human Rights legislation or does the measure reduce or erode those rights?

Principles of the Treaty of Waitangi

- Is the measure one that requires consultation of Maori? If it does, what form should that consultation take?
- Is there a possibility of conflict between the principles of the Treaty and the legislation itself?

International obligations and standards

- Are there any international obligations and standards relevant to the legislation?
- If there are, does the legislation properly implement them?

Relationship to existing law

- Has all the existing common law and other law legislation been considered in relation to this particular measure?
- Are transitional savings provisions needed?

Creation of a new public power

- If a new public power is proposed, is it really needed, or are suitable powers already available under the existing law?
- Is it clearly stated how the new power will be exercised and who will be accountable for its exercise?
- What protection and checks are there on the exercise of the power?

Creation of a new public body

- If a new public body is needed, what form should it take? Should it be a department of State, a state enterprise, or a crown entity, an office of Parliament?
- Is it clear whether the Ombudsmen Act of 1975, the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 apply to the body?

Delegation of law making power

- If the legislation will allow the delegation of legislative power to someone, is that appropriate in the circumstances?
- What procedures have been specified to control the process of making the delegated legislation?
- If the legislation provides for tertiary legislation or 'deemed regulations' is this appropriate?

Exercise of delegated legislative power

- Has the empowering law and general law been complied with in making delegated legislation?
- Does the delegated legislation sub-delegate unlawfully? Is it invalid for repugnancy to other laws or by reason of uncertainty?

Remedies

- If remedies are required for breach of legislation, what are they and how should they be established?
- What should the limitation period be for exercise of remedies?

Criminal offences

- Is it necessary to create a new criminal offence?
- What are the offences?
- What are the penalties?
- What element of intent will be required for the proposed offence?

Appeal and review

- Will judicial review to the Courts be available under the legislation?
- Should there be provision for appeal? If so, what type of appellate body?
- What will the procedure for appeal be?

Powers of entry and search

- Are powers of entry or search necessary?
- Are the conferred powers subject to appropriate safeguards?

Powers to require and use personal information

- Does the legislation affect privacy?
- Has the Privacy Act 1993 been complied with?

Cross border issues

- Are there cross border issues that should be addressed?
- Are special rules required for civil claims or criminal offences with cross border elements?
- Will a regulatory agency be able to perform its role effectively?

- Should there be recognition enforcement of overseas decisions in New Zealand or vice versa?

The above is only a short taste of what comprises the now more than 200 pages of the Legislation Advisory Committee Guidelines.¹⁶ The Guidelines are updated regularly and major changes were made in 2006.

III. THE LEGISLATION DESIGN COMMITTEE

Despite the good work of the Legislation Advisory Committee, on its own, that committee is plainly not sufficient to ensure consistently high quality legislation. Something else is needed. In 2006, the government decided to set up the Legislation Design Committee and gave the Law Commission extra funding to service it. This new committee was established as a response to the experience with the Legislation Advisory Committee and out of the belief among a number of key agencies involved in the legislative process that ‘some significant or complicated legislative proposals would benefit from high level advice on the framework and design of the legislation at an early stage of policy development. Such advice could improve the quality of the final product.’¹⁷

The Legislation Design Committee is made up of representatives from key agencies. Its role is to discuss projects with departments during the development of legislation. This includes examining how best to implement policy objectives through legislation. The membership of the Committee comprises an experienced official from the Ministry of Justice, the Chief Parliamentary Counsel, the Solicitor General, the legal advisor from the Department of Prime Minister and Cabinet and the Treasury Solicitor. It is chaired by me.

The new committee is not involved in detailed policy formulation. Rather, it becomes involved at a stage prior to drafting of the legislation, where a project has a high level of commitment by the government. The Committee considers the means by which a project will be translated into legislation. This is discussed and in effect workshopped. Obviously not every small amending Act will be an appropriate subject for the Committee. However, new legislation that breaks new ground, or that is big and has an effect on the coherence of the statute book as a whole will be of central concern to the Committee.

The Committee is not intended to cut across existing government accountabilities. The government department promoting the legislation continues to be directly responsible for the policy and the drafting instructions for the Bill. The general consultation with interested departments will continue to take place in the development of advice to Cabinet.

Neither are the new Committee’s views binding on anyone. There is no new requirement to separately identify the Committee’s views in a Cabinet paper. It is intended that the Committee’s role will be complementary to that of the Legislation Advisory Committee. It uses the Legislation Advisory Committee Guidelines and the combined experience of the people on the Legislation Design Committee to try and act as a guide, philosopher and friend to departmental officials generating difficult legislative proposals.

After it was set up in 2006, the Committee delivered a number of seminars to interested government departments that generate a lot of legislation outlining the assistance that it offers. Al-

16 *Legislation Advisory Committee Guidelines* available at <<http://www.justice.govt.nz/lac/index.html>> (last accessed 12 February 2007).

17 Cabinet Paper, Office of the Minister of Justice, Cabinet Policy Committee ‘Legislation Design Committee and Law Commission Funding’ (2006).

ready the new Committee has had a number of interesting assignments. The Bill dealing with intellectual property and other issues arising out of the holding of major events in New Zealand was the first major project that the Committee engaged in.¹⁸ After the policy had been decided in broad terms by Cabinet, the Committee looked at the policy and conducted extensive discussions with various officials and provided advice on the shape the legislation should take.

The experience of the Legislation Advisory Committee has played an important role in monitoring and improving the quality of new legislation through the promulgation and scrutiny of observance of its Guidelines. However, The Legislation Design Committee is able to become involved in the production of more principled coherent and workable legislative proposals earlier in the process. It is thought that this may give it more bite. Obviously, the Legislation Design Committee will only have a significant impact if its work adds value. The degree of success of this new Committee will require assessment after further experience.

IV. THE FUTURE

There is a case for melding the Legislation Advisory Committee and Legislation Design Committee into a new combined entity. Whether that will be done remains to be seen. But there are wider vistas of concern that also deserve consideration.

Lurking in the background is a different and more profound issue. It is not only the legal and constitutional requirements of the Legislation Advisory Committee Guidelines that are an important ingredient of legislative design and practice. There are many others, particularly the economics of 'good' regulation. What are the key costs, benefits, risks and options associated with alternative policy choices that are going to be converted into legislative form? Most regulation requires legislation.

New Zealand has a strong Cabinet system. Indeed, in many ways it is stronger, more disciplined, more collegial and more an instrument of across government coordination than its counterpart in the United Kingdom.¹⁹ One of its features is a Cabinet Manual that instructs ministers and others on how to do things and how the Cabinet system works in great detail.²⁰ One of the matters the Manual deals with is legislation, so far as that concerns the Executive – which, it may be remarked, is not nearly as much as it used to do due to the consequences of MMP.

It has become the habit over time to add matters to the Cabinet Manual imposing procedural requirements. Including such matters in the Cabinet system act as a sort of control in the coordination of the whole of Government. The Legislation Advisory Committee Guidelines that are approved by Cabinet is one such example. But there are other important ones. Indeed the Manual requires Ministers in their bids for Bills to draw attention to any aspects that have implications for or may be affected by:²¹

- the principles of the Treaty of Waitangi;
- the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
- the principles of the Privacy Act 1993;

18 Major Events Management Bill 2006 99–1.

19 Geoffrey Palmer, 'The Cabinet, the Prime Minister and the Constitution: The Constitutional Background to Cabinet' (2006) 4 NZJPIL 1.

20 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001).

21 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para. 5.35.

- international obligations.

These are important matters. Indeed, in relation to the Bill of Rights, the Attorney-General is obliged to draw to the attention of the House any Bill that appears to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.

The quality of regulation in New Zealand has also been a problem. In 1997 the Government published a Code of Regulatory Practice.²² *The Step by Step Guide: Cabinet and Cabinet Committee Processes* requires that regulatory impact statements must accompany 'all policy proposals submitted to Cabinet with legislative implications (leading to government Bills and statutory regulations or Members' Bills that the government is planning to support or adopt) unless an exemption applies.'²³ Work has been going on in the Ministry of Economic Development to enhance and develop the regulatory impact regime further.

The public law and economic quality indicators discussed above are dynamically inter-related. Regulation requires law, and law must conform to certain constitutional and rule of law principles. Law and economics go hand in hand. They always have, although it took lawyers a long time to appreciate the point.

The experience with the Legislation Advisory Committee seems to me to mirror what is going on in the efforts to promote good regulatory practice. To successfully address problems of legislative design, these matters must be engaged with early in the process of policy design. It may be too late by the time the proposal even goes to Cabinet, let alone by the time the instructions go to Parliamentary Counsel Office. Sometimes the thinking in the individual departments is not sufficiently linked to the rest of the Government.

I wonder if it would ever be possible to try and deal with all these issues as a job lot at the beginning of the policy development process and to keep them firmly in mind as that process inevitably iterates.

There have been recent developments in Parliament that have highlighted the need to build into legislation requirements for its systematic review within a certain period after its passage in order to see that its objectives have been achieved. For instance, the Justice and Electoral Committee asked the Legislation Advisory Committee to write comments on the Evidence Bill²⁴ and in particular on whether it was too prescriptive. Three members of Legislation Advisory Committee attended the Select Committee and made a submission about the Bill. The submission expressed support for the Bill's codification of the law and proposed that the Bill include five yearly reviews by the Law Commission once enacted. This post enactment period review suggestion was accepted by the Select Committee and included as an amendment in their report back to the House.²⁵ The Bill was enacted as the Evidence Act 2006. Section 202 of the Act requires the Law Commission

22 Ministry of Economic Development website, available at <http://www.med.govt.nz/templates/MultipageDocument-TOC___22149.aspx> (last accessed 13 February 2007).

23 Department of Prime Minister and Cabinet *The Step by Step Guide: Cabinet and Cabinet Committee Processes* (Wellington, 2001) available at <<http://www.dpmc.govt.nz/cabinet/guide/guide.pdf>> (last accessed 12 February 2007) para 3.36.

24 Evidence Bill 2006, no 256-1.

25 Evidence Bill 2006, no 256-2, (select committee report) XIV.

to conduct 5-yearly reviews of the Act to ensure that it is having the desired effect and to review whether its provisions should be retained, amended or repealed.²⁶

We do need vigorous examination of whether legislation has met its policy objectives after it has been passed. We cannot continue to pass Bills and then never consider their design or effect again. We need to rigorously assess test issues such as whether an Act has caused some unforeseen or undesirable consequences, or has had unexpected costs attached to its enforcement. We do hardly any evaluations in New Zealand as to whether Legislation met its policy objectives or had unexpected consequences. Many Acts are amended numerous times in the years following their enactment, but this happens in a reactive way – the changes are quick fixes rather than part of an integrated overview or well-designed plan. We certainly need more considered monitoring of legislation after it has been passed.

From where I sit the real problem is that we still legislate too easily. We give insufficient thought to what we are trying to do when we legislate. And then, having legislated, we do not examine whether we even achieved what we were trying to. We amend too readily when often we should start again. We fail to assess properly the economic consequences of many of the regulatory mechanisms in which we engage. We have created a country with 1100 principal statutes. I think the time has come to put a lot more thought into the legislative process before it starts. In a system where statute is Emperor, we need better methods of statute design, manufacture and maintenance.

26 Evidence Act 2006:

202 Periodic review of operation of Act

(1) The Minister must, as soon as practicable after 1 December 2011 or any later date set by the Minister by notice in the Gazette, and on at least 1 occasion during each 5-year period after that date, refer to the Law Commission for consideration the following matters:

(a) the operation of the provisions of this Act since the date of the commencement of this section or the last consideration of those provisions by the Law Commission, as the case requires:

(b) whether those provisions should be retained or repealed:

(c) if they should be retained, whether any amendments to this Act are necessary or desirable.

(2) The Law Commission must report on those matters to the Minister within 1 year of the date on which the reference occurs.

(3) The Minister—

(a) may not set a date later than 1 December 2011 for the commencement of the initial periodic review of this Act under subsection (1) unless the Minister is satisfied that, because of the limited number of cases concerning the provisions of this Act decided by the superior courts of New Zealand or for any other reason, it is appropriate to defer the date of the initial periodic review; and

(b) must not set a date later than 1 December 2014 under subsection (1).

THE WINDS OF CHANGE HIT THE LEGAL PROFESSION

PROFESSOR JOHN H FARRAR*

Changing demographics, economic change, the Lawyers and Conveyancers Act 2006 and increasing public criticism are having considerable impact on the New Zealand legal profession. New Zealand is not alone in this respect. Similar forces are at work in the United Kingdom and Australia.

In this article we will look at each of these changes in turn. In doing so the author draws on two extremely useful recent publications – *The Business of Law*¹ published by Brookers in 2006 and *Inside Lawyers' Ethics*² by Christine Parker and Adrian Evans and published by Cambridge University Press in 2007. *The Business of Law* is a report on management and financial performance in the New Zealand profession with Ashley Balls, Ronald Pol and Rebekah Palmer as main contributors. It gives an overview of the legal profession, corporate counsel, what clients think, human resources and practice management. *Inside Lawyers' Ethics* is an excellent compact resource for students and practitioners by two able Australian scholars. It deals with values in practice, alternatives to adversarial advocacy, ethics in criminal justice, conflict of interest, overcharging, corporate lawyers and corporate misconduct and regulation of lawyers' ethics. It is very well written and contains a number of very useful case studies. Although written for an Australian audience it is of value in New Zealand.

I. CHANGING DEMOGRAPHICS AND ECONOMIC CHANGE

Today fewer lawyers work in private practice. Data from the New Zealand Law Society Annual Report for the Year ended November 2005 was 68 per cent although there was also a separate 13 per cent for Barristers.³ This is consistent with overseas trends and demonstrates the rise of non private practice – such as corporate or government work which represented seven per cent and nine per cent respectively.⁴

Research by Team Factors Ltd in New Zealand links the growth of non private practice with a number of factors including lack of pricing information, poor client management skills and poor communication. Commercial practice in particular is becoming more demanding and competitive.⁵

Two thirds of the profession are aged under 40⁶ and the average age is declining rapidly. Only 14.2 per cent are over 50. Only 38.4 per cent have more than ten years experience. There are now

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1 A Balls, R Pol and R Palmer (eds) *The Business of Law* (2006) (hereinafter 'The Business of Law')

2 Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (2007) (hereinafter 'Inside Lawyers Ethics').

3 *The Business of Law* 6.

4 Ibid.

5 Ibid.

6 Ibid 10-11.

more female lawyers (51.5 per cent) as compared with 48.5 per cent males. This is also the beginning of a very significant trend where about 60 per cent of current law students are female.

Only 18.5 per cent earn \$150,000⁷ or more yet over 90 per cent⁸ worked more than 36 hours a week. 34.4 per cent said they worked 46-53 hours, 12.2 per cent 56-65 hours and 4.4 per cent more than 65 hours. Either these figures are inaccurate or a significant number of practitioners are working hard for poor rates of remuneration.

II. THE LAWYERS AND CONVEYANCERS ACT 2006

The Lawyers and Conveyancers Act 2006 had a long gestation and is still causing much uncertainty in the profession. It received the Royal Assent on 20 March 2006 but still leaves much to be sorted out. The New Zealand Law Society structure and constitution are still under discussion. The Council is examining how to develop and implement a unitary model which would not require separately constituted District Law Societies. The timetable is for ratification by the Council on 21 September 2007.

Professor Duncan Webb of the Canterbury Law School has prepared a paper on Rules of Professional Conduct and Client Care which is under going debate.

Other matters being discussed are the NZLS constitution, Senior Counsel, Conditional Fee Agreements, Trust Account Rules, Complaints and Standards, the Fidelity Fund and Law Society Libraries.

Having attended what was described as the last ceremony for admission of a QC in New Zealand one was left with the impression of losing some of the strengths of a long tradition without having any clear idea of what is to be put in its place.

III. CRITICISM AND COMPLAINTS

The procedure at the moment is set out in the Law Practitioners Act 1982 with a degree of local autonomy which will disappear.

Some of the common complaints about the profession are:⁹

- Excessive adversarialism in litigation;
- The high cost of litigation;
- Conflicting loyalties;
- Excessive billing and overcharging;
- The role of lawyers in corporate misconduct.

New Zealand has been slower than Australia but faster than the United Kingdom in developing Alternative Dispute Resolution, particularly mediation.¹⁰ There is a need to institutionalise mediation in High Court and District Court practice and procedures.

The method of billing on a time basis and the tendency of some firms to over lawyer transactions is a common complaint.¹¹

7 Ibid 12-13.

8 Ibid 12.

9 *Inside Lawyers' Ethics*.

10 Ibid chapters 2 and 4.

11 Ibid chapter 8.

Conflict of interest problems¹² inevitably arise in a small jurisdiction with a limited number of specialists. The question of coping with the consequences of clients changing firms needs to be dealt with as this is more common with major corporate clients and government departments who are beginning to diversify their legal services work.

The role of lawyers in major corporate scandals in the USA, Canada and Australia has caused the public to question professional ethics and values.¹³ Enron's lawyers Vinson and Elkins were fortunate to avoid the fate of Arthur Andersen. Lawyers for tobacco companies are constantly criticised. The role of the lawyers in the Patrick Dock Wars and James Hardie has been strongly criticised.

The consequences of this are increased responsibility for securities lawyers in the USA and stronger scrutiny in Australia.

In the United Kingdom and some of the Australian states there are steps being taken for greater public involvement in complaints procedures.¹⁴ In the UK the Legal Services Bill currently before Parliament provides for a Legal Services Board with a Consumer Panel. Legal complaints will be dealt with by an Office for Legal Complaints which will operate an ombudsman scheme. The regulatory objectives are:

- (a) to protect the public interest
- (b) to support the rule of law
- (c) to improve access to justice
- (d) to promote consumer protection
- (e) to promote competition
- (f) to encourage an independent, strong, diverse and effective legal profession
- (g) to increase awareness of citizens rights
- (h) to promote professional principles (which are defined).

More modest reforms are taking place in some of the Australian states.¹⁵

These are trends which are hard to resist since other professions have already been gradually subjected to this scrutiny.

The outcome is likely to be a shift from the strong individualism of adversarial advocacy to more responsible lawyering and a return to the gate keeper role that lawyers have had in the past. It is a time for greater realism in the profession. We must acknowledge just criticism¹⁶ but resist a mindless sweeping away of the positive traditions of the Bar. It is time for us to reinvent ourselves before others do it for us. In the meantime lawyers are advised to eat more bananas.¹⁷

12 Ibid chapter 7.

13 Ibid chapter 9.

14 Ibid chapter 3.

15 Ibid.

16 Christine Parker, *Just Lawyers, Regulation and Access to Justice*, (1999) Chapter 5.

17 Simon Tupman, *Why Lawyers Should Eat Bananas*, (2000). It is ironic to note that the cover of this book shows commendation by the Managing Partner of Andersen Legal now no longer in existence post Enron and Meredith Hellicar, former CEO of Corrs Chambers Westgarth and Chair of James Hardie Group, which was strongly criticised for lack of social responsibility in dealing with asbestos litigation in Australia.

WHERE THERE IS A WILL, THERE IS A WAY – A NEW WILLS ACT FOR NEW ZEALAND

BY NICOLA PEART*

I. INTRODUCTION

On 1 November 2007 New Zealand acquired for the first time its own, home grown, Wills Act to replace the Wills Act 1837 (Imp).¹ Although the New Zealand Parliament made several amendments, the Imperial statute remained the foundation statute for wills in New Zealand.² It has stood the test of time and, as a result of the transitional provisions, will have to continue doing so for some years to come. Although s 4 states that the Wills Act 2007 applies to wills of persons dying on or after 1 November 2007, most of the substantive reforms will not affect wills executed before that date.³

The Wills Act 2007 implements many of the recommendations made by the New Zealand Law Commission in its 1997 Report entitled *Succession Law: A Succession (Wills) Act*.⁴ The Law Commission was of the view that there was nothing wrong with the essence of the old law, but its language was archaic, it contained anomalies and anachronisms, and it would benefit from a few substantive changes to ensure testators' wishes were not unnecessarily frustrated. Accordingly, it recommended that the 1837 Act and its amendments be replaced by a single local Act in language that was contemporary and plain so that it could be more readily understood and applied.⁵

Much of the Wills Act 2007 is indeed a restatement of the old law. It is also expressed in plain English and set out logically under clear headings. The overly long provisions of the past have been replaced with short sentences and subsections, and the terminology has been simplified. The term 'testator' has been replaced with will-maker,⁶ and the expression 'testamentary document', was used in the Bill as an inclusive term to refer to the various forms of testamentary documents,

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1 The WA No 36 received its Royal assent on 28 August 2007 and its commencement date is 1 November 2007: WA [WA] s 2.

2 The Act remained in force in New Zealand by virtue of s 3(1) and the First Schedule to the Imperial Laws Application Act 1988.

3 Section 40. For example, the validation power in s 14 and the ability to save gifts to witnesses in s 13 cannot be used in relation to wills executed before 1 November 2007.

4 New Zealand Law Commission, Report 41, *Succession Law A Succession (Wills) Act (1997)* available at <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_41_113_R41.pdf>

5 Ibid, para 4.

6 WA s 6 defines 'will-maker' as the equivalent of 'testator' and 'testatrix'.

is now simply called a will.⁷ The aim was to make the Act as uncomplicated as possible to ensure its accessibility and usefulness to anyone wanting to make a will.⁸

The substantive amendments made by the Act take account of changes in family relationships, remove age restrictions on the ability of minors to execute wills, and reform the law in various ways to enable better effect to be given to a testator's wishes. One of the most significant changes is the power to validate wills that do not comply with the prescribed formalities for making, changing, revoking or reviving wills.⁹ That change follows the Australian lead and avoids wills being invalidated in circumstances where the document is shown to express the deceased's testamentary intentions.¹⁰ Another important change is the widening of the rules of evidence that may be admitted to assist in ascertaining a testator's intentions. In various parts of the Act, the Court is empowered to consider external evidence of the deceased's intentions in determining both the validity and construction of wills.¹¹ This change further contributes to the Act's goal of giving better effect to testamentary intentions. The Act also restates certain common law rules in statutory form.

The Wills Act 2007 does not create a code of rules.¹² Nor does it purport to cover all aspects relating to wills.¹³ The common law will therefore continue to influence the law governing wills. In fact, the role of the Courts is enhanced by this Act, because they have discretionary powers not previously enjoyed.

There are two fundamental principles that underpin the law governing wills. The first is to uphold the ascertainable intentions of will-makers, though this principle is subject to the substantial inroads made by the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and, more recently, the Property (Relationships) Act 1976. The second principle is that great care must be taken in determining whether what is claimed to be an expression of a will maker's wishes is genuinely so, because a will operates only after its maker has died. Over the past few decades, there has been a growing concern that there was an imbalance in favour of the second principle. The plain intentions of testators were easily defeated by technicalities and minor mistakes which the courts were unable or unwilling to overcome.¹⁴ The changes made by the Wills Act 2007 are intended to provide the means to redress the imbalance so that better effect can be given to the ascertainable intentions of testators without losing sight of the caution expressed in the second principle.

7 WA s 8.

8 Wills Bill as reported from the Justice and Electoral Committee (78–2) at p 2 available at <http://www.parliament.nz/NR/rdonlyres/E9767055-8F2B-4390-ADFE-F626C01C4D12/54373/DBSCH_SCR_3736_4892.pdf>

9 WA s14.

10 South Australia first introduced the dispensing power, as it is referred to in Australia, by inserting s 12(2) into its Wills Act 1936 in 1975: Wills Act Amendment Act (No 2) 1975 (SA). A dispensing power has since been adopted in all the other Australian states and territories. Commentators in New Zealand have been recommending this reform for over 25 years: Julie Maxton 'Execution of wills: The formalities reconsidered' (1980–1982) 1 *Canterbury Law Review* 408; Rosemary Tobin 'The Wills Act formalities: A need for reform' [1991] NZLJ 195.

11 For example, s 14(3) and s 32.

12 In contrast to the Succession (Homicide) Act 2007 which establishes a code of rules to replace the common law forfeiture rule.

13 For example, testamentary capacity is not addressed by the Act.

14 See for example the comments made by Fisher J in *Re Jensen* [1992] 2 NZLR 506 in relation to rectification of wills.

This paper will consider whether the Act is likely to achieve these aims. The focus of this paper is on the changes made by the Act, first in regard to the making of valid wills, and then the changing and revoking of wills and gifts in wills. The paper will conclude with a discussion of the provisions in the Act that purport to restate the common law pertaining to mutual wills and correction of wills.

II. MAKING A VALID WILL

A will is valid if it was made by a person entitled¹⁵ and competent to make a will¹⁶, complies with the formalities prescribed by s 11 or is validated by the Court under s 14, and has not been revoked by the will-maker or by operation of law.¹⁷

A. *Meaning of will*

Section 8 defines a will as a document that is made by a natural person and disposes of property to which the will-maker is entitled when he or she dies, or to which the will-maker's personal representative becomes entitled as personal representative after the person's death, or appoints a testamentary guardian. Curiously, no mention is made of the appointment of an executor, which wills typically do. Whenever the term 'will' is used, it includes a codicil or other testamentary document that changes, revokes or revives a will.¹⁸ The use of one word aids simplicity, which is one of the aims of the Act.

Section 8(6) contains a strange provision, which may lead to confusion. It provides that s 108 of Te Ture Whenua Maori Act 1993 overrides s 8. This suggests that wills of Maori land have a different meaning and do something different. That misconceives s 108. It merely restricts the range of beneficiaries to whom Maori freehold land may be devised on death. Owners of Maori land who wish to make a will must comply with the ordinary rules for making, changing and revoking wills.¹⁹ The Law Commission proposed a similar provision to s 8(6) in its Draft Wills Act, but that clause related to the property that a deceased might dispose of and stated that nothing in the section was to restrict the operation of s 108 Te Ture Whenua Maori Act.²⁰ In the context of a clause dealing with the kinds of property that may be the subject matter of a will, the reference to s 108 was appropriate, but it is misplaced in s 8 which is concerned with the meaning of a will.

15 WA s 9 determines minors' capacity.

16 *Banks v Goodfellow* (1870) LR 5 QB 549 establishes the requirements for testamentary capacity. See also *Bishop v O'Dea* [1999] 18 FRNZ 492 and *Nijssen & Ors v Squires & Anor* [2004] Court of Appeal CA CA53/04 (Unreported, McGrath, Hammond & Chambers JJ, Dec 15, 2004).

17 WA ss 16, 18 and 19 deal with revocation. Section 7 defines a valid will as one that complies with s 11 or is declared valid under s 14.

18 WA s 8(2) and (3).

19 Native Land Laws Amendment Act 1895 s 33 invalidated the custom of *ōhākī* (oral will usually made close to death), but the custom is still in use. See for example *Re Moeahu* (1996) 14 FRNZ 609. During the first reading of the Bill on 10 October 2006, Dr Pita Sharples (MP, Maori Party) called upon Parliament to allow *ōhākī* as an alternative expression of a will-maker's intentions: available at <http://www.parliament.nz/en-NZ/PB/Debates/Debates/c/7/d/48HansD_20061010_00000846-Wills-Bill-First-Reading.htm>

20 NZLC above n 4, at 22.

B. Capacity of minors to make wills

Section 9 of the Wills Act 2007 changes the capacity of minors to make wills. There is no longer a minimum age requirement and Court approval can be given generally rather than for a specific will, or for a specific change or revocation of a will. Under the old law, minors could make a valid will if they were or had been married, if they were or had been in a civil union or a de facto relationship.²¹ The minimum age for entering into any of these relationships is 16 and parental or Court approval is required if the minor is under the age of 18.²² Minors who were not in one of those relationships could make a will only if they were at least 16 and had the approval of the District Court or the Public Trust to make, change or revoke a particular will.²³ Minors under the age of 16 were unable to make wills.

Section 9 retains the right of minors to make wills if they are or were married, in a civil union or in a de facto relationship, but it has removed the minimum age requirement for minors who are not in such relationships. Minors of any age can now make a will with the approval of the Family Court if the Court is satisfied that the minor understands the effect of making, changing or revoking wills. The approval is general, rather than for a specific will. The Court's assessment of the minor's understanding must therefore be focussed on their testamentary capacity generally, rather than their ability to understand a specific will. This change accords with the general law relating to minors' capacity,²⁴ and recognises that in the context of modern family structures the intestacy rules may not be appropriate.

The law has been further amended by s 10 to enable minors who have agreed to marry or enter into a civil union to make a will in contemplation of that marriage or civil union, but the will takes effect only if the marriage or civil union occurs.²⁵ There is no equivalent provision for persons under 18 who have agreed to enter into a de facto relationship. They must obtain Court approval under s 9 or wait until they have begun living together as a couple with the approval of their parents or guardians.

De facto partners under the age of 18 should be encouraged to make a will if they want their partner to inherit, because for purposes of the intestacy rules in the Administration Act 1969, and claims under the Family Protection Act 1955 and the Property (Relationships) Act 1976, both de facto partners must be at least 18 years old to be eligible.²⁶ De facto partners must be forgiven for any confusion they may feel in regard to the status of their relationship when they are 16 or 17 years old. Their relationship is legally recognised for some of their succession rights but not for others. This inconsistency defies common sense and ought to be removed.

21 Wills Amendment Act 1969 s 2, as amended by the Wills Amendment Act 2005 s 6.

22 Marriage Act 1955 ss 17 and 18; Civil Union Act 2004 ss 7, 19 and 20; Interpretation Act 1999 s 29A.

23 Wills Amendment Act 1969 s 2.

24 Care of Children Act 2004 ss 6, 36 and 38; *Gillick v West Norfolk And Wisbech Area Health Authority and Department of Health and Social Security* [1986] 1 AC 112, [1985] 3 All ER 402, [1985] 3 WLR 830, [1986] 1 FLR 224; United Nations Convention on the Rights of the Child (1989) Article 12.

25 Section 10 is one of the exceptions to the rule in s 18 that a will is revoked on marriage or entry into a civil union: WA s 18(2).

26 The definition in Property (Relationships) Act 1976 s 2D determines a surviving de facto partner's eligibility to make a claim under that Act and to inherit under the intestacy rules (Administration Act 1969 s 2) or claim under the Family Protection Act 1955 s 2.

As before, a ‘military or seagoing person’ under the age of 18 may also make a will and does not require Court approval.²⁷

C. Formalities for execution

Section 9 of the Wills Act 1837 set out the formal requirements for executing a will. It was introduced to simplify the making of wills in the United Kingdom by introducing uniform rules for all wills, other than wills of soldiers and seamen.²⁸ Prior to 1837 the formal requirements for wills depended on the type of property to be disposed of. There were ten forms of will, each for different circumstances and with different requirements. The importance of land to the feudal system meant that succession to real property was tightly regulated in comparison to succession to other types of property.²⁹ Section 5 of the Statute of Frauds 1677 laid down strict requirements for wills devising realty. They had to be in writing, signed by the testator in the presence of three or four credible witnesses who were required to attest and subscribe the will in the testator’s presence.³⁰ If there was any defect in the execution the will was void. These wills were under the jurisdiction of the common law courts. Wills dealing with a deceased’s personal estate were under the control of the Ecclesiastical Courts, and did not even require writing in some circumstances.³¹ The complex rules pertaining to the making of wills led to the adoption of the Wills Act 1837.

Section 9 of that Act required all wills, other than wills of seamen at sea and soldiers in military action, to be in writing, signed at the foot or end of the document by the testator or another in the testator’s presence and by his direction.³² The signature had to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and those witnesses were required to attest and subscribe the will in the presence of the testator. The requirement that the signature be at the foot or end of the document was clarified in s 1 Wills Act Amendment Act 1852 (Imp), but otherwise s 9 applied unamended in New Zealand until the Wills Act 2007 came into force. Strict compliance with s 9 was required. Minor mistakes or technical glitches invalidated the will.³³

27 Section 10(4).WA.

28 Commissioners on the Law of Real Property, Fourth Report, HC 226 (1833) at p 12.

29 Wills of certain types of land tenure became legally possible only after the Statute of Wills was adopted in 1540. For a brief overview of the legal history of wills see A Borkowski, *Textbook on Succession* (1997) pp39–41 and R F Atherton and P Vines, *Succession; Families, Property and Death* (2003) at 24–28. The history is more fully described in T Jarman and R Jennings, *Jarman on Wills Volume 1* (1951); Sir John Baker, *The Oxford History of the Laws of England: Volume VI: 1483–1558*, (2003) ch 35 for wills relating to land; for wills relating to personality, see R H Helmholz, *The Oxford History of the Laws of England: Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (2004) ch 7.

30 A witness was not credible if he or she had an interest in the will.

31 See the references in note 29 above.

32 The Statute of Frauds 1677 (Imp) s 22 exempted soldiers and seamen from its requirements and that exemption was continued in the Wills Act 1837 s 11. Those provisions were replaced in New Zealand by the Wills Amendment Act 1955 Part 1.

33 It is interesting to note that in *Re Menzies; NZ Guardian Trust Ltd v Public Trust* [2006] High Court New Plymouth CIV 2006–443–00318 (Unreported, Judges, 20 October 2006) the Court did not adopt the same rigid approach to a will made under the Protection of Personal and Property Rights Act 1988 s 55. It admitted the will to probate even though it was not executed in the presence of both witnesses.

Langbein identified four main functions in the wills formalities: an evidentiary, channelling, cautionary, and protective function.³⁴ The evidentiary function is served by the need for writing, the will-maker's signature and the attestation of the witnesses. They provide the Court with reliable evidence of the will-maker's testamentary intent and of the terms of the will. The formalities also have a channelling function, because they channel will-makers into standard forms of behaviour, organization, language and content of most wills. The cautionary function of the formalities reminds the will-maker of the importance attached to the making of a will. The signing of a written will in the presence of witnesses and their attestation create a ceremony that impresses on the participants the solemnity and legal significance of what is being done. Finally, the formalities have a protective function. The presence of two independent witnesses is aimed at reducing the risk of fraud, forgery or undue influence.³⁵

These functions are important to the principles underpinning wills. It is not surprising, therefore, that s 11 of the Wills Act 2007 makes only one change to the formalities for executing wills. It omits the requirement that the signature be placed at the foot or end of the will. It may now be placed anywhere on the document. The effect of this change is that parts of a will that come after the signature can now be admitted to probate without the need to resort to strained constructions to avoid those parts being omitted from probate.³⁶ Although this change follows similar changes made in the United Kingdom³⁷ and most of the Australian states³⁸, it is a curious change. The position of the signature has the practical advantage of indicating where the will ends and guards against unauthorised additions to the will.³⁹ In view of the validation power in s 14, the need for this change is questionable.

The retention of the other formalities, in particular the requirement that the witnesses be present at the same time to witness the same act, means that wills such as the one in *Re Colling* will still be invalid.⁴⁰ Mr Colling was in hospital when he executed his will. A patient in the next bed and the ward sister were his witnesses, but as he started to sign his will the ward sister was called away. Mr Colling continued to sign his will witnessed by the patient who attested and signed the will. When the ward sister returned, Mr Colling acknowledged his signature, whereupon she signed the will. The will was held to be invalidly executed, because the two witnesses had witnessed different acts. This type of departure from the formalities will continue to render

34 JH Langbein, 'Substantial compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489.

35 *Ibid* at pp 492–495.

36 Wills Act Amendment Act 1852 (Imp) s 1 provided that nothing underneath a signature was effective. The Courts construed this section very liberally. See for example *Stewart (deceased), Re* [1991] High Court Auckland A389/85 (Unreported, Tompkins J, 17/12/91) where the Court admitted all three pages of a will to probate, even though the signatures of the testator and the witnesses appeared at the bottom of the second page and the residuary gift was on the third page. In *Millar (deceased), Re* [1986] High Court Auckland CP1362/86 (Unreported, Sinclair J, 26/7/88) on the other hand, the portion below the signature was excluded, but that contained only her funeral and burial instructions.

37 Administration of Justice Act 1982 (UK) s 17 amended Wills Act 1837 s 9 to remove that requirement.

38 For example, Wills, Probate and Administration Act 1898 (NSW), 7(1)(c); Wills Act 1936 (SA) s8(b); Wills Act 1970 (WA) s 8(b).

39 In *Fairhurst, Re (dec'd)* [1976] 1 NZLR 51, for example, the Court found that the writing after the signature did not exist when it was signed. Only the part before the signature was admitted to probate.

40 *Re Colling* [1972] 3 All ER 729; [1972] 1 WLR 1440. See also *Re Harvey* [1986] High Court, Whangarei PS04/85 (Unreported, Thorp J, 14/1/86), *Parata v Parata* [1989] High Court, Auckland M205/87 (Unreported, Gault J, 8 November 1989), *Young v Young* [2002] High Court, Auckland P2689/01 (Unreported, Morris J, 22 May 2002).

wills invalid under s 11 of the Wills Act 2007, though the Court now has the power to validate non-compliant wills under s 14.

D. Validation of non-compliant wills

A major change in the Wills Act 2007 is the power given to the Courts by s 14 to validate wills that do not comply with the formalities prescribed by s 11. This change follows similar amendments made in Australia, though the power differs between the States. Queensland requires substantial compliance with the formalities and has taken a stringent approach to wills that do not meet the formalities.⁴¹ The other states followed South Australia's lead of providing a general dispensing power.⁴²

Given the importance of the power to validate non-compliant wills, it is worth quoting s 14 in full:

- (1) This section applies to a document that –
 - (a) appears to be a will; and
 - (b) does not comply with section 11; and
 - (c) came into existence in or out of New Zealand.
- (2) The High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.
- (3) The Court may consider –
 - (a) the document; and
 - (b) evidence on the signing and witnessing of the document; and
 - (c) and evidence on the deceased person's testamentary intentions; and
 - (d) evidence of statements made by the deceased person.

Section 14 imposes three requirements for a will to be declared valid. First, there must be a document. Second, the document must appear to be a will, and third, the Court must be satisfied that the document expresses the deceased's testamentary intentions.

1. Document

The Court's validation power can only be invoked if there is a 'document'. This term is defined in s 6 as 'any material on which there is writing'. Section 29 of the Interpretation Act 1999 defines 'writing' as representing or reproducing words, figures, or symbols in a visible and tangible form or medium (for example print).⁴³ The term 'material' is not defined in either of these Acts, but the remedial nature of s 14 and the purpose of the Act as a whole suggest that it should be given a wide meaning. It would naturally include paper, fabric, stone, wood, metal, glass, or photographs on which writing appears.⁴⁴ A will written on a wall, as in the South Australian case of *Estate of Slavinskyj*, would qualify as a document under s 14.⁴⁵ It would also include electronically stored

41 Succession Act 1981 (Qd) s 9; R F Atherton and P Vines, *Succession; Families, Property and Death* (2003) at 253.

42 Wills Act 1936 (SA) s 12(2) inserted by Wills Act Amendment Act (No 2) 1975 (SA).

43 There is no restriction as to the agent that can be used in writing a will, but if part of it is written in pencil and the other part in ink, there is a risk that the part in pencil may be seen as a draft only and not intended to be part of the will: *In the Goods of Adams* (1872) LR2 P&D 367. The Court could come to the same conclusion when exercising the validation power under s 14.

44 In *Re Estate of Torr* (2005) 91 SASR 117 a photograph was admitted as a document.

45 *Estate of Slavinskyj* (1988) 53 SASR 221. The relevant part of the wall could have been cut out, because it was made of plasterboard, but the Court accepted a photograph.

documents, even if they could not be printed, as long as they could be seen on a screen.⁴⁶ A text message could qualify as a document, and so could a film, video or CD on which a will had been written. Even writing on the shell of an egg would come within the meaning of ‘document’, though the will would have to be brief!⁴⁷

A visual or audio recording of a person making an oral will may strain the meaning of ‘document’, because there would be no writing, only spoken words. In *Treacey v Edwards* the Supreme Court of New South Wales admitted an audio tape of a will to probate, but that was after the meaning of document had been amended in that State to include ‘anything from which sound, images or writings can be reproduced’.⁴⁸ Those additional words do not appear in the definition of ‘document’ in s 6 of the Wills Act 2007. On a literal interpretation of that definition audio or visual recordings of oral wills would not appear to qualify as a document. But a purposive interpretation could support admitting such recordings as documents. The medium would qualify as material, and the words are arguably reproduced in a visible or tangible form, especially if blind and deaf persons are considered. Blind persons often use speaking computers and deaf persons may read lips. The evidentiary function of requiring a document is not eroded by an audio or visual recording. The recording is direct evidence of the will-maker’s expressed intentions and the spoken words can be easily and reliably converted into a conventional written document. Nonetheless, until the definition is amended or its meaning is construed expansively, as suggested, doubt must remain whether an audio or visual recording of an oral will can constitute a document for purposes of the Wills Act.

An oral will that was not recorded in some manner is even less likely to qualify as a ‘document’, not even if it was made formally in the presence witnesses. Even though the evidentiary, cautionary and protective functions of such a will may not be undermined, there would be neither ‘material’ nor ‘writing’, only the evidence of the witnesses as to what the will-maker said. Section 14 does not appear to envisage such indirect evidence of the will-maker’s intentions, at least not as a starting point. It would seem, therefore, that the Maori custom of *ōhākī* would not meet the threshold requirement for the Court’s validation power. Ironically, if someone had minuted the *ōhākī* in writing, there would be a document within the meaning of the Act. Whether it would be admitted to probate would depend on the Court being satisfied that the other requirements of s 14 were satisfied. But at least it would meet the threshold requirement and allow the Court to consider its validity.

It is unfortunate that there is only one gateway into s 14 and that is by means of a document. It is the ticket without which admission to the Court’s validation powers cannot be granted. It is the only requirement prescribed by s 11 which is not dispensable and its definition is capable of a narrow construction. All the other requirements can be excused. The ability of the Courts to give better effect to a deceased’s testamentary intentions is thus constrained, even where those intentions can be readily and reliably ascertained by means other than a document, as in the case of an

46 In *Re Trethewey* (2002) 4 VR 406 a computer file on a hard drive was admitted as a will. <<*In the Will of Mark Edwin Trethewey* [2002] VSC 83.

47 *Hodson v Barnes* (1926) 43 TLR 71 where a ship’s pilot with a liking for eggs wrote his will on the empty shell of a hen’s egg. The will was not admitted because of lack of *animus testandi*, not because it was written on an egg shell.

48 In *Treacey v Edwards* (2000) 49 NSWLR 739 the Court noted the concern about audio tapes and videos of oral wills, but commented that for some testators recording their testamentary intentions on a tape might be easier than writing them down. In case that was wrong, the Court held that the tape could also be admitted under the doctrine of incorporation, because there was a written will that referred to the audio tape.

audio or visual recording of an oral will or an *ōhākī*.⁴⁹ In this respect the Act achieves its goal only partially.

2. *Document appears to be a will*

The second pre-requisite for the validation power in s 14 is that the document must ‘appear to be a will.’ The document must therefore purport to do all or any of the things described in the definition of a will in s 8: dispose of property to which the person is entitled when he or she dies, appoint a testamentary guardian, or exercise a power of appointment. Alternatively, the document must refer to an existing will which the document is purporting to change, revoke or revive.⁵⁰ The validation power applies not only to the making of a will, but to all forms of testamentary actions including the making of a codicil.

The content of the document may be sufficient to establish that the document appears to be a will. If not, the circumstances of its ‘execution’, and any statements made by the deceased about the document may shed some light on its apparent purpose. The fact that it must appear to be ‘a will’ suggests some finality about the document and may be used to exclude drafts or notes of instructions.

3. *Expresses the deceased’s testamentary intentions*

If there is a document and it appears to be a will, the validation power can be exercised. The Court must be satisfied that the document expresses the deceased’s testamentary intentions. This is not the ‘substantial compliance’ model that Queensland adopted. It is similar to the dispensing power of the other Australian states, though it is expressed slightly differently. The Australian statutes permit the Courts to validate a document that purports to be a will if they are satisfied that ‘the deceased person intended the document to constitute the person’s will.’⁵¹ A New Zealand Court will have to be satisfied that the document ‘expresses the deceased person’s testamentary intentions’. The difference in wording could be material.

The Australian wording has been construed by some courts to mean not only that the document must express the deceased’s final intentions as to the disposition of the property referred to in the document, but also that it is that particular document that the deceased intended to be his or her will. Wills instructions and drafts of wills have been excluded by this approach.⁵² Other Courts have opted for a more liberal approach, focussing on the substance of the document rather than its form.⁵³ The New Zealand provision could also be construed liberally, because it does not require the Court to be satisfied that the document is the deceased’s will, merely that it expresses the deceased’s testamentary intentions. The emphasis is not on the subject document, but on its content. However, the requirement that the document must appear to be a will may be used to follow the more constrained interpretation.

49 See the comments made by Dr Pita Sharples (MP, Maori Party) during the first reading of the Wills Bill on 10 October 2006, accessed on 21/2/07 available at <http://www.parliament.nz/en-NZ/PB/Debates/Debates/e/7/d/48HansD_20061010_00000846-Wills-Bill-First-Reading.htm>

50 WA s 8(3).

51 Wills, Probate and Administration Act 1898 (NSW) s 18A. See also Wills Act 1936 (SA), s 12(2); Wills Act 1970 (WA) s 34; Wills Act 1997 (Vic) s 9.

52 See for example *Re Application of Brown; Estate of Springfield* (1991) 23 NSWLR 535 and *Baumanis v Praulin* (1980) 25 SASR 423. See further R Atherton, ‘Dispensing with Wills Formality in Australia: the problem of the draft will in the tranquil revolution’ (1994) 2 *APLJ* 68.

53 *In the Matter of the Will of Lobato; Shields v Caratozzolo* (1991) 6 WAR 1; *Estate of Blakely* (1983) 32 SASR 473.

In the Australian states, other than Queensland, documents that were unsigned or not properly witnessed have been admitted to probate as the deceased's will.⁵⁴ The dispensing power has also been exercised to admit lost wills,⁵⁵ a suicide note,⁵⁶ and where two will-makers executed each other's will.⁵⁷ The greater the departure from the prescribed formalities, the more difficult it will be to satisfy the Court that the document was intended to be the deceased's will.⁵⁸

The test in s 14 is not an objective one. It is specific to the particular deceased person. No two cases are necessarily the same. The wills may suffer from the same defects, but in the one case the Court may conclude that the document does express the deceased's testamentary intentions, whereas in the other it does not.⁵⁹ The Court must be satisfied to the ordinary civil standard of proof that the evidence as a whole, including any evidence of the will-maker's statements and testamentary intentions, shows that the document expresses the deceased's testamentary intentions.⁶⁰

Australian precedent will no doubt assist the New Zealand Courts in developing this jurisdiction but, as indicated above, there are different approaches. New Zealand will have to develop its own approach with due regard to its social and cultural circumstances and Parliament's intent. The remedial purpose of s 14 and the aims of the Wills Act invite an expansive approach to the Court's validation power, whilst not losing sight of the evidentiary, protective and cautionary functions that the formalities would have served if they had been satisfied.

Two recent New Zealand cases that predate the adoption of the Wills Act provide interesting fact scenarios against which to test how the validation power might be exercised. The first case is *Costelloe v Costelloe* in which both witnesses denied being present when the will was signed.⁶¹ One of the witnesses also denied that the signature beside his name was his signature. He was a business partner of the deceased and told the Court that the deceased had previously forged his signature on documents relating to their business. The other witness said that the signature was

54 In *Estate of Williams* (1984) 26 SASR 423 the document was unsigned. In *Re Tretheway* (2002) 4 VR 406 the will-maker typed his name at the bottom of the computer file which was held to be the equivalent of a signature. In *Estate of Graham* (1978) 20 SASR 198 the document was signed by the will-maker and then given to her nephew to get it witnessed by the neighbours; in *In the Estate of Kelly* (1983) 32 SASR 413 the will was not signed in presence of witnesses.

55 *Estate of Williams v South Australia* unreported, SC(SA), Bollen J, 27/6/1989, 1584/89 referred to in *Will of Lobato; Shields v Caratozzolo* (1991) 6 WAR 1, where the Court admitted a reconstruction of a will from a witness's memory. The absence of a validation power in New Zealand has not prevented lost wills from being admitted to probate if their former existence, execution and terms can be established with sufficient certainty: *Davies (deceased)*, *Re* [1999] High Court, Tauranga M47/98 (Unreported, Williams J, 4/8/99), *Re Hauraki* [2005] High Court, Auckland CIV 2005-404-3591 (Unreported, Heath J, 27/7/05). In *Re Campbell* [1948] NZLR 510 the Court admitted a will in reliance on the parol evidence of the widow and the consent of her son. As they were the only two persons who would benefit under the intestacy rules, the Court said that less evidence was required to establish the loss of the will and its contents than might otherwise be the case.

56 *Ryan v Kazacos* (2001) 159 FLR 452.

57 *Estate of Blakely* (1983) 32 SASR 473. Note that in *McConagle v Starkey* [1997] 3 NZLR 635 a switched will was able to be admitted to probate by using the Court's rectification powers.

58 *Re Brown; the Estate of Springfield* (1991) 23 NSWLR 535, 539-540.

59 Compare, for example, the decisions of Gray J in *Estate of TLB* (2005) 94 SASR 450 and *Estate of Schwartzkopff* [2006] 94 SASR 465 where similar defects nonetheless produced different outcomes.

60 Some Australian states, such as South Australia, required the Court to be satisfied beyond reasonable doubt, but that was subsequently changed: Wills Act 1936 (SA) s 12(2).

61 *Costelloe (dec'd)*, *Re; Costelloe v Costelloe & Ors* [2007] High Court, Auckland CIV 2007-404-000922 (Unreported, Harrison J, Aug 10, 2007).

hers, but she did not know she had signed a will.⁶² The deceased often asked her to sign documents that were covered up to prevent her knowing what she was signing. She did not see the deceased sign the document, nor did he acknowledge his signature to her. The Court concluded that the presumption of due execution had been rebutted and declared the will invalid.⁶³

If the power to validate a will had been available, the Court may well have found that the will expressed the deceased's intentions. The defects in the attestation would not have been fatal and the steps he took to ensure that the will appeared to be properly witnessed suggests that the document did express his testamentary intentions.

The second case is *Da Costa v Adamson*, in which two computer wills were relied on to support a successful testamentary promises claim.⁶⁴ The applicant, Ms Da Costa, and the deceased, Mr Adamson, had both been married and had children from those marriages. They were Jehovah's Witnesses and had been de-fellowshipped when they made it known in 2004 that they were having a relationship and intended to move in together. Mr Adamson acquired a house in which the couple planned to live. To give his children time to adjust to their parents' separation and their father's new relationship, Ms Da Costa delayed moving in, but the couple did take steps to prepare for their joint household and their future together. During this period Mr Adamson wrote two virtually identical wills on his computer, one in July 2004 and the other in September 2004. Ms Da Costa was a major beneficiary in these wills. Neither will was printed off or signed or witnessed, but Mr Adamson did email Ms Da Costa a copy of the first one. He was killed in a plane crash in May 2005 shortly before Ms Da Costa was to move in with him.

Ms Da Costa was not able to claim under either the Property (Relationships) Act 1976 or the Family Protection Act 1955, because the Court found that she was not Mr Adamson's de facto partner. They never lived together as a couple.⁶⁵ Nor could she benefit from the 'computer wills', because they were invalid under s 9 Wills Act 1837. But the Court was satisfied that the computer wills were not tampered with and there was no evidence that Mr Adamson ever reconsidered his position as set out in those wills. He received a draft will in different terms from his solicitors, but there was no evidence that he had given instructions covering that draft up until his death 8 months later. The computer wills were accepted as evidence of Mr Adamson's intention and promise to make provision for Ms Da Costa and her testamentary promises claim was successful. But she received substantially less than Mr Adamson had left her in his computer wills.

Although the Court had no power to validate a will in this case, the observations made in regard to the computer wills suggest that they would have met the requirements of s 14 and could have been admitted to probate. If the deceased's children had objected to its terms, they could have made a claim under the Family Protection Act 1955. It is worth noting, however, that if Mr Adamson had died after the Wills Act 2007 came into force, Ms Da Costa would be in no better position. The wills would still have been invalid under s 11 and the Court could not have exercised the validation power in s 14 because the wills were made before 1 November 2007.⁶⁶ The Act will therefore continue to defeat clearly expressed testamentary intentions for some years to come.

62 The validity of a will is not affected if the witnesses did not know that the document they were signing was a will: WA s 12(2).

63 *Re Young (Deceased)* [1969] NZLR 454.

64 *Re Adamson; Da Costa v Adamson* [2007] Family Court, Lower Hutt FAM 2005-032-001015 (Unreported, Ullrich QC, 13/7/07).

65 Property (Relationships) Act 1976 s 2D.

66 WA s 40(2)(k).

E. Gifts to witnesses

To ensure that the formalities serve their evidentiary and protective functions, witnesses should be independent and impartial. Accordingly, s 15 of the Wills Act 1837 (Imp) precluded witnesses from taking a benefit under the will. The will was not invalidated, but the gift to the witness was void. Section 3 of the Wills Amendment Act 1977 ameliorated the section's application if the gift was to a superfluous witness and the will had been attested by two witnesses who did not take an interest under the will.⁶⁷

Gifts to a spouse who was married to a witness at the time of execution were also void.⁶⁸ Until the latter part of the 19th century the law treated husband and wife as one person.⁶⁹ A gift in a will to the spouse of a witness therefore conferred a benefit on the witness.⁷⁰ While that aspect of the rationale has no application in the present day,⁷¹ the need for independent and impartial witnesses remains important. The witness may later be called upon to give evidence of due execution of the will and may not be perceived as a reliable witness if there is a conflict of interest. Thus in *Re Madsen*, where the evidence of the witnesses was required to show that the deceased had executed two testamentary documents on the same day, both witnesses had to forego any benefit under the will.⁷²

Section 13 of the Wills Act 2007 restates the rule, and extends it to invalidate gifts to partners who were in a civil union or de facto relationship with a witness when the will was executed.⁷³ The gift is also void if the property would go to a person claiming under the witness or his or her spouse or partner, such as a child of a witness taking by substitution.⁷⁴ Executors may witness a will⁷⁵, but will lose the benefit of a charging clause in the will.⁷⁶

While the need for this rule is understandable, it has on occasion produced harsh results and defeated a will-maker's intentions in circumstances where the gift was not in any way suspect.⁷⁷ In *New Zealand Guardian Trust Company v Mahe*, for example, the deceased's brother in law

67 This change was first made in the United Kingdom in s 1(1) Wills Act 1968 in the wake of the decision in *In the Estate of Bravda* [1968] 2 All ER 217.

68 *New Zealand Guardian Trust Company v Mahe* [1989] High Court, Rotorua M218/85 M33/88 (Unreported, Doogue J, 22 June 1989). In *Ross v Caunters* (1980) Ch 297; [1979] 3 All ER 580 the invalidity of a gift to the spouse of a witness resulted in the solicitors who prepared the will being held liable for negligent advice about the execution of the will off site. See also *Hill v Van Erp* (1997) 188 CLR 159; (1997) 142 ALR 687.

69 The Married Women's Property Act 1884 put an end to the wife's legal invisibility. Margaret Briggs, 'Historical analysis' in Peart, Briggs and Henaghan et al *Relationship Property on Death* (2004), chapter 1.

70 Under the Statute of Frauds (Imp) 1677 witnesses were not competent if they benefited from the will, rendering the will invalid. Under the Wills Act 1752 the witness was not incompetent, but any benefit to the witness was void.

71 In fact, under s 10 of the Property (Relationships) Act 1976 inherited property would normally be separate property of the recipient and not be subject to division between the spouses or partners.

72 *Re Madsen* (2003) 23 FRNZ 79.

73 A gift to a fiancé or fiancée of the witness is not caught by s 13. In the case of a gift to a de facto partner of a witness, the uncertainty as to commencement of most de facto relationships may make it difficult to determine whether the beneficiary was living together as a couple with the witness at the time of execution.

74 WA s 13(1)(c).

75 WA s 12(1).

76 *Re Pooley* (1888) 40 Ch D 1.

77 *Aplin v Stone* [1904] 1 Ch 543; *Re Doland's Will Trust* [1970] Ch 267.

witnessed his will in which his wife, the deceased's sister, was a major beneficiary.⁷⁸ The gift failed. To reduce the harsh consequences, the Court strained the requirements of the Law Reform (Testamentary Promises) Act to restore some of the gift to the deceased's sister.

While will-makers may intuitively realise the need for independent witnesses, they may not appreciate the rule's application to spouses, and now partners, of witnesses. Spouses appear to be the ones most often caught by this rule. Fortunately, s 13(2) of the Wills Act 2007 ameliorates the rule by enabling gifts to witnesses or their spouses or partners to be saved. The gift is not void if all the persons who would benefit directly from the avoidance of the disposition consent in writing or electronically to the distribution of the property and have the legal capacity to give consent. Alternatively, the High Court may validate the gift if it is satisfied that the will-maker knew and approved of the disposition and made it voluntarily.

The first method of saving the gift is a statutory variation on the rule in *Saunders v Vautier* and suffers from similar limitations.⁷⁹ It is of no use if even one of the relevant beneficiaries lacks capacity or does not consent. However, the only beneficiaries whose consent is required are those who would 'benefit directly from the avoidance of the disposition'. That may reduce the number of beneficiaries whose consent has to be sought. Sections 28 and 29 should assist in identifying which beneficiaries would take the failed gift.

The alternative means of saving a gift to a witness, or their spouse or partner, is by making an application to Court and proving that the will-maker knew and approved of the disposition and made it voluntarily. The Court can declare the gift valid against the opposition of those who would benefit from the gift if it failed. Their opposition is relevant only if it shows that the deceased did not make the gift voluntarily or did not know and approve of the gift. The opposition of interested beneficiaries is not otherwise relevant. Even where it is relevant, the Courts are likely to treat their evidence with caution, because it may well be driven by self-interest. Section 13(2) is not a discretionary measure in which the interests of others must be taken into account. Any dissatisfaction that opposing beneficiaries may feel if the gift to the witness or the witness's spouse or partner is saved must be channelled through other testamentary remedies, such as the Family Protection Act.

III. CHANGES TO WILLS

Section 15 restates the law governing changes to wills. As under s 21 of the Wills Act 1837, the change may be made by obliterating words in a will in such a way as to prevent their effect being apparent,⁸⁰ or by writing on the will and executing the changes in the manner prescribed by s 11. Changes that were not attested are presumed to have been added after the will was executed and are not admitted unless the presumption is rebutted.⁸¹ However, the validation power in s 14 can

78 *New Zealand Guardian Trust Company v Mahe* [1989] High Court, Rotorua M218/85 M33/88 (Unreported, Doogue J, 22 June 1989).

79 *Saunders v Vautier* (1841) 4 Beav 115 affd Cr & Ph 240; [1841] EWHC Ch J27; [1841] EWHC Ch J82; (1841) Cr. & Ph 240.

80 *Re Adams* [1990] 1 Ch 601; [1990] 2 WLR 924; [1990] 2 All ER 118.

81 *In re Clarkson* [1918] GLR 205; *Cinnamon v Public Trustee for Tasmania* (1934) 51 CLR 403.

now be used to validate those changes, as they were in the South Australian case of *Estate of Standley*.⁸² Wills of privileged persons may be changed informally.⁸³

IV. REVOCATION OF WILLS

The law governing revocation of wills and gifts in wills has also been amended. The means by which a will may be revoked by the will-maker have been expanded and the anomalies in regard to the effect of marriages and civil unions on wills have been removed. Both are now treated alike. The Act also brings the effect of separation orders on wills into line with their effect on intestate succession of spouses and civil union partners.⁸⁴ These changes not only ensure consistent treatment, but also prevent a will-maker's intentions from being unnecessarily defeated by the rigid application of inflexible rules.

A. *Wills revoked by the will-maker*

Section 16 of the Wills Act 2007 relaxes the manner in which will-makers may revoke their wills. As before, they may revoke their will by executing a new will that complies with the formalities in s 11,⁸⁵ or they may write a document that makes it clear that they intend to revoke all or part of an existing will and execute that in accordance with s 11. A will is also revoked if the will-maker intends to revoke the will by destroying it or directing someone else to do so in the will-maker's presence.

In addition to these longstanding methods of revocation,⁸⁶ a will can now be revoked by the will-maker doing 'anything else in relation to the will that satisfies the High Court that the will-maker intended to revoke the will.'⁸⁷ Any act that stops short of destroying the will could come within the scope of this provision provided it was done with the intention to revoke the will. A will is also revoked if the revocation is declared valid under s 14.⁸⁸ Privileged wills may be revoked informally.⁸⁹

B. *Effect of marriage or civil union on wills*

The entering into a marriage or civil union may also revoke a will, and their ending by a legal process revokes gifts in wills to former spouses and civil union partners. The Wills Act 1837 and

82 *Estate of Standley* (1982) 29 SASR 490.

83 WA s 34(2).

84 Section 26 Family Proceedings Act 1980 governs the effect of separation orders on intestate succession rights of spouses and civil union partners.

85 The earlier will may be expressly revoked by a revocation clause in the later will, or impliedly where the later will is partially or wholly inconsistent with the earlier one: *In re Prosser* [1918] NZLR 590. In *Re Madsen; Alt cit Anderson v Anderson*, (2003) 23 FRNZ 79 both wills were admitted to probate because they were executed on the same day and, despite some inconsistencies, the Court found that the two instruments should be read together to form the deceased's whole will.

86 See Wills Act 1837 s 20.

87 WA s 16(g).

88 WA 16(h).

89 WA s 34(2).

its subsequent amendments dealt only with the effect on a will of a marriage and its dissolution.⁹⁰ The changes made to the Wills Act in 2005 did not treat civil unions and marriages alike for all purposes. Wills of civil union partners were not revoked on entering into a civil union and its dissolution did not affect testamentary gifts to a former civil union partner. Sections 18 and 19 of the Wills Act 2007 remove these anomalies and treat civil unions and marriages alike. Section 19 also removes the different effects of separation orders on wills and intestacies. However, these changes apply only to wills executed after 1 November 2007.⁹¹ The old anomalies will therefore continue to plague this area of the law and are likely to create considerable confusion.

Further confusion may be caused by the fact that de facto relationships are not treated in the same way as marriages and civil unions. The beginning and ending of a de facto relationship have no effect on the validity of the will of either partner or on gifts in the will to a former partner.⁹² The uncertainty that commonly surrounds the commencement of de facto relationships makes it impossible to determine at what point the will is revoked. The need for certainty also precludes a separation from revoking gifts in a will. That affects not only former de facto partners, but also separated spouses and civil union partners who have no separation order.

1. *Effect on wills of entering into a marriage or civil union*

Section 18 of the Wills Act 2007 starts by stating that a will is revoked if the will-maker marries or enters into a civil union. However, it is not revoked if the will expressly says that it is made in contemplation of a particular marriage or civil union, or if the circumstances at the time of making the will clearly show that it was made in contemplation of a particular marriage or civil union.⁹³ An expression of contemplation of marriage in the will itself is therefore no longer necessary, at least not in wills executed after 1 November 2007.⁹⁴ It may be inferred from surrounding circumstances.

Whether this relaxation of the former provision would have saved the will in *Public Trustee v Crawley* is far from certain.⁹⁵ In that case the Court held that the term fiancée in a will was not an expression that necessarily contemplated marriage. The deceased may have intended the will to apply only during the engagement, not after marriage.⁹⁶ That was not the view of the English courts. The contemplation of marriage was held to be inherent in the word fiancée.⁹⁷

In the recent decision in *Lynch v Lynch* the deceased's will executed two months before her marriage left only a life interest to her much younger second husband and the remainder to her adult children.⁹⁸ In the absence of any expression in the will contemplating the marriage, the will was revoked and the husband became entitled to a much larger share of her estate under the intestacy rules which was then reduced by the children's successful claims under the Family Protection

90 Wills Act 1837 s18 and Wills Amendment Act 1955 s 13(1) governed the effect on a will of entering into a marriage. Wills Amendment Act 1977 s 2 regulated the effect of dissolving a marriage on a will benefiting a former spouse.

91 WA s 40(2)(o)–(q).

92 The beginning and ending of a de facto relationship do affect the intestate entitlement of a de facto partner: s 77 and the definition of 'surviving de facto partner' in Administration Act 1969 s 2.

93 Section 18 is also subject to s 10 in respect of wills made by minors who have agreed to marry or enter into a civil union.

94 WA s 40(2)(o) and (p).

95 *Public Trustee v Crawley* [1973] 1 NZLR 695.

96 It followed *Burton v McGregor* [1953] NZLR 487.

97 *Estate v Langston* [1953] P 100.

98 *Lynch v Lynch* [2007] NZFLR 543.

Act. The will's proximity in time to the marriage, her husband's age, the will-maker's legitimate concern to protect her capital for her children and the terms of the will would all suggest that she made the will in contemplation of her impending marriage. Under s 18 the absence of a clear and unequivocal expression in the will would not be fatal to the continued validity of the will after marriage.

2. *Effect on wills of ending a marriage or civil union*

Former spouses and partners might assume that when their marriage or civil union was over neither party would continue to benefit under the will of the other. However, that assumption is only correct if they have legally dissolved their marriage or civil union or if a separation order exists.⁹⁹ As separation orders are rare and a formal dissolution cannot be sought until the parties have been separated for at least two years,¹⁰⁰ some former couples may not realise that they have to revoke or change their wills if they wish to exclude their former spouse or partner. De facto separation has no effect on wills.

(a) *Effect of dissolution of marriage or civil union*

Prior to the Wills Act 2007 the dissolution or annulment of a marriage before the will-maker's death precluded a former spouse from benefiting under any will of the deceased former spouse if the will predated the dissolution of the marriage.¹⁰¹ The statutory revocation affected not only gifts and appointments of property in favour of the former spouse, but also an appointment of the former spouse as executor. Only testamentary payments of debts or liabilities to the former spouse remained valid.¹⁰² The will took effect as if the former spouse had predeceased the will-maker.¹⁰³ The revocation did not apply if a contrary intention was expressed in the will, or the will was expressed to be made in contemplation of the dissolution or annulment, or if the will was ratified after the dissolution. Wills made by civil union partners were not affected by this rule.

Section 19 of the Wills Act restates the previous rule in plain English but makes two changes. First, it treats wills of former civil union partners in exactly the same way as wills of former spouses, but only if the will was executed after 1 November 2007.¹⁰⁴ The second change is that the exceptions to the revocation may have been widened by the re-wording of the provision. Rather than requiring an expression in the will that the revocation was not to apply or that the will was expressed to be made in contemplation of the dissolution, s 19(5) provides that the revocation does not apply if the will makes it clear that the will-maker intended the provision to be effective even if there was an order dissolving the relationship. The exception may apply where there is no expression in the will, but it is otherwise clear from the will that the gifts should not be revoked.

(b) *Effect of separation order*

⁹⁹ WA s 19.

¹⁰⁰ Family Proceedings Act 1980 s 39.

¹⁰¹ Wills Amendment Act 1977 s 2; *Re Jackson (Deceased)* [1991] 3 NZLR 125; *Re Dedden* [1998] NZFLR 868; (1998) 17 FRNZ 591.

¹⁰² Wills Amendment Act 1977 s 2(3)(a). The fulfilment of a testamentary promise within the meaning of the law Reform (Testamentary Promises) Act 1949 was also unaffected by the revocation.

¹⁰³ Wills Amendment Act 1977 s 2(2)(c); *Re Jackson (Deceased)* *ibid*; *Re Baker (deceased)*; *Alt cit Delugar v Baker* [2005] High Court, Auckland CIV 2004-404-5114 (Unreported, Cooper J, 4 March 2005).

¹⁰⁴ WA s 40(2)(q).

The fact of separation does not affect a will.¹⁰⁵ But a separation order as between spouses and civil union partners does if the order was made after the will was executed and was still in existence when the will-maker died. Separation orders used to affect only the intestate entitlement of a surviving spouse or civil union partner.¹⁰⁶ Section 19 of the Wills Act now provides that a separation order has the same effect on a will as an order dissolving a marriage or civil union and is subject to the same exception.

An important difference between separation orders and orders dissolving or annulling a marriage or civil union is, of course, that the parties to the separation order retain their status as spouses or civil union partners and hence their eligibility under the Family Protection Act.¹⁰⁷ Any harsh effects of the statutory revocation can be ameliorated by an order under that Act. That avenue is not available if the marriage or civil union has been dissolved. Where there has been a dissolution, former spouses have on occasion successfully claimed under the Law Reform (Testamentary Promises) Act.¹⁰⁸

(c) *Effect of the Property (Relationships) Act on wills*

The Wills Act is not the only statute to affect wills of spouses or partners whose relationship has ended. Gifts to a surviving spouse or partner are also revoked by the Property (Relationships) Act 1976 if the spouse or partner elects to apply for a division of relationship property.¹⁰⁹ Section 76 provides that in that event any gifts in the will to the surviving spouse or partner of a beneficial interest in any real or personal property in the estate are deemed to be revoked unless a contrary intention is expressed in the will.¹¹⁰ The will takes effect as if the surviving spouse or partner had died before the deceased spouse or partner. On application by the surviving spouse or partner, the Court may reinstate the testamentary gifts if it considers it necessary to do so to avoid injustice.¹¹¹ Alternatively, the spouse or partner may seek provision from the estate by making a claim under the Family Protection Act 1955.¹¹²

105 *Goodwin v Public Trust* [1993] High Court, Wellington CP862/89 (Unreported, Neazor J, 10/9/93), *Rendle v Ford* (2003) 23 FRNZ 256; [2004] NZFLR 66.

106 Family Proceedings Act 1980 s 26.

107 Family Protection Act s 3 simply refers to 'the spouse or civil union partner of the deceased'. See for example *Re Hilton (dec'd)* [1997] 2 NZLR 734; (1997) 15 FRNZ 340; [1997] NZFLR 438. See also Family Proceedings Act (1980) s 26.

108 *Dedden (deceased), Re Rattenbury v Bersma* (1998) 17 FRNZ 591; [1998] NZFLR 868, *Re Goodwin* [1993] High Court, Wellington CP862/89 (Unreported, Neazor J, 10 September 1993).

109 Property (Relationships) Act 1976 s 61.

110 For example, *B v Adams* (2005) 25 FRNZ 778 (FC) and *de Muth v Lee*

Alt cit EM v SL [2005] NZFLR 281 (FC). Neither case contained a contrary intention clause because the wills predated the adoption of the Property (Relationships) Amendment Act 2001 which inserted Part 8 into the Property (Relationships) Act 1976 and applies to wills that predate the amendments: Property (Relationships) Act 1976 s 56. Anecdotal evidence suggests that few will-makers are advised of the possibility of inserting a clause permitting their surviving spouse or partner to inherit some or all of the provision made for them in the will if they choose to take their relationship property entitlement.

111 Property (Relationships) Act 1976 s 77. The Court did so in *B v Adams* (2005) 25 FRNZ 778 (FC), because there was not much relationship property to share owing to the fact that the couple married later in life and were married for only a few years. Also the deceased had been persuaded by his widow to leave her only a small part of his estate out of concern that she was seen as a gold digger. The bulk of the estate, a farm, was left to a young man whom the deceased had befriended many years earlier but to whom he owed no moral duty in a Family Protection sense.

112 Property (Relationships) Act 1976 s 57 preserves the eligibility of spouses or partners to make claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.

3. *Effect of the forfeiture rule on wills*

The Succession (Homicide) Act 2007 codifies the common law rule that prevents a killer from benefiting financially from his or her victim.¹¹³ Section 7(1) invalidates testamentary gifts to a beneficiary who is guilty of the homicide of the deceased.¹¹⁴ Subject to any express testamentary direction to the contrary, any interest that the killer is not entitled to by virtue of s 7 passes as if the killer had predeceased the victim.¹¹⁵

V. RESTATEMENT OF COMMON LAW RULES

The Wills Act 2007 restates the common law rules pertaining to mutual wills and rectification. It calls the latter ‘correction’.

A. *Mutual Wills*

Spouses and partners sometimes make mutual wills, usually to ensure that assets pass to their (respective) children with or without first passing through the hands of the surviving spouse or partner. The essence of a mutual will is the agreement between the two parties that they will not revoke their wills or deal with the subject matter of the mutual will in breach of their agreement.¹¹⁶ If the first party to the agreement dies without revoking his or her will, the surviving party cannot renege on the agreement and the obligations are enforceable by means of a constructive trust.¹¹⁷

The origin of mutual wills can be traced back to *Dufour v Pereira* where Lord Camden described the doctrine as follows:

It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.¹¹⁸

The mutual wills doctrine is thus part of the Court’s traditional equitable jurisdiction to prevent the unconscionable revocation of a will.

The common law doctrine is now restated in statutory form in s 30. It provides, in summary, that when

- two persons make wills disposing of property in the manner agreed, and
- they have promised each other not to change their wills in a way that breaches their agreement, or to dispose of the property in their lifetime,
- and the first one to die has kept the promise, but the second one to die has not,
- then any person who would have benefited from the will of the second person to die if that person had kept the promise may claim from that person’s estate any part of the benefit that the estate does not provide.

As Lord Camden said in *Dufour*, the core element of the mutual wills doctrine is the promise between the parties not to revoke or change their wills in breach of the agreement. Section 30(3)

¹¹³ *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 QB 147 at 156–157, where Fry LJ invoked the ‘so-called rule of public policy’ to prevent criminals from benefiting from their own wrongdoing.

¹¹⁴ Homicide is defined in s 4 as in the Crimes Act 1961 but excludes a killing caused by negligent act or omission, infanticide under s 178 Crimes Act 1961, killing pursuant to a suicide pact and assisted suicide.

¹¹⁵ Succession (Homicide) Act 2007 s 7(3).

¹¹⁶ *Lewis v Cotton* [2001] 2 NZLR 21; (2000) 20 FRNZ 86; *Re Newey. (deceased)* [1994] 2 NZLR 590.

¹¹⁷ *Lewis v Cotton* *ibid*; C David ‘Mutual wills; formalities; constructive trusts’ [2003] Conv 238–247.

¹¹⁸ *Dufour v Pereira* (1769) 1 Dick 419; 21 ER 332 at 333.

provides that the promise may be made orally, in writing, or electronically. That too is a restatement of the common law.¹¹⁹ That the promise may be made orally should not be taken to mean that its existence will be inferred from slight material or from the fact that the will-makers had executed corresponding wills. Mutual wills can give rise to practical problems and undesirable consequences for the surviving party. The Courts therefore insist on clear and unequivocal evidence of a promise not to revoke a will.¹²⁰

In *Lewis v Cotton* the Court of Appeal scrutinised the evidence closely and concluded that there was insufficient evidence of an agreement between the parents not to revoke their wills. In *Fisher v Mansfield*, on the other hand, there was no doubt that the spouses had made mutual wills, because the husband's will said so. In *Price v McLennan* the agreement not to revoke the will was inferred from the terms of the will, the family circumstances, and the widow's statement to her late husband's children that she would not revoke her will that divided the assets equally between her son and her husband's two children.¹²¹ She later executed a new will leaving the estate entirely to her son. Such breaches will now be amenable to claims under s 30 of the Wills Act 2007.

The section is only a partial restatement of the common law doctrine. It does not deal with the interest of the beneficiary of the promise pending the death of the surviving party to the promise. In *Lewis v Cotton* the Court of Appeal stated that a constructive trust would be imposed on the assets. In *Re Goodchild* the Court held that a floating trust would come into existence on the death of the first testator that would crystallise on the death of the second testator.¹²² In *Fisher v Mansfield* the beneficiaries of the mutual will were held to have a sufficient interest in the land that was the subject matter of the mutual will to lodge a caveat to protect their interest until the widow's death.¹²³ The common law will thus continue to be relevant to mutual wills, but the criteria establishing their existence are now clarified and expressed in accessible language in s 30.

B. Correction of wills

Section 31 empowers the Court to correct a will that contains a clerical error or that does not give effect to the will-maker's instructions. This power affirms the recent developments of the common law that started with *Re Jensen*.¹²⁴ Prior to that case the Courts were very reluctant to rectify wills out of concern that they might make a will based on vague evidence that did not reflect the testator's intentions.¹²⁵ They would at most exclude words that were mistakenly inserted by the testator or by someone else without the testator's knowledge or authorisation.¹²⁶ The Courts would not supply mistakenly omitted words or make other corrections until Fisher J took the first step in *Re Jensen* in 1991. In that case, the very similar numbers on two mortgages were accidentally switched in the course of changing the wills of the deceased parents. Fisher J stated that he would

119 *Lewis v Cotton* above n 116.

120 *Ibid.*

121 *Price v McLennan Case name* [2000] High Court, Nelson M33/99 (Unreported, Wild J, 21/8/00).

122 *Re Goodchild* [1996] 1 All ER 670.

123 *Fisher v Mansfield* [1997] 2 NZLR 230. The beneficiaries were able to trace the original subject matter of the mutual will through its proceeds into the property purchased by the surviving widow.

124 *Jensen (deceased), Re Alt cit Ranby v Ranby* [1992] 2 NZLR 506.

125 *Isaac v Mills* (1887) 5 NZLR (CA) 122.

126 *Tanner & Ors v Public Trustee & Ors* [1973] 1 NZLR 68; *Tartakover v Pipe* [1922] NZLR 853; *Re Morris* [1971] p 62.

have rectified the wills if he had not reached the same result as a matter of construction. It was a classic case for rectification.

Since *Jensen*, the Courts have on several occasions relied on Fisher J's obiter dictum to relax the traditional common law constraints on the Court's power to rectify wills. In several cases clerical errors similar to the one in *Jensen* have been corrected.¹²⁷ And in *Re Walker* the Court corrected a will to insert the name of one of the will-maker's children.¹²⁸ Although the will-maker had read the will prior to executing it, the evidence of the solicitor who drafted the will satisfied the Court that the omission did not give effect to the will-maker's instructions. The power to rectify has not been used when the error results from the testator being mistaken about the beneficiary he intended to benefit.¹²⁹ The Court's willingness to rectify wills has been limited to clerical errors and to inserting or omitting words to give effect to the testator's instructions.

Section 31 affirms these common law developments. It does not confer a general power on the Courts to rewrite wills that do not produce the result that the will-maker had intended. In *Re Laurie* for example, the deceased left his estate to his widow for life and on her death to his siblings who were then living.¹³⁰ The will-maker's siblings survived him, but predeceased his widow. In the absence of a gift over to the will-maker's nephews and nieces, an intestacy resulted and the estate was distributed among the wife's family. The Court appreciated that the construction it was bound to give to the will meant that it produced the opposite result to that intended by the will-maker. Section 31 is unlikely to assist in that sort of case. The omission would not qualify as a clerical error and there was nothing in the judgment in *Re Laurie* to suggest that the will-maker had given instructions to insert a substitutionary gift. In the absence of instructions, express or implied, the statutory power of correction is not available.

Section 31 is merely intended to restate the common law in clear language and to provide legislative confirmation of the powers that the Courts had developed. Section 31 does not displace the common law. There is scope for further development of the power to correct wills. However, the very existence of a statutory power of correction may dissuade the Courts from expanding the common law powers to enable rectification in a wider range of circumstances.

VI. CONSTRUCTION OF WILLS

An important change appears in s 32 pertaining to the rules of extrinsic evidence in the construction of wills. It allows the Court to use evidence of the will-maker's testamentary intentions when words used in a will make the will or part of it meaningless, ambiguous or uncertain. Under the common law such direct evidence would not have been admissible.¹³¹ However, evidence of the testator's intentions can be admitted only after the Court has established that there are words in the will that make it meaningless or make the will on its face ambiguous or uncertain. The Court can not use the will-maker's intentions as surrounding circumstances from which to deduce that

127 For example, *Macrae v Trustees Executors and Agency Company of New Zealand Ltd* [2002] High Court, Wellington CP251/01 (Unreported, Young J, 23/10/02) where the testator had mistakenly inserted the wrong investment policy number in a gift to one of the grandchildren. *Gibbs & Billing v Bluck* [2006] High Court, Auckland, CIV 2006-404-2054 (Unreported, Judges, 1 August 2006) the Court corrected an obvious mistake in a reference in a codicil to the will.

128 *Walker (deceased), Re; Alt cit Walker v Walker* [2000] High Court Wanganui M37/99 (Unreported, Ellis J, 21/7/00).

129 *Re McMillan* Case name [2001] High Court, Invercargill CP7/00 (Unreported, Young J, 5/4/2001).

130 *Laurie (dec'd), Re*: [1971] NZLR 936.

131 This rule is similar to the provision in the Administration of Justice Act 1982 (UK) s 21.

the words make the will ambiguous or uncertain. The ambiguity or uncertainty must be apparent from the face of the will, for example because the words are capable of more than one meaning in the context of the will.

In *Re Jensen* the Court found that the wills and codicils that the parents had executed contained inconsistencies.¹³² There was therefore uncertainty on the face of the wills which would have entitled the Court to use evidence of the will-makers' intentions to construe the wills. As it was, the Court had to rely principally on the terms of the various testamentary documents and circumstantial evidence to determine the testators' intentions.

The will in *Re Laurie*, discussed above, was not meaningless. Nor did any of the words in the contingent gift of residue to the will-maker's siblings make the will ambiguous or uncertain on its face. The wording was clear and the consequence of the contingency not being satisfied was certain: the intestacy rules would apply. The problem was not with the words used, but with the will's failure to provide for the possibility of the contingency not being satisfied. A case such as *Re Laurie* would not be assisted by s 32, despite the fact that the testator's overall testamentary intent was apparent. The rules of extrinsic evidence are therefore still quite narrowly drawn. They cannot be used to admit evidence of the testator's intentions in circumstances where the will is silent.

VII. MISCELLANEOUS PROVISIONS

Aside from the major changes outlined above, there are a few other provisions that are worth noting. First, s 25 enables testamentary gifts to be made to unincorporated associations that are not charitable. The section stipulates the steps that the executor must take to give effect to the gift. Second, s 28 determines the destination of a fractional part of a gift that fails. It goes to the part that does not fail or if more than one part does not fail to all the parts proportionately. As with many of the reforms in this Act, neither of these provisions will apply to wills executed before 1 November 2007.¹³³

VIII. CONCLUSION

The Wills Act 2007 makes some much needed changes to the law governing wills. Apart from bringing the law into a single act and expressing it in plain, modern language, the Act removes the inconsistent treatment of civil unions and marriages and makes a number of reforms to enable the Courts to give better effect to testamentary intentions. These changes are to be welcomed, and they are not before time. They are based on recommendations of the Law Commission in a Report published 10 years ago.

The principal aim of the Wills Act is to enable better effect to be given to the ascertainable intentions of will-makers. While that aim is laudable, it must be remembered that there are significant restrictions on testamentary freedom. The Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 have a long history of overriding testamentary wishes. To these Acts must now be added the Property (Relationships) Act 1976 which revokes gifts in a will to a spouse or partner who elects to apply for division of relationship property. These three Acts create something of a tension with the aim of the Wills Act.

¹³² *Re Jensen* [1992] 2 NZLR 506.

¹³³ Section 40(r).

Within the limits on testamentary freedom, however, the Wills Act is a significant advance on the old law. The power to validate wills that do not comply with the formalities is one of the most significant changes. It is unfortunate that access to that power is constrained by the need to have a written document. At a time when audio and visual technology is so advanced, the need for a conventional medium to convey testamentary intentions seems unnecessarily restrictive and outdated. The lost opportunity to revisit the Maori custom of *ōhākī* is also regrettable. The ability to save gifts to witnesses and give effect to wills made in contemplation of a marriage or civil union without the need for an explicit statement to that effect in the will, are also welcome changes. All of these powers contribute significantly to the Act's remedial purpose. However, the fact that they cannot be used in relation to wills that predate the Act's commencement date is a major drawback and is likely to confuse and frustrate both the lay and professional communities.

For wills executed after 1 November 2007, the Act has the potential to give better effect to testamentary intentions than its predecessor. The extent to which that potential will be realised will depend upon the Courts' willingness to adopt an expansive approach both to the terms and the powers provided by this Act. If they do, it would be true to say: 'Where there is a will, there is a way.'

PROPERTY LAW IN THE SOUTH ISLAND HIGH COUNTRY – STATUTORY, NOT COMMON LAW LEASES

BY JOHN PAGE* AND ANN BROWER#

I. INTRODUCTION

This article examines the statutory, common law, and traditional foundations of property rights in pastoral leases in order to look at recent changes in government policy regarding the implementation of the South Island high country land reform. Called tenure review, this land reform divides Crown land into two distinct forms of tenure – freehold title and full Crown ownership to be managed for public conservation. Tenure review began inside the bureaucracy of the Department of Lands (now called Land Information New Zealand, or LINZ). The Crown invited holders of pastoral rights to enter voluntary negotiations to determine which land would transfer into freehold ownership, and which would shift into the public conservation estate. In 1998, Parliament granted statutory authority to the administrative process, and formalised the pre-existing rules.

The Crown Pastoral Land Act 1998 (hereinafter CPLA) stated the primary goal of tenure review as ‘ecologically sustainable’ land management in the high country.¹ Subject to the primary goal, the CPLA stipulated that land ‘capable of economic use’ would be privatised into freehold ownership, and land with ‘significant inherent values’ would be protected ‘(preferably) in full Crown ownership,’ or (presumably less preferably) by another protective instrument such as a covenant.² In 1992, the Crown pastoral estate made up one-tenth of New Zealand’s landmass. Since 1992, about one-fifth (about 80) of the original 340 leases have completed the reforms. The Crown has privatised 270,082 hectares (or 58 per cent), and shifted 196,728 hectares into public conservation land (or 42 per cent).³ Following the exchange of rights, the new freehold title-holders have paid the Crown \$18.5 million to extinguish the Crown’s interest; and the Crown has paid

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1 CPLA s 24(a).

2 CPLA s 24(b), (c).

3 See Ann Brower, ‘Whither the Crown’s Interest in South Island High Country Land Reform?’ (2007) Vol. 3, No. 4 *Policy Quarterly*.

the former pastoral right-holders \$37 million to extinguish the pastoral rights in the new conservation land. In total, the Crown has paid new title-holders \$18.5 million in 'equity of exchange' payments.⁴

As with any change in property regimes, tenure review has been contentious from the start.⁵ The question of property rights rose to the fore of the debate in early 2006, when a research report argued that the pastoral rights were less valuable than freehold rights, and therefore less valuable than right-holders and the tenure review administrators appeared to think.⁶ The right-holders' defence of the legitimacy and value of their pastoral rights culminated in successive media statements asserting that pastoral rights are very similar to freehold rights.⁷ In September 2006, the Cabinet asserted the Crown's property rights in the pastoral land by announcing that the right-holders would henceforth be charged rent amount based on a land value that includes amenity values such as lake frontage and scenic vistas.⁸

Through this debate over security and value of property rights in pastoral land, the legitimacy of the tenure review process became the subject of mounting academic and public scrutiny.

4 Ibid.

5 See, eg, *North & South* magazine described the debate as follows: 'But our smugness at how lucky we are to have such unblemished beauty has been seriously unsettled lately by a realisation these views are at risk due to a government policy that's got away from the politicians and gone over the heads of most New Zealanders. It's a process whereby 10% of New Zealand's most remote but most beautiful country, owned by the Crown, is being divided up, with much of it effectively given away to farmers, who until now have only leased this land. It's called tenure review and it's been going on for 15 years but it's only now people seem to be understanding what's really happening, how many iconic landscapes are under threat – and what's already been lost.'

M White, 'High Country Hijack.' *North & South* (Auckland), November 2006, 42.

6 See Ann Brower, 'Interest Groups, Vested Interests, and the Myth of Apolitical Administration.' Report submitted to Fulbright-New Zealand, February 2006.

7 See in late 2006, a spokesperson for the High Country Accord, an advocacy group for pastoral right-holders was quoted in *The Timaru Herald* saying 'in order to get our views across we had to commission an independent report.' 'Economists Hired to Discredit Report,' *The Timaru Herald*, (Timaru), 25 November 2006, 2. To announce the release of the commissioned independent report, the High Country Accord held a press conference at which one of the report's authors stated: 'The rights of a lessee approximate to ownership rights in the case of high country real estate, so long as the lessee continues to use it for pastoralism.' A pastoral lease was very different from renting, with lessees holding title to the land which had been transferred into private hands by the Crown. 'The fact that this was done through a perpetually renewable lease rather than through the transfer of freehold property rights does not change the fact that properties concerned are now in private hands.' (Prof. Neil Quigley quoted in 'High Country Lessees Vindicated by Report', *Otago Daily Times* (Dunedin), 27 November 2006, 10.

8 Cabinet Business Committee, *A Sustainable Future for the South Island High Country: Pastoral Leases Valuation Reviews: Report Back*, 9 October 2006, CAB Minute (06) 37/6.

Though the right-holders argued that tenure review delivers public benefits,⁹ several prominent conservation, recreation, and taxpayer interest groups began to argue that the public was losing more than it was gaining.¹⁰ Following several such statements questioning the win-loss calculus,¹¹ the Cabinet moved to improve procedural quality assurance and ensure greater ministerial oversight of tenure review.¹² This may represent a distinct paradigm shift for tenure review.¹³

Specifically the new policy will identify leasehold properties with 'highly significant lakeside, landscape, biodiversity or other values'¹⁴ for permanent exclusion. This property identification exercise, with a default assumption for lakeside properties, will excise identified pastoral leases from the free holding opportunity implicit in tenure review. Though the Crown has enjoyed veto power since 1992, June 2007 is the first exercise of that power.¹⁵

9 See in August 2006, several conservation groups called for a moratorium on tenure review. *The National Business Review* reported the interest group machinations as follows: 'Farmers and environmentalists have done a U-turn on their respective positions over high country land tenure review in light of a new report that says the review is endangering bio-diversity. ... The process had generally been supported by environmentalists in spite of concerns about some specific deals, whereas a farmer lobby group, the High Country Accord, had complained that landowners were getting a raw deal. ... But now the farmer lobby is back-peddalling at top speed', Chris Hutching, 'Farmers and Greenies Swap Positions: Researchers Call for a Halt to High Country Land Review,' *The National Business Review* (Auckland), 18 August 2006.

The Press reported the one right-holder's defense of tenure review as follows: 'Moratorium opposed: Rakaia Gorge farmer Duncan Ensor says tenure review is working as well as it can. His back-country station, Glenrock, has been in the review process for years, with an agreement likely in weeks. ... If Ensor accepts the proposal, 6000ha of the 7000ha station will be surrendered to conservation. ... Ensor said some conservation lobby groups might be getting carried away, and he did not want his review held up by a moratorium sought by the Canterbury - Aoraki Conservation Board.' John Keast, 'Halt to Tenure Review Urged' *The Press* (Christchurch), 10 August 2006.

- 10 For rising interest group scrutiny, see, eg, www.StopTenureReview.co.nz; and Eugenie Sage, 'Conservation and public being short changed by tenure review', *Otago Daily Times* (Dunedin), 28 August 2006.
- 11 See the most prominent expressions of the media attention were on TV3's Campbell Live (Richard Langston, 'The Great South Island Land Rip-Off'; *TV3 Campbell Live*, 28 February 2007 available at <<http://www.tv3.co.nz/default.aspx?tabid=112&articleID=22032>> 26 October 2007; in *The Press* Ian Steward, 'Stations to become resorts.' *The Press* (Christchurch), 19 January 2006; and the *Dominion Post*, Sarah Boyd, 'Fears That Condos Will Be New Rabbits'. *Dominion Post* (Wellington), 14 October 2006; and 'A Blot on Our Landscape', *Dominion Post* (Wellington), 20 October 2006.
- 12 Cabinet Business Committee, *South Island High Country Landscape, Biodiversity, and Access Issues*, 5 June 2007, Cabinet Business Committee Minute of Decision CBC Min (07) 10/12.
- 13 C.f. the limited terms of reference for the Parliamentary Commissioner for the Environment's (PCE) Investigation into tenure review for South Island High Country Crown pastoral leases of June 2006 which did not investigate in depth property rights. Parliamentary Commissioner for the Environment, *Investigation into South Island high country land tenure review*, (2006) available at <<http://www.pce.govt.nz/projects/2006206.shtml>> 26 October 2007.
- 14 Cabinet Business Committee ((07)10/12) above n 12, item 11.
- 15 See Land Information Minister David Parker defends the decision to veto deals in-progress and withdraw some leases before they start. As reported in *The Press*:

'He says tenure review has always been voluntary, for both the lessees and the lessors. "Their rights under their leases are not being eroded. Lessees have long said it should not be compulsory for them to have to take part in tenure review. I agree. Neither should it be (compulsory) for the Crown.'" He says it is inconsistent that some farmers insist tenure review must be voluntary for farmers, but not for the Crown. "We're talking about landscapes that are special to all New Zealanders. We think it's in the interests of all New Zealanders that we protect these properties where we're happy with the status quo. Pastoral leases protect the status quo more than freehold would."

David Williams, 'High-Country Headaches,' *The Press* (Christchurch), 26 October 2007, page 10.

Tenure review represented for pastoral leaseholders a government sanctioned opportunity to effect the transition from lesser use rights to the superior property regime of freehold title. However Cabinet's resolution of 5 June 2007 to voluntarily exit some tenure review negotiations acknowledges the pre-eminence of government as the grantor of new property rights, and its inherent power to withhold such rights.

Cabinet's attitudinal change (from confidence in tenure review delivering conservation and land management objectives to increasing scrutiny) suggests that it is timely to reflect on a number of issues of property law integral to the tenure review debate. Though commonly called pastoral lessees, the holders of pastoral rights are more properly described as the holders of an interest under Part 4 of the CPLA.

Parts II and III examines the rights of the pastoral right-holder through the prism of their constituent statutory origins. This exercise indicates that the rights of so-called 'pastoral leaseholders' correspond more accurately to those of a statutory quasi-usufruct. Whilst nomenclature of property rights may seem erudite and remote from the vigour of tenure review, it is submitted that if all parties properly understood their respective theoretical positions, then the practical imperatives of certainty, consistency and transparency would be better served.¹⁶

Part IV examines the rhetorical foundation for the right-holders' claims of legitimacy and value. It briefly compares several arguments supporting their claim – the classical economics efficiency argument, and the Lockean labour theory of property.

Lastly Part V examines the role of government as the grantor and guarantor of property rights. It is argued that the Government's policy change may represent the rekindling of a functioning and balanced property rights regime in this vital area.

Pastoral right-holders rely on three distinct but related sources of legitimacy and value for their rights – statute, common law, and rhetoric. This article examines the three sources and concludes that pastoral rights are conferred by statutory lease, not common law lease. The former is more constrained than the latter. It does not confer exclusive possession as the common law defines the term nor does it guarantee rights and remedies that are possessory-based (such as trespass). Hence much of the rhetoric surrounding pastoral property rights has a flimsy legal foundation. As such, despite the prominent narratives, the Crown may set goals and rules for tenure review based on its current land use goals,¹⁷ rather than according to rhetoric promoted by interest groups.

16 See for example the comments of Professor Neil Quigley that 'there is a comprehensive misunderstanding of the lessee's interests in the land.'

Quigley, Neil, 'Tenure review no sinecure for high country farmers,' *New Zealand Herald*, (Auckland) 24 January 2007, available at <http://www.nzherald.co.nz/topic/story.cfm?c_id=195&objectid=10420514> 23 August 2007.

17 See the Media Statement of the Hon. John Tamihere dated 18 August 2003 for the government's stated high country land use goals available at <<http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=17584>> 24 July 2007.

For other land-related goals, see Department of Conservation and Ministry for the Environment, *The New Zealand biodiversity strategy*, (2000);

Land Access Ministerial Reference Group, *Walking Access in the New Zealand Outdoors: A report by the Land Access Ministerial Reference Group*, (2007) available at <<http://www.maf.govt.nz/mafnet/rural-nz/people-and-their-issues/access/walking-access-in-nz-outdoors>> 26 October 2007;

Ministry for the Environment, *New Zealand Climate Change*, (2007) available at <<http://www.mfe.govt.nz/issues/climate>>.

II. PART 1 CPLA HOLDERS – A CONSTRAINED BUNDLE OF RIGHTS

The rights of the 304 South Island High Country Crown pastoral right-holders are prescribed generally in Part 1 and specifically in section 4 of the CPLA. The section is succinct and superficially simple.

A pastoral right-holder has:

- a) the exclusive right of pasturage over the land;
- b) a perpetual right of renewal for terms of 33 years;
- c) no right to the soil; and
- d) no right to acquire the fee simple of any of the land.

Any instrument executed pursuant to section 4 should and must adhere to the four corners of this truncated statutory construct. Any additional or ancillary gloss to such rights must be explained by reference to this tightly constrained bundle of rights in Part 1 of the Act, and the *mutatis mutandis* scope for the continued application of the Land Act 1948.¹⁸

Traditional legal theory describes property as a bundle of rights. This bundle or collection of sticks typically includes hallmark rights of unfettered alienability, rights of use, exploitation and enjoyment, and the right to exclude. The greatest real property interest known to the Anglo-common law tradition, the fee simple estate contains the biggest bundle. As the right in question varies or diminishes, the bundle of rights itself adapts. Hence from a hierarchical perspective, one would expect the fee simple estate to be at the apex of a reverse pyramid, with leasehold interests thereunder, and at the bottom of the hierarchy, lesser proprietary interests such as mere equities,¹⁹ or usufructs.

Section 4 CPLA sets out four basic rights.²⁰ The bundle here is small and constrained. Each individual ‘right’ shall now be examined in turn.

A. *Exclusive right to pasturage over the land*

This right is exclusive to the holder. It has been defined at common law as ‘a right to feed animals from vegetation growing on the land of another, [emphasis added] or a right to take grass and other herbage by the mouths of animals.’²¹

The common law then subdivides the right into three sub-categories, of which ‘several pasturage’ is the closest approximation to section 4. None of these common law distinctions are particularly pertinent, given that the local right is purely statutory, and given the irrelevance of the social and geographic conditions of feudal England to contemporary New Zealand.

The blend of statute and residual and applicable common law would suggest that this right *simpliciter* is a right to graze and feed animals from the grasslands and other herbage of the High Country. It is a right of use that the holders are not obliged to share with anyone else.

On a superficial reading, one might assume that an exclusive right to pasture also confers an exclusive right of possession, and possessory-based remedies such as trespass. As Part III concludes, such an inference would be incorrect.

18 CPLA s 23.

19 See, eg, *Latec Investments Pty Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965). 113 CLR 265.

20 See that these 4 rights were carried over without change from the former section 66 Land Act 1948 (now repealed).

21 *Earl de la Warr v Miles* (1881) 17 Ch D 535, 588–9.

B. *A Perpetual Right of Renewal for Terms of 33 years*

This right is powerful, in that it guarantees perpetuity of duration of term. It 'rolls-over' every 33 years,²² ostensibly to pay lip service to common law notions of certainty of term.

However in substance it is anomalous that a leasehold can theoretically endure in perpetuity (subject only to forfeiture or surrender). It is only the force of statute that guarantees its potentially unlimited life, given that leaseholds at common law demand certainty of, and limitation of duration.²³

However this right is merely temporal, it is not in itself substantive. It does not confer use rights in isolation; rather it confirms that the other use rights (or non-rights as the case may be) listed in section 4 have the potential to endure, problematically forever, for the benefit of the holder. Though the right-holder may graze the land forever and may exclude others from doing the same, this grazing right will never mature into a right to subdivide or even to exclude uses which do not interfere with the statutory right to graze.²⁴

The perpetual right of renewal is purportedly qualified by a rent review process,²⁵ however a failure to agree on the fixing of the amount of the 'rent' after the expiry of the first instrument's term is far from fatal from the perspective of the right-holder.²⁶ Where the Crown seeks to impose a higher fee (representing for example scenic amenity values²⁷) the holder has significant rights to dispute the re-calculation without prejudice to his or her rights of renewal. In so appealing a rent review, the consequences of a failure to adhere to time limits are all visited on the Crown. But for the discretionary forfeiture section 135 Land Act, 1948, the 'right to renew' in Part 8 is in substance an ultimate right to surrender entirely vested in the Part 1 CPLA right-holder.

C. *No Right to the Soil*

Unlike the positive right to pasturage, this soil right is couched in negative terms. It is thus a non-right, or one reserved by the Crown.

There is no judicial interpretation of the term 'right to soil' in New Zealand land law jurisprudence. It is thus to the terminology of land law that one must turn. In traditional common law parlance, the terms 'soil' and 'land' are not interchangeable.

'Land' implies a three-dimensional space, including the surface soil, and a relative and discretionary area that extends to such airspace height as a land owner can reasonably use and enjoy,²⁸ and analogously into the sub-soil below. It also implies a bundle of rights (variously referred to as estates, interests, hereditaments or tenements) both corporeal and incorporeal. Hence 'land' is simultaneously physical and intangible. It has the scope to envisage and embrace modern intangible rights such as subdivisional or development rights.

22 See also CPLA ss 5, 10.

23 *Sevenoaks, Maidstone and Tunbridge Railway Co v London Chatham and Dover Railway Co* (1879) 11 ChD 625 at 635–636.

24 See, eg, in the US, activities such as tramping, mountain biking, and even motor-biking are deemed consistent with grazing federally-owned lands. Hence all compatible recreational uses are allowed on US federal grazing land.

25 CPLA s 63(3), 63(4) & Land Act 1948 pt 8.

26 CPLA s 10.

27 See Cabinet Business Committee, *A Sustainable Future for the South Island High Country: Pastoral Leases Valuation Reviews: Report Back*, 9 October 2006, CAB Minute (06) 37/6.

28 *Baron Bernstein of Leigh v Skyways & General Ltd* [1978] QB 479.

Conversely ‘soil’ remains resolutely physical and tangible. It has been the foundation of legal aphorisms including: ‘whoever has the soil, also owns the heavens above and to the centre beneath’ (relating to the limits of land); ‘whatever is affixed to the soil becomes part of the soil’ (relating to the doctrine of fixtures) and ‘alluvio’ (being the soil a land owner acquires by accretion). It is described in the Encyclopaedic Australian Legal Dictionary as ‘the thin veneer of comparatively unconsolidated material covering large areas of the Earth’s surface.’

To borrow another aphorism, land includes all soil, but soil does not include all land. Hence ‘no right to the soil’ means no rights to the physicality of the surface of the earth. Further, it means no rights of use or enjoyment, other than the narrow user rights to graze previously traversed. It certainly does not hint at conferring any rights incidental to the wider concept of ‘land’ such as subdivision or development.

Further, pursuant to the *eiusdem generis* rule of interpretation, this non-right should be construed together with its other negative right, the ‘no right to acquire the fee simple.’ Taken together, the two clearly preclude the right-holder from all non-pastoral uses of pastoral land without prior Crown consent.

D. No Right to Acquire the Fee Simple of any of the land

The tenure of the statutory pastoral right-holder is purportedly frozen in a property rights regime that precludes any transition to the fee simple estate of any of the land [emphasis added]. This prohibition is mirrored elsewhere in Part 1 of the CPLA.²⁹

However it is the ambiguity and internal tension between Parts 1 and 2 of the Act that underpins much of the angst of the current tenure review debate. Part 1 curtails pastoral interests forever as user rights with no entitlement to fee simple. Conversely Part 2 anticipates change, whereby ‘reviewable lease holders’ may invite the Commissioner of Crown Lands to ‘undertake a review’.³⁰ Such review is designed ostensibly to further the Objects of Part 2,³¹ namely ecological sustainability, the unshackling of management constraints (direct and indirect) from land capable of (better) economic use, the restoration of full Crown ownership of land with ‘significant inherent values’ (or at least appropriate protective mechanisms), and ultimately the freehold disposal of reviewable land.

It is the shambolic ‘all things to all people’ nature of Part 2 that renders this negative right illusory. Whilst it is strictly true that in its current incarnation, the pastoral lease (and occupation licence) remain constrained use rights, their possible migration via Part 2 to *inter alia* freehold disposal fuels the perception (and the partisan rhetoric) that perpetual pastoral rights equate to freehold.³² Moreover Lockean notions of the ‘sweat of the brow’ and related catechisms such as the law rewards the productive use of land find legislative resonance and comfort in Part 2, particularly section 24(a)(ii). This rhetoric/property rights dichotomy shall be addressed in Part IV.

29 CPLA s 12 relating to occupation licences.

30 CPLA s 27.

31 CPLA s 24.

32 When queried about the \$18 million paid to new freehold title-holders in equity of exchange payments in tenure review, advocates of pastoral right-holders argue that their rights are the moral and economic equivalent of freehold, therefore \$18 million is a bargain for the Crown. For example, *The National Business Review* reported in 2006: ‘Mr Eckhoff said the true value of the Crown pastoral leases was the exclusive use conferred on runholders in perpetuity. “It becomes tantamount to freehold title. The only difference is we pay a bit of rental on it.”’ Chris Hutching, ‘Farmers “Load Their Muskets”’ *The National Business Review* (Auckland), 20 October 2006.

III. LEASE, LICENCE OR STATUTORY USUFRUCT?

The CPLA, and indeed the generic Crown lands legislation the Land Act 1948, distinguish between the terms ‘lease’ and ‘licence’ merely by reference to the quantum of rights each respective entitlement confers, and not by any doctrinal justification(s). This purely statute-based descending hierarchy is evidenced by a comparison of the ambit of rights in sections 4 and 12 of the CPLA. For example ‘pastoral leases’ endure for renewable 33 year terms, whilst ‘occupation licences’ are for lesser-fixed terms with a lower security of tenure.

In the Land Act, the distinction between lease and licence is merely one of procedure and form.³³ Indeed the terms become virtually interchangeable in section 68 where ‘short-term tenancies’ are simultaneously ‘licences’. Another gradation in this statutory taxonomy is that of ‘permit,’ the ‘no-frills’ licence revocable on one month’s notice.³⁴ The interpretation section 2 (which describes either a ‘lease’ or ‘licence’ as meaning the respective interest granted under the Land Act 1948, or its predecessors) underscores that the distinction is entirely statutory.

This position should be contrasted with the common law’s treatment of leases. Whether an instrument is a lease or not depends on its substance, not its form. If it confers a right of exclusive possession to the tenant, guarantees quiet enjoyment, non-derogation from grant, and obliges the tenant to yield up vacant possession at the end of the term, then on balance the law will treat it as proprietary. Regard will be had to the presence or not of the usual covenants typically seen in leases, which suggest the granting of an interest in the land to the putative tenant.³⁵

The substance/form dichotomy is particularly confused in the touchstone common law right of ‘exclusive possession’³⁶ (at times inaccurately called occupation³⁷), and the concomitant covenant of ‘quiet enjoyment.’ Right-holders and their advocates frequently claim that a pastoral lease confers these rights.³⁸ Several Part 1 CPLA instruments (regulations and administrative documents) state that a pastoral lease confers “exclusive occupation and quiet enjoyment,”³⁹ though both phrases are conspicuously absent from the Land Act and the CPLA. Further, right-holders have argued that quiet enjoyment and exclusive possession are so often listed together that it is easy to

33 Land Act 1948 s 81.

34 Land Act 1948 s 68A.

35 See for example limits on the rights of assignment, and qualified rights of entry.

36 *Radaich v Smith* (1959) 101 CLR 209 at 222; *Fatac Ltd v Commissioner of Inland Revenue* [2002] 3 NZLR 648.

37 See for example M Wonnacott, *Possession of Land*, (2006) 14–18.

38 See for example, a professor of farm management opined in the *Otago Daily Times* that ‘The problem starts with a poor understanding within the community, and even by some so-called experts, as to runholders’ existing bundle of rights. The high-country leases have a perpetual right of renewal. ... The runholders also hold a legal right to the quiet enjoyment of the land. This means they can legally exclude everyone else from the land in exactly the same way as if they held freehold title. And they can do so forever. ... In many cases there is not much difference between what runholders can do with their leasehold tenure compared to converting it to freehold.’

Keith Woodford, ‘Process Becoming Messy as Rules Change.’ *Otago Daily Times* (Dunedin) 6 January 2007.

39 Commissioner of Crown Lands, *The Tenure of Crown Pastoral Land, the Issues and Options: A Discussion Paper* 38, (1994) 11.

assume they are equivalent.⁴⁰ Right-holders' claims and regulatory proclamations in this case resemble a chicken and egg conundrum in which it is difficult to know which came first.

However the form of the terms 'exclusive possession' and 'quiet enjoyment' belie their substance. At common law 'exclusive possession' is a proprietary right to exclude all, and is the defining incident of the relationship between the estate holder and their corporeal leasehold estate. When used in statutory instruments, it is inaccurate to represent that exclusive possession has the same all-embracing ambit. Rather it must be referable to the purpose of the statutory grant. In other words, the rights are circumscribed. In the case of pastoral leases, it relates to the degree of control necessary 'to prevent others from engaging in pastoral activities on the same land.'⁴¹ Analogously in the case of another creature of statute, the mining lease, 'exclusive possession [is conferred] only to the extent necessary to prevent others from carrying out mining.'⁴² Notwithstanding its 'common law connotations, the nomenclature of a "lease" (when used as a descriptor for pastoral leases) does not of itself grant exclusive possession.'⁴³

Similarly the statutory covenant of 'quiet enjoyment,' an adaptation of the common law tenant's right to freedom from interference in exercising their tenancy rights, is less fulsome. For right-holders, this particular freedom from interference must be referable to the legitimate exercise of the primary right to pasturage. That such a right is exclusive [emphasis added] entrenches the obfuscation. But it does not extend to a generic common law lessee's freedom from interference; if it did, it would step outside the four corners of the statutory remit and should properly be *ultra vires*:

Land law is but one area in which statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms.⁴⁴

Finally the common law demands of leases a certainty of term. William Blackstone explained that a lease is called a term 'because its duration' or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end.⁴⁵ The assertion that (for example) pastoral leases under section 63 Land Act 1948 or 'Glasgow leases' do not offend this basic rule⁴⁶ is not incontrovertible. A perpetual right of renewal in substance renders the certain end-date illusory. This is evidenced in the rhetoric of pastoral right-holders themselves who admit:

40 However frequently cited, these phrases are never followed by a citation listing the statute, section, and sub-section from which these rights arise. For example, the government-commissioned report on the pastoral rental valuation methodology stated the following, with no footnotes: 'We agree with the interpretation on all of the heads of rights set out above except for their view that the SIVs "belong" to the Crown as lessor. This may be a matter of interpretation because whilst it may be that they do belong to the Crown, the Crown has no access to them due to the lessees' right of *perpetual occupation, quiet enjoyment, exclusive use and the right of perpetual renewal* [emphasis added] of the lease.'

D J Armstrong, R L Engelbrecht, and R L Jefferies, *Interim Report High Country Pastoral Leases Review 2005: A Review of Pastoral Lease Rental and Tenure Review Valuation Methodologies and Outcomes Associated with Pastoral Lands Throughout the South Island of New Zealand*, (2005).

41 *Western Australia v Ward* [2002] HCA 28 at [589]–[590] (Kirby J); *Ward v Western Australia* (1998) 159 ALR 483 (Lee J).

42 *Ward v Western Australia* (1998) 159 ALR 483 (Lee J).

43 *Western Australia v Ward* [2002] HCA 28 [180] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

44 *Wik Peoples v State of Queensland* (1996) 141 ALR 129, 242 (Gummow J).

45 *Commentaries* 1st ed (1766) Bk II 143.

46 See, Hinde, McMorland, & Sim, *Butterworths Land Law in New Zealand* (1997) 437.

[P]astoral lessees entered into an agreement with the Crown in perpetuity [emphasis added] when they signed their lease documents, and in exchange for their rights to pasturage accepted certain restrictions and undertook a caretaker role. They strongly believe in the sanctity of lease documents...⁴⁷

Unlike the traditional dichotomy between leases for a fixed term (with a certain end date) and periodic or continuing tenancies (where the end date is capable of being made certain by notice), Part 1 CPLA holders are a hybrid of the two. Their duration is only sustainable by superior force of statute. Of course 'Parliament may ...create proprietary interests of a kind unknown at common law,'⁴⁸ and 'perpetual leases enjoy this legislative dispensation.'⁴⁹

The common law has maintained the traditional distinction between leases and licences⁵⁰ by effectively quarantining licences to the law of contract. The common law notion that a lease confers a proprietary interest (with attendant implied covenants and the protection of property law remedies⁵¹) whilst licences are merely contractual permits to occupy for stated purposes is not explicit in either the CPLA or the Land Act. These Crown land statutes have largely ignored or understated common law lease pre-requisites when creating their statutory interests, save the tag. The abiding conclusion is that the Crown Land interests created are purely statutory ones, whose ambit depends properly on tenets of statutory interpretation.

That statutory pastoral 'leases' should not have the imprimatur of their common law cousins has (as traversed) received the highest judicial support in Australia.⁵² When canvassing the ambit of a pastoral right-holder's right(s), the implied common law covenants of quiet enjoyment and exclusive possession have no determinative role. Rather the rights (being creatures of statute) should be measured by their constituent statutory instrument of grant. Australian High Court Justice Gaudron was succinct:

It is clear that pastoral leases are not creations of the common law...That they are now and have for very many years been anchored in statute law appears from the cases which have considered the legal character of holdings under legislation of the Australian states.⁵³

Pastoral leases as a statutory phenomenon have been described as:

...a limited form of property right. [where] the rights of the pastoralist are set out in various Land Acts. ...This system ...is unique to Australia and New Zealand and evolved last century to control the activities of squatters and to protect the rights of Indigenous peoples.⁵⁴

Historically statutory pastoral leases were recognised as:

giv[ing] only the exclusive right of pasturage in the runs, not the exclusive occup[ation] of the Land, as against Natives using it for the ordinary purposes: nor was it meant that the Public should be prevented from the exercise, in those Lands, of such rights as it is important for the general welfare to preserve, and

47 Evidence of High Country Pastoral Lessees to Ngai Tahu Land Report, Waitangi Tribunal, Department of Justice, Wellington (1991) [23.2.2].

48 *Sevenoaks, Maidstone and Tunbridge Railway Co v London Chatham and Dover Railway Co* (1879) 11 ChD 625 at 635–636.

49 P Butt, *Land Law* (5th ed, 2007) 887.

50 *Street v Mountford* [1985] AC 809.

51 See for example the possessory-based remedies of trespass, nuisance and ejection.

52 *Wik Peoples v State of Queensland* (1996) 141 ALR 129.

53 *Wik Peoples v State of Queensland* (1996) 141 ALR 129 at 204.

54 National Indigenous Working Group (NIWG) Fact Sheet on Pastoral Leases, available at <http://www.faira.org.au/niwg/fact_sheets/fs2.html> 13 August 2007.

which can be exercised without interference with the substantial enjoyment by the lessee of that which his lease was **really** [emphasis added] intended to convey.⁵⁵

There is no reason in principle, authority or logic to treat the rights of Part 1 CPLA holders as anything other than statutory interests. To imbue their rights as those of ‘lessees’ is to inaccurately colour the strength of such rights with the common law antecedence of leasehold.⁵⁶ To avoid confusion, nonsensical interpretation, or ‘throw[ing] well-established principles into turmoil,’⁵⁷ accuracy of nomenclature is and should be important.

In contrast to leases, the law has recognised lesser user rights (collectively ‘the usufruct’). The usufruct is a proprietary right significantly lower on the public’s radar. It is an ancient right, documented in Roman law as ‘the right to use and enjoy the things of another without impairing their substance.’⁵⁸ It was also recognised as proprietary, ‘usufruct is a fraction of ownership and stands by itself in that it can be granted so as to take effect immediately or from a future day.’⁵⁹ The usufruct had acknowledged economic and environmental values. It was a short form, often transient, bundle of right(s) that had minimal impact on the common estate, permitting authorised modes of use or exploitation provided waste was not a consequence thereof. It fell far short of full ownership of land.

The rights of Part 1 CPLA holders are a statutory bundle. They consist of a perpetual and exclusive right to pasturage (‘the primary right’) subject to two prohibitions. Ancillary rights to the primary right must be construed from residual provisions of the Land Act (for example that the interest may be transferred,⁶⁰ or mortgaged⁶¹) and activities incidental to pasturage, such as erecting fences or yards.⁶²

The bundle is a truncated short-form interest that has as its core rationale an exclusive right to pasturage. In the interests of taxonomic good order, it would be more accurate to describe the right(s) of Part 1 CPLA holders as a quasi-usufruct of statutory origin.

IV. THE RHETORIC/PROPERTY RIGHTS DICHOTOMY

It is perhaps not surprising that a statutory lease (or indeed a quasi-usufruct of statutory origin) could pass for a common law lease for so long in New Zealand’s high country. Property rights in the Anglo-New Zealand common law tradition are captive to the normative force of the rhetoric of property law, and high country right-holders use this rhetoric as a third source of legitimacy for their property claims. Holders of private rights in public lands in Australia, the US and New Zealand have been observed using this rhetorical flexibility to bolster the longevity, breadth, and value of their rights.⁶³ These rhetorical claims often resemble traditional narratives more closely

55 Earl Grey writing to NSW Governor FitzRoy in 1847 as cited in L Godden, ‘Wik, Feudalism, Capitalism and the State. A Revision of Land Law in Australia’, 1929 APLJ LEXIS 3.

56 ‘Traditional concepts of English law...may still exert ...a fascination beyond their utility in instruction for the task at hand’, *Wik Peoples v State of Queensland* (1996) 141 ALR 129, 226 (Gummow J).

57 M Wonnacott, *Possession of Land* (2006) 18.

58 Paul, *Vitellius*, book 3 cited in *The Digest of Justinian* Vol 1 Book 7.

59 Paul, *Edict*, book 2 cited in *The Digest of Justinian* Vol 1 Book 7.

60 Land Act 1948 s 89.

61 Land Act 1948 s 94.

62 See also the definition of ‘improvements’ in s 2 CPLA (carried over from the Land Act 1948).

63 See Ann Brower, John Page, Amanda Kennedy, and Paul Martin, ‘The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Property in the Us, New Zealand, and Australia.’ (forthcoming).

than statute. As an evolving and constantly dynamic process, the refinement of existing property rights, or the creation of new rights, is susceptible to the narratives that sustain rhetoric. These narratives include historical, doctrinal and theoretical themes that individually and/or collectively have the capacity to influence the nature, content or extent of new property rights.

A. *Possession as the root of title*

Firstly, pastoral right-holders extract substantial legitimacy from the possessory origins of property law.⁶⁴ In the common law tradition, property rights in land were rooted in seisin, a feudal form of possession,⁶⁵ yielding the maxim '[p]ossession is the origin of property'.⁶⁶

Carol Rose describes possession as akin to yelling *this is mine* loudly enough to all those who may be interested in hearing. If that person says it often enough in a way the public understands as clear and unequivocal, '[he] gets the prize and the law will help him keep it.'⁶⁷

B. *The law rewards the productive use of land*

This narrative takes root in John Locke's labour theory. If 'every Man has Property in his own Person [it follows that] [t]he labour of his Body, and the Work of his hands ... are properly his.'⁶⁸ In common law, this Lockean principle is one of the important theoretical grounds that rationalises the doctrine of adverse possession. Pastoral right-holders defend their rights, their privileged status in tenure review, and the privatisation of Crown land on Lockean grounds.⁶⁹ This Lockean narrative is further supported in the academic anthropology literature.⁷⁰

64 'The rights of a lessee approximate to ownership rights in the case of high country real estate. ... The fact that this was done through a perpetually renewable lease rather than through the transfer of freehold property rights does not change the fact that properties concerned are now in private hands.' Professor Neil Quigley, consultant to high country right-holder advocacy group High Country Accord, quoted in 'High Country Lessees Vindicated by Report.' *Otago Daily Times* (Dunedin), 27 November 2006.

65 See generally the doctrines of tenure and estates.

66 C M Rose, 'Possession as the Origin of Property' *The University of Chicago Law Review*, Vol. 52, No. 1 (1985) 73, 74.

67 C M Rose, 'Possession as the Origin of Property' *The University of Chicago Law Review*, Vol. 52, No. 1 (1985) 73, 81.

68 J Locke, *Second Treatise of Government*, ch. V s 27 cited in M J Radin, 'Property and Personhood' cited in R C Ellickson, and C M Rose, and B A Ackerman (eds), *Perspectives on Property Law* (3rd ed, 2002).

69 In a press release responding to the conservationist groups' August 2006 call for a moratorium on tenure review high country advocacy group, the High Country Accord, defends holders right to retain land as freehold by arguing that 'the land that lobbyists want transferred back to the Crown has been farmed for 150 years.' Though not directly invoking Locke, this mention of labouring the land is immediately followed by the following claim of ownership: 'There is also a wilful disregard ... of the legal position of high country leases. The fact is that the land is permanently in private hands.' Finally, tenure review would be less difficult and acrimonious, argues the farming lobby, 'if everyone accepted that high country lessees were capable of good stewardship of their land, and that land they farm is theirs.'

High Country Accord, *Tenure Review Can Provide Win-Win Outcomes High Country Accord* 15 August 2006 cited available at <<http://www.highcountryaccord.co.nz/index.php?page=11>

70 Anthropologist Michele D. Dominy testified to the Waitangi Tribunal that pastoral right-holders' 'Material affinity [for the land] is expressed in the value runholders place on their sense of ownership in the land they farm and inhabit. It is also expressed in the value place on the long term security of tenure.'

Michelle D. Dominy, 'New Zealand's Waitangi Tribunal: Cultural politics of an anthropology of the high country', (1990) Vol. 6 No. 2 *Anthropology Today* 11, 13-14.

C.Privileges conferred on right-holders by narratives

Right-holders' use rights of High Country lands (in some cases back to 1856) entitle them as a class of initial users to a privileged status. This status takes four forms within the legislative regime of the CPLA, and arises from ideas from law and economics.

Firstly, the longevity of tenure coincides with (and likely arises from) the classical economics notion that assigning long-lived property rights gives the right-holder the economic incentive to develop and improve the economic productivity of the land. In 1948, the Crown created the statutory instrument of a pastoral lease in its current form with the perpetually renewable tenure. Though the use rights conferred were narrow, the longevity of tenure was likely designed to encourage pastoral development.⁷¹ Adding the classical economic logic to the Lockean, it is good public policy to award title to the person who efficiently cultivates or maintains his or her land, rather than an impliedly negligent absentee owner who has not checked their land for the period of limitation. In the pastoral context, it is similarly good public policy to unshackle appropriate reviewable land from management constraints (direct and indirect) that hold it back from its most economically efficient use. Hence the CPLA echoes both Locke and classical economics by rewarding the productive owner with 'the freehold disposal of reviewable land.'⁷²

In contrast to the perpetual renewability granted by statute, the exclusive possession privilege appears to arise from an erroneous inference that a pastoral lease is a common law lease. As substantial case law refutes the inference, this privilege has no legal basis.

Likewise, when it comes to tenure review negotiations, this inferred exclusive possession right appears to make the right-holder a monopolist. When the Crown disposes of its interest in pastoral land, it restricts itself to dealing only with the existing tenant. It neither sells land at auction nor entertains any other bids for freehold title.⁷³ Further, the right-holder may veto a deal at any time. While the Public Works Act requires the Crown to offer first purchase option to the original (impliedly indigenous) owner when it sells land, the current right holder is not the original owner. Hence this monopolist power appears to rest on the lease, not on other statute. That reliance appears ill-placed.

Finally, in addition to limiting the Crown to negotiate with the existing tenant, the illusory exclusive possession seems to devalue the monetary value of the Crown's interest in the land.⁷⁴

While the perpetually renewable privilege does seem to serve the goal of efficiency, as defined by classical economics, the latter three privileges have legal grounding that is shaky at best. Using

71 Indeed *The Press* reports this link between security and investment: 'Federated Farmers former high country chairman John Aspinall ... said in a crucial move in 1948, leaseholders were given the right to occupy the land in perpetuity. This was to give leaseholders the security needed to invest in good land management.'

Kamala Hayman, 'Study Says Tenure Review Flawed,' *The Press* (Christchurch), 23 February 2006. And the *Otago Daily Times* reports similarly: '[Mr Ensor said] "Pastoral leases have been incredibly good thing for the high country." The idea was to give lessees certainty of tenure, confidence to invest in improvements and to make the business sustainable in the long term. In short, he said, it was designed to look after the land.'

Neal Wallace, 'A Land Grab, or a Way to Preserve Modern Heritage? Tenure Review of South Island High-Country Leases Seems to Be Satisfying Few People,' *Otago Daily Times* (Dunedin) 2 January 2004.

72 See CPLA s 24(c)(ii).

73 See A Brower, P. Meguire, and A. Monks, (in review) 'Closing the Deal: Principals, Agents, and Sub-Agents in New Zealand Land Reform.'

74 'With no access to these SIVs in perpetuity, (that is while the land is held in a pastoral lease) they can be of no value to the Crown.' Armstrong, Engelbrecht, and Jefferies, above n 40.

public resources to honour illegitimate rights hints of a breach of public trust. While efficiency is good, so is good governance. Efficiently breaching the public trust rarely satisfies the Court.

D. Narratives of Ownership and the Law

Coase argues that the initial allocation of property rights is of little consequence to the long-term efficiency of outcomes, as long as the allocation is clear and holders are free to bargain away from it.⁷⁵ This Coasean clarity and freedom are necessary for an efficient property rights regime. We submit that vigilant attention to statutory and common law foundation of rights is equally necessary for good governance. When the government uses public resources to erroneously honour a perceived right with no statutory or legal foundation, it is improper governance (no matter how efficient). Therefore a functioning and vigilant property rights regime should be capable of demarcating the fine line beyond which such narratives should not pass. Transgressing this line of probity is a risk that the law constantly must resist. For the law to over-reach is the start of a 'slippery slope,' where rhetoric outweighs substance and new property rights risk the stain of illegitimacy.

Indeed while narratives about land and ownership are important to the fabric of the high country culture,⁷⁶ they have limited utility in property law's process of allocating rights. Statutes and common law, not narratives, confer rights. English Law Lord Millett affirms that 'property rights are determined by fixed rules and principles. They are not discretionary. They do not depend on ideas of what is "fair, just and reasonable."' Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.⁷⁷

V. THE ROLE OF GOVERNMENT

The role of government in creating new property rights is amply demonstrated in tenure review, especially in light of the Cabinet Minute of June 2007. Robert Nelson ascribes the creation of new property rights as an unintended consequence of the intervention and implementation of government policy. Nelson describes a four-stage process of new property rights under the heading 'Fencing the Modern Commons.'⁷⁸ The first stage is when 'demands for use of the resource grow large enough to create a congestion problem.'⁷⁹ This leads to the need for government control of the resource. The second stage arrives when government establishes a permit system to allocate the resource to specific users. This allocation creates a class of 'initial users' who defend their privileged status quo against later adverse change. 'At some point, the[ir] dominant influence ... becomes accepted as the norm and existing users have acquired de facto private property rights.'⁸⁰ The third stage occurs when these rights acquire the fundamental quality of alienability, such that

75 See Ronald Coase, 'The Problem of Social Cost' (1960) *Journal of Law and Economics* Vol. 3, No. 1,3,5.

76 Michelle D. Dominy, 'New Zealand's Waitangi Tribunal: Cultural politics of an anthropology of the high country,' (1990) Vol. 6 No. 2, *Anthropology Today* 11, 13.

77 *Foskett v McKeown* [2000] 1 AC 102, 127 (Lord Millett).

78 Robert Nelson, 'Private Rights to Government Actions: How Modern Property Rights Evolve' (1986) *U. Ill. L. Rev* 361, 374.

79 *Ibid.*

80 *Ibid.*

‘the rights become detached and independently transferable.’⁸¹ Finally the ‘government regulatory agency formally transfers use rights to the private user and then ceases its regulatory activities.’⁸²

The freehold disposal of Crown land as freehold⁸³ epitomises Nelson’s theory. Demand for the resource that is High Country pastoral land instigated regulation through a permit system embracing pastoral leases with perpetual rights of renewal, together with lesser use rights under special term leases and occupation licences. These initial users, in particular the pastoral right-holders with rights of perpetual renewal, have defended the privileged *status quo* by arguing the duration of their title equates to *de facto* ownership.⁸⁴ The 80 new title-holders who have completed tenure review, have successfully matured their *de facto* user permit property right into a detached, alienable and fully private right. Under the Nelson model, the Crown has vacated its regulatory role, devolving authority over land use to regional resource management authorities. One Regional Council has expressed anxiety at Councils’ lack of preparedness for this devolution.⁸⁵

However the role of government is a ‘double-edged sword.’ Carol Rose states that government can do much for property⁸⁶ including the creation of ‘off the rack property entitlements,’ the termination of obsolete property rights, and the transition from one property regime to another. Property creates the macro-environment conducive to good governance but (perversely) within ‘smaller groups,’ (such as the original 340 pastoral right-holders) government has a powerful determinative role as the ‘shaper’ of property. As shaper, it can set goals for which rights are created in tenure review. Those goals can follow any guidelines – from the NZ Biodiversity Strategy,⁸⁷ to the Walking Access Panel’s recommendations,⁸⁸ or even to the latest trend in climate change mitigation.⁸⁹

Similarly, the Government is the grantor and guarantor of property rights.⁹⁰ What the government gives, it can equally take away. It need not follow rhetoric, no matter how prominent. Rather it could imbue the Lockean notion of ‘productive use’ with a more contemporary environmental ethos, such that the law should properly reward landholders who act as good custodians. Indeed, in 2006 the government stated its willingness to remit rent in exchange for contributions to “sustainable management” which exceed the good husbandry statutory requirements. Examples of such exemplary contributions include pest and weed control or improved public access,⁹¹ or limiting stock levels in furtherance of Crown conservation objectives. Indeed when Cabinet an-

81 Ibid.

82 Ibid.

83 CPLA s 24(c)(ii).

84 See Hutching, above n 34.

85 Keast, John Halt to tenure review urged, *The Press*, (Christchurch) 10 August 2006, 3.

86 Carol Rose, ‘What Government Can do for Property (And Vice Versa)’, cited in N Mercurio and W J Samuels (eds), *The Fundamental Interrelationships Between Government and Property* (1999) 209

87 Ministry for the Environment, ‘New Zealand Biodiversity Strategy,’ Wellington, NZ. Available at <<http://www.biodiversity.govt.nz/picture/doing/nzbs/index.html>> 2 November 2007.

88 See for example the Crown negotiated for access arrangements in *Hunter Valley Station Limited at Timaru v. The Attorney General* CA CA 38/05 26 May 2006. The Walking Access Panel’s report is found available at <<http://www.walkingaccess.org.nz/publications.html>> 2 November 2007.

89 See above n 17.

90 R J Goldstein, ‘Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law’, (1998) 25 *B.C. Env’tl. Aff. L. Rev.* 347

91 The Land Act requires the right-holder practice ‘good husbandry’ including weed control, but not all exotic woody plants are classified as a weed requiring such control.

nounced an increase in pastoral rents to include amenity values inherent in high country land, it intimated a willingness to negotiate lower rent for higher conservation stewardship or recreation access.⁹² Such a negotiation to serve the Crown's non-pastoral goals would be well within the Crown's purview. The Crown should enter negotiations open to a broad range of outcomes, and ever cognisant that right-holder's interest is a statutory construct, not a common law lease with its attendant privileges.

VI. CONCLUSION

The right-holders' interest is a constrained bundle, not a leasehold estate as understood at common law. As such, the New Zealand pastoral lease must be interpreted within the confines of its statutory remit, disregarding common law gloss of exclusive possession and the rhetoric that has influenced property rights to date. In understanding that the primary right is an exclusive right of pasturage, any attendant rights must refer to the primary right. Hence the holder may exclude competing graziers or preclude activities inconsistent with pasturage, but may not infer that such exclusive pastoral rights are the economic equivalent to freehold title.

The tenure review journey is far from over. In what started as a perceived 'win-win' for efficient land management for pastoral right-holders, and broad conservation objectives, the tenor has subtly but significantly changed since 5 June 2007. How it plays out remains to be seen.

It is submitted that the journey ahead would be better served by some taxonomic coherence in defining the rights of Part 1 CPLA holders, and an awareness of the legal rhetoric that has the scope to muddy rather than clarify the debate. The fundamental expectation that a property rights regime delivers outcomes that are certain, consistent and transparent depends inherently on such an analysis.

92 See question number 9 'What options will be available to lessees who can't afford the rents?' in Minister of Land Information (2006) 'Media Questions and Answers – Review of valuation methods for pastoral lands.' Wellington, NZ, available at <www.linz.govt.nz/core/crownproperty/highcountry/valuationreview/mediaqa/index.html#9> 26 October 2007.

USING E-PORTFOLIO TO ENABLE EQUITY STUDENTS TO REFLECT ON AND DOCUMENT THEIR SKILL DEVELOPMENT

TINA COCKBURN, TRACEY CARVER, MELINDA SHIRLEY AND IYLA DAVIES*

The focus of higher education is shifting towards building students' skills and self awareness for future employment. This means that there is an increasing need for teaching tools which provide a context for skills development and an opportunity for students to prepare for the transition from education to professional practice. This paper considers how QUT E-Portfolio has been integrated into the core undergraduate law unit, Principles of Equity, at the Queensland University of Technology (QUT) as a means of enabling students to reflect on and document their skill development in that unit.

I. INTRODUCTION

Since the 1980's, much time and attention has been devoted to the incremental development of graduate attributes, to complement the acquisition of professional knowledge, in every field of Australian tertiary education. This shift in educational focus, which centres on building students' skills and self awareness for future employment, has also highlighted the desirability of work integrated learning experiences, and teaching tools, which provide: a context for skills development (that highlights their relevance to employment); and an opportunity for students to prepare for the transition from university to professional practice.

There is also a growing recognition that authentic student learning involves students learning via their own 'active behaviour' and not just through 'what the teacher does.'¹ Therefore, from the student's perspective work integrated learning experiences provide an opportunity for students to augment their theoretical training with practical skills, learn about career options, explore their abilities and mature as they move towards transition to the professional workplace.² E-learning tools provide a platform from which to explore learning opportunities which meet all of these imperatives.

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1 See generally John Biggs, *Teaching for Quality Learning at University* (2nd ed, 2003).

2 C Cates & P Jones, (1999) Learning Outcomes and the educational value of cooperative education, paper presented at the 1999 WACE/CEA International Conference on Cooperative Education, downloaded from <www.waceinc.org> on 29 August 2006, World Association for Cooperative Education, Boston.

After considering further the higher education context which has brought online work integrated learning to the fore,³ this paper discusses how QUT E-Portfolio,⁴ an e-learning tool which students can use to document and present their academic, professional and personal development in the format of an e-portfolio (electronic portfolio), has been integrated, at the Queensland University of Technology, into the core undergraduate law unit LWB240 Principles of Equity, as a means of enabling students to reflect on and document their skill development. Student perceptions on the ability of this tool to provide a ‘real world’ context for their skills development, and their overall learning experience, are also considered.

II. THE HIGHER EDUCATION CONTEXT

The higher education sector in Australia has undergone a period of rapid change during the last decade. An altered funding model, new levels of competition between providers, an increasing emphasis on research quantity and quality, and a larger, more diverse and demanding student population, are all factors which have contributed. The strategies currently employed by Australian universities in these changing times are both proactive and reactive in nature. A substantial number of strategies are aimed at improving the quality of the educational experience for the new student body.

In 2005, using an analysis of data collected from the 2001–2004 *Course Experience Questionnaire (CEQ)*, which aims to gain insight into students’ perception of the quality of their educational experience by surveying every graduate a few months after the completion of their studies, a study was conducted by Geoff Scott of what ‘retains students and promotes engagement in productive learning in Australian higher education.’⁵ Scott found that there was general agreement that in the current higher education context, universities faced a dilemma involving ‘how best to balance mission (achieving the key purposes of the university) with market (giving students what they want in order to gain and retain them—even if this is specific, skills focused job training).’⁶ The beneficial learning experiences created through work related learning tasks have proven to be a positive factor in improving student experience with research showing that ‘engagement in activities contribut[es] to enhanced academic outcomes.’⁷

Queensland University of Technology is conversant with the need to balance mission and market, and has utilised its strategic planning process to emphasise the importance of improving the student experience while strengthening ‘real world’ engagement. One of the University’s Learning and Teaching Strategies is to ‘strengthen the real world focus of learning experiences through

3 Material in this section has been drawn from Melinda Shirley, Iyla Davies, Tina Cockburn and Tracey Carver, ‘The Challenge of Providing Work-Integrated Learning for Law Students – the QUT Experience’ (Paper presented at the ACEN Conference, Griffith University, 27-29 September 2006).

4 Also known as Student Portfolio.

5 Geoff Scott, *Accessing the Student Voice: Using CEQuery To Identify What Retains Students and Promotes Engagement In Productive Learning in Australian Higher Education – Final Report of a Project funded by the Higher Education Innovation Program and The Collaboration and Structural Reform Fund Department of Education, Science and Training* (2006) Department of Education, Science and Training (i) available at <<http://www.dest.gov.au/NR/rdonlyres/B8C7FFCF-DD44-4983-A6CD-999F6F1CF893/10606/HEIPCEQueryFinalv21stFeb06.doc>> at 6 September 2007.

6 Ibid 42.

7 A Furco, ‘Strengthening Community Engagement in Higher Education’ (Seminar held at Queensland University of Technology, Brisbane, 12 October 2005).

developing and strengthening active partnerships and collaborations within and beyond the University.’⁸ The *QUT Learning and Teaching Plan 2007–2011* commits each faculty to:

Providing opportunities for work-integrated learning that facilitate student transition to professional practice; and reviewing and integrating emerging technologies which can most effectively support student learning, and creating physical environments to complement those learning experiences.⁹

In particular, objective three (High Quality Learning Environments Including Physical and Virtual Environments) provides that ‘QUT will provide high quality learning environments and experiences to foster and support effective student learning to be at the forefront of developments in new teaching technology and pedagogy.’ Objective 3.2 provides that QUT will:

Ensure the learning experiences, curriculum, and assessment of all courses are consistent with, and strengthen, QUT graduate capabilities and foster critical thinking including by complete implementation of (inter alia) the student e-Portfolio tools (to emphasise development of graduate capabilities) ...

Further, objective 3.3 provides that QUT will ‘facilitate optimal student learning outcomes by seeking out and capitalising on emerging technologies and integrating information and communications technology into our teaching.’

The Faculty of Law at QUT is one of the largest law faculties in Australia. In 2005 the Faculty had 2,419 students enrolled in its Bachelor of Laws (LLB) and associated double degree courses. Of those, 647 were enrolled as external students. The Faculty caters effectively for the diverse learning needs of students through a range of on and off campus delivery modes, all of which include components of online delivery which provide a greater level of flexibility in terms of accessing study materials and resources, access to staff and the completion of assessment items. In addition, steps have been taken to ensure that graduates enter the workforce with appropriate levels of theory and knowledge combined with the requisite capabilities and skills required of both law and justice professionals to operate effectively in the context of professional practice.

In its major review of the Federal Civil Justice System,¹⁰ the Australian Law Reform Commission concluded that legal education should be more concerned with ‘what lawyers need to be able to do’ as distinct from the traditional Australian approach which has been centred around ‘what lawyers need to know.’ In response to that recommendation, and a number of other reports echoing the same theme,¹¹ the QUT Faculty of Law integrated professional attributes, or skills, within the content of all substantive undergraduate law units to facilitate incremental capability development throughout the LLB degree.¹²

To ensure incremental development, each specific skill was broken down into three levels to represent gradual attainment. The first level involves scoping of the component parts of the

8 *QUT Learning and Teaching Plan 2005-2009* (2005) Queensland University of Technology available at <http://www.appu.qut.edu.au/resources/learn_teach_plans/> at 6 September 2007.

9 *QUT Learning and Teaching Plan 2007-2011* (2007) Queensland University of Technology available at <http://www.appu.qut.edu.au/resources/learn_teach_plans/> at 6 September 2007.

10 Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999).

11 Australian Law Reform Commission, *Managing Justice – A Review of the Civil Justice System*, Report No 89 (1999) [2.21]; American Bar Association, *Legal Education and Professional Development – An Educational Continuum* (1992) (MacCrate Report); C McInnis, S Marginson and A Morris, *Australian Law Schools After the 1987 Pearce Report* (1994).

12 See generally, Sally Kift, ‘Lawyering Skills: Finding their Place in Legal Education’ (1997) 8 *Legal Education Review* 43; Sharon Christensen and Sally Kift, ‘Graduate Attributes and Legal Skills’ (1997) 11 *Legal Education Review* 207.

skill, the second level provides an opportunity to practise the component parts of the skill and the third level offers an understanding of the skill in the context of practice. Broadly speaking, those three levels are developed through core units in the first, second and third years of the LLB respectively.

Essential to the project was the pedagogical aim to embed skills training within the content of learning and to specifically assess competency levels within each of the skills through a reflective process that would lead to the development of a 'student capability profile.' To be effective, this learning approach required each skill to be developed through a cycle of instruction, practice, feedback and assessment both horizontally and vertically through the LLB degree. This project was implemented effectively from 2000 to 2003.¹³

Therefore, the above studies and policies favoured (at both a macro and micro level) the integration, within the Queensland University of Technology undergraduate law unit LWB240 Principles of Equity, of online teaching tools which provided: a context for skills development and work integrated learning; and an opportunity for students to prepare for the transition to professional practice. This was achieved via the use of QUT E-Portfolio, which enabled students to reflect upon and document their skill development in that unit.

III. E-PORTFOLIO

QUT E-Portfolio, also known as Student Portfolio, is a web based tool which students can use to document and present their academic, professional and personal development in the format of an e-portfolio (electronic portfolio).¹⁴ An e-portfolio has been described as 'an interactive learning object or a learning landscape, which allows engagement and the formation of learning through various modes of communication.'¹⁵ The *QUT Manual of Policies and Procedures* 'promotes the use of the electronic portfolio to assist in learning and teaching, preparation for employment and in the development of graduate capabilities.'¹⁶

The main elements of the QUT E-Portfolio application, and the benefits of the use of e-portfolios in a learning environment context, are described below.

A. *QUT E-Portfolio Elements*

The QUT E-Portfolio application consists of the following three core elements:

1. *Experiences*

Students are encouraged to reflect on experiences drawn from a wide variety of situations, including their education, past or present employment, community based activities, and recreational pursuits. Each experience recorded in E-Portfolio must be associated with one of ten core skill areas. These skill areas have been defined with reference to generic employability attributes, industry

13 For a discussion see, Sharon Christensen and Natalie Cuffe, *Embedding Graduate Attributes in Law – Why, How and is it working?* (2002) Central Queensland University available at <http://lifelong.learning.cqu.edu.au/2002/papers/Christensen_Cuffe.pdf> at 4 September 2007.

14 QUT E-Portfolio is available online to all Queensland University of Technology students at: <www.studentportfolio.qut.edu.au>.

15 D Mihram, 'ePortfolios' (Paper presented at the 7th Annual Teaching and Learning with Technology Conference, University of Southern California, 17 September 2004).

16 *Manual of Policies and Procedures*, (2006) Queensland University of Technology ch F, [1.6] available at <<http://www.mopp.qut.edu.au/>> at 6 September 2007.

group standards, and the QUT graduate capabilities. They include skills such as: communication; teamwork; problem solving and critical thinking; leadership; and social and ethical responsibility.

2. *Artefacts*

QUT E-Portfolio also enables students to publish, and link to the documentation of their experiences, examples of their work and other relevant documents (termed 'artefacts') that demonstrate their skills and provide evidence of their achievements.

3. *Views*

If students wish to release their portfolio to another person (or to a group of people), for example their tutor or a prospective employer, they can do so by creating and releasing a 'view'. A view is a particular selection of portfolio content. Students can create different views, tailoring each one to a specific audience or purpose.¹⁷

B. *Benefits of E-Portfolios*

Research on the use of e-portfolios in a learning environment has found that such tools provide students with an opportunity to evaluate and reflect on all of their activities and achievements.¹⁸ The process of active reflection within this framework is intended to help students to recognise the variety, depth and ongoing development of their knowledge and abilities, increase their confidence in themselves as an emerging professional, and help them identify skill areas in need of improvement.¹⁹ Reflection on academic experiences should lead students towards a better understanding of the connection between their coursework and the graduate capabilities they are expected to develop while at university. This will help them to review and refine their educational goals, and encourage them to take a more active role in their learning and development. In addition to encouraging reflective thinking and the development of lifelong learning skills, QUT E-Portfolio enables students to build a comprehensive repository of information that will provide them with a valuable resource for demonstrating their skills, knowledge and achievements to prospective employers.

Elizabeth Hartnell-Young is seen as the pioneer of the use of e-portfolios in the Australian context through her work on multi media professional portfolios.²⁰ She notes that Australians are enthusiastic in the uptake of new electronic technologies. Consequently, the short and long term benefits of e-portfolio development, for students in an Australian university environment, have been summarised as:²¹

- building the capacity to develop and record quality stories;
- being better organised;
- focussing on the process of reflection and skill development;
- enhanced access to both employers and potential employers; and

17 For a more detailed explanation see, *Project Information* (2007) Queensland University of Technology available at <<http://www.studentportfolio.qut.edu.au/projectinfo/>> at 17 March 2007.

18 M Bhattacharya, 'Electronic Portfolios, Student Reflective Practices, and the Evaluation of Effective Learning' (Paper presented at the AAREducation International Education Research Conference, Fremantle, 2-6 December 2001).

19 For a discussion of the development of the QUT E-Portfolio see: Col McCowan, Wendy Harper and Kim Hauville, 'Student E-Portfolio: The Successful Implementation of an E-portfolio Across a Major Australian University' (2005) 14(2) *Australian Journal of Career Development* 40.

20 Elizabeth Hartnell-Young, 'Developing Multimedia Career Portfolios In Australia: Opportunities and Obstacles' (2001) 17(3) *Career Planning and Adult Development Journal* 45.

21 McCowan, Harper and Hauville, above n 19, 49.

- developing valuable lifelong learning skills.

IV. USING E-PORTFOLIO TO REFLECT UPON AND DOCUMENT SKILL DEVELOPMENT IN THE LAW UNIT ‘PRINCIPLES OF EQUITY’

The skills modules in LWB240 Principles of Equity – teamwork and letter writing – build upon skills theory and practice which students have already studied in the first year of their undergraduate law degree, and incorporate this theory and practice at various stages in the unit’s lecture and tutorial program.²² In particular, students are required to engage in teamwork activities and then, in teams of four, write and submit a letter of advice in relation to a specified tutorial question dealing with the law relating to fiduciaries (the ‘team letter writing exercise’). The outcome of the team letter writing exercise – the letter – is assessed and weighted at ten percent of the assessment in the unit.

The letter writing skill components of the unit are lectured face to face during the first hour of the week two lecture, where students are guided through the principles relevant to writing and structuring a client focused letter of legal advice. Students are also referred to an online talking PowerPoint presentation which contains an overview of teamwork theory relevant to enabling effective group work.²³ Internal students then engage in the team letter writing exercise in compulsory face to face tutorials during weeks two, four and five of the teaching semester. Following the implementation of an online team letter writing exercise model in semester one 2006, external students are now able to elect to engage in the team letter writing exercise online, and in the same timeframe as the internal students. Those students not adopting this option engage in the exercise at an External Attendance School over a period of two hours.²⁴

Following student feedback which indicated that students did not appreciate the benefits of engaging in the skills components of the unit, in semester one 2007 it was decided to integrate the use of QUT E-Portfolio into the LWB240 Principles of Equity unit to provide students with an opportunity to reflect upon and document their skill development following completion of their team letter. The aim was to provide a context for the students’ skills development (that highlighted the skills’ relevance to future employment) whilst also contributing to the students’ preparation for the transition to professional practice.²⁵

22 For a discussion of the integration of skills into the complimentary unit, LWB241 Trusts see, Melinda Shirley and Wendy Harris, *Assuring Quality in the Assessment of Negotiation Skills: A Case Study in the Teaching of Trusts* (2002) 9(3) Murdoch University Electronic Journal of Law available at <<http://www.murdoch.edu.au/claw/issues/v9n3/harris93.html>> at 4 September 2007.

23 The theory focused upon is the ‘Ten Commandments of Teamwork’ outline in: Graham Gibbs, *Learning In Teams: A Student Guide* (1994).

24 Given the unavoidable time constraints associated with conducting this activity during an external attendance school weekend, during which students must also attend seminars and assessment relevant to all other units they are studying, students are strongly encouraged to begin preparing for the team letter writing exercise individually before forming their teams at the External Attendance School.

25 The project follows on from the excellent foundation work of Natalie Cuffe and later Judith McNamara, both of the QUT Faculty of Law, who successfully integrated QUT E-Portfolio into the core undergraduate first year unit LWB143 Legal Research and Reasoning. In LWB143 students are given a workshop on the use of E-Portfolio for recording their skills and achievements. There is no compulsory requirement to use E-Portfolio in the unit, but a strong link is made between student learning and the need to reflect and record their experiences for use with job applications in the future.

Following completion of the team letter writing exercise, students were therefore required to use QUT E-Portfolio to reflect on and document their skill development in the areas of teamwork and letter writing (communication), which are the focus of skill development in LWB240 Principles of Equity. Each student was required to complete an individual e-portfolio entry. To introduce QUT E-Portfolio and to explain its significance in terms of reflecting on and documenting skill development, particularly in the context of preparing for their future careers, and in particular making job applications, Mr Col McCowan, Head, Careers and Employment at QUT gave a presentation at the lecture which dealt with letter writing skills. This presentation was recorded and made available for all students on the unit's online teaching site and the accompanying Power-Point slides were saved as a resource for students.

After surveying the students in relation to their prior experiences with QUT E-Portfolio at the beginning of the semester, and ascertaining what they would like to learn more about, materials were developed for students (taking into account the survey responses) in relation to the application of E-Portfolio in LWB240 Principles of Equity. These materials were made available to students via the unit's online teaching site.

The materials aimed to facilitate student engagement with and reflection upon the development of their work related skills in the unit by particularly addressing the following student concerns commonly reflected in the preliminary survey;²⁶ namely:

- I would like to learn more about how to use it more efficiently
- I would like to have a simple guide
- I did not really understand how to add [artefacts] to it
- I would like to learn more about where it is, how to access it
- I found it difficult to do reflections
- I would like to learn more about better techniques at writing the e-portfolio.

As students sought the most assistance in relation to structuring and writing an explanation of an activity (or experience) and then reflecting upon the skills derived from it, the materials included the instructions outlined below in Figure One.

Figure 1

How to create an experience of your skill development in LWB240 Principles of Equity

You should reflect upon your skill development and document your experience as soon as possible after you have completed your team letter writing exercise. Someone has to read your reflection so keep it short and to the point. Consider using a hyperlink to an example of work that supports your experience.

1. Selecting an experience

The following scenario is an example of an experience that a student might choose to reflect on and include in their e-portfolio.

²⁶ The survey, entitled 'E-Portfolio Reflection,' was distributed during the first tutorial and asked students to provide comments upon the following four matters:

1. Some ways in which I think that E-Portfolio can be used and why it might be a useful resource are ...
2. I would like to learn about the following aspects of E-Portfolio ...
3. (If you have used E-Portfolio before ...), what I liked most about using E-Portfolio was ...
4. (If you have used E-Portfolio before ...), what I liked least about using E-Portfolio was ...

I recently studied the subject Equity at QUT. In this unit, I was required to complete a project. This project required me to work in a team of four and produce a client letter. My team had a couple of mature age students.

There was immediately a clash of values between the younger students (who'd come to uni straight from school) and the mature age students.

I had to find some middle ground between my team members' differing views. I decided to call a team meeting to set up some rules for the group. When the project was over, the team received a Credit. The project might not have been a brilliant success, but the task was completed satisfactorily.²⁷

2. Reflecting on your learning

STAR L stands for **Situation, Task, Action, Result** and lessons **Learnt**.

STAR L can help you to structure your reflections about an experience in such a way that the meaning and outcome of the experience can be clearly identified and communicated to others.

- **Situation** – The *situation* is the context in which the experience occurred.

In our example above, the experience took place at the Queensland University of Technology within the context of a team project. This project was undertaken as part of Principles of Equity (LWB240). The team had four members, two of whom were mature age students.

- **Task** – The *task* is what was actually required of you in the situation.

If an experience occurred during a project at uni, the associated task might have been related to organisation (e.g. managing project documentation), teamwork (e.g. ensuring that each team member was aware of their responsibilities), or communication (e.g. delivering a presentation as part of the project).

In our example above, the task was to resolve a problem that arose as a result of personal differences.

- **Action** – *Action* refers to the steps that you personally took in response to the task.

When reflecting on your actions, ask yourself why you chose to respond in that particular way.

In our example above, the action was initiating and organising a team meeting to develop some ground rules.

- **Result** – *Result* refers to the outcome of your actions. How did your actions contribute to the completion of the task? How did your actions affect the final outcome of the situation?

In our example above, the action resulted in successful conflict management, and contributed to the satisfactory completion of the project.

- **Learnt** – *Learnt* refers to the things you have learned from the experience.

Highlight any skills or abilities that you have developed or improved as a result of the experience. Think about whether you have gained a deeper understanding of any particular issues. Think about how you might apply what you've learned to other situations.

In our example above, we might have learned that setting team rules is a good way to impersonalise any issues or conflict, and that this should be done as early in the process as possible.²⁸

27 Adapted from QUT E-Portfolio: *Getting Started – Selecting an Experience* (2007) Queensland University of Technology available at <<http://www.studentportfolio.qut.edu.au/forstudents/gettingstarted/selecting.jsp>> at 17 March 2007.

28 Source QUT E-Portfolio: *Getting Started – Reflecting on Learning* (2007) Queensland University of Technology available at <<http://www.studentportfolio.qut.edu.au/forstudents/gettingstarted/reflecting.jsp>> at 17 March 2007.

3. Recording the details of your experience

After using the STAR L process to reflect on the above experience, the final e-portfolio entry might look like this:

Team letter writing project for LWB240

I was required to participate in a team letter writing project for the subject LWB240 Principles of Equity. Teams of four were allocated randomly and our team had two mature age students in it. There was immediately a clash of values between the school leaver students and the mature age students.

I undertook to try to find some middle ground in terms of the expectations of each sub group. This was an extremely difficult task because neither sub group was initially willing to accommodate the others' views. Eventually I called a team meeting and with their help tried to draw up a set of group rules in terms of both process and desired outcomes. These were agreed to on a trial basis and roles were allocated accordingly.

Although it was not brilliantly successful and there was still minor skirmishes, we did get the task done satisfactorily and achieved a Credit. I now know that setting group rules to work by is a good way to impersonalise an issue(s) before it potentially arises and should be done very early in the process.²⁹

In addition to an explanation of what was required of students in relation to the writing and completion of an e-portfolio experience, instructions, resources, quick reference guides and tip sheets were also provided as to: how and where to access QUT E-Portfolio; how to add artefacts (such as the team letter, team rules, meeting agendas and agreed work plans) to the documentation of an experience; and how to save and print entries and artefacts.³⁰ Finally students were referred to a range of student support services, such as the 'Frequently Asked Questions' link on the E-Portfolio site,³¹ as well as dedicated email support from QUT support staff and the general help desk for information technology support.

V. EVALUATION

In order to measure the effectiveness of the integration of QUT E-Portfolio into LWB240 Principles of Equity, an evaluation was conducted, which adopted a qualitative approach using survey method, to collect and analyse student perceptions on the nature and impact of the use of this tool on their learning environment and experience. After making their E-Portfolio entry, as part of the

29 Adapted from: *Portfolio Capabilities Sample Portfolio* (2007) Queensland University of Technology available at <https://qutvirtual.qut.edu.au/portal/pls/portal/sp_resource_links_p.show?p_arg_names=p_show&p_arg_values=portfolios#> at 17 March 2007. See also QUT E-Portfolio: *Getting Started – Recording The Details* (2007) Queensland University of Technology available at <<http://www.studentportfolio.qut.edu.au/forstudents/gettingstarted/recording/>> at 17 March 2007.

30 For example, students were referred to: *QUT Student Portfolio Student Quick Reference Guide* (2006) Queensland University of Technology available at <<http://www.studentportfolio.qut.edu.au/forstudents/guides.jsp>> at 17 March 2007.

31 *Frequently Asked Questions* (2007) Queensland University of Technology available at <<http://www.studentportfolio.qut.edu.au/forstudents/faq.jsp#ASPQ7>> at 11 September 2007.

team letter writing exercise, students were asked to complete (and submit either online or in paper form) a survey providing written comments in relation to the following three matters:³²

1. What I liked most about using E-Portfolio to reflect on and document my skill development was ...
2. What I liked least about using E-Portfolio to reflect on and document my skill development was ...
3. What I learned from engaging in the Team Letter Writing Exercise and documenting my skill development was

Through the use of this open questionnaire a rich description of the phenomenon under investigation was collected from which the following emergent themes were identified.

A. Benefits of E-Portfolio

Student responses commonly indicated that they welcomed the opportunity provided via QUT E-Portfolio to actively reflect upon and evaluate their participation in the LWB240 Principles of Equity team letter writing exercise, and to think about the task and the skills derived from it. For example, student comments included:

- It made me think about what I learned from the experience, rather than just viewing it as a necessary school task to be gotten through.
- It really made me read into the exercise and draw out what skills I learnt as a result of this ‘hands on’ task.
- I am really excited about E-Portfolio because it gives me an interactive resource to guide my skill reflection.
- It helped me to learn about myself, my strengths and weaknesses. It will certainly prepare me for my next teamwork activity.
- It made me really think about what I learnt and experienced in writing the letter, when I would not usually think about such things.
- Documenting skill development allows you to reflect on the process you actually went through. It isn’t something you might normally do and being forced to makes you realise the skills you actually do possess, especially [with regard to] teamwork/communication.

These responses therefore indicate that engaging in this reflection process helped students to realise the personal and educational benefits of engaging in the skills component of the unit – something that some of them would not have otherwise done or appreciated, respectively.

Secondly, and consistently with previous observations on the use of e-portfolios in a learning environment, which argues that reflection on academic experiences should enable students to better understand the connection between their coursework and the graduate capabilities they are expected to develop whilst at university,³³ students opined that:

- Documenting my skill development enables me to learn from one experience to another, and see my development as a student and my ability as a team member.
- I am realizing that over the semesters and subjects my skills are definitely growing in strength and type.

³² Unrelated to the use of QUT E-Portfolio, students were also asked to comment upon:

1. What I liked most about working in my team to complete the letter writing exercise in Equity was ...
2. What I liked least about working in my team to complete the letter writing exercise in Equity was ...

³³ See above n 18-21 and accompanying text.

The utilisation of QUT E-Portfolio within LWB240 Principles of Equity consequently augmented student appreciation that their lifelong skills were progressively developing throughout their LLB degree.³⁴

Furthermore, in terms of information storage, many students acknowledged that over time people commonly lose track of information. They therefore particularly valued E-Portfolio as a convenient data storage device:

- Knowing that I can keep my information in this one particular place, which I will be able to add to and amend, in order to build a strong academic portfolio.
- E-Portfolio has a very structured approach toward documenting and storing experiences from university, and the relevant skills that were developed. Therefore, if used consistently the user will build up a number of experiences that will be useful to draw upon for interview and employment purposes.

Students also commented favourably upon the materials developed in response to the features of E-Portfolio that the preliminary survey of their prior experiences with this tool indicated that they would like to know more about.³⁵ For example, student responses included:

- I have known about E-Portfolio ... but never really understood how to use it, though I realised it could be great – so having the excellent worksheets I now know how to use it!
- ... the instructions given on the LWB240 OLT [online teaching] site were very helpful.
- At first I did not know what to write, but once I looked at [the] examples I realised what was required of me.

These identified benefits therefore further facilitated student engagement with E-Portfolio and their reflection upon the development of their work related skills.

However, concerning E-Portfolio's ability to provide a 'real world' context (or relevance) for students' skills development, and their overall learning experience, perhaps the most important benefit identified by the evaluation was that this tool enabled a significant number of students to link the skills achieved in the team letter writing exercise assessment item to the skills needed in the workplace. Consequently, after this exercise a greater number of students appreciated the future work related benefits of engaging in the skills component of the unit, in addition to the general benefits (in terms of personal and educational development) discussed above. For example, responses to the question '*what I liked most about using E-Portfolio to reflect on and document my skill development was...*' included:

- It made me think beyond the subject and re-enforced the end goal of my degree – which is to gain professional employment. It made the subject seem really relevant to my overall goal.
- It allowed me to think of this activity as something that would be of good use for when I leave university and go on to practice law.
- It made me realise some of the qualities and experiences employers look for in potential employees. It also made me see how what we do at uni relates to the workplace.
- This is an effective tool for me to use for the future in compiling all my skills gained throughout my degree, and I'll be able to release it to prospective employers.

34 For further discussion of the QUT Faculty of Law's aim to facilitate incremental skill development throughout the LLB degree, see above n 12 and accompanying text.

35 These materials, and the preliminary survey conducted, are discussed at above n 26-31 and accompanying text.

- [E-Portfolio] will undoubtedly prove a huge help in composing a CV and displaying my [academic] experience and previous work to potential employers.
- It ... helped me recognise the skills I was developing and their relevance to my future career.

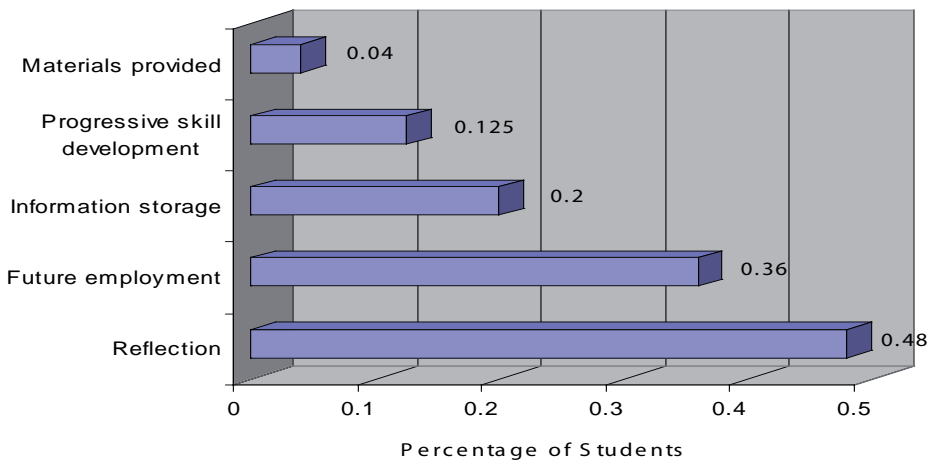
Responses to ‘*what I learned from engaging in the teamwork letter writing exercise and documenting my skill development was*’ included:

- That the team letter writing exercise gives one essential skills which will be needed once I enter the workplace.
- To actually think about what I gain and how it will help me in my chosen career.

Therefore, in general, student perceptions indicated that the integration of E-Portfolio into LWB240 Principles of Equity, as a means of enabling student reflection upon (and documentation of) their skill development, led to greater student appreciation of the “real world” relevance of engaging in the skills component of that unit – the team letter writing exercise. The survey responses indicate that after the implementation of this initiative, students were more likely to appreciate that they were being made to engage in the development of graduate attributes, to complement the acquisition of professional knowledge, for a reason. This was in contrast to prior feedback which indicated that students did not appreciate the benefits of engaging in the unit’s skills components.³⁶ As such the utilisation of E-Portfolio assisted to highlight the skills’ relevance to the students’ future employment, whilst also positively contributing to their preparation for the transition to professional practice.

The benefits identified above, in terms of: reflection; progressive skills development; information storage; materials provided; and future employment, are summarised in Figure Two below according to the percentage of students surveyed who addressed them.³⁷

Figure 2: E-Portfolio Benefits



36 Discussed at above n 25 and accompanying text.

37 Based upon a sample of 176 students.

B. Criticism of E-Portfolio

Despite these benefits, seven percent of students surveyed³⁸ considered that the use of E-Portfolio, and/or reflection upon their skills development, had no, or very limited, work related benefit for them. These students also opined that they would not use E-Portfolio in the future.

Of this small percentage, the most common reason given for this opinion was that the student concerned did ‘not regard E-Portfolio to be relevant to someone at [their] life stage.’³⁹ This seemed to either be because the student was: mature aged and already in gainful employment; or not concerned about applying for jobs in the immediate future (being only in the second year of their four, or five,⁴⁰ year LLB degree). For example, student responses included:

- As an experienced mature age student many of my skills and attributes are already documented in my resume ... It sometimes seems that it is a waste of time to input information into E-Portfolio when I cannot see myself using it in the future.
- I can see relevance in some cases (job seeking etc), but personally these applications don’t apply.
- Sometimes it feels like a waste of time doing it because I won’t be applying for jobs for some time.

Other students failed to appreciate that the communication and teamwork skills reflected upon in the LWB240 Principles of Equity team letter writing exercise were transferable to occupations outside the legal profession:

- The E-Portfolio will not be very relevant in my future ie: I will not be practicing law.

Nevertheless, despite this criticism, it remains that the significant themes identified by the student responses are in overall support of the benefits of using e-portfolios as teaching tools. As one student stated:⁴¹

- This exercise improved many of my skills that will be integral if I ever enter a law firm, as teamwork is essential and letter writing will be an integral part of the job. Overall learning how to improve my skills and document my experience was a great development in my life as a law student.

VI. CONCLUSION

Effective e-learning tools offer modern universities the opportunity to provide authentic work integrated learning experiences for law students. Such learning approaches (by supplementing the acquisition of knowledge with the building of students’ professional skills and self awareness for future employment), require significant adaptation of the traditional learning theories which have underpinned educational literature in this field to date. However, the current policy imperatives of the Australian higher education sector, and the rapidly changing nature of today’s students’ learning preferences, suggest that it is a worthwhile goal. This is supported by the student perceptions on the QUT E-Portfolio tool incorporated in the unit LWB240 Principles of Equity at the Faculty of Law, Queensland University of Technology. By providing an online tool via which students can reflect upon and document their skill development for use in future employment, this project provides a working example of an attempt to reconcile the above imperatives in the design of an

38 This equates to 13 students out of a sample of 176.

39 Seven out of 13 students.

40 In the case of combined degree students. This period may be even longer for students studying the LLB degree on a part-time basis.

41 Emphasis in original.

authentic and rewarding learning experience for law students preparing for the “real world” of professional practice.

COPYRIGHT LAW, DESIGNS LAW, AND THE PROTECTION OF PUBLIC ART AND WORKS ON PUBLIC DISPLAY

BY ANNA KINGSBURY*

I. INTRODUCTION

Artworks, designs and architectural forms situated in public places implicate a number of interests. There is a public interest, which arises simply by virtue of situating a work in a public place. More broadly, there is a public interest that arises from the public investment in the work – investment both in terms of money and investment in terms of meaning as people identify with and relate to a particular work. Public works can become important to individuals as landmarks, icons, or locations for significant public or personal events.

As well as the public interest, there are private interests in public art. Most obviously, the artist or creator of the work has an interest both economic and moral. The creator has a financial interest in any royalties flowing from commercial exploitation of the work, and also an interest in the display, treatment and preservation of the work. Under the Copyright Act 1994, the creator as author will be first owner of copyright in the work, unless it was made in the course of employment or commissioned. The author will also have moral rights in relation to the work. If the author no longer owns the copyright, then the owner of the copyright, for example, the person who commissions the work, has rights in the work. If the commissioner of the work is an organisation such as a local authority or company, members or stakeholders of the organisation will have an interest in the work. In addition, the owner of the land or building on or in which the work is situated will also have an interest, and if the land or building is sold the new owners will also acquire that interest.

This article considers the application of copyright and designs law to works of public art in New Zealand. The range of competing interests in public art, and the range of people with stakes in a public art work, produces tensions not easily resolved in a satisfactory way by the law as it stands. New Zealand's copyright and designs regimes do not satisfactorily balance the competing interests. Copyright law provides copyright protection for public art, and it provides for limited moral rights for the artist. However it provides a blanket exception from protection for artistic works on public display, at the expense of the rights of author/creators. Moral rights offer some protection, but do not provide adequately for preservation of works, or even for continuing public access. This article argues that artistic works on public display are under-protected by the law as it stands. A better balance would be struck by introduction of a fair dealing exception to allow for fair uses of public art by the public, including reasonable non-competing uses of a commercial nature. This would be preferable to the blanket exception currently offered, which can permit unreasonable as well as reasonable uses. A strengthened moral rights framework would also assist in protecting artists' rights and in preserving works and public access to those works.

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II. COPYRIGHT PROTECTION AND THE EXCEPTION FOR ARTISTIC WORKS ON PUBLIC DISPLAY

Under the New Zealand Copyright Act 1994, copyright subsists in original artistic works.¹ Section 2 of the Act provides that ‘Artistic work’:

- (a) Means –
 - (i) A graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or
 - (ii) A work of architecture, being a building or a model for a building; or
 - (iii) A work of artistic craftsmanship, not falling within subparagraph (i) or subparagraph (ii) of this definition; but
- (b) Does not include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994.²

The definition of artistic work means that copyright protects an enormously wide range of subject-matter, including sculptures and buildings, and also drawings and plans, casts and models for works such as sculptures and buildings. Works such as sculptures, murals and buildings, which may be situated in public places and/or constitute public art are therefore protected as copyright works under the Act. In New Zealand, the definition of artistic works is broad enough to also cover more functional works that might be situated in public places, such as outdoor furniture or playground equipment. The definition of artistic work will cover not only the work of public art itself, but also any works created in preparation for creating the work, for example drawings for a sculpture or functional work, or plans for a building, all of which will be protected as graphic works.

The Copyright Act provides that, where copyright subsists in a work, the owner of the copyright has a number of exclusive rights in relation to that work. The exclusive rights of the copyright owner are set out in s 16.³

16. Acts restricted by copyright –

- (1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30–34 of this Act, the following acts in New Zealand:
 - (a) To copy the work:
 - (b) To issue copies of the work to the public, whether by sale or otherwise:
 - (c) To perform the work in public:

1 Copyright Act 1994 s 14.

2 Section 2 further provides that:

‘Graphic work’ includes –

- (a) Any painting, drawing, diagram, map, chart, or plan; and
- (b) Any engraving, etching, lithograph, woodcut, print, or similar work.

‘Photograph’ means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced; but does not include a film or part of a film.

‘Sculpture’ includes a cast or model made for purposes of sculpture.

‘Building’ includes –

- (a) Any fixed structure; and
- (b) A part of a building or fixed structure.

3 The Copyright (New Technologies and Performers’ Rights) Amendment Bill, cl 11, currently before Parliament, would amend section 16 by repealing s 16(1)(f) and substituting the following paragraph: ‘(f) to communicate the work to the public.’

- (d) To play the work in public:
- (e) To show the work in public:
- (f) To broadcast the work or include the work in a cable programme service:
- (g) To make an adaptation of the work:
- (h) To do any of the acts referred to in any of paragraphs (a) to (f) of this subsection in relation to an adaptation of the work:
- (i) To authorise another person to do any of the acts referred to in any of paragraphs (a) to (h) of this subsection.

(2) Subsection (1) of this section applies subject to Parts III and VIII of this Act.

Copyright is infringed when a person does, other than pursuant to a copyright licence, any of the restricted acts which are the exclusive right of the copyright owner. Infringement includes doing the restricted act in relation to the work as a whole or in relation to a substantial part of the work, and it can be done directly or indirectly.⁴ Section 29 provides:

29. Infringement of Copyright –

- (1) Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act.
- (2) References in this act to the doing of a restricted act are to the doing of that act –
 - (a) In relation to the work as a whole or any substantial part of it; and
 - (b) Either directly or indirectly; –
 and it is immaterial whether any intervening acts themselves infringe copyright.
- (3) This part of this Act is subject to Parts III and VIII of this Act.

For works of public art, two of the forms of infringement most likely to be of concern to artists and copyright owners are copying,⁵ and issuing of copies to the public.⁶

‘Copying’ is defined in s 2.⁷

‘Copying’ –

- (a) Means, in relation to any description of work, reproducing or recording the work in any material form; and
- (b) Includes, in relation to a literary, dramatic, musical, or artistic work, storing the work in any medium by any means; and

⁴ Copyright Act 1994 ss 29 and 16.

⁵ Copyright Act 1994 s 30 provides:

30. Infringement by copying –

The copying of a work is a restricted act in relation to every description of copyright work.

⁶ Copyright Act 1994 s 31 provides:

31. Infringement by issue of copies to public –

The issue of copies of a work to the public is a restricted act in relation to every description of copyright work.

⁷ Copyright Bill, above n 3, cl 3 would amend the definition of copying by:

Repealing paragraphs (a) and (b) and substituting the following paragraph: ‘(a) means, in relation to any description of work, reproducing, recording, or storing the work in any material form (including any digital format), in any medium and by any means; and’

Repealing paragraph (d) and substituting the following paragraph: ‘(d) includes, in relation to a film or communication work, the making of a photograph of the whole or any substantial part of any image forming part of the film or communication work.’

- (c) Includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and
- (d) Includes, in relation to a film, television broadcast, or cable programme, the making of a photograph of the whole or any substantial part of any image forming part of the film, broadcast, or cable programme; –
- (e) And ‘copy’ and ‘copies’ have corresponding meanings.

For public art, copying can therefore involve copying a work by making either a two or three dimensional copy of it, whether by drawing or photographing it, or by making a similar three dimensional work. Under s 29, copying can be of the whole work or a substantial part of the work, and can be direct or indirect. Copying of a work of public art would therefore also involve copying of any underlying works such as drawings or plans on which the work was based.⁸

Infringement by issuing copies to the public is also relevant to works of public art. Issuing copies of a work to the public generally means putting into circulation copies not previously put into circulation.⁹ This can involve copies made directly or indirectly, and includes two dimensional copies, such as photographs, drawings and plans, and three dimensional copies, such as replica works.

There are therefore a number of ways by which copyright in public art or artistic works on public display can be infringed. However s 73 of the Copyright Act provides an exception to copyright infringement that applies to certain artistic works on public display. Section 73 provides:¹⁰

Representation of certain artistic works on public display

- (1) This section applies to the following works:
 - (a) Buildings:

8 *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd (No 2)* [1989] 1 NZLR 234.

9 Copyright Act 1994 s 9. Meaning of ‘issue to the public’ –

(1) References in this Act to the issue of copies of a work to the public mean the act of putting into circulation copies not previously put into circulation; and do not include the acts of –

- (a) Subsequent distribution or sale of those copies; or
- (b) Subject to subsections (2) and (3) of this section, subsequent hiring or loan of those copies; or
- (c) Subsequent importation of those copies into New Zealand [; or]
- [(d) Distribution of imported copies that are not infringing copies within the meaning of section 12 subsequent to their importation into New Zealand.]

(2) The issue of copies of a work to the public, in relation to computer programs, includes the rental of copies of computer programs to the public [and rental subsequent to those works having been put into circulation]; but does not include any such rental where –

- (a) The computer program is incorporated into any other thing; and
- (b) The rental of the computer program is not the principal purpose or one of the principal purposes of the rental; and
- (c) The computer program cannot readily be copied by the hirer.

(3) The issue of copies of a work to the public, in relation to sound recordings and films, includes the rental of copies of those works to the public [and rental subsequent to those works having been put into circulation].

10 Copyright Bill above n 3, clause 42 would amend section 73(2) by repealing paragraph (c) and replacing it with ‘(c) communicating to the public a visual image of the work.’ It would also repeal subsection (3) and replace it with ‘(3) Copyright is not infringed by the issue to the public of copies, or the communication to the public, of anything the making of which was, under this section, not an infringement of copyright.’ These changes do not materially alter the effect of the section for the purposes of this article.

- (b) Works (being sculptures, models for buildings, or works of artistic craftsmanship) that are permanently situated in a public place or in premises open to the public.
- (2) Copyright in a work to which this section applies is not infringed by –
 - (a) Copying the work by making a graphic work representing it; or
 - (b) Copying the work by making a photograph or film of it; or
 - (c) Broadcasting, or including in a cable programme, a visual image of the work.
- (3) Copyright is not infringed by the issue to the public of copies, or the broadcasting or inclusion in a cable programme, of anything whose making was, under this section, not an infringement of copyright.

Section 73 is substantially the same as the equivalent provision in the United Kingdom.¹¹ A version of the section appeared in the 1911 UK Act¹² and in the 1956 UK Act.¹³ Section 62 of the United Kingdom Act provides:

62. Representation of certain artistic works on public display.

- (1) This section applies to –
 - (a) buildings, and
 - (b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.
- (2) The copyright in such a work is not infringed by –
 - (a) making a graphic work representing it,
 - (b) making a photograph or film of it, or
 - (c) broadcasting or including in a cable programme service a visual image of it.
- (3) Nor is the copyright infringed by the issue to the public of copies, or the broadcasting or inclusion in a cable programme service, of anything whose making was, by virtue of this section, not an infringement of the copyright.

The purpose of both of these provisions is presumably to allow copying of works and buildings where this is incidental to creating a new work in a public place – so that for example it is not an infringement to take wedding or holiday photographs depicting friends and family in front of a sculpture in a park or in front of a building. Sections 73(3) and 62(3) mean that it is also not a copyright infringement to photograph these kinds of works and sell the photographs or make and sell postcards. Printing drawings or photographs on T-shirts and selling these will also not infringe. It is irrelevant that these are commercial uses; they are still permitted under the exceptions. However, the provision does not extend to cover the making of copies in three dimensions beyond what is permitted as a graphic work – to copy a sculpture by the making of a new sculpture is not permitted. Two dimensional copies only are permitted, so that it is not permissible to make what would effectively be a competing work. People can photograph or draw the work, and even exploit the work for profit by selling photographs or drawings in any form, but they can't make a three dimensional copy of the work, whether the work be a building, sculpture or functional artistic work such as outdoor furniture or equipment. Derivative works are therefore allowed, but not competing works.

11 Copyright, Designs and Patents Act 1988 (UK), s 62.

12 Copyright Act 1911 (UK) s 2(1) (iii).

13 Copyright Act 1956 (UK) s 9(3)-(6).

A. Problems With the Section 73 Exception

The rationale for the exception is fairly clear. However the provisions have long been criticized as potentially uncertain and anomalous, and possibly unreasonably broad, although few cases have reached the courts.¹⁴ Four issues (or potential issues) arise in relation to the New Zealand s 73:

1. Commercial Reproduction

While s 73 provides for an exception to copyright infringement for private use (holiday snaps for example), it also allows for commercial reproduction for profit (as in the production of postcards, T-shirts or posters). Artists and authors are arguably not adequately protected, in that the provision not only deprives them of the exclusive right to copy and issue copies to the public, but it also deprives them of the exclusive right to commercially exploit their work or license others to do so, and therefore receive any financial benefits arising from copyright in the work. In addition, the provision deprives authors and artists of the right to decide when and how any such commercial exploitation may take place. They not only lose the right to license, they also lose the right to decline to license any such uses.

This concern is illustrated by the New Zealand case *Radford v Hallensteins Bros Ltd*.¹⁵ The plaintiff, John Radford, was a sculptor who had created three large architectural forms, situated in a public park, in Auckland. The defendant, Hallensteins, a clothing retail chain, commissioned and sold T-shirts on the front of which was a photograph of two of the three forms, along with other design elements. The plaintiff brought an unsuccessful action for copyright infringement, but the High Court Judge held that s 73 applied and that there was no infringement. The Judge considered both s 73 and the English provision s 62 and its antecedents, and commentary thereon. He said that s 73:

... sets out to allow members of the public, including players in the market, to copy in two-dimensions sculptures permanently in the public domain and even for profit; and it does so by setting aside any copyright in the work that the author might otherwise enjoy. However s 73 is interpreted, that clear policy is not for compromise.¹⁶

The sculptor in that case was understandably aggrieved that Hallensteins were permitted to commercially exploit his copyright work without a license from him, and without his receiving any royalties. In addition, the sculptor had been deprived of the opportunity to protect his work from being used in this way. Indeed, he has been quoted as saying that he would never have licensed the use of his work by the defendant,¹⁷ but that the effect of s 73 was that he had no choice. This is arguably contrary to the purpose of copyright in protecting creators, and people working in the fine arts are generally seen as among those most deserving and in need of copyright protection.

2. Underlying Works

It has not been clear from the drafting of the section whether the exception applied to sketches and design drawings for the works to which it applies. There has therefore been a question whether copyright in the sketches and design drawings may still be infringed even though the copyright in the work is not infringed, meaning that the section is effectively meaningless for any work that

14 See for example the discussion in H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (2nd ed, 1995) vol 1, 255-6.

15 *Radford v Hallensteins Bros Ltd* High Court, Auckland, CIV 2006-404-004881, (Unreported, Keane J, 22 February 2007).

16 *Ibid* para 35.

17 J Radford, 'Artist John Radford Responds: Letter to the Editor' *NZ Lawyer* 61, 30 March 2007, 9.

was preceded by drawings.¹⁸ It is not clear in this regard whether the use of the phrase ‘in such a work’ in the UK Act, which is absent in the New Zealand provision, makes any material difference.¹⁹ It seems more likely that it does not, and that both the UK and New Zealand provisions apply to buildings, sculptures, models for buildings and works of artistic craftsmanship. On its face, the provision does not cover drawings. At best, these are covered by implication.

This issue also arose in the case of *Radford*. The plaintiff argued that in copying the sculptures, Hallensteins indirectly copied and infringed his copyright in his underlying works, s 73 notwithstanding. He argued that s 73 did not need to extend to all underlying works in order to be effective. He argued that it permitted sculptures in public places to be copied, even for profit, but only where there were no underlying works in which copyright inhered, or where copyright had expired in the underlying works, or where the copy did not infringe copyright in such underlying works.

The Judge held that s 73 set out to allow members of the public, including players in the market, to copy in two-dimensions sculptures permanently in the public domain and even for profit;²⁰ and it did so by setting aside any copyright in the work that the author might otherwise enjoy. He said that the interpretation argued for by Mr Radford did not allow s 73 that scope and effect, as s 73 would then not protect anyone who copied sculpture in the public domain from any possible claim in copyright. It would leave them vulnerable to a claim in copyright if they indirectly copied any underlying work. It would only protect them where there was no such work, or where copyright in it had expired, or where any indirect copy was not a true copy and did not infringe. It would erode the immunity s 73 seemingly conferred. He said the argument for interpretation was also impractical. Most sculpture permanently in the public domain would express in fully realised form some underlying work in which copyright could still inhere. Anyone who copied any such sculpture must first discover whether there were underlying works and whether they remained subject to copyright, and they must compare the finished with the underlying work to see whether any indirect copy of the latter would infringe copyright. This would also erode the immunity section 73 apparently conferred. He held that, to protect from any claim in copyright anyone who copied sculpture permanently in the public domain, s 73 must condone indirect copying of underlying works whether in two or three dimensions and whether or not they too are in the public domain. On this interpretation, s 73 remained a true exception. It only exempted copies of three-dimensional works permanently in the public domain, not works exhibited temporarily, and only two-dimensional copies. The work itself could not be replicated in three-dimensions, whether directly or as a copy of one made in two-dimensions. The governing principle of the 1994 Act thereby remained uncompromised.

Before *Radford* was decided, the uncertainty in the drafting of s 73, and of the equivalent English provision, meant that there was a real question as to whether the exception protected against indirect infringement of underlying works.²¹ The Judge’s interpretation in *Radford* is at least arguably the one most likely to represent the intentions of the legislature, and it does give efficacy to a section that would otherwise have little practical application. It was the apparent intention of

18 See discussion in Laddie, Prescott and Vitoria, above n 14, 255.

19 See discussion in K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright* (15th ed, 2005) vol 1, 558-9.

20 *Radford* above n 15 paras 35-39.

21 See L Bently and B Sherman, *Intellectual Property Law* (2nd ed, 2004) 217, Laddie, Prescott and Vitoria, above n 14, 255, Garnett, Davies and Harbottle, above n 19, 558-9.

the Legislature, and is clearly practical, to allow for two dimensional reproduction of works on public display (there is perhaps some confusion in the Judge's reference to the 'public domain' in this context), so that people can take photographs or produce postcards. However the effect of the exception in allowing multiple copies for commercial purposes is arguably beyond what was intended, and also beyond what might be seen as a fair use in other circumstances.

3. *Meaning of 'permanently situated in a public place or in premises open to the public'.*

Section 73 covers works that are permanently situated in a public place or in premises open to the public. This means that either private or commercial copying within the section of artworks permanently situated in art galleries or museums will not infringe copyright, and copies may be issued to the public. There is an area of uncertainty in relation to works that are permanently situated in a public place or in premises open to the public. There remain questions about what constitutes being 'permanently situated in premises open to the public'. It is not clear exactly what would be required for a work to be 'permanently situated', and it is not entirely clear when premises would be regarded as 'open to the public'. There are also related questions about the ability of owners of the premises open to the public in which works are permanently situated to restrict the right to copy. Owners of the premises may be able to impose contractual conditions restricting copying as a condition of entering the premises, and this is in fact common practice in art galleries.²² However these issues all remain untested.

Where works are held to be works that are permanently situated in a public place or in premises open to the public, and the section therefore applies, the effect will be that photographs or drawings of artworks in art galleries or museums could be made, reproduced in multiple copies (including copied onto posters or T-shirts, or internet sites) and sold for profit without infringing the artist's copyright. It is understandable that artists would regard this as an unreasonable restriction of their exclusive rights under copyright, and as unfair exploitation of their work. Once again, artists would lose not only the opportunity to license and collect royalties, but also the opportunity to decline to license uses of their works that they regarded as inappropriate or undesirable, or potentially damaging to the market for their work. The section also does not require that works permanently situated in a public place or in premises open to the public remain so situated or even on public display. The section therefore does nothing (and is intended to do nothing) to protect and preserve public art works. Artists and creators have an interest in seeing their public art works preserved, and displayed, allowing ongoing public access. But there is nothing in s 73 to ensure this. The owners of the artwork are free to deal with the work, so long as they do not infringe copyright's economic or moral rights.

The s 73 exception also applies to buildings irrespective of where situated. The buildings do not need to be on public display. This means that it is not a copyright infringement to copy a private home or building by photograph or graphic work, and copies can be distributed commercially. This aspect of the provision is less likely to be problematic, and is clearly consistent with the purpose of the provision in allowing the public to take photographs and make drawings of works in public places, or in this case works visible from public places.

4. *Consistency with International Treaty Obligations*

There is an issue as to whether the provisions are consistent with international copyright treaties, particularly the obligations under Article 9 of the Berne Convention for the Protection of Literary and Artistic Works 1886 ('Berne') and under Articles 9 and 13 of the Agreement on Trade-Re-

22 See discussion in Garnett, Davies and Harbottle, above n 19, 558-9.

lated Aspects of Intellectual Property Rights 1994 ('TRIPS'). The express purpose of Berne is 'to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.'²³ Article 9 of Berne provides first for the protection of authors, and then limits the scope of exceptions. Article 9 of Berne provides:

Right of Reproduction:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author...

Article 9 of TRIPS requires that members should comply with this and other provisions of Berne. Article 13 of TRIPS provides:

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

The effect of both provisions is to allow for limitations and exceptions to copyright only if they comply with the three step test, that is, they must be special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. There is thus a question whether the exception provisions in both the United Kingdom and New Zealand Acts comply with the three step test requirement. First there is an issue whether the exceptions apply only to special cases, especially as they are worded so as to grant a blanket exception. There is also an issue as to whether they may cover situations in which the exception from copyright protection conflicts with the normal exploitation of the work and/or unreasonably prejudices the legitimate interests of the right holder. Allowing members of the public to take holiday snaps in public places is clearly within the scope of allowable exceptions. However, the fact that the exceptions for artistic works on public display allow for commercial exploitation is in itself arguably beyond the scope of exceptions allowed by the three-step test,²⁴ and it is certainly arguable that some particular examples of commercial exploitation would go beyond this. In *Radford, s 73* was considered in relation to New Zealand's international obligations under Berne and TRIPS.²⁵ The Judge said:

This threefold test for validity expresses accurately, I accept, the duty subscribers to TRIPs assume – to be sparing in the exceptions to the protection of copyright that they allow. I have not, however, found the test helpful in deciding the ambit of s 73. It is, unavoidably, too abstract. The values on which the test relies it does not define and each involves choices. Moreover, the 1994 Act must be presumed to be definitive as to what those choices are within New Zealand and is, itself, like TRIPs, a regime of some elasticity. Copyright extends potentially, in the 1994 Act, to every phase in the evolution of a work, protecting the author comprehensively. Yet it does not do so absolutely.²⁶

²³ Berne Convention for the Protection of Literary and Artistic Works 1886, Preamble.

²⁴ It appears to be allowed by the European Information Society Directive 2001 Article 5 however. See Garnett, Davies and Harbottle, above n 19, 599.

²⁵ *Radford* above n 15, paras 13-22.

²⁶ *Radford* above n 15, paras 19-20.

The Judge went on to say that s 73 must be assessed against its own singular purpose, and that it was better approached by looking first to the English provision on which it was clearly modelled. Taking a purposive approach, the Judge found that the use of the work by the defendant was covered by the s 73 exception, and that copyright was not therefore infringed. It remains arguable however that the use in the *Radford* fact situation was beyond the scope of allowable exceptions under Berne and TRIPS. The artist lost what would otherwise have been an opportunity to license and receive royalties for a commercial exploitation of the work.²⁷ The loss of an opportunity to decline to license a use the artist regarded as inappropriate and unreasonable also potentially prejudices the legitimate interests of the artist in this situation. While the Judge did not find the three-step test helpful in interpretation of s 73, a more contextual approach looking at Berne as a whole might have made it a little more useful. Nevertheless, the Judge's interpretation of s 73 as drafted is at least arguably the one most likely to represent the intentions of the legislature, and it does give efficacy to a section that would otherwise have little practical application. However, it is also at least arguable that s 73 as currently drafted and as interpreted creates a statutory exception to copyright protection that goes beyond that permitted under the Berne and TRIPs three-step test. In particular, the extent of the exception in allowing multiple copies for commercial purposes without reference or royalties to the author does conflict with normal exploitation of the work and does unreasonably prejudice the legitimate interests of the right holder.

Section 73 as drafted, and as interpreted by the High Court in *Radford*, leaves creators/authors of artistic works on public display underprotected. Section 73 allows for many reasonable uses by the public of public art. However it also allows for arguably unreasonable uses such as commercial exploitation without recourse to the copyright owner. Section 73 therefore creates a gap in copyright protection for a category of copyright owners who are among the most deserving of copyright protection. The next sections will consider whether the gap in copyright protection created by s 73 can be filled by other regimes such as the moral rights regime in the Copyright Act or the Designs Act 1953.

III. MORAL RIGHTS PROTECTION FOR ARTISTIC WORKS ON PUBLIC DISPLAY

In New Zealand, moral rights provisions are contained in Part IV of the Copyright Act 1994.²⁸ The rights provided are as follows:

- The right to be identified as an author or director.²⁹
- The right to object to derogatory treatment of the work.³⁰
- The right to object to false attribution and false representations.³¹
- The right to privacy of certain photographs and films.³²

27 The artist also argued that the use had a depreciating effect on the value of a series of one-tenth scale bronzes he had made in a limited edition, a number of which he still had to sell.

28 For a broader comparative analysis of public art and moral rights, see V Zlatarski, 'Moral' Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States' 23 *Colum-VLA J.L. & Arts* 201.

29 Provided for in ss 94-97 of the Copyright Act 1994 (NZ).

30 Provided for in ss 98-101 of the Copyright Act 1994 (NZ).

31 Provided for in ss 102-104 of the Copyright Act 1994 (NZ).

32 Provided for in s 105 of the Copyright Act 1994 (NZ).

Under New Zealand law, moral rights are not assignable.³³ However, any of the rights may be waived by the right-holder, by an instrument in writing signed by the right-holder.³⁴ New Zealand moral rights are limited in duration. They generally expire when the copyright in the work expires,³⁵ Infringement of moral rights is actionable by the person entitled to the right, and damages and injunction are available remedies. In some circumstances the court may require a disclaimer.³⁶

Moral rights in the New Zealand Copyright Act apply to works of public art in the same way as to other works, as the economic rights do. Authors of copyright sculptures can, for example, object to derogatory treatment of their copyright works if the treatment is prejudicial to their honour or reputation,³⁷ provided the other requirements are satisfied. ‘Derogatory Treatment’ is defined as follows:

- (a) The term ‘treatment’ of a work means any addition to, deletion from, alteration to, or adaptation of the work, other than
 - (i) A translation of a literary or dramatic work; or
 - (ii) An arrangement or transcription of a musical work involving no more than a change of key or register; and
- (b) The treatment of a work is derogatory if, whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author or director.³⁸

There is very little case law on the meaning of derogatory treatment in the New Zealand legislation,³⁹ and also little case law on the equivalent United Kingdom provision.⁴⁰ Speculation is therefore still open on what will or will not constitute ‘treatment’, ‘distortion’ or ‘mutilation’, or ‘prejudicial to the honour or reputation of the author or director’. In particular, there is continuing debate about whether the test for ‘prejudicial to the honour or reputation’ is objective, or whether it contains subjective elements.⁴¹ ‘Treatment’ as defined will not necessarily cover all activities that might be prejudicial to honour or reputation, and the definition is narrower than the language

33 Copyright Act 1994 (NZ), s 118.

34 Copyright Act 1994 (NZ), s 107(2). The provision for waiver is at odds with the civil law moral rights tradition, and waiver does not appear to have been envisaged by Article 6*bis* of the Berne Convention, although the provision does not expressly require that the rights be inalienable. The waiver provisions are therefore subject to criticism as undermining the very rationale for, and usefulness of, moral rights. According to Dworkin, ‘the existence of an uncontrolled power to ‘agree’ to waive moral rights calls into question the effectiveness of the entire code of moral rights.’ G Dworkin ‘Moral Rights and the Common Law Countries’ (1994) 5 AIPJ 5, 28.

35 Copyright Act 1994 s 106(1). The right to object to false attribution and false representations however expires twenty years after the death of the author.

36 Copyright Act 1994 s 125.

37 Copyright Act 1994 s 98. This was argued in *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2004] 1 NZLR 26 (CA), although the argument was unsuccessful because it was brought by the owners rather than the authors of the copyright work.

38 Copyright Act 1994 s 98(1). This definition of treatment is narrower than the Berne Convention approach in Article 6*bis* which refers to any ‘derogatory action’. See discussion in Bently and Sherman above n 21, 243-5.

39 The New Zealand Court of Appeal has observed that ‘The moral rights of authors are provided to enable authors to protect the integrity of their works even though ownership passes to others.’ *Mitre 10* above n 37, 34.

40 Copyright, Designs and Patents Act 1988 (UK), s 80.

41 The Canadian case *Snow v The Eaton Centre* (1982) 70 CPR (2d) 105 (Canada) suggested a subjective element, whereas there is British authority to suggest the test is objective. *Tidy v Trustees of the Natural History Museum* [1998] 39 IPR 501.

in Article 6bis of Berne which refers to ‘any ... derogatory action.’⁴² Association of a work with offensive material is probably not covered by ‘treatment’ as defined. Removing a work from public display so that public access is denied is probably not covered by ‘treatment’ either.

The plaintiff in *Radford* claimed that the defendant Hallensteins had breached his moral rights by setting his sculptures on the T-shirt in a context that was incongruous, distorting and derogatory. This claim has not yet been determined. The plaintiff has said that he is fighting the case:

... to protest about what I feel has been the careless commercial exploitation of my art work and damage to my reputation... I believe that having cheap, distorted screen prints of the largest works I have ever created appear on an unknown number of \$16.95 T-shirts ... has put into action a chest-mounted billboard campaign associating my work with the Hallensteins’ Planet 8 brand.⁴³

The plaintiff in a case such as *Radford* would generally need to show that reproduction of the work constituted a ‘treatment’. Any doubt that the right to object to derogatory treatment extends to cover *Radford*-type facts is removed by the application of s 99. Section 99(2) of the Act provides that, in the case of an artistic work, the right to object to derogatory treatment is infringed by a person who:

- (a) Publishes commercially or exhibits in public a derogatory treatment of the work, or broadcasts or includes in a cable programme a visual image of a derogatory treatment of the work; or
- (b) Shows in public a film that includes a visual image of a derogatory treatment of the work or issues to the public copies of such a film; or
- (c) In the case of –
 - (i) A sculpture; or
 - (ii) A work of architecture in the form of a model for a building; or
 - (iii) A work of artistic craftsmanship, – issues to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work.⁴⁴

Section 99(3) however provides that the same protection does not extend to buildings. It provides:

- (3) Subsection (2) of this section does not apply to a work of architecture in the form of a building; but where the author of such a work is identified on the building and it is the subject of derogatory treatment the author has the right to require the identification to be removed.

The issue then will be whether the treatment is derogatory, which it will be if, whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author or director. The plaintiff asserts that the T-shirt design is a distortion of his work, and that he feels that there has been damage to his reputation, which would be enough on a purely subjective test, but he will likely also need to show prejudice to his honour or reputation objectively assessed. Association of the work with the brand is unlikely alone be enough for derogatory treatment, but it may support a claim under the Fair Trading Act 1986.

The moral rights provisions therefore have the potential to offer some protection to artists and architects who have created works on public display that are covered by s 73, although the protection is limited for buildings. There still remains some uncertainty about the scope of the rights, and the fact that they may be waived considerably undermines their effectiveness in protecting

42 See discussion in Bently and Sherman above n 21, 244.

43 *Radford*, above n 17, 9.

44 See also Copyright Act 1994 s 99(6).

artists. Artists commonly enter into contracts to sell artwork from a position of unequal bargaining power, and they may be pressured to waive their rights at the time a work is sold. Moral rights do not in themselves resolve all of the difficulties identified in the scope of s 73, and do not ensure that a work will be preserved or remain on public display.

IV. DESIGNS LAW PROTECTION FOR ARTISTIC WORKS ON PUBLIC DISPLAY

In New Zealand, designs are protected by copyright law as artistic works, and can also be protected by registration of the design under the Designs Act 1953. The Act provides protection for registered new or original designs,⁴⁵ and in some cases, this could apply to works of public art or works on public display where a design is applied to an article. Under the Designs Act, s 2(1):

‘Design’ means features of shape, configuration, pattern, or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye; but does not include a method or principle of construction or features of shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform.

‘Article’ means any article of manufacture; and includes any part of an article if that part is made and sold separately.

The duration of design protection is five years renewable, with a fifteen year maximum.⁴⁶ The rights given by design registration are set out in s 11:

the exclusive right in New Zealand to make or import for sale or for use for the purposes of any trade or business, or to sell, hire, or offer for sale or hire, any article in respect of which the design is registered, being an article to which the registered design or a design not substantially different from the registered design has been applied, and to make anything for enabling any such article to be made as aforesaid, whether in New Zealand or elsewhere.

The Designs Act will therefore apply to new or original designs applied to articles, generally where the purpose of the design is not purely functional. In practice, a broad range of things can be included. Designs for items in public places can clearly be included, whether or not these are also protected as artistic works under the Copyright Act. Furniture design is an obvious example here, but it will apply to any design applied to articles in public places.

Under the Designs Act, there is no exception provision equivalent to s 73 of the New Zealand Copyright Act for artistic works on public display. It will therefore be an infringement to copy a design on public display and apply it to an article in respect of which the design is registered and to then sell the articles. The Designs Act therefore offers stronger protection than the Copyright Act where the work on public display is a registrable design, and is registered. However, many of the works covered by the s 73 exception for artistic works on public display will not constitute registrable designs, and will not be registered designs. Designs Act protection will only be an option for some of these works. In addition, New Zealand law generally offers dual protection for designs, so that registrable and registered designs are also protected by copyright law, meaning that many designers rely on copyright for protection, even where design registration is an option. It would therefore be anomalous in policy to require design registration as a means to avoid s 73.

45 Designs Act 1953 s 5.

46 Designs Act 1953 s 12.

V. A BETTER BALANCE: A FAIR DEALING EXCEPTION IN COPYRIGHT LAW AND STRENGTHENED MORAL RIGHTS

There remains a gap in protection created by the effect of s 73 of the Copyright Act and the absence of alternative protection in other regimes. However s 73 does provide an essential exception to infringement in some situations for works of public art. There is a public interest in providing the public with a form of user right for works of public art. Repeal of s 73 would result in photographs, postcards or drawings of works of public art constituting copyright infringement. Plainly this would be undesirable and unreasonable. However, the section as drafted is a blanket exception that also allows for multiple copies, commercial exploitation, and uses of a work in circumstances that might depreciate the value of the work or that the creator might consider inappropriate or find distressing.

It would be preferable if the section provided for some judicial judgment as to whether a particular dealing with a work under the exception was fair in all of the circumstances. Factors like the purpose, extent and character of the use could then be taken into account in light of the purpose of the provision. It might then be possible to distinguish a reproduction of multiple copies on T-shirts from the reproduction of photographs and postcards, which uses would be otherwise indistinguishable under the exception as currently drafted. There is a need to strike a better balance by redrafting the s 73 exception as a fair dealing exception.

In New Zealand, users' rights are set out in the Copyright Act 1994, Part III: Acts Permitted in Relation to Copyright Works. Acts permitted are listed in sections 40-93, covering a number of activities, many vary narrowly drawn and specific. The more general provisions are the fair dealing provisions, which allow for dealing with a copyright work where the dealing is 'fair' and for a particular allowed purpose. The Copyright Act provides for exceptions from infringement for fair dealing for the purposes of criticism, review and news reporting,⁴⁷ and fair dealing for the purposes of research or private study.⁴⁸ New Zealand has few decided cases on the users' rights provisions,⁴⁹ but there is also case law on the equivalent English provisions, and on Australian and Canadian provisions. Courts generally consider a number of factors in assessing whether a dealing is fair. In *TVNZ Ltd v Newsmonitor Services Ltd*⁵⁰ Blanchard J in the High Court considered fair dealing for the purposes of research or private study.⁵¹ The Judge said that:

A fair dealing is simply a reasonable use. What is reasonable must be judged by looking at the nature of the works themselves and the purpose for which the defendant dealt with them. What is a reasonable use of this particular copyrighted material for the purpose of research or private study of the kind being engaged in? The quantity of the material which has been taken, both standing in isolation and as compared with the amount of material in the whole of the work, also has to be considered.⁵²

47 Copyright Act 1994 s 42.

48 Copyright Act 1994 s 43. Section 43(3) provides that, in determining whether copying constitutes fair dealing for the purposes of research or private study, 'a court shall have regard to (a) the purpose of the copying; and (b) the nature of the work copied; and (c) whether the work could have been obtained within a reasonable time at an ordinary commercial price; and (d) the effect of the copying on the potential market for, or value of, the work; and (e) where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.'

49 The principal decisions are *TVNZ Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 and *Copyright Licensing Ltd v University of Auckland & Ors* [2002] 3 NZLR 76 (HC).

50 *TVNZ Ltd* above n 49.

51 Copyright Act 1994 s 43.

52 *TVNZ Ltd* above n 49, 107.

The Judge also said that in some cases it was necessary to pay regard to any depreciating effect on the worth of the plaintiff's work.⁵³

In *Copyright Licensing Ltd v University of Auckland & Ors* the parties applied to the High Court for rulings on provisions in Part III of the Act. In relation to fair dealing, the Judge said:

In Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, 3rd ed, Butterworths, London, 2000 at paragraph 2016, three factors are identified in assessing whether a dealing is a fair dealing:

1. Whether the alleged fair dealing is commercially competing with the copyright proprietor's exploitation of the copyright work;
2. Whether the work has already been published;
3. The amount and importance of the work that has been taken.⁵⁴

The Judge said that the question of whether there had been a fair dealing with a work was one to be determined on the facts of a particular case.

The English Court of Appeal considered the meaning of 'fair dealing' for purposes of criticism or review, or reporting current events, in *Pro Sieben v Carlton*.⁵⁵ Robert Walker LJ said that fair dealing was:

a question of degree ... or of fact and impression ... The degree to which the challenged use competes with exploitation of copyright by the copyright owner is a very important consideration, but not the only consideration. The extent of the use is also relevant, but its relevance depends very much on the particular circumstances.⁵⁶

The Canadian decision in *CCH Canadian Ltd v Law Society of Upper Canada*⁵⁷ is of particular interest in relation to fair dealing as it offers a broad overall framework for interpretation, based explicitly on copyright principle. The Canadian provisions are broadly similar to the equivalent New Zealand Copyright Act provisions.⁵⁸ The Supreme Court said that the fair dealing exceptions should not be interpreted restrictively as these defences are users' rights. The Act did not define 'fair' and whether something was fair was a question of fact. Citing *Hubbard v Vosper*⁵⁹ and the United States doctrine of fair use, the Court approved a list of factors as a useful analytical framework to govern determinations of fairness in future cases. The factors to be considered (although they would not all arise in every case) in assessing whether a dealing was fair were: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

This fair dealing jurisprudence could usefully be applied to artistic works on public display, so that only fair dealing with such works was protected. Whether a dealing was fair would then be determined on the facts of the case, considering whether the dealing was reasonable taking into account the various relevant factors as discussed. To achieve this, s 73 could be amended to introduce a fair dealing element, so that it no longer grants a blanket exception, irrespective of fairness. The section could be amended to read as follows:

53 Ibid.

54 *Copyright Licensing Ltd v University of Auckland & Ors* [2002]3 NZLR 76, 82.

55 *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605, [1999] FSR 610.

56 Ibid.

57 *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339.

58 Copyright Act 1994 ss 42-43.

59 *Hubbard v Vosper* [1972] 1 All E.R. 1023 (C.A.), 1027.

Representation of certain artistic works on public display

(1) This section applies to the following works:

- (a) Buildings;
- (b) Works (being sculptures, models for buildings, or works of artistic craftsmanship) that are permanently situated in a public place or in premises open to the public.

(2) Copyright in a work to which this section applies is not infringed by fair dealing with the work which involves –

- (a) Copying the work by making a graphic work representing it; or
- (b) Copying the work by making a photograph or film of it; or
- (c) Broadcasting, or including in a cable programme, a visual image of the work.
- (d) Issue to the public of copies, or the broadcasting or inclusion in a cable programme, of anything whose making was, under this section, not an infringement of copyright.

In determining, for the purposes of this section, whether a dealing with the work constitutes fair dealing, a court shall have regard to:

(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

The provision would then provide protection for reasonable uses of the work, but not blanket protection that would protect every use covered by the section, even large-scale production of multiple copies for commercial gain, where fairness would suggest that a license should be sought. A fair dealing exception would also allow for a court to permit otherwise infringing uses of a work where an artist chose not to license the use, but where the Court believed there was an overriding public interest in allowing the use, for example where a new work was created by a transformative use, such as a parody.⁶⁰

A fair dealing exception for artistic works on public display would offer scope for judicial interpretation of when a dealing was fair, informed by the Berne three step test and informed by the jurisprudence on what constitutes a fair dealing.

As amended, a new s 73 would better protect artists/creators rights while also protecting the public interests in public art. However, it would still do nothing to protect the public interest in preservation of artworks and in continued access to public artworks. This would be better achieved (although not ensured) by a strengthened moral rights framework, in which waiver of moral rights was no longer available, and in which derogatory treatment was more broadly defined to include actions like withdrawing a work from public display.

VI. CONCLUSION

Section 73 of the Copyright Act is a powerful exception to the copyright protection provided to artists, architects and other creators of artistic works on public display. Ironically, these people comprise one of the very categories of people copyright law was designed to protect. The gap in protection is not adequately filled either by the moral rights provisions in the Copyright Act or by the protection offered by the designs regime.

In order to better balance the interests of creators and the public, a redrafting of s 73 is required. There is a need to strike a balance between the interests of the authors and artists and the interests of second-comers or creators of commercial derivative works. Broader public interests must also be considered. There are public interests in access to and reasonable use of public

⁶⁰ See for example *Campbell v Acuff-Rose Music, Inc* 510 U.S. 569, 590 (1994).

works. There is also a public interest in creation and preservation of artworks, and in the creation of future works. The law as it stands under-protects artists in some circumstances, to the benefit of subsequent commercial users. The artist's interest is in copyright protection that both provides for financial recognition and for protection and preservation of the work. The public interest is also in protecting and preserving artworks, and there is an additional public interest in allowing fair uses which acknowledge the public nature of the works.

At present, the New Zealand Copyright Act does not satisfactorily balance these competing interests. It provides copyright protection for public art, and it provides for limited, waivable moral rights for the artist. However it does not provide adequately for preservation of works, or even for continuing public access. In addition, it offers a blanket exception from protection, at the expense of the rights of authors. A better balance would be struck by introduction of a fair dealing exception to allow for fair uses of public art by the public, including reasonable non-competing uses of a commercial nature. This would be preferable to the blanket exception currently offered, which can permit unreasonable as well as reasonable uses. A strengthened moral rights framework would also assist in protecting artists rights while preserving public access.

AN EXAMINATION OF MEDICAL AND LEGAL ISSUES IN THE STRUGGLE OF NEW ZEALAND SAWMILL WORKERS AND ACC COVER FOR PCP POISONING

BY BERNHARD KREBER*

I INTRODUCTION

Since the 1940s chlorinated phenols, specifically pentachlorophenol (PCP), have found wide application in many industry sectors throughout the world including their use as pesticides to protect wood from fungal degradation.¹ Chlorophenol-based treatments were also widely used by the New Zealand timber industry for wood protection from the early 1950s. Furthermore, a host of products containing chlorinated phenols were available from retailers for domestic purposes, for example, to control moss and algae.² Exterior and interior wood stains containing PCP were also used widely for residential homes.³ While large quantities of PCP were sold worldwide an estimated 5000 tonnes was used by the timber industry over a 40 year period in New Zealand.⁴ Because of widespread, historical use of PCP products for industrial and domestic purposes PCP contamination has become ubiquitous in the environment, namely in soil, drinking and surface water, vegetable, fruits and livestock.⁵

Concern about the potential health risk of PCP exposure to European sawmill workers arose in the 1970s through findings that commercial PCP formulations contained a variety of contaminants, for example, polychlorinated dibenzo-dioxins (PCDDs) and polychlorinated dibenzofurans (PCDFs). PCDDs and PCDFs represent two groups of compounds with over 200 isomers, with some known for their high acute toxicity.⁶ For example, the most toxic and biologically active of the 75 PCDD isomers is 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD).⁷ The most toxic of the 135 PCDF isomers is 2, 3, 4, 7, 8 pentachlorodibenzofuran (4-PeCDF) which is half as

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1 D Graham, 'History of wood preservatives' in D Nicholas (ed) *Wood deterioration and its prevention by preservative treatments* (1973) 1, 17.

2 P Stevenson, 'The scandal of the PCP dumps.' *Terra Nova*, August 1992, 10-15, 11.

3 C Krause, M Chutsch, N Englert, 'Pentachlorophenol exposure through indoor use of wood preservatives in the Federal Republic of Germany' (1989) 15 *Environment International* 445-447.

4 K Dew, 'National identity and controversy: New Zealand's clean green image and pentachlorophenol' (March 1999) Vol 5 No 1 *Health and Place* 45-57, 48.

5 R Chhabra, R Maronpot, J Bucher, et al., 'Toxicology and carcinogenesis studies of pentachlorophenol in rats' (1999) Vol 48 *Toxicological Sciences*, 14-20.

6 U C Ahlborg, 'Health and environmental aspects of the use of chlorophenols with particular references to chlorophenol and dioxin toxicity' in *Chlorophenol wood treatments - safety and the environment* (1978) 11.

7 Ibid.

toxic as 3, 4, 7, 8-TCDD.⁸ Acute toxicity varies greatly between closely related PCDD and PCDF isomers. Because of potential health risks to sawmill workers Sweden became the first country to effectively de register all PCP based pesticides in 1978.⁹ Many European countries followed in the 1980s imposing bans on PCP based wood treatments. Other countries, for example Canada and the United States, have continued using PCP based products for pressure treatment of wood but have put in place strict management procedures that are thought to greatly reduce the risk of adverse effects to human health and the environment.¹⁰

In New Zealand, PCP pollution became the focus of attention when alarmingly high concentrations were detected in the sediment from Manukau harbour in 1988. The fear of widespread PCP pollution stipulated the set up of a National Task Group (NTG) in 1990 to determine the extent of PCP contaminated sites in the timber industry. Following growing local and international concern over PCP contamination New Zealand also banned the sale of PCP in 1991.¹¹ Subsequently, regulatory bodies attempted to develop guidelines to clean up contamination of the land in the 1990s, arguably in an attempt to maintain New Zealand's 'clean green' image.¹² In contrast, workers who claimed that occupational PCP exposure resulted in debilitating health effects receded into the background in such environmentally focused debate. Consequently, little support has been offered by governmental bodies to identify and compensate workers for illness suffered from working with PCP. In essence, sawmill workers claiming compensation from the Accident Compensation Corporation (ACC), the state run no fault insurance scheme covering industrial accidents, must demonstrate that the health effect suffered is both real and linked to PCP exposure during the course of employment, and is not substantially caused by other agents, or life style choices. Undoubtedly, that is a very heavy burden of proof and it is not surprising that workers have largely failed in doing this.

The object of the present research is to examine medical and legal issues that sawmill workers encounter in their struggle for compensation from ACC for ill health effects caused by PCP poisoning.

II. BACKGROUND ON PCP USE IN THE TIMBER INDUSTRY

PCP, one of the most important biocides used in the timber industry in the last century, is a crystalline phenolic compound. It has five substituted chlorine atoms at its phenolic ring, is largely water insoluble, has a vapour pressure of 10^{-4} mm Hg at 20 degrees Celsius, and exhibits a strong phenolic smell.¹³ PCP is soluble in organic solvents, for example, petroleum oil distillate such as white spirit or odourless kerosene. Wood treatments using PCP were typically performed in a treatment vessel using different pressure treatment processes. In New Zealand, a 5 per cent solu-

8 National Task Group on Site Contamination from the Use of Timber Treatment Chemicals, Study Team Report, NTG (1992), 'NTG Pentachlorophenol Risk Assessment Pilot Study' Camp Scott Furphy Pty. Ltd. 6-3.

9 Swedish Product Control Board, 'Press Release' (Stockholm), 27 May 1977

10 J Wilkinson, 'Pentachlorophenol. The US and Canadian experience' International Wood Preservation Symposium. The Challenge - Safety and Environment, Cannes-Mandelieu (France), 6-7 Feb 1995, 357.

11 'Still selling PCP's', (June 1992) *Terra Nova* 11.

12 Dew, above n 4, 45.

13 S Wood, W Rom, G White, et al., 'Pentachlorophenol poisoning' (July 1983) 25 *Journal of Occupational Medicine* 527.

tion of PCP in fuel oil replaced creosote in the 1950s to pressure treat poles.¹⁴ From the early 1960s PCP/oil treatments were performed using the Rueping process.¹⁵ At the Waipa sawmill in Rotorua, the Rueping process involved placing air dried wood into the treatment vessel, applying an initial pressure, flooding the vessel with 4 per cent weight/weight (%w/w) of PCP in oil solution, heating the vessel to 90 degrees Celsius, and then increasing the pressure to 950 to 1050 kilonewton per square meter (kN/m²). After about eight hours, at which time up to 150 litres per square meter (L/m²) was absorbed by the timber, the pressure was released causing the air trapped inside the wood to force excess solution from the timber. The treatment solution was withdrawn from the vessel and a final vacuum was then drawn to reduce bleeding of the PCP/oil solution from the timber. This process effected deeper chemical penetration of refractory wood species and also produced cleaner poles which reduced PCP bleeding in service.¹⁶ However, bleeding of excess PCP from treated wood still occurred during subsequent timber storage and from wood in service. Undoubtedly, PCP bleeding contributed to environmental pollution at treatment sites, and likely posed a health risk to workers handling treated wood.

PCP/oil treatments were used to provide permanent protection to wood from decay fungi in situations of moderate and high decay hazard, for example, railway sleepers, pilings, transmission poles, cross arms and fencing posts. However, PCP/oil was also used for exterior and occasionally interior wood stains to prevent growth of mould and sapstain fungi on decorative timber in service; it was usually applied by brush.

Undoubtedly, PCP is very toxic to a wide range of fungi and insects making it a highly effective wood preservative. Other advantageous properties of PCP are that it has a low vapour pressure, is stable and resistant to high treating temperatures, non corrosive, retains the natural colour of wood, can be over painted, and importantly, was very cost effective.¹⁷

Because of consumers' demand for clean wood showing no fungal discolouration antisapstain chemicals have been widely used since the early 20th century.

Sodium salt of PCP, commonly known as sodium pentachlorophenate (NaPCP), is water soluble. NaPCP was widely applied as a prophylactic, short term wood treatment to control development of a plethora of mould and sapstain fungi that colonise sapwood of freshly felled logs and unseasoned sawn lumber. Mould and sapstain fungi can utilize readily accessible wood compounds as food source, for example, simple wood sugars. As they penetrate fresh sapwood they form pigmented hyphae and spores; this causes aesthetic damage, commonly referred to as sapstain or bluestain, which does not affect the structural integrity of wood.

NaPCP is a highly effective wood surface treatment and was used at concentrations of up to 2.5 per cent w/w. At the Waipa sawmill, a mixture of 0.5 %w/w NaPCP and 1.5 per cent w/w pentahydrated borax was used as antisapstain treatment.¹⁸ NaPCP was commonly applied by immersion, by passing processed timber through large dip tanks, and occasionally by spray application. Following antisapstain treatment, wood is stacked and ideally allowed drying of excess solution under cover for 24 hours.

14 M Hedley and P Mills, Forest Research Institute New Zealand Forest Service (New Zealand) Technical Paper 64 'Service tests of softwood transmission poles in New Zealand' (1977) 5.

15 National Task Group, above n 8, 2-4.

16 Hedley and Mills, above n 14, 4.

17 A Bravery, 'Present uses of chlorophenols in wood treatments' in (1978) 3.

18 National Task Group, above n 8, 2-5.

In New Zealand, the boron diffusion process used for treating construction timber also contained NaPCP, for example, 0.2 %w/w was used at Waipa.¹⁹ Timber was dipped into a hot borate solution, and then block stacked under cover for six to eight weeks to allow diffusion of borates throughout the timber. NaPCP was added to prevent fungal infections occurring during the diffusion process when wood moisture content was high enough to encourage fungal growth.

III. BRIEF DESCRIPTION OF WORKERS' PCP EXPOSURE AND REPORTED SYMPTOMS

Significant amounts of PCP contamination including some dioxins were found at the Waipa sawmills.²⁰ This likely reflected the situation at other New Zealand sawmills that used PCP based wood treatment. As outlined above, sawmill workers came into contact with PCP when performing various jobs at sawmills with PCP exposure occurring through direct contact (PCP solution), dust, vapour and mist. Men working at the green chain, a site where freshly sawn timber was passed through a dip tank containing NaPCP solution and then stacked according to timber grade and size, had direct exposure which inevitably caused skin soakage by the PCP solution. Workers reported that after a day of work on the green chain they went home absolutely saturated from the sap running off the freshly treated timber, mainly in the areas of their thighs and feet.²¹ Although workers were given some protective equipment, for example, PVC gloves and aprons, the measures were generally inadequate. Workers reported that gloves tore open after a while and aprons funnelled chemicals into their boots, further promoting skin soakage.²²

Aprons were also said to impair freedom of movement and were thus discarded by some workers. Workers at the green chain wore shorts in the mild season of the year, and on hot days took their shirts off. This illustrates the general lax health and safety attitude workers had at that time. A Labour Department officer visiting the Waipa sawmill in 1990 when PCP use had discontinued, also observed very poor practices of workers and management dealing with wood treatment chemicals and treated wood, and commented that 'it was exactly the same when PCP was used.'²³

Another high (PCP) risk task also performed by graders was to manually mix the NaPCP solution.²⁴ Mixing of NaPCP solution was required daily and could be required three to four times a day depending on what timber size was in demand.²⁵ Workers also had to clean the dipping tank daily by scrubbing it out by hand to remove sludge accumulating at the bottom of the tank. The sludge was then stored onsite around the green chain area and periodically dumped somewhere offsite, for example, in a farmer's paddock.²⁶ In this context, farmland containing toxic waste (dumped sludge) from a Whakatane sawmill has been implicated in serious health problems of occupants.²⁷ Interestingly, a 1992 information sheet by the Occupational Safety and Health Service (OSH) issued a warning to sawmill workers of the health risks associated with PCP sludge, and advised on precautionary measures when handling and disposing of PCP sludge and PCP contam-

19 Ibid.

20 Ibid, ii.

21 'The poisoning of Papatuanuku', (March 1996) *Pu Kaea* 20, 22.

22 A Spence, 'The chain gang: nightmare at the mill' (March 2001) *North & South* 62, 66.

23 P Stevenson, 'PCPs: Crunch time for the timber industry' (August 1992) *Terra Nova* 20.

24 Spence, above n 22, 65.

25 'The poisoning of Papatuanuku' above n 21, 22.

26 Spence, above n 22, 65.

27 'When dreams turn poisonous' (8 June 2003) *Sunday Star Times* 5.

inated soil.²⁸ It is clear from workers' reports that none of those precautions, for example, chemically resistant impermeable overalls and respirators, recommended in the 1992 OSH information were used by workers when removing sludge contaminated with PCP from dip tanks. In the view of occupational physicians the nature of PCP exposure of green chain workers performing the different tasks mentioned above produced a constant high level of exposure.²⁹ Other tasks, for example, filleting of NaPCP treated timber, were thought to produce an intermittent low degree of exposure.³⁰

While NaPCP was used in nearly all sawmills leading to widespread exposure of workers, oil based PCP wood treatments were far less common in New Zealand. There were only five sawmill sites in New Zealand pressure treating wood with PCP/oil. However, reports from operators of pressure treatment plants and also responsible for preparing PCP/oil solution and removal of PCP sludge from the treatment cylinder, paint a grim picture of the working conditions. In essence, operators were constantly exposed to PCP dust and hot and smelly fumes.³¹ It is likely that oil fumes posed an additional burden on the health of operators. Protective equipment for these workers was usually inadequate, for example, safety goggles fogged up which caused workers to remove them to see what they were doing.³² Also, operators dealt with large quantities of PCP, reportedly handling up to 1,000 kilograms during a normal eight hour shift.³³ PCP spills which inevitably occurred, PCP bleeding of treated wood, and onsite PCP sludge disposal resulted in significant soil contamination, for example, adjacent to pressure treatment facilities and in sawmill well water that workers used for drinking.³⁴ Unsurprisingly, the nature of PCP exposure of treatment operators was considered constantly high.³⁵ It is also worthwhile mentioning that treatment plant operators worked with a range of different wood preservatives including chrome copper arsenate (CCA) and creosote.³⁶ Recently, the former wood preservative received considerable media attention as the public expressed concerns relating to potential health risks associated with use of CCA treated wood.³⁷ For sawmill workers however, the prolonged exposure to different wood preservatives likely caused an increased body burden. From an occupational health assessment view, workers with a history of exposure to *multiple* wood preservatives may face even greater difficulties establishing a causal relationship between PCP exposure and health problems. Exposure to other wood preservatives then becomes a confounding factor in workers' occupational history; ACC legislation however, requires workers to prove on a balance of probability that occupational exposure to a physical agent, such as PCP, caused alleged health problems. The issue of confounding factors will be discussed later.

28 Occupational Safety and Health Service [OSH], *Handling and Disposal of PCP Sludges at Timber Treatment Plants* (September 1992) available at <<http://www.osh.govt.nz/order/catalogue/pdf/pcp-i.pdf>>

29 Occupational Safety and Health Services [OSH], *An investigation into the health effects of previous occupational pentachlorophenol exposure on timber sawmill employees* (1996) 9.

30 Ibid.

31 P Stevenson, *No risk to Employees' Health* available at <<http://www.stevenson.net.nz/reup.html>>.

32 Ibid.

33 Ibid.

34 D Williams, 'On the PCP trail' (June 1002) *Terra Nova* 13.

35 OSH, above n 29, 9.

36 'The poisoning of Papatuanuka', above n 21, 22.

37 E Kwon, H Zhang, Z Wang, et al., 'Arsenic on the Hands of Children after Playing in Playgrounds' (2004 Oct) 112(14) *Environmental Health Perspectives* 1375–80.

There is little doubt that work related exposure to PCP has affected the quality of life of sawmill workers and their families. However, at the time of actually working with PCP workers largely had little or no awareness of the potential health consequences of PCP exposure. Concerns raised by workers, for example with their general practitioners, were often brushed aside.³⁸ Many sawmill workers reported various degrees of skin irritation, burning eye sensations, eye watering, and dizziness working around PCP.³⁹ Furthermore, many workers experienced on going problems with skin rashes and eye burning for many years following exposure to PCP. Interestingly, some family members experienced similar skin rashes and eye watering.⁴⁰ Other common symptoms included severe headaches, constant sinus problems and fever,⁴¹ extreme tiredness,⁴² reeking night sweats,⁴³ and severe weight loss⁴⁴. Some workers also reported coughing up blood and passing it in their faeces.⁴⁵ The workers also believe that PCP caused other diseases, for example, asthma, diabetes, heart problems, kidney and liver ailments and cancer.⁴⁶ As will be discussed below, medical evidence has not been able to support the workers' notion that PCP triggered these diseases.

IV. SELECTED MEDICAL STUDIES ON PCP POISONING

A relatively large body of medical publication has focused on establishing the effect of occupational PCP exposure on human health. For a layperson, medical research is confusing and often difficult to understand because of unfamiliar terminology. However, one gets a sense of the complexity and difficulty of medical science establishing a clear causal relationship between occupational PCP exposure and persistent health problems claimed by workers.

Medical research draws a distinction between acute and chronic consequences of PCP exposure. The Concise Medical Dictionary offers two meanings for acute, namely, 'disease of rapid onset, severe symptoms and brief duration' [and] 'any intense symptom, such as severe pain'.⁴⁷ Acute PCP consequences can occur though a single dose of exposure of sufficient severity. For example, skin irritation is well recognized as an acute symptom of PCP exposure. Severe instances of acute PCP poisoning have resulted in death of workers involved in preparing wood preservatives.⁴⁸ In contrast chronic is defined as 'disease of long duration involving very slow changes [and] often of gradual onset'.⁴⁹ Also, the term chronic makes no reference to the severity of the disease, but simply refers to a persistent health problem.⁵⁰ For chronic symptoms in workers, the frequency of PCP exposure and PCP concentrations used are likely important contributing factors.

The distinction between acute and chronic consequences of PCP exposure is not clear cut because some chronic effects are the persistence of acute health effects. While the medical com-

38 Stevenson, 'PCP's: crunch time for the industry', above n 23, 19.

39 Stevenson, above n 31.

40 Spence, above n 22, 69.

41 Spence, above n 22, 65.

42 'The poisoning of Papatuanuka', above n 21, 21.

43 H Murdoch, 'Ex-timber worker battles on with PCP poisoning' (15 May 2001) *The Nelson Mail* 6.

44 'The poisoning of Papatuanuka', above n 21, 22.

45 Stevenson, above n 31.

46 Spence, above n 22, 69.

47 E Martin, (ed) *Concise Medical Dictionary* (2002) 8.

48 Wood et al, above n 13, 528.

49 Martin, above n 47, 133.

50 Ibid.

munity has never questioned that PCP exposure can trigger a range of acute symptoms in the human body, chronic health effects have been a lot more problematic.⁵¹ I provide in Table 1 a list of some acute and chronic effects reported in humans following PCP exposure. Those effects have been observed following domestic and occupational PCP exposure. Not all effects listed in Table 1 were associated to PCP exposure of sawmill workers. Then, I give a snapshot of selected international and domestic medical studies to illustrate aspects of current medical knowledge on PCP poisoning in people. I further indicate why those medical findings have somewhat impeded the cause of New Zealand sawmill workers to get public acknowledgement that PCP poisoning severely impacted on their quality of life.

Table 1: Acute and alleged chronic health consequences in humans exposed to PCP.⁵²

Health Effect	Acute	Chronic
<i>Skin</i>	Irritation or burning of the skin after a single exposure to strong PCP solutions or prolonged and repeated exposure to lower PCP solutions	Chloracne, low grade skin inflammation and infection
<i>Eyes</i>	Eye irritation and itching	Conjunctivitis and/or eye discomfort
<i>Respiratory tract</i>	Irritation of nasal airways and upper respiratory tract	Sinusitis and irritation of the upper respiratory tract; bronchitis
<i>Endocrine and metabolic systems</i>	Fever, sweating, weakness, tachycardia, dyspnoea, hyperthermia, anorexia, diaphoresis, nausea, vomiting	Hyperpyrexia, diabetes, disturbances of lipid metabolism
<i>Nervous system</i>	Headaches, mental fatigue, dizziness, balance loss, ataxia	Dizziness, headache, personality and mood changes, peripheral neuropathy
<i>Cardiovascular system</i>	Increased heart rate, cardiac arrhythmia or arrest at acute PCP poisoning	
<i>Kidneys</i>	PCP accumulates in the kidneys	Reduced glomerular filtration rate and tubular reabsorption.
<i>Haemopoietic system</i>		Haemolysis, thrombocytopenia, aplastic anaemia
<i>Reproductive systems</i>		Increased risk to father off spring with congenital anomalies, including dislocation of hip, cleft lip, eye, genital organs
<i>Immune system</i>		Activated T-cell and B-cell dysfunction, Decrease in Ig G and Ig A immunoglobins
<i>Liver</i>	Increase in AST & ALT levels, hepatomegaly	
<i>Cancer</i>		Kidney, gastric, duodenal ulcer, soft tissue sarcoma

51 V Edwards, 'The danger of PCP exposure' (27 November 1996) *GP Weekly* 12.

52 Table 1 is a summary of some acute and chronic health effects reported in the 1996 OSH report.

A. Cancer

Several epidemiological studies have been undertaken to determine the relationship between chlorinated phenols including PCP and cancer. In the 1980s health care professionals and epidemiologists at the University of British Columbia in Canada (UBC) undertook the largest cohort study (more than 20,000 workers) to date to determine whether workers exposed to PCP and 3,4,6-tetrachlorophenol (TCP) were at an increased risk of cancer. PCP and TCP were widely used in British Columbia and by 1987 the province had consumed 1,100 tonnes annually to which over 100,000 workers were exposed.⁵³ A significant trend of increased risk of non-Hodgkin's lymphoma associated with increased exposure and small excesses in overall cancer incidences and lung cancer was observed, but none of the cancers of interest caused elevated mortality.⁵⁴ The UBC study could not establish a risk between childhood cancer and parental PCP exposure.⁵⁵ Finnish research observed an excess of skin cancer and leukaemia in sawmill workers.⁵⁶ Wolf and colleagues investigating malignant nasal tumours in the German wood working industry reported that PCP is genotoxic in nasal cells of human beings.⁵⁷ Except for the UBC study, a general limitation of epidemiologic studies is that the majority are based on relatively small sample sizes lacking statistical power to detect excessive cancer risk. Furthermore, most studies lack specific information on the types of chlorinated phenols workers were exposed to and cannot exclude confounding by other occupational carcinogenic agents. Clearly, exposure misclassification leading to underestimation of cancer risk of workers is an important consideration when interpreting findings.⁵⁸ Based on these limitations the International Agency for Research on Cancer considers there is sufficient scientific evidence from animal studies for carcinogenicity of PCP but has classified the evidence regarding human carcinogenicity as limited.⁵⁹ Animal carcinogenesis studies are the prime indicators of potential carcinogenicity risk to humans. Furthermore, a perfect correlation has been found for all human carcinogens that have been tested in animals.⁶⁰ However, animal bioassays often centre on individual agents. In reality however, human cancer is probably caused by multiple factors including individual genetic susceptibility and lifestyles.

B. Reproductive effects.

Offspring of male sawmill workers in British Columbia were at an increased risk of developing congenital anomalies, for example, congenital cataracts, but no association was found with low

53 C Hertzman, K Teschke, A Ostry, et al., 'Mortality and cancer incidence among sawmill workers exposed to chlorophenolate wood preservatives' (1997) 87(1) *American Journal of Public Health*, 71–9.

54 Ibid.

55 H Heacock, C Hertzman, P Demers, et al., 'Childhood cancer in the offspring of male sawmill workers occupationally exposed to chlorophenolate fungicides' (2000 Jun) 108(6) *Environmental Health Perspectives* 499–503.

56 P Jappinen, et al., 'Cancer Incidence of Workers in Finnish Sawmill (1989) 15 *Scand. J. Work Environ. Health* 18–23.

57 J Wolf, P Schmelzer, D Fengel, et al., 'The Role of Combination Effects on the Etiology of Malignant Nasal Tumours in the Wood-Working Industry: Most Recent Findings and Analysis of 147 Indemnified Cases of Adenocarcinomas' (30 July 1998) Volume 118, Supplement 535 *Acta Oto-Laryngologica* 3–16, 15.

58 M Kogevinas, H Becher, T Benn, et al., 'Cancer mortality in workers exposed to phenoxy herbicides, chlorophenols, and dioxins: an expanded and updated international cohort study' (1997) 145 *American Journal of Epidemiology* 1061–75, 1073.

59 J Huff, 'Sawmill Chemicals and Carcinogenesis' (2001) 109 *Environmental Health Perspectives* 209–212, 211.

60 Huff, above n 59, 209.

birth weight, still birth or prematurity.⁶¹ Significantly reduced birth weight and length were found in offspring of female day care workers exposed to wood preservatives including PCP; reduced birth weight was suggested to be a childhood risk factor for some adverse health effects.⁶² PCP has been detected in semen of exposed sawmill workers.⁶³ In this context, New Zealand sawmill workers believe that some health problems suffered by their children, for example, persistent irritations of the skin, are related to PCP poisoning. New Zealand sawmill workers took their work clothes home where they were often washed together with other family clothes; thus indirect PCP exposure of children is theoretically plausible.

C. Neurological problems

Peper and colleagues suggested that long term domestic exposure (inhalation) to wood preservatives including PCP has adverse effects on neurobehavioral performance, for example, working memory, and is further related to frequent subjective complaints including increased fatigue, distractibility and mood swings in women.⁶⁴ However, considerable heterogeneity of exposure conditions between and within exposed subjects and confounding factors such as solvents, pigments, and other contaminants found in wood preservatives was noted. New Zealand studies have also noted neurological dysfunctions in exposed sawmill workers as discussed below.

D. New Zealand research on PCP effects

Overseas research, starting in the 1970s, indicated serious health and environmental problems associated with occupational PCP use. Research in New Zealand, despite the widespread use of PCP in the timber industry and for domestic purposes, did not commence until the late 1980s when findings of high PCP sediment levels in the Manukau harbour caused the government to set up a National Task Group (NTG) to examine environmental issues. Specifically, NTG's mandate was to assess the extent of PCP contaminated sites and advise the government and industry on policies concerning liability and clean up.⁶⁵ In contrast, the impact of widespread PCP use on workers' health has received much less attention, and did not gain momentum until 1995 when several timber companies commissioned medical experts to undertake a literature review on the health effects of PCP.⁶⁶ The review confirmed that exposure to PCP in the timber industry causes a range of acute health effects (Table 1), but the literature review did not provide conclusive evidence of long term health effects. An immediate action arising out of the literature review was the set up of an OSH initiated, questionnaire based study by medical experts, involving current and ex workers

61 H Dimich-Ward, C Hertzman, K Teschke, et al., 'Reproductive effects of paternal exposure to chlorophenolate wood preservatives in the sawmill industry' (1996) vol 22 no 4 *Scandinavian journal of work, environment and health* 267-273.

62 W Karmaus and N Wolf, 'Reduced birthweight and length in the offspring of females exposed to PCDFs, PCP, and lindane' (1995 December) 103(12) *Environmental Health Perspectives* 1120-1125.

63 Dimich-Ward, et al., above n 61, 271.

64 M Peper, M Ertl and I Gerhard 'Long-term exposure to wood-preserving chemicals containing pentachlorophenol and lindane is related to neurobehavioral performance in women' (1999) Vol 35 Iss 6 *American Journal of Industrial Medicine* 632-641.

65 National Task Group, above n 8, 1-2.

66 OSH, above n 29, 18.

who felt their symptoms of ill health was attributed to PCP use.⁶⁷ The study investigating disease and symptom prevalence in a non random sample of sawmill workers found a strong association between PCP exposure estimates of individuals and the frequency of acute symptoms. The study further showed an apparent close relationship of some acute effects of PCP, specifically, persistent fever (sweating), weight loss, fatigue, nausea as well as a screening measure for neuropsychological dysfunctions. In essence, the OSH study provided strong evidence of long term effects of PCP and also mirrored the clinical experience of two authors.⁶⁸ Limitations of the OSH study noted were the small sample size of 127 workers, the self selective nature of the population investigated and the lack of controls.⁶⁹ In 1997, the New Zealand Engineers Printing and Manufactures Union (EPMU) undertook a survey of members primarily involved in mill maintenance, for example, welding tanks containing PCP residue, and suggested a range of persistent health effects, for example headaches, fatigue, breathing difficulties and mood swings, which were attributed to past PCP exposure.⁷⁰ Subsequently, EPMU with the input of the Wood Industries Union, set up a register to identify sawmill workers who alleged ill health due to PCP exposure and assist with ACC claims. A 1999 telephone questionnaire study conducted by 5th year medical students found that the majority of workers suffered from a high percentage of symptoms at relatively low exposure levels and problems of neurological origin; headaches, mood changes and depression were the leading complaints.⁷¹ An assessment of 62 PCP exposed workers undertaken to determine clinical syndromes that could be related to PCP exposure identified three groups of syndromes as follows:

- i) acute symptoms of fever, headaches, upper and lower respiratory tract and eye irritation, skin disease and foul smelling and discoloured sweat. These symptoms, with the exception of sweating and skin disease, often resolved after workers left the timber industry;
- ii) a chronic fatigue syndrome in workers starting during PCP exposure and often persisting following their PCP exposure;
- iii) a delayed encephalopathy (various diseases affecting the function of the brain) developing well after workers had left the timber industry including anxiety, depression, behavioural, cognitive and personality problems, and confusion.⁷²

This latter syndrome complex was found in more than a third of the cohorts studied. The authors suggested thought that none of the syndromes were characteristic of PCP poisoning because many confounders identified questioned the specificity of symptoms.⁷³ A study commissioned by Sawmill Workers Against Poison (SWAP) showed a large number of sawmill workers had symptoms

67 C Walls, W Glass, N Pearce, 'Health effects of occupational pentachlorophenol exposure in timber sawmill employees: a preliminary study' (1998) 111 *NZ Medical Journal* 362–4.

68 *Ibid.*, 364.

69 D Gorman, J Monigatti, B Glass, B., et al 'Assessment of pentachlorophenol-exposed timber workers using a test-of-poisoning model' (2001) 7 *Int. J. Occup. Environ. Health* 189–194.

70 N Bandaranayake, B Caldwell, F Connell, et al., *PCP in the timber industry: A follow-up of exposed workers* (1999) Appendix 3.

71 *Ibid.*, 25.

72 Gorman, above n 69, 189

73 Gorman, above n 69, 193.

attributed to PCP exposure including high blood pressure, depression, mood swings, blood disorders and cancer.⁷⁴

E. Presence of PCP in human urine and blood

Indoor use of wood preservatives containing PCP resulted in occupants showing three times the levels of PCP in their urine than the controls. But with the exception of reddening of tonsils in men, depression in women and slightly elevated basophil counts, no pathological symptoms or alterations suggesting an association to PCP exposure were detected in persons with high PCP exposure despite credible complaints of severe health problems.⁷⁵ Increased blood levels of PCP found in patients with long term, low dose PCP exposure were associated with cellular and humoral immunodeficiency leading the researcher to suggest a causal relationship between immune dysfunction and clinical symptoms, for example, recurrent respiratory infections (colds) and chronic fatigue.⁷⁶ Triebig, in a response to the former study, argued that many confounding factors, for example, age, gender, medication, viral infection, stress, smoking and alcohol consumption can influence immune dysfunction, thus high PCP levels in blood does not prove causation.⁷⁷ New Zealand sawmill workers who had constant high PCP exposure, for example, at the green chain, showed high PCP levels in urine specimens prompting mill management to shift workers to areas with less PCP exposure. However due to insufficient medical data, occupational physicians, are unclear how to interpret PCP levels found in humans, specifically at what levels a person can expect health problems.⁷⁸ This is in contrast to other well known occupational diseases, for example, lead poisoning, where biological measurements can be related to workers' health outcomes.

The research summarized above shows that PCP exposure can be associated by the worker with 'non specific, difficult to measure symptoms of ill health or unusual disease entities'⁷⁹. Medical experts in New Zealand maintain that long term health effects of occupational PCP exposure remain uncertain and they are supported in their view by the general lack of published, scientific information linking cause and effect(s).⁸⁰ Calls from the medical science community for further studies have now been answered in New Zealand, and a study is underway at Massey University to investigate health outcomes of former timber workers exposed to PCP.⁸¹ As PCP use in the timber industry stopped in 1988 many of the worst affected workers have reportedly already died. In my view, it is questionable whether this study can establish a clear link between PCP poisoning and ill health effects considering the subjectivity of some of the symptoms which make it very difficult to establish scientific certainty for PCP poisoning. Scientific certainty may not be possible in the face of the inherent difficulty associated with correct determination of the amount and type of exposure, symptoms not uniquely associated with exposure, latency between exposure and ef-

74 Daily Post Rotorua 'Survey of sawmillers and families face "health risk"' (26 June 2002) *The New Zealand Herald* available at <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=2048748>

75 Krause, above n 3, 446.

76 V Daniel, W Huber, K Bauer, et al., 'Association of Elevated Blood Levels of Pentachlorophenol (PCP) with Cellular and Humoral Immunodeficiencies' (2001) 1 *Archives of Environmental Health* 77.

77 G Triebig, 'Letter to the Editor' (1997) 2 *Archives of Environmental Health* 148.

78 Edwards, above n 51, 12.

79 Walls et al, above n 67, 364.

80 Ibid.

81 Massey University, 'Health outcomes of former New Zealand timber workers exposed to pentachlorophenol (PCP)', available at <<http://publichealth.massey.ac.nz/research/CPHRBased/Completed/resocccp.htm>>

fect, and conflicting scientific evidence on the effects of exposure.⁸² Arguably, there can be no certainty in science. Science however, can offer a story that explains best a particular phenomenon at a certain point in time.

Former timber workers argue there is no need for further research to tell them what health problems they suffer and they believe sufficient evidence is already available that PCP poisoning has harmed them.⁸³ In the following I will examine the legal barriers that sawmill workers face to get cover under the New Zealand accident compensation scheme.

V. NEW ZEALAND ACCIDENT COMPENSATION SCHEME(S)

A. *The Beginning*

Prior to ACC the common law provided one avenue to claim compensation for personal injury where the personal injury could be attributed to negligence.⁸⁴ The common law remedy however, was considered flawed; for example, it was unable to compensate large numbers of victims and guarantee damages thus impeding rehabilitation of injured people, and took a long time to deliver benefits to those who did secure them.⁸⁵ Statutory compensation systems supplemented the common law, for example, the Workers' Compensation Act 1908 further amended in 1922 and 1956, which was backed by compulsory but privately administered insurance; it offered compensation for workers if injured at, but not out of, work.⁸⁶ It is interesting to note that the 1908 Act already included occupational diseases such as anthrax and lead, mercury and arsenic poisoning, and lump sum payment for loss of function.⁸⁷ In addition to Workers' Compensation Act, the Social Security Act 1964 offered some assistance with pressing needs, if the means test was met.⁸⁸ However, the common law and workers' compensation were regarded as highly inefficient, fragmented and capricious. Perhaps the most important criticism of the pre ACC system was that large amounts of money were absorbed by legal and administrative costs.⁸⁹ The Woodhouse Commission (Woodhouse) bluntly documented the general inadequacy associated with remedies available to workers. Specifically, Woodhouse recognized that injuries result in costs; for example, lost income, loss of work and production capacity, and medical costs, and 'the community as a whole has a responsi-

82 K Dew, 'Accident insurance, sickness and science: New Zealand's no-fault system' (2002) 32(1) *International Journal of Health Services* 163–178, 173.

83 N Boyes, 'Former timber workers say there's no need for new dioxin study', (27 September 2004) *The New Zealand Herald* available at <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=3595005>.

84 P McKenzie, 'The compensation scheme no one asked for: The origins of ACC in New Zealand' (2003) *Victoria University of Wellington Law Report* 193, 195 available at <http://www.austlii.edu.au/nz/journals/VUWLRRev/2003/10.html>.

85 G Palmer, 'The Nineteen-Seventies: Summary for presentation to the Accident Compensation Symposium' (2003) *Victoria University of Wellington Law Report* 239, 241 available at <http://www.austlii.edu.au/nz/journals/VUWLRRev/2003/13.html>.

86 McKenzie, above n 84, 195.

87 I Campbell, 'Compensation for personal injury in New Zealand: its rise and fall' (1996) 17.

88 McKenzie, above n 84, 195.

89 B Easton, 'The historical context of the Woodhouse commission' (2003) *Victoria University of Wellington Law Report* 207, 211 available at <http://www.austlii.edu.au/nz/journals/VUWLRRev/2003/11.html>.

bility to distribute those costs according to the principles of social equity'.⁹⁰ The new system was designed to remove 'once and for all the perceived delays, waste and unfairness of disparate systems'.⁹¹ Woodhouse recommended a set of five coherent and acceptable principles as the foundation of a new social insurance regime to alleviate mounting social problems arising from personal injury.⁹² Proposing a new standard of public entitlement Woodhouse advocated real compensation similar to common law damages to all accident victims to compensate for economic and physical loss regardless of whether the injury was caused by fault.⁹³ Removing the element of fault which determines common law damages, Woodhouse suggested that compensation for personal injury was a matter of public welfare, thus the responsibility of the community. After long debate, policy makers enacted the first accident compensation legislation in 1973 which was to be administered by a government department.⁹⁴ It has been suggested that with this enactment New Zealand became the first country in the world to set up a coordinated public response to victims suffering personal injuries.⁹⁵

A unique feature of ACC is a comprehensive, non fault compensation system providing 24 hour coverage in respect of all personal injuries regardless of cause.⁹⁶ ACC's focus was on the victim and not 'the culpability or fault of whoever has caused the events giving rise to cover'.⁹⁷ That 24 hour coverage on a no fault basis has largely remained the grundnorm throughout the scheme's history.⁹⁸ In return for ACC entitlements the Accident Compensation Act 1972 prohibited the right to sue in a New Zealand Court to recover damages for personal injury suffered in New Zealand to those persons covered by ACC.⁹⁹ That prohibition, which has been largely carried forward in subsequent accident compensation legislation, is frequently referred to as a social contract.

ACC was celebrated as a revolutionary measure providing certainty and encouraging early rehabilitation of victims.¹⁰⁰ In the first 18 years, ACC was administered generously providing real compensation (lump sum, pain and suffering) generally leaving recipients of ACC benefits reasonably content.¹⁰¹

B. ACC after 1992

In the late 1970s and 1980s many countries recognised the growing power of market systems and concepts such as free market and free choice increasingly dominated public debate. Neo-liberal

90 R Gaskins, 'Rebuilding ACC: An International View' in *Rebuilding ACC beyond 2000 : papers from a conference on reformulating the Woodhouse principles for a modern social insurance scheme in the new century, July 1999, Michael Fowler Centre, Wellington* (1999) 13, 18.

91 O Woodhouse, 'ACC: Integration or demarcation' in *Rebuilding ACC* above n 90, 6.

92 McKenzie, above n 84, 203.

93 J Ferguson, 'Medical Misadventure under Accident Compensation: Diagnosis and Treatment of a Problem' [2003] *NZLR* 485, 490.

94 Palmer, above n 85, 241.

95 Gaskin, above n 90, 15.

96 A Clayton, 'Some reflections on the Woodhouse and ACC legacy' (2003) *Victoria University of Wellington Law Report* 450, 456 available at <http://www.austlii.edu.au/nz/journals/VUWLRRev/2003/28.html>.

97 Ferguson, above n 93, 491.

98 Clayton, above n 96, 456.

99 D Rennie, 'Comprehensive entitlement' in *Rebuilding ACC* above n 90, 27.

100 A Duffy, 'The common-law response to the accident compensation scheme' (2003) *Victoria University of Wellington Law Report* 367 available at <http://www.austlii.edu.au/nz/journals/VUWLRRev/2003/21.html>.

101 Ferguson, above n 93, 493.

market concepts also gained control in New Zealand in the late 1970s and 1980s causing major ideological shifts in public policy 'away from state building policies and towards market systems as the new guardians of public welfare'.¹⁰²

As public policies are ultimately driven by political priorities of the party in government, liberal market ideologies did not seriously impact on ACC until the national government enacted the 1992 Accident Rehabilitation and Compensation Insurance Act (1992 Act).¹⁰³ The long title of that Act claimed that persons suffering personal injury will be 'compensate[d] in an equitable and financially affordable manner'.¹⁰⁴ Arguably, the words 'financially affordable manner' implied National's view that that the two previous accident compensation legislation had granted ACC too much discretion resulting in an escalation in cost. Thus, National restricted ACC's discretion by enacting tighter definitions, for example, of accident, personal injury and medical misadventure, and the removal of two lump sum entitlements; one for permanent disability and the other for loss of amenity and pain suffering. The 1992 Act reflected the general trend in government's policies of the 1990s; user pays, cut backs in the level of benefits and the delivery of services under contractual arrangements to government funding organizations.

As ACC's focus has changed from a needs based to a cost savings approach it has greatly impacted on the generosity of ACC. This has caused widespread public discontent and a call for justice from some victims claiming the nature of the social contract has been damaged. Sawmill workers alleging ill health due to PCP poisoning arising out of their employment represent one such group of victims facing great injustice. Sawmill workers firmly believe they have suffered a personal injury due to occupational PCP exposure and should be granted full ACC entitlements. ACC's hard rules however have continued to disregard the needs of affected workers. In the following discussion I will look at the specific provisions relating to diseases arising out of employment.

VI. PERSONAL INJURY CAUSED BY WORK RELATED GRADUAL PROCESS, DISEASE OR INFECTION

Personal injury caused exclusively or substantially by gradual process, disease or infection has never been part of New Zealand's accident compensation schemes unless the disease was personal injury by accident; in which case personal injury included the physical manifestation of the accident, namely the disease.¹⁰⁵ This separation between sickness and accident suggests an inconsistency in social policy considering that disease, like personal injury, is a mishap to the person, and not a choice one makes in life. There is little doubt that a disease can have serious consequences for the individual and their family, and also the wider community. Fortunately, the ambit of Accident Compensation Act 1972, and the 1973 Amendment to that Act and the Accident Compensation Act 1982 (1982 Act) gave wide discretion to ACC to deal with unusual circumstances and reasonable doubt in favour of the applicant; this is clearly exemplified in *ACC v E*.¹⁰⁶

102 R Gaskins, 'Recalling the future of ACC' (2000) *Victoria University of Wellington Law Report* 215, 222 available at <http://www.austlii.edu.au/nz/journals/VUWLR/2000/17.html>.

103 Accident Rehabilitation and Compensation Insurance Act 1992.

104 Campbell, above n 87, 92.

105 *Stok v Accident Compensation Corporation* [1995] NZAR 396.

106 [1992] NZLR 426.

While personal injury caused by disease exclusively does not qualify for ACC entitlement ACC has long acknowledged, for example, in s28 of the 1982 Act, that workers are eligible for compensation for diseases arising out of employment. The 1992 Act however, introduced new legislation through s7 to qualify personal injury that is the consequence of occupational or work related disease. The essential focus of s7 of the 1992 Act is upon causation. That focus has been carried forward in s30(2) of the Injury Prevention, Rehabilitation and Compensation Act (IPRCA) 2001. It is undisputed that the 1992 Act has severely constrained the scope of coverage for work related disease or infection and has added further complexity.¹⁰⁷

Determination of compensation for work related process, disease or infection is often very difficult as it involves consideration of complex, multiple factors. Following the 1992 Act however, workers claiming a particular type of personal injury, namely that caused by gradual process, disease or infection in the course of employment, had to meet strict qualifying conditions that assess the employment risk as outlined in s7(1) of the 1992 Act and s30(2) of the present IPRCA. In essence these sections prescribe when particular types of personal injury due to gradual process, disease or infection contracted in a work place are established.

Before I discuss the specific qualifying conditions it is important to note that all claims for personal injury caused by gradual process, disease or infection must satisfy the qualifications defined in the relevant ACC legislation unless the personal injury is derived from exposure in employment to dangerous substances described in the Schedule(s) of the Act. For example, mesothelioma caused by exposure to asbestos is an acknowledged personal injury listed in Schedule 2 IPRCA. Therefore, if mesothelioma is contracted in employment a claimant suffering such personal injury is entitled to compensation providing the disease results in the person's incapacity. Importantly, a person suffering a Schedule 2 injury is not required to undertake an assessment of causation pursuant to s30(4).¹⁰⁸ The implications from that are that once a claimant has established a Schedule 2 personal injury then the onus is on ACC to prove that the person's personal injury has a cause other than employment or falls outside a Schedule 2 personal injury as stated in s60 IPRCA.

The situation however, is very different for timber workers experiencing a wide range of symptoms due to prolonged, occupational PCP exposure because the list of dangerous substances and occupational diseases in Schedule 2 makes no reference to any diseases relating to PCP exposure. This means timber workers are not only required to establish that the personal injury or alleged disease is a consequence of PCP exposure in the course of employment but must also meet strict qualifying conditions before ACC grants cover.¹⁰⁹ Panckhurst J summarized the three qualifying, cumulative pre conditions set out in s7(1)(a),(b) and (c) of the 1992 Act as follows:

First, the employment task had a particular causative property or characteristic. Next that such property or characteristic is not materially found in the person's non employment activities. Third that persons performing the particular employment task are known to be at significantly greater risk of suffering the injury in question.¹¹⁰

The onus on the claimant to satisfy the three cumulative pre conditions heavily suggesting that parliament intended to compensate for personal injury said to be caused by work related gradual

107 Campbell, above n 87, 109.

108 *ACC v Estate of Lehmann* [2004] District Court, Wellington 225/04 (Unreported, Ongley DCJ, 11 August 2004).

109 Ibid.

110 *JBDB v ARCIC* [2000] NZAR 385.

process, disease or infection, only in clear cases.¹¹¹ It is logical that to apply the tests in s7(1) it is necessary to define the injury.

With regard to the 7(1)(a) inquiry, Ongley J stated in *Mallia v ARCIC*, (a case on sick building syndrome, an umbrella term for patients with a variety of symptoms, controversial in nature and cause but volatile organic compounds, for example, formaldehyde in the building environment which has been implicated in the literature) that the inquiry considers whether there is sufficient evidence to demonstrate that the environment in which the claimant performed the employment task had the property or characteristic of exceeding the formaldehyde levels of 0.1pm, a guideline comfort limit, more or less continuously.¹¹² Because formaldehyde levels determined were consistently above the upper limit of 0.1pm, Ongley J decided that on the balance of probabilities the levels were sufficiently high to cause the appellant's discomfort.¹¹³ Applying *Mallia*, sawmill workers must provide sufficient evidence that on the balance of probability occupational PCP exposure consistently exceeded acceptable PCP levels, and caused adverse human health effects. Threshold levels below which no adverse effects will be experienced have also been estimated for PCP and PCDDs/PCDFs.¹¹⁴ For example, the NTG for the Waipa study adopted an Acceptable Daily Intake (ADI) of 0.03 mg PCP per kilogram of bodyweight per day as appropriate for non carcinogenic human health effects.¹¹⁵ An estimated minimal oral lethal dose of about 30mg/kg in humans has been reported for PCP.¹¹⁶ Similar dose levels administered through inhalation and skin contact, the chief routes of exposure to PCP in an industrial setting, are thought to have a similar degree of toxicity.¹¹⁷

It seems that not only scientific information but also considerable value judgment is required to determine whether PCP levels in sawmills exceeded threshold limits below which no observable health effects may be expected. In my view there is circumstantial evidence that PCP levels were sufficiently high to cause worker's discomfort, at least. I support that proposition using published data as follows:

1. The NTG determined significant concentrations of PCP in the soil at Waipa ranging from 0.35–3600 mg/kg in the vicinity of the green chain and 50–1250 mg/kg in the vicinity of the Rueping plant.¹¹⁸ Highest concentrations were associated with soil surfaces (0.5 cm). Furthermore, marked PCP levels were confined to Waipa sawmill and an adjacent stream.¹¹⁹
2. In the environment, PCP rapidly degrades by exposure to the sun but low oxygen levels in soil cause PCP to persist. For example, PCP has a half life of 10–70 days in flooded soil.¹²⁰ However, sawmill soil is not water logged for extended periods of the year. Therefore PCP degradation would occur at a faster rate for most times of the year.

111 Ibid.

112 *Mallia v ARCIC* [1996] 1 BACR 386.

113 Ibid.

114 National Task Group, above n 8, 6–19.

115 National Task Group, above n 8, 6–3.

116 P Jorens and P Schepens, 'Human pentachlorophenol poisoning' (1993 Nov) 12(6) *Human & Experimental Toxicology* 479–95.

117 OSH above n 29, 25.

118 National Task Group, above n 8, ii.

119 S Anderson, S Buckland, J Gifford, et al., 'Pentachlorophenol (PCP), PCDD, PCDF and pesticide concentrations in a fresh-water lake catchment' (1996) 32(11) *Chemosphere* 02097–02113, 2111.

120 National Task Group, above n 8, 6–2.

3. Considering the reported half life of PCP in soil and the fact that the PCP measurements at Waipa were undertaken three years after PCP was used, it is reasonable to conclude that those PCP levels found are unlikely to have been less when workers were using PCP for timber treatments.
4. The PCP levels determined at Waipa likely reflect the situation at other sawmills with high PCP use, for example, in Whakatane.
5. Theoretically, the lethal oral dose for a worker weighing 100kg would be at least 3g of PCP. Using the Waipa data one kilogram of soil could contain up to 3.6g of PCP. It is plausible that at the upper PCP levels found in Waipa soil, workers were placed at a significantly high risk. For example, inhalation of PCP tainted soil particles (dust) is a known route of human exposure in industrial settings.¹²¹ NTG also documented significant concentrations of PCDD/PCDF in soil and suggested that Waipa workers in the green chain area exceeded the ADI for PCDD/PCDF through inhalation and ingestion of contaminated dust.¹²²
6. Tests of individual timber workers confirmed PCP in their urine.¹²³ PCP in the human body can trigger a range of acute health effects which indicates it is acting as a human toxicant. It is accepted that medical experts have insufficient understanding of what these levels mean in terms of advising a patient whether they will get a disease in the long term.¹²⁴
7. Test on three sawmill workers performed seven years after the Whakatane mill closure showed dioxin blood levels that were four to five times above levels the World Health Organisation regards as safe.¹²⁵

From the above it seems reasonable to propose that the property or characteristic in sawmills causing or significantly contributing to worker's ill health was constant exposure to high levels of PCP. This resulted in cumulative body burden through inhalation and skin absorption, and ultimately in personal injury.

The proposition just described is not sufficient to satisfy the qualifying condition under 7(1)(a) unless a claimant can document an occupational exposure history revealing long and intense exposure to PCP.¹²⁶ Such exposure history takes into account months of exposure, task(s) undertaken, what PCP process was used (water based or oil based), adequacy of personal protection and severity of exposure.¹²⁷ Furthermore, the appellant must show relevant symptoms in keeping with associations documented for PCP poisoning in medical literature.¹²⁸ For example, persistent fatigue has been associated with sawmill workers who showed a high PCP exposure history.¹²⁹

Importantly, appellants must show that there is a physical injury resulting in a range of symptoms, and that but for the original physical injury, the symptoms or illness from which they suffer would not have occurred.¹³⁰ Ongley J stated in *ACC v Smith*, a case on occupational chemical poisoning, that the existence of physical injury being irritation (red mucosae), is not to be decided from physical consequences that may only be symptoms and not caused by any physical

121 Wood et al, above n 13, 527.

122 National Task Group, above n 8, Appendix H at 24.

123 Spence, above n 22, 65.

124 Edwards, above n 51, 12.

125 V Edwards, 'Frustrated workers' (15 May 2002) *New Zealand GP* 20.

126 OSH, above n 29, 40.

127 Ibid, 9.

128 Ibid, 40.

129 Walls et al, above n 67, 362.

130 *ACC v Smith* [2002] District Court, Palmerston North 76/02 (Unreported, Ongley J, 7 March 2002).

effect.¹³¹ For example, some people will faint at the sight of blood without any physical effect but the symptom itself. Following *ACC v Smith* a noxious element, for example, PCP, must cause or significantly contribute to physical damage. In my opinion, sawmill workers could argue that irritations of skin, eyes and respiratory tract which are well documented, were immediate physical manifestations of injuries caused by PCP exposure. I further suggest that those physical injuries suffered by sawmill workers are personal injuries that fall within the definition of s7 of the 1992 Act.¹³² In *Flay v ARCIC*, another case on chemical poisoning, Ongley J decided that the appellant's long term consequences which did not fit into any known pattern of illness, would unlikely have occurred but for the physical effect experienced in the first place.¹³³ Thus, Ongley J, while accepting the medical contention that physical consequences of exposure should have abated in a short time and the remaining illness could have stemmed from other causes that were of psychogenic origins, held that those other causes could not be separated from the physical consequences of the appellant's exposure.¹³⁴ In essence, Ongley J held that the defendant's whole health problems stemmed from exposure to a noxious element and rejected the possibility that, if the exposure had not caused physical distress, her serious illness would have occurred in any case. Sawmill workers also suffer from a range of long term consequences that do not fit into any characteristic pattern of disease. The question is whether those persistent health problems stem from a separate cause that would have occurred in any event. In my view, it is highly improbable that the general debilitating conditions sawmill workers suffer would have occurred in any event if PCP had not caused physical distress; this distress then set off a chain of persistent symptoms resulting in the debilitating health of workers.

The second qualifying pre condition set out in s7(1)(b) of the 1992 Act requires an appellant to demonstrate that the property or characteristic, namely high PCP levels, were not found to any material extent in their non work environment. While PCP has become ubiquitous in the environment including the food chain, those levels are very much lower than found at sawmill sites. According to Ongley J a claimant is entitled to cover if 'a contributory cause from non employment activities with marginal effect is not material'.¹³⁵ In my opinion, there is insufficient evidence to indicate that non work related PCP exposure would have substantially caused those syndromes in sawmill workers.

Under the s7(1)(b) inquiry however, any other factor which could equally cause the symptoms claimants display must be considered and discounted as being material. Beattie J held in *Thomas v ARCIC and Carter Holt Harvey Ltd*, a case where the appellant suffered from solvent neurotoxicity from PCP exposure, that drug and alcohol abuse, which medical evidence suggested could also cause the appellant's symptoms, are two such factors that fall under the s7(1)(b) inquiry.¹³⁶ Additional factors that must be discounted as being material to the symptoms claimed could include exposure to other wood preservatives and concurrent diseases, for example, diabetes, medication, head injuries or depression. For example, in *Thomas v ARCIC and Carter Holt Harvey Ltd* a

131 Ibid.

132 *Flay v ARCIC* [1996] District Court, Whangarei 144/96 (Unreported, Middleton J, 29 November 1996).

133 *ACC v Doyle* [2002] District Court, Wellington 270/2004 (Unreported, Ongley J, 7 March 2002).

134 Ibid.

135 *Mallia* above n 112, 398.

136 *Thomas v ARCIC and Carter Holt Harvey Limited* [1999] Christchurch District Court 373/99 (Unreported, Beattie J, 25 November 1999).

claim that PCP exposure at work was causative of asthma was not accepted because the appellant showed a predisposition to this malady since early childhood.¹³⁷

The final statutory precondition that must be satisfied concerns a risk assessment in general terms. It compares the risk of persons, but not the claimant, to contract the condition(s) when performing the specific type of work with that property or characteristic and the general population. Young J in *Knox v ARCIC* decided that a medical expert has to make three assessments:

- i) The risk to a person carrying out the relevant task in the relevant work environment of developing the injury concerned (classified as 'X');
- ii) The risk to persons not performing that task in the environment of suffering from that personal injury (classified as 'Y');
- iii) If 'X' were determined to be significantly greater than 'Y' section 7(1)(c) was satisfied.¹³⁸

Medical experts accept that any sawmill worker falling into the high category of PCP exposure would have a good case for a connection between PCP exposure and current medical symptoms.¹³⁹ For example, workers in the high category of PCP exposure showed a strong association with persistent fever (sweating).¹⁴⁰ An assessment of the risk of the general population to contract a 'PCP related condition' such as persistent sweating is complicated by the fact that we are generally dealing with non specific, difficult to measure signs of ill health. Medical experts must also provide an opinion determining the risk of the general public (Y) who did not use PCP for the intensity and duration identified for sawmill workers of acquiring, for example, persistent sweating.¹⁴¹ It is my opinion for the general public working in occupations that do not involve on going high PCP exposure, for example, constant handling of PCP treated timber or daily mixing of PCP treatment solutions, the risk of suffering from that personal injury, for example, persistent fever, is much lower. If the risk of persons exposed to constant high PCP is much greater than for the general public having no occupational PCP exposure then s7(1)(c) is satisfied.

From the above discussion it is evident that the issue of causation is established through consideration of s7(1)(a) and (b) while s7(c) is a risk assessment in more general terms. A claimant in a work related disease case such as PCP poisoning must satisfy the three pre condition in s7(1) before ACC entitlements can be regarded as reasonably unambiguous. Because of the uncertain nature of PCP poisoning, specialists and in particularly medical experts, play a key role in assisting ACC in the decision making process. The role of specialist will be considered in the following discussion.

VII. ROLE OF EXPERTS IN THE LEGAL DECISION MAKING PROCESS

The 1992 Act introduced new legislation for personal injury caused by work related gradual process, disease or infection requiring claimants to establish causation, on the balance of probabilities, that a work related task caused personal injury to justify ACC entitlements. Thus, the 1992 Act has introduced an adversarial system into a no fault accident compensation system where a claimant is required to make a proposition why ACC cover should be granted. In complicated cases,

137 Ibid.

138 *Knox v ARCIC* [2000] NZAR 609.

139 OSH, above n 29, 40.

140 Walls et al, above n 67, 364.

141 *Knox v ARCIC*, above n 138, 620.

claimants depend heavily on the views of specialists from different disciplines, in particularly medical experts, to support their theory of causation.¹⁴²

Studies in New Zealand have documented associations between various syndromes of disease and PCP exposure. Medical experts however, argue that determination of ill health effects arising from PCP exposure involves a diagnosis of exclusion based on detailed occupational and medical investigations to exclude other causes.¹⁴³ For example, experts must determine whether any confounding factor contributed to workers' illness and whether that factor was substantial in the causation of the alleged symptoms. The argument against ACC cover generally is not that PCP is entirely excluded as a cause of a claimant's illness but that there are more likely causes for the condition. It is undeniable that medical diagnosis and etiology have become critical factors in determining eligibility for ACC cover in this particular field.¹⁴⁴ A diagnosis of PCP poisoning cannot be made with certainty because symptoms, for example, persistent fatigue, is non specific, present in the general public, and there is no specific diagnostic test available. Consequently, considerable disagreement can exist among medical experts regarding causation of symptoms which may result in delays in the decision process due to litigations. This puts further financial and emotional distress onto the claimant, in addition to the health problems suffered.

VIII. TEST OF POISONING

As discussed above medical research has not shown a causal link between PCP exposure and chronic ill health symptoms of timber workers. In other words, scientific validation has failed to conclusively demonstrate causation of long term effects of PCP poisoning of timber workers, and thus is of little aid to workers claiming compensation. Because it is not proven from a medical science point of view that PCP exposure causes long term health effects ACC has used an assessment procedure, called a test of poisoning (TOP).¹⁴⁵ For ACC compensation any worker alleging a causal relationship between PCP exposure and chronic illness must take the TOP.

TOP is a tool used by the PCP medical expert panel to decide whether recommendation can be made to ACC to grant compensation to workers claiming personal injury due to PCP poisoning. The TOP has been criticised by some occupational physicians because it has not been validated.¹⁴⁶ Other critics of the TOP suggested that for some occupational disorders, medical experts have to rely on probability 'based on symptoms and clinical findings, where the results obtained at functional assessment are not positive'.¹⁴⁷ Gorman and colleagues however, argued that the TOP estimates the likelihood that a person's syndromes being due to chemical poisoning; thus it is a particularly useful tool in conditions of uncertainty. In other words, the TOP does not require proving the cause of an illness but what is required is to accept or reject the hypothesis that a chemical agent has caused the illness.¹⁴⁸

142 *Primary Producers Co-Operative Society Ltd v ARCIC* [1999] District Court, Christchurch (Unreported, Beattie J, 17 August 1999).

143 OSH, above n 29, 40.

144 G Duncan, 'Moral hazard and medical assessment' (2003) *Victoria University of Wellington Law Report* 433, 435 available at <http://www.austlii.edu.au/nz/journals/VUWLR/2003/26.html>.

145 V Edwards, 'PCP poisoning: the uncertainty lingers', (15 May 2002) *New Zealand GP* 20.

146 C Walls, 'Diagnosis of chemical poisoning' (1998 Jul 10) 111(1069) *New Zealand Medical Journal* 258-9.

147 T O'Donnell, 'Chemical poisoning and occupational asthma: Diagnosis and/or acceptance for current compensation.' (1998) 111(1074) *New Zealand Medical Journal* 372-3.

148 Dew, above n 82 at 175.

The TOP is divided into three parts classifying a patient's symptoms into major, intermittent and minor criteria categories.¹⁴⁹ It awards points scored for each criterion of the test which are summed up to determine the likelihood that health problems experienced are the consequence of chemical poisoning. If a patient scores at least nine points the expert panel accept the likelihood of chemical poisoning and will make a recommendation to ACC to grant cover for personal injury.¹⁵⁰ The TOP is a very strict, and in my opinion unfair, assessment tool because the standard of proof is very high to establish that PCP poisoning is causative of workers' illness. In the following paragraphs I will discuss selected criteria of the TOP to illustrate that it disadvantages timber workers seeking ACC cover for PCP poisoning.

The TOP may award points if workers suffered symptoms, for example, excessive sweating, on the day of the ACC assessment. ACC's assessments for PCP poisoning however, did not start until about 1998; this is ten years after timber workers used PCP for various wood treatments. The medical community accepts that PCP exposure can cause acute excessive sweating which constitutes one of a host of measurable reactions of the human body dealing with acute PCP stress.¹⁵¹ Clearly, former timber workers have reported on going problems with sweating.¹⁵² While ACC may accept excessive sweating as an indication of PCP poisoning its absence at the day of assessment does not disprove that the health problems of timber workers are not the consequence of PCP exposure. Sweating may be intermittent but still chronic in some workers. Since the TOP awards only points for symptoms measurable on the assessment day it ignores workers' evidence of severe sweating in the past.

Furthermore, points are not awarded if symptoms failed to meet ACC's specification ascribed to PCP poisoning. For example, excessive sweating, which ACC may accept as a specific symptom of PCP poisoning, must have a particular foul smell and rot clothes.¹⁵³ This means a worker having excessive sweating on the assessment day but with sweat lacking a particular smell would not qualify for any points. ACC believes that foul smelling and discoloured sweat only have a clear temporal relationship to PCP exposure which will abate after PCP exposure ceases. Again, the example above illustrates the rigor of the ACC's test of poisoning.

Also, the TOP further grants points to workers that have had an appropriate exposure to the chemical at which levels chronic effects of PCP poisoning could be possible.¹⁵⁴ To determine exposure a formula was developed that takes into account the job task, length of time at that task and the type of PCP formulation (oil vs. water based) to estimate the level of PCP exposure in workers, also called exposure index.¹⁵⁵ However, the toxic potency of technical grade PCP used at sawmills was not included in calculating the exposure index because it is unknown. It is well known that PCP based wood treatments contained dioxin contaminants of variable nature and quantities. It is likely that contaminants found in PCP based products which were purchased from

149 D Gorman and E Dryson, 'Diagnosis of chemical poisoning: report of a working party established by the Australasian Faculty of Occupational Medicine, Royal Australasian College of Physicians, Auckland, 9 May 1997' (1998 Feb 13) 111 (1059) *New Zealand Medical Journal* 34-7.

150 *Ibid.*

151 Wood et al, above n 13, 528.

152 Gorman, above n 149, 35.

153 Dew, above n 82 at 171.

154 Gorman, above n 69, 191.

155 Gorman, above n 69, 190.

different overseas suppliers varied depending on the source of supply.¹⁵⁶ Also, workers' recall bias may result in miscalculating PCP exposure levels. It seems reasonable to suggest that the calculated exposure index may grossly underestimate the 'real' risk timber workers encountered when working with PCP based wood treatments.

Furthermore, it is likely that individual workers have different thresholds or tolerance levels to PCP. The consequence of variable PCP tolerance is that individual workers may still experience persistent health problems at relatively low PCP exposure levels. According to the TOP however, chronic effects are not plausible at those lower PCP levels. Exposure level is significantly correlated to increased mood changes, rhinorrhoea and breathing difficulties but not to other symptoms timber workers experience.¹⁵⁷ Also, workers with relative low PCP exposure reportedly suffer from a large number of symptoms.¹⁵⁸ While there is great uncertainty at what level of exposure PCP is harmful to humans the TOP defines a somewhat arbitrary exposure index above which ACC accepts that chronic effects would be plausible.¹⁵⁹

TOP further awards ten points if a patient has levels of chemicals in their body in excess of what is considered to be toxic and objective biological markers of the poisoning effect.¹⁶⁰ An example is lead poisoning where body levels of lead and haemoglobin precursors can be concurrently detected.¹⁶¹ ACC however argues that there is no objective biological effect marker for PCP poisoning and bodily PCP levels in workers are not available due to the relative short half life of PCP.¹⁶² PCP had a urinary half life of 33 hours for a human volunteer.¹⁶³ This means timber workers alleging PCP poisoning are unable to get any points based on this criterion. They are clearly disadvantaged because medical science has not yet discovered evidence based measures of toxicity, namely biological effect markers of PCP poisoning. On the other hand dioxin contaminants of PCP based wood treatments vary in nature and extent and have an extensive half life in humans, reportedly between 3 and 20 years.¹⁶⁴ Thus, dioxin can be determined in human blood and fat many years after PCP exposure. However, interpretation of dioxin data with regard to long term human diseases is difficult because it is not clear at what levels human health is at risk.¹⁶⁵ ACC has not determined dioxin levels in serum of timber workers. It is interesting to note that a poor correlation was observed between dioxin levels determined in four sawmill workers and the ACC exposure index, casting serious doubt that the latter measure can estimate the amount of dioxin absorbed in the body.¹⁶⁶

156 National Task Group, above n 8, 2–6.

157 Bandaranayake, above n 70, 21.

158 Ibid.

159 Gorman, above n 69, 191.

160 Gorman, above n 149, 35.

161 Ibid.

162 Edwards, above n 145, 20.

163 G Kleinman, S Horstman, D Kalman, et al., 'Industrial Hygiene, Chemical and Biological Assessments of Exposures to a Chlorinated Phenolic Sapstain Control Agent' (December 1986) Volume 47, Issue 12 *American Industrial Hygiene Association Journal* 731–741, 732.

164 H Kotsas, C Rosenberg, J Tornaeus, et al., 'Exposure of workers to 2,3,7,8-substituted polychlorinated dibenzo-p-dioxin (PCDD) and dibenzofuran (PCDF) compounds in sawmills previously using chlorophenol-containing antistain agents' (1998) *Archives of Environmental Health* 99, 100.

165 Gorman, above n 69, 192.

166 Bandaranayake, above n 70, 34.

The TOP further awards points for symptoms that are characteristic of the chemical agent. Chloracne is the only symptom ACC has accepted as characteristic or proven of chronic PCP poisoning in humans.¹⁶⁷ Timber workers however, cannot provide objective data linking PCP exposure to other, alleged chronic diseases, thus points will not be granted. However, two points will be awarded if any symptoms alleged are biological possible effects of PCP poisoning. For example, the medical expert panel has accepted PCP as a plausible cause of brain injury.¹⁶⁸ This plausible cause is accepted because PCP uncouples oxidative phosphorylation producing cellular disturbance of energy production and utilization.¹⁶⁹

In summary, timber workers alleging chronic effects due to PCP poisoning, unless they suffer from chronic chloracne, are not able to score any points for four out of eight categories of the TOP. This is because medical research has failed to provide conclusive scientific evidence for PCP poisoning. The remaining four categories grant five and two points respectively, yielding a maximum score of 11. As mentioned above timber workers require at least nine points before the medical expert panel can recommend ACC to accept cover for personal injury. By 2002 the medical expert panel recommended to ACC that 20–25 per cent of all claims be accepted.¹⁷⁰ This further indicates that the TOP poses a huge hurdle to timber workers in their battle to get compensation for chronic health problems. However, even if the medical expert panel accepts the hypothesis that PCP poisoning caused a worker's health problem this does not guarantee that ACC will grant compensation. As discussed above other criteria outlined in the ACC legislation must be met before cover is granted for any occupational diseases.

IX. STANDARD OF PROOF

As discussed above the 1992 ACC Act introduced an adversarial system for personal injuries caused by work related gradual process, disease and infection. The onus falls on sawmill workers seeking ACC compensation to establish a nexus between occupational PCP exposure and illness. Essentially, in order to succeed sawmill workers are required to make propositions which provide sufficient, persuasive evidence for this nexus to satisfy ACC on the balance of probability.

Before I elaborate further on standard of proof a clear distinction must be drawn between scientific and legal standard of proof. In science, including medical science, proof showing a causal effect is determined in terms of certainties which basically means beyond reasonable doubt. Researchers establish scientific certainty using various statistical tests to measure significance of a particular effect observed. In an instance where an effect is significant causation is said to be proven at a certain level of probability, for example, 99 per cent. While medical science in New Zealand has shown high levels of probability relating certain symptoms to PCP exposure, calls were made again and again for further studies.

One argument is that better experimental design could provide greater statistical certainty as to the possibility of cause and effect. Public funding has now been granted to investigate health outcomes of former timber workers exposed to PCP.

The legal (civil) standard of proof differs from that applied in medical science. That civil standard is on balance of probability which essential means greater than 50 per cent. There is no

167 Edwards, above n 145, 20.

168 Ibid.

169 Wood et al, above n 13, 529.

170 Edwards, above n 145, 20.

doubt that the Courts, considering the evidence submitted by medical experts and laypersons, apply the appropriate legal test to reach a decision.¹⁷¹ Likewise, ACC decision makers will evaluate the propositions (evidence) made by the parties and then decide the validity of a claim applying the civil standard of proof.¹⁷² Sawmill workers are not required to prove their claim with absolute certainty because it clearly is impossible to ascertain that PCP poisoning caused workers' illnesses. On the other hand ACC will not accept any claim based on mere speculation. Sawmill workers must provide direct evidence or offer other objective proven facts (circumstantial evidence) that enables the decision maker to draw a reasonable deduction from the evidence.¹⁷³ Sawmill workers will fail to discharge the burden of proof unless they create a state of belief in the mind of the ACC decision maker that allows the decision maker to accept that the worker's evidence as submitted is more probable than evidence presented by the opposing party. Within the context of evidence the TOP provides one piece of evidence that may support or reject workers' claim. It must be kept in mind however, that the TOP is a likelihood model for use in situations of uncertainty relating to cause and effect.¹⁷⁴ In other words, the TOP can only indicate whether it is probable that a claimant suffers the alleged personal injury due to PCP poisoning. Thus the TOP represents one view of medical evidence which ACC has to consider within the whole context (evidence) of the appellant's claim. Because, in my view, the TOP is a very strict assessment tool it is highly recommended that sawmill workers seek additional, independent medical evidence to support their claim.

Clearly, the role of ACC decision makers and also judges (in case of litigations) is to critically examine the evidence, including medical, presented by the parties. For example, they will examine the clarity of expression, impartiality, and supporting scientific evidence. Responsible expert opinion cannot be rejected unless there is some clear indication that it is based on mistake or oversight.¹⁷⁵ In weighing up the different medical opinions, a judge will specifically consider whether a medical expert comments on the reasoning or conclusions reached by other specialists.¹⁷⁶ In *Knox v ARCIC* Young J rejected medical evidence by Dr Monigatti because it was 'too conclusive in that it did not lay out the steps in his reasoning'.¹⁷⁷ Ongley J rejected the contention of Dr Monigatti who argued a psychogenic diagnosis following negative TOP results of the appellant, because there was no medical evidence supporting her predisposition to a psychoneurotic illness.¹⁷⁸ Likewise, in *Hawkins* Gorman's strong conviction that the appellant had a somatoform disorder, meaning a physical complaint with no physical basis, was rejected due to 'an absence of clear and unequivocal evidence to that effect from a physiological or psychiatric source.'¹⁷⁹

Within the PCP debate medical experts like Gorman have continued to question the specificity of acute and persistent symptoms that have been documented in the population of former timber

171 *Davidson v ACC* [1995] NZAR 299.

172 *Wilde v ACC* [2001] Accident Compensation Appeal Authority, Auckland 10/02 (Unreported, Cartwright J, 8 August 2001).

173 *Hawkins ET UX v Dominion Breweries, Ltd.* [1948] NZLR 15.

174 Gorman, above n 69, 190.

175 *Doyle* above n 133.

176 *Marshall v ACC* [2004] District Court, Wellington 169/2004 (Unreported, Ongley J, 8 June 2004).

177 *Knox v ARCIC*, above n 138, 619.

178 *Doyle* above n 133.

179 *Hawkins* above n 173, 29.

workers.¹⁸⁰ For example, pre morbid education level, alcohol use, head injuries, depression and senility were thought to confound the identification of neuropsychiatric disorders of PCP in 21 of 48 workers showing significant psychometric abnormalities.¹⁸¹ While Gorman's contention is theoretically plausible there must be sufficient evidence for it. For example, did workers consume alcohol at levels above which the medical community accepts could cause psychometric abnormalities? Although it is difficult to generalize, it is my view that, on balance of probability, deterioration of workers' health, most of whom were physically very fit due to the strenuous nature of the work, was due to exposure to PCP.

X. CONCLUSION

Sawmill workers have been largely battling unsuccessfully to get full ACC entitlement for personal injuries caused by PCP poisoning occurring during the course of employment. To gain ACC cover sawmill workers must prove a nexus of causation between occupational PCP exposure involving inhalation, skin absorption and oral ingestion and the subsequent personal injury affecting their health. ACC relies heavily on medical evidence to decide whether such nexus of causation exists. Because of the complex nature of PCP poisoning decision makers will use considerable value judgments and not just the rational application of scientific knowledge. Any ACC decision however, must be founded on sufficient evidence, not mere speculation, to discharge the legal burden of proof on the balance of probability.

Medical and legal requirements have undoubtedly put many obstacles onto sawmill workers in their attempt to get ACC cover. Ideally, a policy change in ACC compensation would be required to address these grave injustices of the no fault ACC system. For example, the onus could be on ACC to show that occupational PCP poisoning is not causative of personal injury. In my view, sawmill workers suffering debilitating health from PCP poisoning should also receive public acknowledgement to assist in the healing process of past injustices.

180 Gorman, above n 69, 192.

181 Gorman, above n 69, 193.

WHAT CONSTITUTES A JOINT VENTURE COMPANY?

THOMAS GIBBONS*

I. INTRODUCTION

Section 131(1) of the Companies Act 1993 contains what may be considered the essence of a company director's duties: to act in good faith and in what the director believes are the best interests of the company.¹ This duty is however moderated by the remainder of section 131.² The focus here is on s 131(4) of the Companies Act, which provides that a director of a company carrying out a joint venture between shareholders may, if the company's constitution permits, act in the best interests of one or more specific shareholders, rather than in the best interests of the company.

This provision represents a considerable departure from the principle contained in s 131(1). But in the years since the Companies Act came into force, there has been little judicial or academic commentary on it. This essay aims to provide an analysis of this provision, highlight its problems, and consider how it is best interpreted.

The first section considers the background to the passage of s 131(4). The second section analyses the uncertain nature of a 'joint venture' in New Zealand law and the issue of fiduciary obligations between those in a joint venture. The third section considers the particular issues raised by an incorporated joint venture, and discusses existing authority on s 131(4). The fourth section reflects on the difficulties raised by the fiduciary obligations of those in a joint venture relationship when set against the departure from a director's normal fiduciary obligations permitted by s 131(4). The fifth section seeks to promote clarity in relation to s 131(4) by considering a number of solutions to the issues raised.

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1 This section itself is of course problematic. See e.g. P Watts 'Editorial: Statutory Formulation of Directors' Duties – Some Issues' [December 2003] 12 *Company and Securities Law Bulletin* 95 at 95 for comment on the problems of s 131(1) setting up the concept of 'interests of the company' as distinct from the interests of the shareholders as a whole.

2 See ss 131(2), (3) and (4).

II. THE CONTEXT OF SECTION 131(4)

A. Introduction

Section 131(1) of the Companies Act 1993 imposes a general duty on directors of a company to act in good faith and in the best interests of that company.³ Sections 131(2) and (3) vary this general rule in the case of a wholly owned or partly owned subsidiary. Section 131(4) provides a further variation:

A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

It is s 131(4) that is the emphasis of this essay, as it raises a number of questions. What is a joint venture? How do we determine whether one exists in a particular case? What are the implications of this? It is these kinds of questions – and others – that this essay sets out to answer. But first we begin with the background to the provision.

B. The Genesis of s 131(4)

Shortly after its creation, the Law Commission was charged with the task of examining and reviewing the law relating to corporate bodies with a view to drafting a new Companies Act.⁴ A draft Act was set out in the Commission's 1989 report on company law, and this draft is in many places very similar to the Companies Act that was passed in 1993 and is still in force today. There are however some important differences, and one of these is in s 101 of the draft Act, which states that:

The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act in good faith and in a manner that he or she believes on reasonable grounds is in the best interests of the company.⁵

This 'fundamental duty' reflected what was understood as the position at common law and in equity.⁶ By 1990, however, when the Law Commission published a further report,⁷ this provision had expanded to recognize 'limited situations' such as joint venture companies where a constitution could expressly contemplate or require that a director put the interests of one of more shareholders ahead of the interests of the company.⁸ Although not discussed in detail in the Law Commission's 1990 report, Peter Watts has expressed the view that this provision was 'fomented' from various

3 See e.g. Hon Justice Tompkins 'Directing the Directors: The Duties of Directors Under the Companies Act 1993' (1994) 2 *Waikato L Rev* 13, 19–20 for comment on the common law context of s 131(1). Note also that s 169(3) of the Companies Act states that the duty in s 131 is a duty owed to the 'company' rather than to shareholders. It is perhaps a drafting infelicity of s 169(3) that it refers to the s 131 duty being owed to the company, when of course the s 131(4) duty is expressly owed to shareholders, rather than the company.

4 New Zealand Law Commission, *Company Law—Reform and Restatement* NZLC R9 (June 1989) ix.

5 New Zealand Law Commission, *ibid*, 241.

6 See e.g. A Beck and S Grant *Litigation Involving Companies*, (New Zealand Law Society Seminar, Aug–Sept 2004) 83.

7 New Zealand Law Commission, *Company Law Reform: Transition and Revision* NZLC R16 (Sept 1990)

8 New Zealand Law Commission *ibid* at 29.

common law cases, including comment in *Berlia Hestia (NZ) Ltd v Fernyhough*,⁹ that nominee directors may act in the best interests of their appointer, as long as they also have a bona fide belief that acting in the best interests of the appointer will also advance the company's interests.¹⁰ Section 131(4) has also been expressed to represent a 'codification' of various obiter common law statements, including that in *Berlia Hestia*.¹¹ Earlier English authority had been of the view that a director may act in the interests of a particular shareholder, but only if that director was free to exercise his or her judgment in the best interests of the company as well.¹² It is perhaps this approach that the New Zealand reformers wished to avoid.¹³ In Australia, general authority has supported the view that a 'nominee' director could, in certain circumstances, act in the best interests of the person who appointed him or her,¹⁴ and, more specifically, it has been identified that joint venture directors may, like the directors of wholly owned subsidiaries, 'be in a special position in that they may recognise obligations to the joint venture participants or to the parent company.'¹⁵

The Companies Bill had its first reading in Parliament in 1990. The relevant clause 109 largely repeated s 101 of the Law Commission 1989 draft Act, and did not include any provision as to joint venture companies. The Justice and Law Reform Select Committee, which reported back to Parliament in 1992 after two years considering the Companies Bill,¹⁶ recommended that this provision be amended to provide that a director of a joint venture company be permitted to act in the best interests of a shareholder, even though such action might not be in the best interests of the company, if permitted to do so by the constitution – in other words, a provision very similar to that ultimately enacted.¹⁷ The second reading of the Bill in Parliament included this term,¹⁸ as – of course – did the Act ultimately passed.

C. *The Wording of s 131(4)*

Neither the Law Commission nor the Select Committee saw fit to include a definition of 'joint venture' in the Companies Act.¹⁹ Perhaps these bodies saw the meaning as relatively clear – if so, they were unfortunately mistaken. As we shall see, the meaning of the term 'joint venture' is

9 [1980] 2 NZLR 150, 166.

10 See Watts, above n 1 at 95.

11 See D O Jones, *Company Law in New Zealand: A Guide to the Companies Act 1993* (1993) 114.

12 See *Boulting v Association of Cinematology, Television and Allied Technicians* [1963] 2 QB 606, 627, per Lord Denning; cited in N Thompson, 'The Incorporated Joint Venture' in W D Duncan (ed), *Joint Ventures Law in Australia* (1994) 170, 187.

13 Thomas J commented in *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, 95 that courts in New Zealand and Australia have adopted a 'less uncompromising approach' than this in an effort to recognise commercial realities. Cited in R Grantham, and C Rickett (eds), *Company and Securities Law: Commentary and Materials* (2002) 478.

14 Thompson, above n 12 at 187.

15 Thompson *ibid.*, 186. In Australia, s 180 of the Corporations Act 2001 (Cth) places a general duty of directors which can be seen as analogous to the general duty in s 131 of the New Zealand legislation, though the context of this duty is very different. Section 187 of the Corporations Act varies this duty in respect of subsidiary companies in a similar way to the New Zealand legislation, but the Corporations Act overall is silent on joint venture companies.

16 See Mr Rob Munro, 23 February 1993 NZPD, 13359.

17 Justice and Law Reform Select Committee, Report of the Justice and Law Reform Committee on the Companies Bill, 1992.

18 Hon D A Graham, 23 February 1993, NZPD, 13353.

19 They did, however, provide adequate definition of what a 'subsidiary' is: see Companies Act 1993 s 2.

far from settled, inside and outside the company law context.²⁰ Having discussed the origins of s 131(4) and how it differs from the general duty in s 131(1), it is to the question of definition we now turn.

III. THE JOINT VENTURE – DEFINITION AND SCOPE

A. Introduction

Joint ventures are an increasingly common way of carrying out business – ‘in vogue’, as one group of writers has put it.²¹ Some of the reasons joint ventures have found favour include the sharing of risk, access to particular technology, markets or skills, and the ability to share another business’ strategic advantages without having to expand one’s own business.²² The term is however not an easy one to define – the question ‘[h]ow does one know what constitutes a joint venture?’ is not a new one,²³ nor one that is easy to answer.²⁴ It has been stated expressly in the Australian context that ‘[t]he term “joint venture” is not a technical one with a settled common law meaning’.²⁵ One definition of general application is as follows:

An enterprise, corporation or partnership formed by two or more companies, individuals or organizations, at least one of which is an operating entity which wishes to broaden its activities for the purpose of conducting a new profit motivated business of permanent duration. In general the ownership is shared by the participants with more or less equal distribution and without absolute dominance by one party.²⁶

This definition is of course so broad as to include many kinds of undertakings that we might not normally term ‘joint ventures’, and is not particularly useful for s 131(4).

In New Zealand commentary, the term most often arises in the context of partnership law.²⁷ *The Laws of New Zealand*, for example, subsumes its discussion of ‘joint ventures’ within the scope of partnership law,²⁸ though it is recognized, with a nod to Australian case law, that the term may refer to a joint undertaking or activity carried out through a medium other than a partnership.²⁹ One New Zealand writer asked in the 1980s whether an unincorporated joint venture dif-

20 See further Watts, above n 1 at 95: ‘the Act does not define a joint venture, which is a potential source of dispute’.

21 D Quigg, J Horner and D Baker, ‘Joint Ventures and Strategic Alliances’ [2002] NZLJ 98, 98. See also M Chetwin, ‘Joint ventures – a branch of partnership law?’ (1991) UQLJ Vol 16. No 2, 256, 256.

22 Quigg, *ibid* at 98. See also B J Reiter and M A Shishler, *Joint Ventures: Legal and Business Perspectives* (1999), ch. 2.

23 See e.g. J Taubman, ‘What Constitutes a Joint Venture?’ (1955–56) 41 Cornell LQ 640, 640.

24 ‘Finding a definition for the term ‘joint venture’ is an easy task. Defining a joint venture with any amount of consistency is much more difficult.’ Reiter and Shishler, above n 22 at 17. These writers go on to note at 17 that business-people and lawyers often use the phrase ‘joint venture’ in very different ways.

25 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 10 per Mason, Brennan and Deane JJ (hereinafter ‘*United Dominions*’).

26 G R Young and S Bradford *Joint Ventures: Planning and Action*, (1973) pp 11–15 cited in E Herzfeld, and A Wilson, *Joint Ventures* (3rd ed, 1996), 3.

27 Even in 1956, commentary reflected a general view that ‘the joint venture is a branch of partnership law’, though a contrary view was emerging that a joint venture deserved its own legal classification. See Taubman, above n 23, 642 and generally. See however Herzfeld and Wilson, *ibid*, xv: ‘The great majority of what the business world terms joint ventures are carried on through corporations’ and further at 41.

28 P R H Webb ‘Partnership and Joint Ventures’ in Butterworths, *The Laws of New Zealand*, 20.

29 *Ibid* at 189 para 225, citing *United Dominions* at 10.

ferred from a partnership,³⁰ and concluded that it did, though perhaps not by much: a joint venture was not a partnership, but neither was it some unique species.³¹

Partners, of course, owe each other fiduciary duties, and if the first key question of many judges and commentators has been 'what is a joint venture?'; the second has been 'do joint venturers owe each other fiduciary obligations?'. As we shall see, there has been some divergence on this point, though the New Zealand position now looks to be relatively clear.

B. Joint Ventures in the 1980s: The United Dominions and Commerce Commission Decisions

The leading Australasian case, which has guided much Australasian judicial and academic commentary over the last 20 years or so, is *United Dominions*.³² In this case, the High Court of Australia was required to consider the question of whether parties to a property development joint venture owed each other fiduciary duties. The Court held that whether or not the relationship between joint venturers was fiduciary would depend on the form of the particular joint venture and the nature of the obligations the parties had undertaken in relation to each other.³³ The Court found that a fiduciary relationship did exist. Some comments, such as the observation that a fiduciary relationship could arise during negotiations between parties and before a formal contractual relationship was concluded,³⁴ and the observation that the term 'joint venture' has no settled common law meaning,³⁵ have proved of lasting significance.

Much of the comment in *United Dominions* on joint ventures was approved in the New Zealand case *Commerce Commission v Fletcher Challenge Ltd*.³⁶ In this 1989 case, the Court noted that it was questionable whether any legal definition or boundaries existed for the term 'joint venture', and that none of the recent Australian writing on the topic was able to offer a universally accepted definition. The best guidance, in the Court's view, was commentary describing the common qualities of a joint venture as being creatures of contract,³⁷ which created unincorporated associations, and which are not partnerships.³⁸ (It should be clear from the outset that the second of these does not apply to a company which is a joint venture, and the first does not apply inasmuch as a company constitution is a creature of statute as well as contract.) In discussing *United Dominions*, the Court went on to approve the Australian Court's comments that a joint venture relationship was not necessarily fiduciary, as the creation of fiduciary duties depended on the content of the obligations which the parties had undertaken.³⁹ In the Court's view:

30 Chetwin, above n 21 at 256.

31 Chetwin, *ibid* at 270–271.

32 *United Dominions*, above n 25.

33 *United Dominions*, above n 25 at 11 per Mason, Brennan and Deane JJ.

34 *United Dominions*, above n 25 at 11.

35 *United Dominions*, above n 25 at 10.

36 [1989] 2 NZLR 554. Hereinafter, '*Commerce Commission*'.

37 In opposition to this finding, see the comments on *Chirnside*, *infra* n 53 and accompanying text.

38 *Commerce Commission*, 614.

39 *Commerce Commission*, 615, citing *United Dominions*.

[S]ome care is needed in relation to any sweeping definition. The New Zealand commercial world on my perception has embraced the label “joint venture” without necessarily thinking deeply as to its meaning or implications.⁴⁰

C. *Joint Ventures Yesterday: Chirnside v Fay*

The leading New Zealand case is now the recent Supreme Court decision in *Chirnside v Fay*.⁴¹ From 1997, Chirnside and Fay were involved in a project to develop a commercial property. In 1999, Chirnside entered into a conditional agreement to purchase the site as trustee for a company to be formed. By this stage, there had been regular discussions between the parties as to the project, though no formal joint venture agreement had ever been concluded. The project was made feasible by the attraction of a major tenant in 2000, and Chirnside made the agreement unconditional. Chirnside then excluded Fay from the venture – without letting Fay know and with some untruth along the way – and carried out the development through a company he controlled.⁴²

There were four different judgments, with the two main ones both traversing the question of definition of a ‘joint venture’; and the question of fiduciary obligations between joint venture parties. Another key issue in the case – remedies – does not need to be covered here. Elias CJ’s judgment was the first. She observed that ‘the label “joint venture” may sometimes be used to describe what are in fact separate businesses operating at arm’s length’,⁴³ but this was not the case here. Here, the project to develop the site was ‘indistinguishable from a single transaction partnership’, and the fact the parties may have expected to make more formal arrangements through a corporate structure or partnership did not alter the nature of the relationship formed. In Elias CJ’s view, ‘[w]here parties joint together in a joint venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture and while it continues.’⁴⁴

Two points made by Elias CJ deserve particular attention. The first is that, in noting that the parties may have expected to later form a company, Elias CJ recognizes that a company may be used for a joint venture, and that the company may be simply a vehicle for formalizing an already existing joint venture relationship. The second key point is that a venture to share profit is ‘inherently fiduciary’. This is a strong statement, particularly in the light of commentary in *United Dominions*⁴⁵ and various New Zealand commentary⁴⁶ that a joint venture relationship *does not* necessarily imply fiduciary obligations. Most of the arrangements which warrant the name ‘joint venture’ involve some kind of sharing of profit, though this is perhaps primarily an indication that we must look beyond the labels used to the nature of the actual arrangements between the parties.

40 *Commerce Commission*, 615. The Court went on at 616 to observe that ‘it may be that partnership is simply a specialized development of one area of joint venture. In the end ... [t]he Court will look at the substance which is agreed.’

41 [2006] NZSC 68. Hereinafter ‘*Chirnside*’.

42 *Chirnside*, paras 2–3 and 61–68.

43 *Chirnside*, para 14, per Elias CJ.

44 *Chirnside*, para 14, per Elias CJ, drawing on *Meinhard v Salmon* 164 NE 545, 546 (NY CA 1928).

45 ‘One would need a more confined and precise notion of what constitutes a “joint venture” than that which the term bears as a matter of ordinary language before it could be said by way of a general proposition that the relationship between joint venturers is necessarily a fiduciary one’ *United Dominions* at 10 per Mason, Brennan and Deane JJ.

46 See e.g. S Ongley, ‘Joint ventures and fiduciary obligations’ (1992) 22 VUWLR 265 at 267: ‘[T]he non-partnership joint venture is not a category of relationship to which fiduciary obligations automatically attach’. See also N Rogers and G Nisbet, ‘Joint Ventures and Equity – Fiduciary Aspects’ in Duncan (ed) above n 12, 50, 69–70 for debate on whether commercial relationships should have any fiduciary aspect.

In Elias CJ's view, the 'distinguishing obligation' of a fiduciary was one of loyalty, and neither party to the joint venture was permitted to place himself in a position of conflict of interest with the venture.⁴⁷ Chirnside had done this, and breached his fiduciary duties to Fay.

The major judgment in the case was however that of Blanchard and Tipping JJ, given by Tipping J. These judges took the view that the High Court's finding of the existence of a commercial joint venture was reasonable on the evidence and should not be challenged.⁴⁸ This being the case, Blanchard and Tipping JJ went on to discuss the issue of whether there was a fiduciary relationship between the parties. The High Court had stated that the relationship of the parties was analogous to a partnership,⁴⁹ and both the High Court and Court of Appeal had found a fiduciary relationship.⁵⁰ Blanchard and Tipping JJ went further, stating that 'most joint venture relationships can properly be regarded as being inherently fiduciary because of the analogy with partnership.'⁵¹

This comment should perhaps not be dealt with independently of its context; on the other hand, it is sufficiently striking to be likely to be cited in future judgments. Two particular points deserve attention. The first is that, like Elias CJ, Blanchard and Tipping JJ have taken the view that most joint venture relationships are 'inherently fiduciary'. This has great implications for the interpretation of s 131(4). The second point is that the relationship is seen as inherently fiduciary because of its analogy with partnership. Since s 131(4) only arises in the context of a joint venture between company shareholders – which is necessarily not a partnership – it could be argued that this statement has nothing to do with s 131(4) and only applies to partnership situations. This writer is of the view that this is placing too strict an interpretation on the judges' words. A joint venture between shareholders can be seen as analogous to partnership, without actually being a partnership.

Blanchard and Tipping JJ went on to observe that 'all fiduciary relationships, whether inherent or particular, are marked by the entitlement ... of one party to place trust and confidence in the other.'⁵² The judges cited *United Dominions* to the effect that 'a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms that are to govern the relationship between them.'⁵³ Returning to an analogy with partnership, Blanchard and Tipping JJ expressed the view that '[t]he very fact that the parties had not thought it necessary to enter into a detailed formal agreement before embarking on their joint venture suggests that each was reposing trust and confidence in the other as they had in their earlier venture.'⁵⁴ It was fallacious to think that there could be no joint venture until unless and until all necessary details had been contractually agreed.⁵⁵

In Blanchard and Tipping JJ's view:

47 *Chirnside*, para 15, per Elias CJ.

48 *Chirnside*, para 69, per Blanchard and Tipping JJ.

49 *Ibid*, para 71.

50 *Ibid*, 72.

51 *Ibid*, 74.

52 *Ibid*, 80.

53 *Ibid*, 89.

54 *Ibid*, 90.

55 *Ibid*, 91. This raises an interesting point. While Blanchard and Tipping JJ are undoubtedly correct in stating that parties may not conclude a formal arrangements because they are in a relationship of trust, it is important to remember that the reverse may also be true: parties may not conclude a formal agreement because there is *no* relationship between them. It may be equally fallacious to find a joint venture where there was no contract, even if this would not have been the case in this fact situation.

A joint venture will come into being once the parties have proceeded to the point where, pursuant to their arrangement or understanding, they are depending on each other to make progress towards the common objective. Each party is then proceeding on the basis that he or she is acting in the interests of all or both parties involved in the arrangement or understanding. A relationship of trust and confidence thereby arises; each party is entitled to expect from the others loyalty to the joint cause, loose as the formalities of the joint venture may still be.⁵⁶

Gault J agreed with Blanchard and Tipping JJ, further noting that the term 'joint venture' covers many kinds of arrangements, not all of which will give rise to fiduciary obligations.⁵⁷ Elias CJ's views as to fiduciary duty were supported by Keith J, who otherwise supported the judgment of Blanchard and Tipping JJ.⁵⁸

D. Joint Ventures Today: Paper Reclaim and Maruha

Did the Supreme Court in *Chirnside v Fay* go too far? Perhaps, for in later cases the Court has retreated from the idea that all joint venture relationships are fiduciary in nature. *Paper Reclaim Ltd v Aotearoa International Ltd*⁵⁹ concerned the termination of a waste paper export contract. In the High Court, Nicholson J found that the relationship between the parties was a joint venture rather than a partnership or agency relationship, and that each party was required to act with reasonableness and good faith.⁶⁰ The Court of Appeal also labelled the relationship a joint venture. Giving the judgment of the Court, Blanchard J commented that the Courts below were too ready to label a contract of agency a joint venture. In his words: 'To style a contractual relationship as a joint venture may be apt to distract. It is a term to be applied with caution'.⁶¹ The Court found that the agency relationship created obligations of loyalty from the agent to the principal, but not vice versa – no joint venture was found.⁶²

Matters were taken even further in *Maruha Corporation and Maruha (NZ) Limited v Amaltal Corporation Ltd*,⁶³ in which judgment was given a scant month after *Paper Reclaim*. In 1985, Maruha and Amaltal incorporated a company called Amaltal Taiyo Fishery Co Ltd (ATL), in which Maruha held just under 25 per cent of the shares and Amaltal held the rest. An agreement between the shareholders called a 'joint venture agreement' provided that each party had the right to nominate two directors to the Board, and set out the nature of the fisheries operations to be carried out between the parties.⁶⁴ ATL was to keep books of account, but the company's accountant (who also acted for Amaltal) filed tax returns in such a way that deductions were allowed for depreciation to the benefit of Amaltal. Maruha was never told about these deductions, and there were adverse taxation and financial consequences to Maruha based on its arrangements with Amaltal.⁶⁵

The Court was clear that if any fiduciary duty of loyalty was owed by Amaltal to Maruha it was breached. The only issue was whether such a duty existed in the circumstances. In the High

56 Ibid, 91, per per Blanchard and Tipping JJ.

57 Ibid, 52, per Gault J.

58 Ibid, 55, per Keith J.

59 [2007] NZSC 26. Hereinafter '*Paper Reclaim*'.

60 *Paper Reclaim*, para 30.

61 Ibid, para 31.

62 Ibid, para 33 and generally paras 30–36.

63 [2007] NZSC 40. Hereinafter '*Maruha*'.

64 *Maruha*, paras 4–5.

65 Ibid, paras 6–13.

Court, Priestley J had stated that the 1985 agreement in respect of ATL did not itself create fiduciary obligations; however, the terms of the agreement indicated an intention to repose mutual trust and confidence in each other.⁶⁶ Amaltal's responsibilities in respect of accounts, in the context of the commercial relationship as a joint venturer, imposed fiduciary obligations on it – particularly as Amaltal was a local company while Maruha was a foreign entity whose representatives did not speak English as a first language.⁶⁷ The Court of Appeal, on the other hand, commented that while there might be fiduciary duties between joint venturers in some cases, there were no such duties in this instance. In the Court of Appeal's view, the parties were in an 'arm's length commercial transaction' and there were none of the distinguishing features of a fiduciary relationship.⁶⁸

It was argued in the Supreme Court that the relationship was fiduciary because the joint company was incorporated to replace a partnership that had formerly existed between Maruha and Amaltal and some of the terms of the partnership agreement had been carried through to the joint venture agreement in respect of ATL. The Supreme Court disagreed with this approach. In the Court's words:

These were commercial companies who had elected not to continue as partners and, instead, to frame their relationship by internal and external rules applicable to a company, supplemented by a contract between them in their capacity as shareholders. There is no warrant then for imposing upon them generally obligations not found in the company's own constitution, in companies legislation or in the terms of the contract. As partners they would have owed fiduciary duties to one another, but their relationship no longer took that unincorporated form. They had deliberately substituted the Companies Act regime for that of the Partnership Act.⁶⁹

Referring to its own decision in *Paper Reclaim*, the Court went on to say:

The characterisation of a commercial arrangement as a joint venture can be unhelpful as a guide to whether the parties owe each other fiduciary obligations. In our view, when commercial parties elect to use an unincorporated vehicle for a venture that can only loosely be called a joint venture, it is unlikely that their relationship as a whole will be fiduciary in nature.⁷⁰

However, even though the relationship as a whole was non fiduciary, aspects of it could involve fiduciary obligations of loyalty. Here, the accountant was the agent of Amaltal which was, in turn, the agent of Maruha in respect of accounting matters. As principal, Maruha was entitled to expect the accountant to act even handedly and impartially as between the two shareholder companies of ATL. Amaltal encouraged the accountant's disloyalty to Maruha and was in breach of a fiduciary duty.

F. Comment

One significant point from *Chirnside* is the general observation that parties need not have finalised their contractual terms to have a joint venture relationship in equity. Perhaps more important, however, is the finding that a joint venture relationship can generally be seen as 'inherently fiduciary' – whether because of an analogy with partnership or because the parties have a common commercial objective and wish to share profits.⁷¹ On the other hand, *Maruha* takes a view almost the

⁶⁶ *Ibid.*, paras 14–16.

⁶⁷ *Ibid.*, para 16.

⁶⁸ *Ibid.*, para 17.

⁶⁹ *Ibid.*, para 19.

⁷⁰ *Ibid.*, para 20.

⁷¹ *Chirnside*, paras 2, 71.

opposite, noting that the term ‘joint venture’ says nothing helpful about the relationship between parties, and that use of an incorporated company may well suggest that a non fiduciary relationship is intended. These somewhat contradictory promulgations have implications for the interpretation of s 131(4), and it is to this provision we now return.

IV. THE APPLICATION OF SECTION 131(4)

A. Introduction

Chirnside is of course a decision about an unincorporated joint venture, and therefore ignores s 131(4). The judges in *Chirnside* are not alone in this. Much of the commentary on joint ventures in both New Zealand and Australia has focused on unincorporated joint ventures and the conceptual links between joint ventures and partnerships.⁷² Indeed, apart from a few comments in one short article,⁷³ one searches the literature in vain for any useful commentary on s 131(4). While it is recognised that a company may be an appropriate vehicle for a joint venture,⁷⁴ the unique problems of a joint venture company remain largely unexplored, and little assistance is to be gained from the one New Zealand judicial decision to comment on s 131(4).⁷⁵ The circumstances of the case are however set out at some length to illustrate some of the issues surrounding s 131(4) which will be teased out later in this essay.

B. *Shell v Todd*

The *Shell* case related to a long standing joint venture relationship. Todd Bros. Ltd and the Shell Oil Company entered into a joint venture agreement in 1955 in relation to the Maui petroleum field. Other parties later joined the joint venture, and Shell Todd Oil Services Ltd (STOS) was established to provide operator services to the joint venture over a range of petroleum fields. By 2002, a heads of agreement (HOA) had been reached whereby the 1955 joint venture agreement was terminated and a new agreement was to be completed, which included both core terms of the relationship between the parties and the future of STOS. The terms envisaged that Shell and Todd would continue to provide operational services to a number of petroleum fields through an unincorporated joint venture governed by a board to which Shell and Todd would appoint three directors each, with one of Shell’s directors holding a casting vote if required. Shell was to procure a further entity (SIEP) to provide technical support and advice to STOS. The formal agreement envisaged by the HOA was not finalised at the time of this case.⁷⁶

Todd and Shell came to be in dispute over SIEP, with SIEP offering only its standard terms and conditions, and Todd being unhappy with these. Shell came to the view that it could not continue to support STOS, and proposed that STOS be replaced as operator by a 100 per cent Shell owned company. Following a formal proposed resolution for STOS’s removal, Todd sought an in-

72 See e.g. *Chirnside*, para 71; Chetwin, above n 21; Webb, above n 28.

73 See Watts, above n 1.

74 See e.g. J Stephens, ‘Joint Ventures’ in *Property Law – keeping ahead*, New Zealand Law Society seminar, (2006) 5.

75 *Shell (Petroleum Mining) Co Ltd And Ors v Energy Infrastructure Ltd And Ors* [2005] CA 70/05 (unreported, 3 August 2005). Hereinafter ‘*Shell*’. Reference to s 131(4) appears nowhere in the decision in *Maruha*, presumably because the dispute was between the shareholders in ATL, and did not concern the directors.

76 *Shell*, paras 2–10.

terim injunction seeking to prevent the directors of STOS voting on proposed resolutions whereby STOS would cease to provide operator services to the joint venture and another company would assume this role. The High Court granted an interim injunction to Todd which was appealed by Shell, essentially on the basis that there was no serious case.⁷⁷

Under the HOA, STOS was to either remain an ‘unincorporated joint venture’ as nominee or bare trustee for Shell and Todd as joint venturers, or a full operating company. The HOA provided that nothing in the HOA or the relationship between the parties should be construed as creating a joint venture or fiduciary relationship between the parties. The joint venture was not to hold any assets for Shell or Todd: instead, each party would hold its respective interest in its own name.⁷⁸ The Court noted that it was somewhat anomalous that the agreement provided that there was to be no fiduciary element to the parties’ relationship, when the venture conducted through STOS seemed to give rise to ‘some degree of special relationship’ between the parties,⁷⁹ and suggested that the overall venture could be described as ‘unincorporated’ on the basis that it involved a number of parties and that STOS, while an incorporated company, remained a nominee or bare trustee for the parties.⁸⁰ Governance of STOS rested with its board, and the Court rejected the notion that there was any real distinction between the roles played by the same persons as directors of STOS and members of the governance board established under the HOA.⁸¹

A number of causes of action were pleaded, but most relevant for our purposes was Todd’s assertion that Shell’s three appointed directors acting in favour of Shell’s resolutions was a breach of s 131, in that although STOS was a joint venture and the relevant directors were nominees of Shell, the constitution of STOS did not expressly permit directors to act in a matter they believed to be in the best interests of a particular shareholder as required by s 131(4). Todd argued that the HOA did not contemplate any amendment to the STOS constitution to this effect either. STOS’ directors must consider the interests of STOS first and only thereafter the interests of the joint venture parties. Shell, on the other hand, argued that the HOA militated against any fiduciary duties between the joint venture parties (a view which did not find favour with the Court) and that, s 131 being a subjective test, the Shell directors had in good faith come to a commercial assessment that STOS should not continue as earlier envisaged. The Court supported Todd’s view that the absence of any provision in STOS’ constitution permitting the company’s directors to prefer the interests of a joint venture shareholder to STOS the company was significant; though it was not necessarily the case that the decision of the Shell appointed STOS directors to replace STOS as operator was not in the best interests of STOS. There was a seriously arguable case on this point.⁸² On this and other arguments the Court decided that an interim injunction was appropriate and dismissed the appeal.

C. Comment

While *Shell* is useful as a case study, two points limit its usefulness. The first is that the constitution of STOS did not expressly permit any director to act in the best interests of a shareholder, as

77 Ibid, paras 1, 6, 11–20.

78 Ibid, paras 30–37.

79 Ibid, para 39.

80 Ibid, para 38, 40–41.

81 Ibid, paras 45–46.

82 Ibid, paras 63–74.

is required by s 131(4). The provision therefore did not apply. The second is that this was an application for an injunction and not a substantive case. Certain aspects of a joint venture company are however illuminated by *Shell*. The first is that a joint venture carried out through a incorporated company may nevertheless be described as ‘unincorporated’ – as the arrangement was in this case by the parties themselves and, apparently, by the Court. If a joint venture company arrangement can be described as ‘unincorporated’, then the term used in this essay – ‘joint venture company’ – is probably to be preferred to any other.

D. Further Definitional Issues

In *Shell*, the parties had for many years described their arrangements as a ‘joint venture’ and the Court saw no reason to comment on this description. The Court was presumably assisted by the existence of clear contractual arrangements between the parties, notwithstanding the efforts to contractually exclude any fiduciary relationship when one clearly existed.⁸³ But as we have seen, the Companies Act does not define the term ‘joint venture’, and there is no definitive statement in common law. *Chirnside*, while offering some useful definitional statements, goes on to say that the conduct of the parties is as important – perhaps more important – than their contractual arrangements, and *Paper Reclaim* approaches the term ‘joint venture’ with caution.⁸⁴ So how do we know when a company is carrying out a joint venture between shareholders? By the constitution? By contract? By conduct?

The constitutional question can be raised first. The wording of s 131(4) provides that a director may only act in the best interests of a shareholder if expressly permitted to do so by the company’s constitution. It would be reasonable, then, to suppose that the constitution might provide some guidance as to whether a joint venture exists.

Ideally it would, as the Court suggested in *Maruha*.⁸⁵ However, it is important to remember that it is very easy to set up a company, and the parties will not always give close attention to seeking full clarity in the arrangements between them. In the absence of a ‘Table A’ constitution in the Companies Act 1993, many parties use a ‘standard form’ constitution available through the Companies Office at the time of incorporation.⁸⁶ One example of this kind of constitution is Avon form CF–204(V2). The relevant provision of this commonly used constitution states that:

Joint venture

22.3. If the company is carrying out a joint venture between its shareholders, a director may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company. [See section 131(4).]

The first word of this provision illustrates this difficulty. It is unarguable that this provision permits a director of a joint venture company to act in the best interests of a particular shareholder rather than the company itself, but it does nothing to tell us whether or not a joint venture is intended or actually exists. In cases like *Shell*, where the constitution does not permit a director to act in the

83 It is worth suggesting that this might have been a boilerplate clause which the parties may have overlooked at the time of signing.

84 *Paper Reclaim*, para 31.

85 *Maruha*, para 19, above n 69 and accompanying text.

86 See [www.companies.govt.nz](http://www.companies.govt.nz/constitution-docs/AVON204/CONSTITUTION_V204.PDF) available at <http://www.companies.govt.nz/constitution-docs/AVON204/CONSTITUTION_V204.PDF>.

interests of a shareholder rather than the company, matters will be clear. In a situation where the constitution contains a provision like that contained in the Avon form, we will need to look more closely at the parties' arrangements to determine whether a joint venture actually exists.

The questions of whether a joint venture company can be determined to exist by contract or by conduct can, in the light of *Chirnside*, be dealt with together. As was noted in the judgment of Blanchard and Tipping JJ in *Chirnside*, the parties may have a joint venture relationship without ever having concluded a formal contract.⁸⁷ A joint venture may exist by contract or by conduct. It deserves to be noted, however, that *Chirnside* concerned a two party joint venture where such a finding was easily available. Many commercial relationships will be more complicated than this, as the Courts in *Paper Reclaim* and *Maruha* identified.

It should be clear that there may well be many situations where a constitution permits a director to act in the best interests of a shareholder rather than the company, but where it is unclear whether a joint venture exists between the shareholders. The one case to date on s 131(4) provides little assistance, and the lack of any clear statutory or common law definition exacerbates this lack of guidance or authority. In these circumstances, it is fair to say that the precise meaning of s 131(4) is unclear, and that further litigation is inevitable. But the lack of useful guidance as to how s 131(4) should be interpreted is only the beginning of our difficulties. As we shall see in the next part of this essay, s 131(4) may fundamentally alter the usual duties applying between directors, shareholders and their company.

V. THE FIDUCIARY COMPLICATIONS OF A JOINT VENTURE COMPANY

A. *Relationships Between Shareholders*

Chirnside could have meant that (most) joint venture relationships are 'inherently fiduciary', whether by way of analogy with partnership or by way of joint pursuit of a commercial objective with a view to a sharing of profit – which when read together, can perhaps be seen as different ways of describing the same thing. However, the Courts in *Paper Reclaim* and *Maruha* have departed from this approach, each taking the view that calling a commercial arrangement a 'joint venture' provides little guidance as to whether the parties owe each other fiduciary obligations.⁸⁸ Since s 131(4) refers to a 'joint venture between shareholders', the apparent effect of *Chirnside v Fay* could have been seen to be that the shareholders in a joint venture company would have fiduciary obligations to each other. In a normal company in which the directors are governed by s 131(1), shareholders have no fiduciary obligations to each other, save for the protection of minority interests.⁸⁹ or those they might otherwise assume (by an agreement between shareholders, for example).⁹⁰ But if by conduct or by contract, the company arrangement reflects a joint venture between the shareholders, then these shareholders would, following *Chirnside*, have fiduciary responsibilities to each other.

Maruha, on the other hand, suggests that *Chirnside* cannot be applied to joint venture companies in this way. The Court took the view that a corporate structure was very different to a part-

87 See *Chirnside*, above n 53 and accompanying text.

88 *Paper Reclaim*, para 31, approved in *Maruha* at para 20.

89 See e.g. the comments in Grantham and Rickett, above n 13 at 727.

90 On shareholders' agreements, see generally Herzfeld and Wilson, above n 26, ch 7; Reiter and Shishler, above n 22, Appendix C.

nership, and that the decision to form a company operating under the Companies Act rather than remain in a partnership under the Partnership Act that a relationship that was of a non fiduciary nature overall was intended.⁹¹ In other words, once the decision to incorporate is made, the relationship between parties (or shareholders) becomes immediately non fiduciary. The parties may, by the company constitution, by contract, or by conduct agree to fiduciary obligations, but in usual circumstances these cannot simply be implied into the corporate relationship. In a company that is a 'joint venture between shareholders', there is no ability to presume that the relationship between those shareholders is inherently fiduciary.

B. Relationships Between Directors and Shareholders

Where a company is a joint venture between shareholders and comes within the scope of s 131(4), the 'fundamental'⁹² duty of a director to act in good faith and in the best interests of a director does not apply, except inasmuch as it may be imputed by common law. Instead, the director may act in the best interests of a particular shareholder. Putting aside the other duties of a director contained in ss 133–137 of the Companies Act and focusing only on s 131, a director of a joint venture company owes no duty of good faith to the company, but only to one or more particular shareholders. A director becomes a fiduciary of a particular shareholder rather than the company.

It needs to be noted, however, that s 131(4) is unlikely to affect the other duties owed by directors. The useful *Mountfort v Tasman Pacific Airlines of NZ Ltd*⁹³ recently considered the application of s 131(2) of the Companies Act, which allows a director of a wholly owned subsidiary to act in the best interests of a holding company, rather than the company he or she is director of, if the constitution permits. The Court viewed this as 'an ancillary rather than a core provision of the Companies Act' and commented that '[w]hile s 131(2) will relieve directors of the obligation to put the interests of the subsidiary ahead of those of the holding company, such a sidewind cannot relieve them of the fundamental obligation to cease trading upon insolvency.'⁹⁴

C. Comment

So what does s 131(4) actually do? Reading the provision and *Chirnside* together, it could have been said that the directors of a joint venture company owe fiduciary duties only to particular shareholders (and not to the company), while the shareholders become fiduciaries of each other. This would have turned the 'standard' position under s 131 on its head. However, the comments in *Maruha* make it clear that a fiduciary relationship between shareholders will not be lightly or wantonly applied. All we can take from the current case law is that s 131(4) *may* affect the duty of a director to act in the best interests of the company but, following *Mountfort*, probably does not affect a director's other duties. The scope of s 131(4) would therefore appear to be very limited, and the provision can be seen as unlikely to provide a useful defence to any action by a director not made in good faith and in the best interests of the company as a whole. The answer to the question at the beginning of this paragraph is probably 'not a lot'.

91 *Maruha*, para 19.

92 See s 101 of the Law Commission's 1989 draft Aft. NZLC, R9, p 241. This phrase does not appear in s 131 of the Companies Act.

93 *Mountfort v Tasman Pacific Airlines of NZ Ltd* [2006] 1 NZLR 104. Hereinafter '*Mountfort*'.

94 *Mountfort*, 126 para 82.

The question ‘what is a joint venture?’ remains, on current case law, virtually impossible to answer in any general sense. Joint ventures exist, but cannot be defined in any consistent way.⁹⁵ In addition, the question ‘how do we know when a company is a joint venture between shareholders?’ is no less nebulous. At present, it appears we may decide this by reference to the company’s constitution, or to extrinsic contractual arrangements by the shareholders, or even conduct. In short, there is no clear test to decipher when a joint venture between shareholders is in place, and therefore no clear way of knowing whether s 131(4) applies in a particular situation.

This state of affairs is unsatisfactory. If s 131(4) may in certain cases alter the usual duties and obligations applying between directors, shareholders and a company, then it is necessary to have some certainty about when this provision should apply. But what are the options for remedying this uncertainty? As we will see in the next part of this essay, there are a number of options on the part of both Parliament and the courts.

VI. SOLUTIONS

A. *Amendment of the Companies Act: Definition of Joint Venture*

The first is to amend the Companies Act by providing a definition of ‘joint venture’. This would allow those trying to interpret s 131(4) to know whether or not their joint venture arrangements came within the scope of the words ‘joint venture’ as used in s 131(4). However, there are two key difficulties with this approach. The first is that, as we have seen, the term ‘joint venture’ is very difficult to define. No satisfactory definition really exists at law, and while *Chirnside* has provided some useful guidelines, these are more in the way of general principles than the kind of crisp exposition that is needed for a statutory definition, *Paper Reclaim* and *Maruha* have in any event retreated from the more sweeping statements in *Chirnside*. The second difficulty is that, having decided on a definition, that definition will itself be subject to rigorous testing in the light of particular situations. A poor definition may invite more contentiousness than currently exists.

B. *Amendment of the Companies Act: Constitution to provide whether company is a Joint venture*

The second avenue is a simple amendment of s 131(4). Section 131(4) currently provides that a director may act in the best interests of a particular shareholder if permitted to do so by the constitution and if the company is carrying out a joint venture. This could be amended to provide that the constitution must not only permit a director to act in the best interests of a particular shareholder, but must also expressly state whether or not a joint venture exists. This approach, hinted at in *Maruha*,⁹⁶ would not solve the difficulty of defining a joint venture, but would allow those involved to be certain whether or not the s 131(4) regime is to govern their arrangements. This option would, in other words, allow some certainty as to the parties’ intentions and would avoid the problems of the Avon-style standard form constitution, which envisages and allows for a joint venture company but provides no guidance as to whether a joint venture is intended or in fact exists.

⁹⁵ Reiter and Shishler, above n 22.

⁹⁶ *Maruha*, para 19.

C. Judicial Intervention: Constitution to provide whether company is a Joint venture

This kind of avenue could of course be pursued by judges. As noted above, s 131(4) has only been the subject of one decided case, and that case is easily put aside on the basis that s 131(4) did not apply as the constitution did not expressly provide for an alteration of directors' duties as s 131(4) requires. A future Court that is interpreting s 131(4) could require, in the interests of certainty, that the company constitution expressly state whether or not a joint venture actually exists. This would avoid the need for Parliamentary alteration of the provision. However, while a decision along these lines would add desirable certainty to the law, it could be seen as controversial on the basis that it adds an unanticipated judicial gloss on s 131(4). In a particular case, a finding of this nature at first instance might well be appealed, leaving it to an appellate court to decide whether interpretation along these lines should be supported in the interests of certainty or struck down on the basis that it is Parliament's job to amend an unsatisfactory provision.

D. Judicial Intervention: Arrangements between the parties

Another way for the judiciary to add some certainty to the law is for the courts to require the relevant shareholders to have clearly agreed that their arrangements constitute a joint venture – that there must be a clear shareholders' agreement or other contract which sets out whether or not a joint venture exists. The application of s 131(4) can then be determined on this basis, subject to the constitution being (at least) in Avon form or similar – that is, at least envisaging that s 131(4) may apply.

The difficulty with this approach, however, as with the previous one, is that it is somewhat incongruent with the approach taken in *Chirnside*. In that case, the Court found that a 'joint venture' arrangement existed through the conduct of the parties, and could (and often would) predate any formal contractual arrangements. It will be difficult for a Court to argue that while this principle should apply in a case like *Chirnside*, more express arrangements are necessary in the case of a joint venture company – if only because form should not overrule substance.

E. Judicial Intervention: A Presumptive Approach

It could be said that *all* companies with more than one shareholder represent a joint venture between shareholders and are, to some extent at least, 'joint venture companies'. One of the key benefits of a company is that involves the sharing of risk between different shareholders on a limited liability basis. Therefore, it is possible the courts could take a presumptive approach that if the constitution provides that a company might be a joint venture company, it probably is. This approach would however ignore the fact that s 131(1) is undoubtedly intended to be of general application and would go against the comments in *Paper Reclaim* that the term 'joint venture' should be applied with caution.⁹⁷ If virtually all companies are to be taken as joint venture companies and the duties of their directors to be altered, then the effect of s 131(1) will be severely diluted. For these reasons alone, this approach seems unlikely.

⁹⁷ *Paper Reclaim*, para 31.

F. *Amendment of the Companies Act: Repeal of s 131(4)*

It is of course necessary to turn to one of most obvious options: the repeal of s 131(4) entirely. As has been noted above, what this section means is unclear and its application uncertain. In addition, there has been only one case involving this provision in the years the Companies Act 1993 has been in effect. If s 131(4) was revoked, would anyone notice or care?

One reply to this option might be that while s 131(4) creates some unwelcome uncertainty, it also allows for some welcome flexibility. It allows for a situation where particular shareholders may wish for a particular director to act in their interests, rather than the 'company's', and this flexibility could be desirable in certain circumstances. Revocation can be a blunt axe to yield.⁹⁸ Repeal remains, however, a clear option for improving certainty in this area of law.

G. *Overview*

It is important to be practical about law reform. Section 131(4) is problematic, but these problems have not yet arisen in the context of a decided case. It is not unrealistic to surmise that Parliament might not get involved until the courts point out the difficulties of s 131(4), and even then, law reform can be a slow and tortuous process. Even if the Law Commission was to step in before matters reach the courts, it is unlikely Parliament would see any incentive to act until problems have actually arisen.

This leaves us with the courts. It is to be hoped that any future judicial decision on s 131(4) will stretch beyond the facts of the particular case at hand and will look to providing some real predictive certainty as to the application and scope of this provision. Of the above judicial options, this writer believes the first is likely to provide more assistance. If a constitution must expressly provide that the arrangements between the shareholders constitute a joint venture, then this requires of parties a good degree of certainty about their arrangements. In the light of *Chirnside* and considering the arguments against judicial activism, there may be objections to this approach, but it squares with *Maruha* and can be defended on the basis that a company joint venture is a unique species, one that may significantly alter the usual obligations between those involved in a company. As such, certainty is to be desired, and an unwitting assent to alteration of these obligations – as is possible for a company with a standard form Avon constitution – is not to be desired.

VII. CONCLUSION

Most directors must act in good faith and in the best interests of the company to which they are appointed.⁹⁹ Under s 131(4) of the Companies Act, however, a director may put aside this duty (though not others) and act in the best interests of a particular shareholder if expressly permitted to do so by the company's constitution and if the company is carrying out a joint venture between shareholders. This essay has asked some questions about s 131(4) and found it wanting. What is a joint venture? How do we know when one exists? Does s 131(4) alter the usual fiduciary obligations between directors and shareholders in a company? These questions are not easy ones to answer, and the main intent of this essay has been to point out that there is a great deal of uncertainty in the current law, and that this uncertainty is undesirable.

⁹⁸ Watts, above n 1 at 95, expresses the view that 'the provision should be left as it is.'

⁹⁹ Companies Act 1993 s 131(1).

This essay has also proposed a number of solutions to this uncertainty: some for Parliament, some for the courts. It remains to be seen which will demonstrate the will required to clarify the current uncertainty in the law of joint venture companies. Either way, one point seems certain: s 131(4) cannot remain as untouched as it has until now. Until such time as the scope of s 131(4) is clarified by the courts of Parliament, the onus is surely on the parties – and the lawyers advising them – to ensure their arrangements and obligations are crystal clear.

CONTEMPORARY ISSUES IN MĀORI LAW AND SOCIETY *CROWN FORESTS, CLIMATE CHANGE, AND CONSULTATION— TOWARDS MORE MEANINGFUL RELATIONSHIPS*

BY LINDA TE AHO*

Whanaungatanga, the importance of relationships, is a key theme that permeates significant developments in Māori law and society that have occurred during the course of the year.¹ Māori have again called for a relationship with the Crown as their Treaty partner in which they can exercise rangatiratanga: the right for Māori to be self-determining and self-sustaining.² The Court of Appeal case which considered the nature of the Crown-Māori relationship twenty years ago provides a convenient starting point for this year's review which goes on to consider challenges by some Māori to the allocation regime that has been adopted in relation to Crown forest lands. Inextricably linked to concepts of whanaungatanga and rangatiratanga is the special relationship that Māori share with the environment and the resources within. This relationship includes rights and obligations of kaitiakitanga, or guardianship, over certain resources. Māori reaffirmed the importance of such relationships when they articulated their perspectives on climate change during a Crown initiated consultation process early in 2007, and again later in the year in relation to bioprospecting and mātauranga Māori. The issues raised in the latter process go to the heart of the Waitangi Tribunal claim to indigenous flora and fauna, the hearings for which have finally concluded after 17 years. The report of the Waitangi Tribunal on that claim is eagerly awaited. Other reports issued by the Tribunal this year, and reviewed here, are forthrightly critical of Crown Treaty Settlement Policies.

I. RANGATIRATANGA AND THE *LANDS* CASE REVISITED

This year marked the 20th anniversary of the Court of Appeal's decision that interpreted the principles of the Treaty of Waitangi: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case).³ The *Lands* case and the stream of cases that followed⁴ were responsible for

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1 This review covers the period from October 2006 to September 2007.

2 Rangatiratanga is a term sourced from the word 'rangatira' which means chief. Tino rangatiratanga is a term used in the Māori text of the Treaty of Waitangi 1840, the text that Māori signed. The word 'tino' is an intensifier. Tino rangatiratanga literally means unqualified exercise of chieftainship. The corresponding term used in the English version of the Treaty is 'full and exclusive possession' of all resources and things valuable to Māori. An alternative translation is sovereignty. In the Declaration of Independence of New Zealand 1835, the word used for sovereignty had been mana.

3 University of Otago, Faculty of Law, 'In Good Faith' Symposium, 29 July 2007 available at <www.otago.ac.nz/law/symposium/>.

4 Those cases include: *Tainui Māori Trust Board v AG* [1989] 2 NZLR 513 (hereinafter the *Coal* case); *NZ Māori Council v AG* [1992] 2 NZLR 576 (hereinafter the *Broadcasting Assets* case); *New Zealand Māori Council v Attorney General* [1989] 2 NZLR 142 (hereinafter the *Forests* case).

what seemed to be positive practical consequences for Māori who have brought and continue to bring matters to the attention of courts calling into question the manner of their Treaty partner's actions. The State Owned Enterprises Act 1986 provided for certain state assets and resources to be transferred and then 'managed' by private sector boards. The focus of these new State Owned Enterprises (SOEs) was to be profit making, with any non-commercial activity required by government to be subsidised. Māori became concerned that the transfer of natural resources to SOEs would affect the Crown's ability to settle Treaty claims.

As a result of the *Lands* case, the Crown and Māori came to an arrangement as to how Treaty of Waitangi claims would be safeguarded. The Treaty of Waitangi (State Enterprises Act) 1988 reflects the terms of this arrangement. Crown land could be transferred but would be subject to provision for the resumption of the land on the recommendation of the Waitangi Tribunal so that it could be returned to Māori ownership. Subsequently, as a result of the *Forests* case,⁵ the Crown and Māori negotiated an agreement that restricted the Crown's ability to sell Crown forest land. Under that agreement, the Crown would be able to sell cutting rights to trees on Crown forest land until the Tribunal recommended that the land was no longer liable to resumption for the purpose of transfer to Māori ownership.⁶ This agreement was embodied in the Crown Forests Assets Act 1989, which Act also established the Crown Forestry Rental Trust (CFRT).⁷ Rental payments received by the Crown from Crown Forest Licence holders is paid to CFRT who holds funds on trust for Treaty settlements concerning Crown forest licensed land. The interest earned on the accumulated rentals held by CFRT is used to fund certain Treaty claimants and research.

In addition to the systems established to safeguard resources for the purposes of Treaty settlements, the SOE cases are also responsible for the consideration of Treaty 'principles' at times when the Crown and its agents enter into new proposals, or make decisions on major issues – and this is likely to occur even where there is no equivalent to section nine of the State Owned Enterprises Act in an empowering Act. State Owned Enterprises, themselves, are conscious of the scope for review of proposals or decisions by way of judicial review in the Courts, and before the Waitangi Tribunal theoretically ensuring that Māori interests are taken into account in major decisions that affect Māori.⁸

And yet, despite all of this, twenty years after the celebrated *Lands* case,⁹ it is questionable whether the protection mechanisms for lands, and those established later in relation to Crown Forests, are actually working at all for Māori in the context of the Crown's policies for Treaty Settlements. This year Māori protested against the proposed sales of land held by Landcorp in Whenuakite in the Coromandel, and Rangiputa in the Far North that should have been available for Treaty settlements. One commentator has described these proposed sales as inexplicable given that the land available nationwide for Treaty settlements is a tiny fraction of the territories under

5 The *Forests* case.

6 Treaty of Waitangi Act 1975, ss 8HA-8HI, as inserted by the Crown Forest Assets Act 1989, s40.

7 Crown Forests Assets Act 1989 s34.

8 The Treaty may found an application for judicial review where an empowering statute expressly enforces or promotes the principles of the Treaty either as binding restraints on decision-makers or as factors to be taken into account such as in the SOE Act (express reference review), and where a statute is silent but the context of the decision-making imports Treaty considerations (contextual review). According to *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 223, the Treaty or Treaty principles are of such significance that they should be presumed mandatory considerations in the context of a statutory power of decision and this has won support from academics and a number of judges.

9 *NZ Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Māori claim. The Crown's relativity policy and soaring land values make many of the properties that might be available for settlement beyond reach.¹⁰ The Government, in response has begun to review its policy around the land sales processes undertaken by state owned enterprise Landcorp saying that it aims to ensure that land with significant cultural value is properly protected.¹¹

Such challenges to the Crown's Treaty settlement policies reflect the more inherent issue of rangatiratanga. In spite of the reassuring judicial language of partnership, mutual respect and obligation, and so on, if the result of the *Lands* case and the stream of cases that followed, is that the notion of Crown Sovereignty remains unchallenged and becomes so deeply entrenched in the law, or at least in Pākehā law, then, in the words of Ani Mikaere,

tino rangatiratanga cannot be realised and tikanga Māori will forever be positioned as inferior to Pakeha law, tolerated to varying degrees and for different purposes ... but ultimately subject to ... the stroke of the legislative pen, or to misinterpretation at the hands of the judiciary.¹²

These cautionary words are difficult to ignore in balancing the overall ramifications of the *Lands* case in relation to the tangata whenua systems of law and government that existed in this country prior to colonisation by the British.¹³

II. CROWN FOREST ASSETS – CLAIMS TO THE KAINGAROA FOREST

In the year past, claims and challenges relating to the allocation of Crown Forest Assets have been hotly contested both in the courts and in the Waitangi Tribunal. Under particular scrutiny has been the Crown practice of using deeming legislation to avoid the process of settling claims to Crown Forest Licensed Land via the Waitangi Tribunal as envisaged under the Crown Forest Assets Act 1989.¹⁴

A. *Te Pūmautanga o Te Arawa – the Affiliate Te Arawa Settlement*

I have outlined in previous reviews some of the historical background of the claimant group which comprises a number of iwi and hapū of Te Arawa¹⁵ that opted to pursue direct negotiations with the Crown to settle their historical Treaty of Waitangi claims rather than via the Waitangi Tribunal. The cluster of hapū and iwi, once known as Ngā Kaihautū o Te Arawa (Ngā Kaihautū), has more recently taken on the name Te Pūmautanga o Te Arawa (TPT). TPT had been part of earlier attempts to negotiate a collective settlement with all iwi in the Central North Island with interests in the Kaingaroa Forest. Those attempts failed and mandate issues in relation to TPT, who continued to negotiate directly with the Crown, became the subject of two consecutive Waitangi

10 Rawiri Taonui 'Comment: Going, going, gone' *Sunday Star Times – National News* 18 March 2007 available at <http://www.maoriparty.com/index.php?option=com_content&task=category§ionid=1&id=59>.

11 Press statement, New Zealand Government 'Landcorp comment' 28 February 2007 available at <<http://www.scoop.co.nz/stories/PA0702/S00546.htm>>.

12 A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori' in *Waitangi Revisited – Perspectives on the Treaty of Waitangi* (2005) 330, 342.

13 Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups led by rangatira – leaders for their ability to weave people together. Māori societies developed tikanga Māori, which to use a phrase coined by Ani Mikaere in 'The Treaty of Waitangi and Recognition of Tikanga Māori', *ibid*, was the 'first law of Aotearoa/New Zealand' by which Māori governed themselves.

14 The *Forests* case.

15 A confederation of tribes in the Central North Island in and around Rotorua.

Tribunal reports.¹⁶ Ultimately, the Tribunal found that the approximately 24,000 affiliates of Te Arawa iwi and hapū who remained loyal to Ngā Kaihautū (now TPT) had exercised their tino rangatiratanga and those groups were open to negotiate their claims with the Crown. They did so, and went on to ratify a Deed of Settlement with the Crown. It is expected that legislation to perfect that settlement will be introduced into Parliament in late 2007.

The Affiliate Te Arawa Deed of Settlement provides for a comprehensive settlement of historical claims for the affiliates of Te Arawa who chose to settle (the TPT Settlement). It provides for an apology by the Crown, and cultural redress that includes the return of sites of significance such as mountain peaks and geothermal resources. The settlement also promises financial and commercial redress, the most controversial aspect of which is the proposed transfer of Crown Forest Licensed Land predominantly in the Kaingaroa Estate (Settlement Licensed Land). The legislation will deem certain events to have occurred and TPT becomes entitled to accumulated rentals relating to the Crown Forestry Licences as a Confirmed Beneficiary. In addition, TPT may also purchase further Crown forest land on a commercial basis if the settlement legislation is passed by Parliament (Deferred Licensed Land). In relation to Deferred Licensed Land, the settlement legislation will deem certain events to have occurred and the *Crown* will be entitled to accumulated rentals as a confirmed beneficiary. This aspect of the settlement has attracted the most heated debate. The Crown has indicated that it intends to use the accumulated rentals to further Māori development.

*B. Forests and Fiduciary Duties – NZMC v AG (High Court)*¹⁷

In the High Court the New Zealand Māori Council (NZMC), Federation of Māori Authorities (FOMA), and Tumu Te Heuheu, Ariki of Ngāti Tūwharetoa, sought to prevent the Crown obtaining the accumulated rentals pursuant to the agreement it reached with TPT. In addition, Tūwharetoa and other interested iwi contended that their contingent rights are gravely affected by the Crown's actions of allocating parts of the Forest Estate without having first dealt with cross claims. All declarations sought by the plaintiffs were declined, but the Court, albeit cautiously, expressed some concerns about the Crown's proposed actions.

As against the Crown, the plaintiffs alleged that:

1. By using 'deeming legislation' to avoid having all cross claimants' entitlements to Crown Forest land determined by the Waitangi Tribunal, the Crown breached an agreement made in July 1989 with NZMC and FOMA who represented Māori generally;
2. That July Agreement was embodied in the Crown Forests Assets Act 1989, and the Crown settled a Trust Deed establishing the Crown Forestry Rental Trust. The plaintiffs further alleged that the Crown's actions of circumventing the Tribunal process also breached a statutory duty implicit in the Crown Forests Assets Act.
3. By seeking to obtain the benefits of funds as a 'Confirmed Beneficiary' the Crown would also be in breach of the Trust Deed.
4. The Crown is acting in breach of its fiduciary duty to the plaintiffs by

¹⁶ For a fuller outline of the historical background see Waitangi Tribunal, *The Te Arawa Mandate Report* (Wai 115, 2004) and *Te Arawa Mandate Report Te Wāhanga Tuarua* (Wai 1150, 2006) 2 as cited in L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev.* 102, 106-107.

¹⁷ *NZMC v AG* [2007] High Court Wellington CIV 2007-485-000095 (Unreported, Gendall J, 4 May 2007).

- a. failing to act in good faith, fairly, reasonably and honourably by entering into the Settlement Deed with TPT when extant claims were before the Waitangi Tribunal and future claims may also be brought, and where the Waitangi Tribunal had made no recommendation so as to confirm entitlement to rental proceeds as Confirmed Beneficiaries on both TPT and the Crown;
- b. contracting to receive the rental proceeds in breach of the Trust;
- c. avoiding the payment of compensation to claimants; and
- d. ousting the jurisdiction of the Waitangi Tribunal.¹⁸

The plaintiffs sought declarations to that effect, together with orders seeking to restrain TPT from obtaining land, and the Crown from obtaining rental proceeds or trust funds. Gendall J began by revisiting the *Lands* case and the *Forests* case. Both cases had been initiated by the NZMC, and both resulted in the establishment of mechanisms aimed at protecting resources held by the Crown for the purpose of settling Treaty of Waitangi claims for all Māori. Essential to the plaintiffs' case was the claim that the TPT Settlement and the envisaged legislation would thwart the protection mechanisms around Crown Forestry Assets. Previous settlements such as those in relation to Waikato-Tainui and Ngāi Tahu which involved Crown Forestry Assets have already bypassed the Waitangi Tribunal process with the use of deeming legislation. One of those settlements involved a Deferred Licensed Land purchase, a prominent feature of the TPT Settlement, but neither had involved the Crown seeking to obtain benefits of funds for itself as a Confirmed Beneficiary. The use of the deferred selection of licensed Crown forest land from outside the settlement quantum enables TPT to obtain more land than it would otherwise have been able to acquire, said to recognise the importance of Māori rebuilding land holdings through Treaty Settlements. The Deferred Licensed Land is land which the Crown has recognised as being within the tribal region of TPT – this has been challenged by neighbouring tribes.

The Court declined all declarations sought based on the well-established principle that the Court cannot intrude upon the legislative process. The issues raised from the Deed of Settlement were non-justiciable. In other words: 'as a matter of Parliamentary Sovereignty, the Courts cannot presume to tell Parliament what it can or cannot do'.¹⁹

Despite the result, Gendall J cautiously expressed some reservations about the Crown's actions. Firstly, his Honour commented that although the reasons behind the Deferred Licensed Land purchase seem alluring at first sight, it should be remembered that TPT are buying that land with the accumulated rental funds from their settlement land. He questioned why the Crown should receive the rentals from the Deferred Licensed Land, and went on to suggest that the Crown might consider coming to some arrangement whereby the funds from the Deferred Licensed Land might be held pending the determination of competing claims, and then distributed to successful claimants. Secondly, Gendall J commented at length about what he saw as the plaintiffs' true cause of action: fiduciary duties owed by the Crown to Māori. The *Lands* case has made it clear that the Treaty created fiduciary duties on the Crown in favour of Māori who have corresponding fiduciary duties. According to later cases, such obligations are to be recognised irrespective of a specific statutory provision such as s 9 of the State Owned Enterprises Act 1986. Gendall J went further to say that the fiduciary duties exist not only because of the partnership relationship pursuant to

18 The plaintiffs also claimed that the trustees of the Crown Forestry Rental Trust (CFRT) would be in breach of duties if they were to distribute rental proceeds in any way other than required by the Trust Deed. The Court dismissed the claims against the CFRT trustees outright and focussed upon the claims against the Crown.

19 *NZMC v AG*, above n 17, para 89.

the Treaty, but also because of the vulnerability of Māori in the sense that they are subject to the Crown's ultimate power to legislate. The nature of the fiduciary relationship determines the existence and scope of the fiduciary duties, but typically they include a duty to act fairly, not to act unconscionably, to act in good faith or utmost good faith, and a duty of undivided loyalty. Fiduciaries are not allowed to place themselves in positions where their interests and duty conflict, nor should they profit from their position of trust, or be allowed to benefit from their own breach of duty. Gendall J formed the opinion that if the Crown secures benefits for itself at the expense of its fiduciary partners (all Māori) through a process other than by a Waitangi Tribunal declaration, or with the consent of the claimants before the Tribunal to share in such benefits, then that would be inconsistent with its fiduciary duties.²⁰

Those statements were not essential to the decision of the case before him and ultimately Gendall J recognised that TPT's entitlements had been fairly negotiated and it would be wrong for those entitlements to be impeded because of a challenge to the Crown retaining Crown rental funds for itself: 'Te Arawa's interests and entitlements cannot, in justice, be disturbed.'²¹

C. *The case on appeal – a political compact*

In their notice of appeal, the plaintiffs reformulated the relief sought as a judgment or declarations from the Court of Appeal that the transfer to TPT of Crown forest land is inconsistent with the fiduciary duty of the Crown; the transfer to TPT of Crown forest land without a recommendation of the Waitangi Tribunal is in breach of the Crown's contractual obligations and statutory duty to the cross-claimants and to Māori; and the issues arising from the Settlement Deed are justiciable.

The Court of Appeal dismissed the appeal and declined to make any of the declarations sought.²² While the Court agreed with the appellants that the 1989 Act regime did not contemplate the proposed arrangements in the Deed of Settlement, the deviation from that regime will ultimately become lawful if authorised by an Act of Parliament. The Deed of Settlement is a political compact and the courts will not grant relief which interferes with or impacts upon actions of the executive preparatory to the introduction of a bill to Parliament, because to do so would intrude into the domain of Parliament. Because of this principle and the essentially political nature of the Settlement Deed, the issues relating to the Settlement Deed were not justiciable. The Court also went on to disagree with Gendall J's obiter statements that fiduciary duties, sourced from the Treaty itself, can form the basis of an action in New Zealand courts. Rather the Court of Appeal reaffirmed the law as developed from the *Lands* case:

the Crown's duty to Maori is analogous with a fiduciary duty ... The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty ... But it does so by analogy, not by direct application.²³

20 *Ibid.*, para 103(3).

21 *NZMC v AG*, *ibid.*, para 98.

22 *New Zealand Maori Council & Ors v A-G & Ors* [2007] NZCA 269 per William Young P, O'Regan and Robertson JJ.

23 *NZMC v AG*, *ibid.*, para 81.

III. TREATY SETTLEMENT PROCESSES GENERALLY

These cases seeking to halt the Government's current Treaty settlement policies concerning Crown forest assets are reminiscent of the *Lands* case and the other SOE cases that followed a generation ago. Whilst the courts in more recent times did venture to make some guarded statements about the way in which the Crown has gone about crafting these settlements, it has been the Waitangi Tribunal that has played the leading role in the ongoing debate concerning the Crown's Treaty Settlement Policies generally. Two recent Waitangi Tribunal reports illustrate the problems that arise when different claimant groups have overlapping or competing claims, and are also indicative of a Tribunal more forthright in condemning certain Crown settlement policies and more prescriptive in recommending ways to improve those policies.

A. *The TPT Settlement and the Waitangi Tribunal*

Not only was the TPT settlement the subject of the court cases reviewed above, it has also been the subject of inquiry by the Waitangi Tribunal. The first two Tribunal reports on the settlement focussed on mandate issues.²⁴ The Tribunal's third report on the settlement was released shortly before the Court of Appeal hearing.²⁵ The Tribunal, led by Judge Fox, strongly criticised the approach of the Office of Treaty Settlements (OTS), the Crown agency responsible for negotiating Treaty Settlements.²⁶ It was particularly critical of OTS's policy of negotiating with TPT without engaging with the other iwi and hapū of Te Arawa which did not participate in the TPT negotiations. Even so, the Tribunal concluded:

... we do not think the tribes of the Te Arawa Waka who have supported the ... settlement should suffer for OTS's failures, so we do not recommend that the settlement not proceed at this stage. But we believe that it must be varied.²⁷

The Tribunal's position was to shift, however, following a further hearing that focussed specifically on the forestry issues in the settlement. In its final report on the TPT settlement²⁸ the Tribunal formed the view that while the iwi and hapū affiliated to TPT deserve a settlement, the Tribunal could not endorse the settlement in its current form. Prejudice would result to those iwi and hapū who were not part of the settlement if the settlement went ahead. Delaying the settlement would, on balance, cause less prejudice given that the disadvantage would be to a smaller group.

Accordingly the Tribunal recommended that the settlement be varied and delayed pending the outcome of a forum of Central North Island (CNI) iwi. The Tribunal noted the failed attempts to negotiate a collective settlement with all CNI iwi with interests in the Kaingaroa Forest Estate dating back to 1990. Despite those failed attempts and the fact that settlements involving Kain-

24 Waitangi Tribunal, *Te Arawa Mandate Report* (Wai 115, 2004) and *Te Arawa Mandate Report Te Wāhanga Tuarua* (Wai 1150, 2006) 2 reviewed in L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev.* 102, 106-107.

25 Waitangi Tribunal, *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* (Wai 1353, 2007).

26 For a recent review of Treaty of Waitangi Claims Processes, see L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev.* 102, 104-106.

27 Waitangi Tribunal, *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* (Wai 1353, 2007) 11.

28 Waitangi Tribunal, *Final Report on the Impacts of the Crown's Settlement Policies on the Te Arawa Waka and Other Tribes* (Wai 1353, 2007).

goroa forest lands have already been effected using the deeming legislation complained of in the courts, the Tribunal formed the view that that the time is ripe to attempt such a collective approach again. It proposed that a forum of CNI iwi be constituted, the aim being to negotiate, according to tikanga, high-level guidelines for the allocation of Crown Forest Lands, similar to the Māori Fisheries Commission.²⁹

The Tribunal also took the opportunity to send a clear message to the Crown about its Treaty Settlement policies:

Future settlements cannot proceed like this. In particular, the Crown must seek to redress the imbalance in information and resources between the negotiating parties. It cannot continue to 'pick favourites' and make decisions on tribal interests in isolation, based on inadequate information'.³⁰

B. *Tāmaki Makaurau and the Waitangi Tribunal*

Tāmaki Makaurau is the original name for the area now more commonly known as Auckland. Literally, Tāmaki means lovers and rau means hundred. The origins of the name, then, appropriately describe Tāmaki Makaurau *as a place* desired by many because of its rich resources and accessibility, and many battles were fought for its possession.³¹ In its report on the Tāmaki Makaurau settlement process³² the Tribunal, led by Judge Wainwright, heavily criticised the OTS approach of negotiating with one claimant group in isolation from those with overlapping claims in the wider Auckland area. The Tribunal recommended that the proposed settlement with Ngāti Whatua o Orakei not proceed and that OTS should work with other tangata whenua groups to negotiate settlements for them.

Just as the 1987 *Lands* case provided a platform for this review, it provided a platform also for the findings of the Tribunal which cited a key passage from one of the judgments:

The responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as ... to be able to say it had proper regard to the impact of the principles of the Treaty.³³

IV. CLIMATE CHANGE

He tau kotipū

A year cut short is a year of early winter.

This concise proverb reminds us that an unexpected frost, heralding an early winter, upsets the yearly cycle of life. Unexpected adversity is more difficult to deal with than adversity known in advance.³⁴ In its attempt to deal with the challenges of climate change sooner rather than later, the

29 Waitangi Tribunal, *ibid*, 68-69.

30 Waitangi Tribunal, *ibid*, 67.

31 A W Reed, *The Reed Dictionary of New Zealand Place Names* (2002 ed) 482-3.

32 Waitangi Tribunal, *Tamaki Makaurau Settlement Process Report* (Wai 1362, 2007).

33 *New Zealand Maori Council v A-G* [1987] 1 NZLR 641, 682 (CA) (per Richardson J), cited in Tamaki Makaurau Report, *ibid* at 100.

34 P Grace, and W Grace, *Earth, Sea, Sky: Images And Maori Proverbs From The Natural World Of Aotearoa New Zealand* (2003) 46.

Crown, via its lead Ministries,³⁵ unveiled its policy framework discussion documents on climate change in February 2007 and embarked on a consultation process. In its attempt to fulfil some of its responsibilities under the Treaty of Waitangi, that wider process included a process specifically for Māori that would involve twelve regional consultation hui held across the country. In response, Māori have come together to address the significant challenges posed by climate change.

A. Overview

The Kyoto Protocol provided an early step towards coordinated international action on climate change and the New Zealand Government has affirmed its resolve to meet its commitments. Government officials distributed five consultation documents relating to the Government's work programmes on issues such as energy, sustainable land management, and transport. The documents explore alternatives to a carbon tax such as a more narrowly-focused tax, emissions trading, voluntary agreements, and other measures such as discouraging the conversion of land use from forestry to farming given that New Zealand's economy is largely based around agriculture and emissions from agriculture make up nearly half of our annual greenhouse gas emissions.

Having been presented with the Government's agenda, Māori provided their feedback about climate change issues and the solutions proposed by government officials from their own perspectives. At every hui, tangata whenua affirmed that climate change is an important and urgent issue, that human action – and inaction – will be judged by future generations, and that balance must be restored in the environment. It became clear that for Māori this conversation has come quite late because climate change has been part of the Māori awareness for a long time. However, equally as prevalent was the desire for further and better information about the economic impacts and opportunities that might flow from the proposed policies on climate change. During the hui, tangata whenua expressed their own values and unique stories in relation to the problems and issues in their own regions. It became clear that different tangata whenua groups require different information and different solutions in relation to the issues in their respective regions, and tangata whenua reserved their right to engage directly with the Crown on their own behalf. Without wanting to detract from that in any way, some common themes did emerge from the consultation hui and these are summarised below.

B. Common themes emerging from the climate change consultation process³⁶

1. Prioritising Māori Values and a Māori World View

The relationship that Māori share with the environment cannot be overstated. It is reflected through whakapapa, ancestral place names, and tribal histories. The regard with which Māori holds the environment reflects the close relationship that Māori have with their ancestors, being direct descendants of Ranginui and Papatūānuku.

At the hui held in New Plymouth, Whanganui Māori reminded the Government of the valuable information already contained in various Waitangi Tribunal Reports about this Māori world view. In the *Motunui-Waitara Report* (Wai 6, 1983), for example, the Tribunal found that as at

35 Ministry for the Environment, Ministry of Agriculture and Forestry, and Ministry of Economic Development.

36 This summary is an adaptation of a document entitled 'Climate Change Consultation Hui Summary of Key Themes' a summary commissioned by the lead Ministries on climate change issues and collated by the writer on behalf of Indigenous Corporate Solutions Limited in March 2007.

1840 the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi as a taonga of central significance. The river was conceptualized as a whole and indivisible entity, not separated into beds, banks, and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, the river is a living being, an ancestor with its own mauri, mana, and tapu. This holistic world view was promoted at every hui and Māori warned against dealing with taonga in a compartmentalised way. Time and again, it was argued that there needs to be more linkage between climate change issues, the Government's Water Programme of Action, and the claims to flora and fauna (Wai 262).

Strong feelings that a Māori world view in relation to climate change is not being adequately considered, and that the proposed policies do not go far enough to protect the environment were a recurring message. Māori agree that climate change is a real and important issue: it will affect their lands, waterways, flora and fauna, and food sources, and consequently their rights and responsibilities in relation to rangatiratanga and kaitiakitanga. A Māori world view which is holistic and focuses on caring for all aspects of our environment is a model for sustainability and should be accorded higher priority in policy and decision making. This can only occur, Māori said, with improved analysis, better Māori input into policy development, and ongoing quality engagement.

2. *Te Tiriti o Waitangi*

The Treaty of Waitangi obliges the Crown to protect Māori people in the use of their resources to the fullest extent practicable, and to protect them especially from the consequences of the settlement and development of the land.³⁷ Māori frequently referred to their Treaty relationship with the Crown and asserted rights and guarantees affirmed in the Treaty.

That Māori were not properly consulted in the Kyoto process may be a Treaty breach. Also under the Kyoto rules only forests established from 1990 onwards can be counted as creating new carbon sinks and therefore eligible for carbon credits. Clear boundaries in the proposed policies, such as this 1990 date, flow directly from the Kyoto Protocol, yet there had been insufficient consideration of tangata whenua issues when the New Zealand Government entered that arrangement.

Further analysis is needed on Treaty impacts – particularly for those iwi who have settled. In Ngāi Tahu for instance, the point was also openly made that if Ngāi Tahu's ability to use land (such as forest land) that has been returned pursuant to a Treaty Settlement with the Crown is to be constrained or penalised by the Government's proposed policies – that could well lead to litigation or a claim to the Waitangi Tribunal for a contemporary Treaty breach.

3. *Government Coordination and Leadership*

At every hui there were calls for the Government to lead by example, not just in small ways such as reducing the size of its vehicle fleet. The Department of Conservation and Landcorp are large pastoral owners. Solid Energy uses and mines coal. It was urged that these organisations should be leading by example in their business practices. There were also requests for Government to take a more coordinated approach in its response to climate change. For example, where Māori want to relocate to rural areas, there is need for coordination between the Ministries of Social Development, Housing, Health and Immigration as well as ensuring that local government act consistently with central government policy.

37 Waitangi Tribunal, *Motunui-Waitara Report* (Wai 6, 1983).

4. Consultation

(a) Consultation process generally

The Treaty of Waitangi requires that the Crown consult with Māori on important issues.³⁸ However, at every hui, participants expressed scepticism and disillusionment about governmental consultation generally. It was said that too often Māori views, values and submissions are simply ignored, the Foreshore and Seabed debacle often cited as an example of that.³⁹ Accordingly there were calls for consultation that better reflects the Treaty relationship. The strategy of government officials coming in to areas, giving a presentation, then leaving and Māori making recommendations to Government which may or may not be followed was heavily criticised. Climate change, it was said, was not created by Māori, but by Western civilization and its greed.

(b) Information, timeframe, representation, and resourcing

While there was some acknowledgement of the Government's efforts to consult, criticisms levelled at the lack of availability of information, the complexity, volume, and lack of relevance to Māori, were voiced at almost every hui.

(c) Consultative forum

Whilst the proposed process of nominating representatives from each hui to attend a Māori Reference Group for Māori across the country to caucus and discuss the issues was seen as a positive step, some hui felt that more than one representative was needed from each rohe. Further there was a need for continuing consultation with such a group well versed in these complicated issues. Advocating ongoing dialogue was a key feature of many of the hui held and some hui proposed models for ongoing consultative groups as well as models of good consultation practice such as the Public Works Act process accepted by Land Information New Zealand and the National Māori network hui with the Environmental Risk Management Authority.

Some suggestions made for addressing the ongoing engagement of Māori in relation to climate change included that:

- Māori have input through to and beyond the papers and recommendations to the Ministers and Cabinet;
- There be a further consultation round on the actual policies prior to legislative confirmation process; and
- Māori reference groups that relate to natural resources be combined.

To its credit the Government accepted most of these suggestions. The Māori Reference Group that was established was resourced by the Government to meet in March 2007. At that hui the group presented a set of recommendations to relevant senior government officials from the lead Ministries. One of those recommendations sought a meeting with Ministers, and in July 2007 the Māori Reference Group met with relevant cabinet Ministers to discuss their concerns and recommendations. In September 2007, executive members of the Māori Reference Group met with iwi leaders in a forum to discuss issues and share information about the Government's proposed programme for dealing with climate change, focussing specifically on the anticipated release of the Govern-

38 The *Forests* case.

39 The Foreshore and Seabed Act 2004 was enacted hastily despite the widespread and passionate opposition of Māori, and in defiance of strong recommendations made by the Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071 2004).

ment's proposed emissions trading scheme. A summary of the outcomes of the September hui is set out below in section C of this part of the review.

(d) Other Concerns about consultation

In addition to the concerns summarised above, it was said that Māori are over-consulted, and that consultation should be more cohesive and include other policy issues such as the Water Programme of Action and the claims in relation to flora and fauna (Wai 262). Also, consultation ought to be carried out with landowners as well as tribal groups.

In the midst of all the criticism there was some acknowledgement of the efforts made by the lead Ministries with respect to the consultation hui on climate change, and where tangata whenua specifically requested additional meetings in their own tribal regions, or meetings with officials on specific issues such as forestry, those requests were met.

5. *The need for further and better Māori-specific information*

(a) Economic impacts and opportunities

Whilst many Māori were concerned about the impacts of climate change on the environment, there were frequent requests by Māori for a report on the economic impacts and opportunities from the proposed climate change policies that specifically affect Māori. Before Māori could truly engage, they need to know how the policies affect them and their choices for future land use. What incentives could be provided for Māori to retain their land in indigenous forests or to convert from pine to indigenous species? What are the benefits of organic farming? What research opportunities might arise from the policies in which Māori could play a lead role? What are best practice examples that might be applied to Māori situations?

(b) The distinctive nature of Māori land

As a result of a long and complicated legislative history, Māori Freehold Land currently constitutes just six per cent of the total landmass of Aotearoa/New Zealand, and the land that does remain in Māori hands is typically fragmented and uneconomic. For these reasons Te Ture Whenua Māori Act 1993/ Māori Land Act 1993 (Te Ture Whenua Māori) explicitly recognises that land is of special significance to Māori people, and promotes retention of Māori land in Māori ownership. Due to the limited flexibility that arises because of this principle, and because land use options are often limited given the location of much Māori land, several requests were made for better information about how the proposed policies impact on the management of Māori land. Māori have to generate their wealth from farm gate returns or forestry returns. They cannot rely on capital gains like other farmers in the country. Requests for information included, for example, a comparative analysis of the options of farming and forestry.

6. *The Need for Equity*

(a) Will Māori carry a disproportionate amount of the burden arising from these policies?

Māori argued the need for equity. It was said that inequities will arise if the proposed policies do not take into account the limited flexibility of Māori land. Māori also have a clear perception that Māori landowners and some iwi must already be carbon neutral given the vast amounts of forestland (both indigenous and exotic) in Māori ownership. What is the information relating to Māori and emissions per capita? Who is really responsible for the emissions?

(b) The imposition of 1990 as an arbitrary date for carbon credit eligibility

One of the more controversial issues that arose during the consultation process was the importing of the 1990 date from the Kyoto Rules as an arbitrary date for eligibility of carbon credits. Some of the largest tracts of Māori land are standing in forests. Māori forest owners felt they should be rewarded for continuing to hold their lands in forests, yet the imposition of 1990 as a cut-off date for carbon credit eligibility impacts adversely upon Māori.⁴⁰

The 1990 date flows from the Kyoto Protocol and I have noted above the view that the Government did not properly consider its Treaty of Waitangi responsibilities when it agreed to the Kyoto Protocol, and that the Government failed to work with Māori in this international context. What can be done in New Zealand to provide for iwi who have pre-1990 forests? Do New Zealand's domestic policies have to be Kyoto based? Is it not preferable that our policies be climate based? It was argued that domestic policies ought to encourage the conversion from exotic to indigenous forests, and provide some credit or reward for Māori from such new indigenous forests regardless of whether they are established on pre-1990 forestland.

(c) Equity across industries

Māori are significant landowners and are involved in both forestry and agriculture. There were constant calls for industries to be treated equitably from the outset. The proposed policies privilege farming, and forestry bears an inequitably large part of the burden. The transport industry and energy efficiency must also be targeted.

(d) Disproportionate impacts of reacting to Government policies

In addition to the other factors outlined in this section on the need for equity, Māori also expressed concern that they will once again be disproportionately affected by Government policy simply because the Government fails to understand Māori realities. For instance, it was argued that Māori are disproportionately represented in lower income households and will be more vulnerable to likely increases in energy prices. There were strong calls for research to clarify and confirm these distinct Māori realities, and to ensure that such distinctions are reflected appropriately in any re-shaped policies that go forward to relevant Ministers and Cabinet. The need to support low-income earners seems to have been addressed in the engagement document on forestry and emissions trading.⁴¹

7. Impacts on Diverse Māori Realities – Questions and Proposals

Other specific questions were raised and proposals made that were distinctively Māori and Government was urged to recognise this distinctiveness when making its decisions. How would the proposed policies affect lands that are subject to Ngā Whenua Rāhui Covenants?⁴² What impacts would there be on the land banking of Crown land for the purposes of Treaty Settlements? Carbon credits will benefit the wealthy corporates, would some be set aside for Māori? It was suggested that the clearance of forests for papakāinga (housing) should be exempt from any penalty regime for deforestation – that there should be more and better information about thresholds and the impacts for different sizes of land blocks. What opportunities and incentives are available for

40 This issue is addressed in the Government's new policy on emissions trading released as this article went to print: *Forestry in a New Zealand Emissions Trading Scheme* Engagement Document September 2007 available at <<http://www.maf.govt.nz/climatechange/background-reports-and-analysis/forestry-in-nz-emissions-trading-scheme/>>.

41 MAF, *ibid*.

42 Voluntary covenants to protect native forest and other indigenous ecosystems on Māori-owned land.

research and development specifically for Māori in the energy sector: geothermal, tidal energy and wind farms? These issues seem to have been addressed in the Government's very recently released engagement document on forestry and emissions trading.⁴³

8. *Issues specific to certain regions*

Tangata whenua expressed their own values and unique stories in relation to the problems and issues in their own regions. It became clear that some issues impact more on some areas than others and different tangata whenua groups require different information and different solutions in relation to the issues in their respective rohe. Often tangata whenua reserved their right to engage directly with the Crown on their own behalf.

For example, the costs of complying with the New Zealand Energy Strategy will make it more expensive for Northland Māori to relocate to Northland and build homes. Transport requirements, too, are quite different in the far north, with so many of their communities isolated. In the far south a key feature of the discussion was the inequitable burden that South Islanders bear in terms of the supply of energy relative to use, as compared with the North Island. It was asked: 'If there is a strategic benefit of NZ becoming carbon neutral, how will that benefit the regions?' Implications for oysters and muttonbirds and the impacts of climate change on Murihiku (Southland) were explained at the hui held in Invercargill, illustrating that not only is the New Zealand context important, so too are the implications at a regional level and for individuals.

9. *General questions and issues raised*

A number of questions and issues were raised that were not necessarily specific to Māori. The more frequently asked questions and issues expressed are summarised below:

1. Trading regimes are farcical and amount to licences to pollute which will not achieve the desired environmental outcomes. A more effective way of achieving those outcomes could be by each organisation having its own carbon balance sheet, with excess emissions being taxed.
2. Fears were expressed that taxes will increase and that some industries (such as forestry) will be doubly taxed. There is a need to measure agricultural emissions.
3. What are market based mechanisms and how do trading regimes work? What is the value of carbon credits? Could there be a possible weighting systems for tender arrangements?
4. More information is needed on the impact of climate change on human health.

C. *Towards active engagement on climate change*

In September 2007 executive members of the Māori Reference Group established for climate change met with an iwi leader's forum to discuss the possible impacts of climate change policies for Māori and how Māori might actively engage in the process going forward. The hui supported a suite of policies aimed at improving the well being of our environment and the people of Aotearoa/ New Zealand. Based on an understanding that the Government was in the process of developing an emissions trading scheme this forum took the opportunity to emphasise some key points:

- Māori acknowledge that climate change is a critical issue and acknowledge that the consequences of leaving climate change unchecked are potentially disastrous, and
- Māori are committed to actively leading the response to this challenge with the Government, and with others in the community, including business.

43 Above n 40.

The hui acknowledged the work undertaken by the Māori Reference Group, the Māori Reference Group Executive, and the Iwi Leadership Forum and confirmed some key resolutions:

1. That the Māori economy ought to be recognised as a distinct sector;
2. That Māori must work together collectively and collaboratively to ensure maximum benefit sharing;
3. That any policies on climate change be fair and equitable for Māori and be based on a principled approach; and
4. That Māori and the Crown have a Treaty partnership and that Māori have Treaty rights in relation to climate change policy.

It is understood that the Government will be embarking upon a second round of consultation later in 2007 as requested by Māori during the first consultation process.

V. RANGATIRATANGA, KAITIAKITANGA, AND NATURAL RESOURCES

*Hutia te rito o te pū harakeke
Kei whea te kōmako e kō?*

This well-known and oft-cited traditional proverb urges conservation. If you destroy the harakeke (flax plant) from where will the bellbird sing?⁴⁴ The feedback on climate change asserted rangatiratanga and kaitiakitanga in relation to the environment generally, manifested in the requests that Māori be actively engaged in the protection of the environment and participate meaningfully in any opportunities that might arise from Government policies to confront climate change. Assertions of rangatiratanga and kaitiakitanga were more precise in the recently completed Waitangi Tribunal hearings on the claim by Māori to indigenous flora and fauna, and in the consultation process that was to follow on bioprospecting, intellectual property, traditional knowledge, and mātauranga Māori. The issues proposed for consultation are summarised in this part of the review, as are some recent judicial decisions that seem to recognise the spiritual connections of certain iwi with sites of special significance and tribal waters. This part of the review ends with a summary of a draft agreement in principle that Waikato-Tainui has reached with the Crown over their ancestral River.

A. *The claim to indigenous flora and fauna, mātauranga Māori, and bioprospecting*

This year Māori were asked to respond to discussion documents published by the Government entitled 'Bioprospecting: Harnessing Benefits for New Zealand' and 'Te Mana Taumarua Mātauranga: Intellectual Property Guide for Māori Organisations and Communities.' Both documents are currently the subject of formal consultation between the Crown and Māori. The discussion documents refer to issues concerning bioprospecting, intellectual property, traditional knowledge, mātauranga Māori, and relevant Government's international work programmes.

These issues were also the subject of the Treaty of Waitangi claim regarding indigenous flora and fauna brought by Ngāti Kuri, Te Rarawa, Ngāti Wai, Ngāti Porou, Ngāti Kahungunu and Ngāti Koata, Wai 262. Though hearings began in 1998, for a number of reasons they were not completed until 2007. The claim seeks recognition and protection for mātauranga Māori and rights in respect of indigenous flora and fauna and calls into question the protections given by the intellectual property regime, the Protected Objects regime, aspects of the education system, the envi-

⁴⁴ Grace and Grace, above n 34, at 14.

ronmental decision-making regime, those parts of the health system that involve rongoa, and also the wider decision-making process including the way in which the Crown negotiates international instruments on behalf of New Zealand.

Almost as soon as the Waitangi Tribunal hearings were completed, the Government embarked on its consultation process seeking feedback on issues that went to the very heart of the Wai 262 claim. Given that there is currently no coordinated approach in place for bioprospecting activities (the search for and gathering of biological material that will then be examined for features of potential value), the Government has formed a preliminary view that there is a need for a better approach to bioprospecting. Consultation on whether Māori also consider there is a need for a better approach could also clarify some of the issues around Wai 262, and could clarify New Zealand's priorities in relation to the International Convention on Biodiversity (CBD); and the use of intellectual property rights in relation to traditional knowledge.

The consultation process with Māori involved Government officials from the Ministries of Economic Development (MED), Ministry of Foreign Affairs and Trade (MFAT) and Te Puni Kōkiri travelling to various locations around the country seeking feedback from Māori as to whether New Zealand needs a better approach and if so, what the priorities should be. MED was interested in seeking feedback on bioprospecting and also in sharing information about its work programme on intellectual property, mātauranga Māori, and traditional knowledge. MFAT was particularly interested in understanding what might need to be developed at an international level to ensure that New Zealand's approach has effect offshore and what New Zealand's priorities should be.

During the consultation process some counsel for claimant iwi in Wai 262 attended various hui. Counsel for the northern claimants, Ngāti Kuri, Te Rarawa, and Ngāti Wai, presented the following issues as those relevant to the bioprospecting debate:⁴⁵

- Biological and Genetic Resources;

That all indigenous flora and fauna (referred to as including associated biological and genetic resources of indigenous flora and fauna, and the habitats, ecosystems and environment of indigenous flora and fauna) within the respective rohe of Ngāti Kuri, Te Rarawa and Ngātiwai were and remain 'taonga' which are guaranteed protection under Article 2 of the Treaty of Waitangi.

- Matauranga Māori:

That the customary systems of knowledge or matauranga (including tikanga and reo) of each of the respective iwi of Ngātiwai, Te Rarawa and Ngāti Kuri are taonga guaranteed protection under Article 2 of the Treaty of Waitangi, and includes rongoa and the taonga works derived from matauranga.

- Treaty Partnership:

Local, national and international partnerships with Māori including co-management regimes between Kaitiaki and DOC.

- International:

That the Treaty guarantee of tino rangatiratanga extends to the Crown protecting at an international level the rights and interests of Ngāti Kuri, Te Rarawa and Ngātiwai in relation to their indigenous flora and fauna and their environment, matauranga and customary laws and practices and the Crown has failed to recognise, actively protect and give effect to those rights and interests.

45 This extract from a presentation made by Maui Solomon and Leo Watson, counsel for claimants in the Wai 262 claim is incorporated as part of the minutes from the consultation hui held in Wellington. Available at <<http://www.med.govt.nz/upload/51885/hui-minutes-Wellington.pdf>>. Copies of minutes from each of the hui are available at <http://www.med.govt.nz/templates/ContentTopicSummary___30302.aspx>.

This particular feedback is indicative of the types of views expressed during the consultation process. As always, however, there is strong diversity in the views expressed by Māori. Some called for a moratorium on bioprospecting until the report on Wai 262 is released. Those Māori already engaging in bioprospecting activities seek a more protective framework in which they can continue their operations. There was also a strong call for Māori to have a lead role in bioprospecting rather than just participating in any new framework as guardians. Feedback from the consultation hui, the Māori Reference Group hui, and from the formal submissions process is now to be collated and Government officials expect to submit their report to the relevant Ministers by the end of 2007. The Waitangi Tribunal's report on the Wai 262 claim is eagerly awaited.

B. Waiuku Forest

For generations, Ngāti Te Ata has asserted rangatiratanga and kaitiakitanga over Waiuku Forest near the mouth of the Waikato River, and in a recent decision the Environment Court confirmed the status of the site as waahi tapu and declined an application by Crown Forestry to harvest pine trees in the forest.⁴⁶ Waiuku Forest is part of a large block of land confiscated from Māori in 1864 following the land wars. Certain parts of the block were returned to Māori in 1865, including four historical waahi tapu areas. However the blocks were later reclaimed in order to stabilise sand dunes, and for state forest purposes.

Crown Forestry (the Ministry of Agriculture and Forestry) lodged an application with Environment Waikato to harvest up to 305 hectares of plantation forestry within Waiuku Forest in December 2003. The Auckland/Waikato Fish and Game Council lodged a submission noting its concern that the spraying of post-harvest vegetation could remove food sources for game birds. Ngāti Te Ata opposed the application on the basis it contravened the Regional Plan and certain sections of the Resource Management Act 1991 (RMA). In May 2004 Environment Waikato declined the consent application on the basis the consent would not adequately fulfil several fundamental requirements of the RMA, specifically those matters referred to in sections 5, 6(e) and 7(a). Section 5 sets out the purpose of the RMA which is to promote 'sustainable management' of the natural and physical resources, and that is defined to mean their use, development, and protection in a way, or at a rate, that enables people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety while:

- (a) sustaining the potential of physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 requires all persons exercising functions under the Act to recognise five matters of 'national importance'. They refer to the protection of coastal marine areas, wetlands, lakes and rivers, outstanding natural features, and indigenous traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. Also, those persons shall have regard to eight matters under section 7, the first being 'kaitiakitanga' – the 'exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship' according to section 2.

⁴⁶ *Chief Executive of the Ministry of Agriculture and Forestry v Waikato Regional Council* [2006] Environment Court A133/2006 (Unreported, Sheppard J & Commissioner Stewart, 17 October 2006).

The Ministry of Agriculture and Forestry then lodged an appeal with the Environment Court. In October 2006 the court released its decision disallowing the appeal and declining the consent application. The court confirmed the status of the site as waahi tapu and concluded that the proposal would not adequately protect any physical remains of ancestral burials, or and intangible waahi tapu values of those areas. In the court's judgment,

The extent to which the removal of trees from the four blocks would contribute to enabling people and communities to provide for their economic well-being and of their safety, and would sustain the potential of the forest to meet the reasonably foreseeable needs of future generations would be relatively slight: and

The extent to which the disturbance of soil associated with the removal of trees would hinder the people and community of Ngāti Te Ata from providing for their cultural well-being would be relatively considerable.⁴⁷

C. Whanganui River

Ko au te awa, ko te awa ko au.
I am the river, the river is me.

This adage reflects the inextricable relationship that Whanganui people share with their tupuna awa.⁴⁸ Just as Ngāti Te Ata has long asserted its rangatiratanga over the Waiuku Forest land, the Whanganui River Māori Trust Board, Ngāti Rangi Trust, and Tamahaki Society continue to assert rangatiratanga and kaitiakitanga over their tupuna awa (ancestral river). These applicants applied successfully in the Court of Appeal for special leave to appeal against the High Court's decision that they lacked evidence to prove their cultural interests in the river were being infringed by Genesis Power and the Manawatu-Whanganui Regional Council.⁴⁹ The Tongariro Power Development project, commissioned in 1973, was devised in the 1950s as a means of generating electricity by using energy from the rivers and streams that flow through the mountains of the central plateau. In 2001, the regional council granted state-owned Genesis a 35 year resource consent to use water from the Whanganui River for the Tongariro Power Development project. That term was later reduced to 10 years by the Environment Court to allow the parties time for mediation over the rights Māori felt were being infringed. The decision was quashed by the High Court in August in 2006, which ruled that Māori had failed to produce evidence to support their case and that the Environment Court had incorrectly interpreted the Resource Management Act. This most recent ruling states that the dispute over resource consent raises important questions about how environmental disputes should be approached by the courts. The appeal court queried whether the High Court was correct in placing the onus on Māori to provide solutions to their grievances.

47 *MAF v WRC*, *ibid*, 65.

48 See Part IV.B.1 above for further discussion about this particular relationship.

49 *Ngāti Rangi Trust, Tamahaki Inc Society and Whanganui River Māori Trust Board v Genesis Power Limited and Manawatu-Wanganui Regional Council* CA275/07 [2007] NZCA 378.

D. Waikato River

Last year I reviewed the progress of the negotiations regarding Waikato's claim to its tupuna awa (ancestral river) in the context of the Crown's Treaty of Waitangi Settlement policies which policies have typically not viewed rivers as ancestors and therefore indivisible.⁵⁰ I shared the nature of the special relationship between the Waikato people and their ancestral river as seen in statements such as that by the late Te Kaapo Clark, respected Tainui elder:

*Spiritually the Waikato River is constant, enduring and perpetual. It brings us peace in times of stress, relieves us from illness and pain, cleanses and purifies our bodies and souls from the many problems that surround us.*⁵¹

This year, Waikato-Tainui signed a draft Agreement in Principle with the Crown which focuses upon the health and wellbeing of the ancestral river and proposes a new era of co-management over the Waikato River.⁵² Co-management is defined as including the highest level of good faith engagement; and consensus decision-making as a general rule, while having regard to statutory frameworks and the mana whakahaere (authority and rights of control) of Waikato-Tainui and other Waikato River iwi. The main redress items establish a framework for this to occur. Waikato-Tainui is in the process of consulting with its people and other Waikato River iwi on the draft document. The Crown is consulting with Environment Waikato and other relevant local authorities, other Waikato River iwi, other key stakeholders and the public generally. Following this consultation process an Agreement in Principle may be entered into.

A significant feature of the draft agreement is the proposal for two documents to be produced: a Vision for the Waikato River (the Vision) and a Strategy to achieve this Vision (the Strategy). The Vision will set the direction for enhancements to the health and wellbeing of the river and will operate across statutory frameworks such as the frameworks for Resource Management, Conservation, and Fisheries.

Another key feature of the draft document is the acknowledgement by the Crown that its raupatu (confiscation) in the 1860s denied Waikato-Tainui's rights and interests in the Waikato River; that it failed to respect, provide for and protect the special relationship Waikato-Tainui have with the River; and that degradation of the River has occurred while the Crown has had authority over the River causing distress to Waikato-Tainui.

The draft agreement also provides for the creation of certain statutory bodies which provide an insight into the model of co-management envisaged by the signing parties. A Guardians Establishment Committee is to be established after the signing of the Agreement in Principle whose membership will comprise equal members to represent Waikato-Tainui, and the Crown and regional community interests. For the longer term, the draft agreement also provides for the establishment of permanent Guardians of the Waikato River who will have an ongoing responsibility for the

50 L Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua' (2006) *Wai L Rev.* 102, 108-110.

51 Statement of Evidence of Te Kaapo Clark of Ngāti Korokī Kahukura, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996 as cited in Te Aho, *ibid.*

52 'Draft Agreement in Principle between the Crown and Waikato-Tainui for the settlement of the historical claims of Waikato-Tainui in relation to the Waikato River', available at <www.beehive.govt.nz/Documents/Files/Waikato%20River%20Media%20Summary.doc> and <<http://www.tainui.co.nz/riverclaim/images/Draft%20Agreement%20In%20Principle.pdf>>.

Vision and the Strategy. The Guardians will comprise equal numbers of iwi (including Waikato-Tainui and other iwi with interests along the Waikato River should they wish to join); and Crown appointed members (including one appointed by Environment Waikato (EW)). The Guardians will be responsible for finalising the Vision and the Strategy, and for reviewing those documents at regular intervals. They will also have monitoring and reporting roles.

In practice, the draft agreement envisages that EW will give effect to the Vision in the preparation and change of regional policy statements and regional plans, insofar as the Vision relates to resource management issues affecting the Waikato River. The Vision and the Strategy will be deemed to be matters that decision makers must have regard to when issuing resource consent applications relating to the Waikato River; and the Minister for the Environment will have particular regard to the Vision and will engage with the Guardians to achieve co-management when considering whether to issue a national policy statement or recommending the making of any national environmental standards that relate to the Waikato River. The Director-General of Conservation will have particular regard to the Vision and will engage with the Guardians to achieve co-management when preparing any draft conservation management strategy, conservation management plan, national park management plan or fresh water fisheries management plan in respect of an area through which the Waikato River flows. The New Zealand Conservation Authority will do the same when approving or otherwise considering such plans. The Vision and any relevant provisions of the Strategy will be deemed to be plans under the Fisheries Act 1996. The Crown will consult with Waikato-Tainui in the development of any new legislation impacting on the Waikato River, and the parties will work together to identify other existing legislation that impacts on the Waikato River and consider whether and how the Vision and Strategy might be appropriately addressed under such legislation.

In addition to the Guardians, there is provision for the establishment of a Waikato River Statutory Board. The membership for this Board will be equal numbers of representatives of Waikato-Tainui and current EW councillors. The Board's purpose will be to assist with the implementation of the Vision and those parts of the Strategy that relate to EW's responsibilities by enabling Waikato-Tainui's effective participation in decision-making under the Resource Management Act and the Local Government Acts that affect the Waikato River.

At this stage, no financial redress has been agreed upon, and this is bound to be the subject of further negotiation between the Treaty partners.

VI. SUMMARY AND CONCLUSION

Tangi ana ngā tai

Rū ana te whenua

Listen to the roar of the sea

Feel the land tremble

Contained in the few words of this proverb is a warning that the intensity of the feelings of Māori cannot be ignored when it comes to their being dispossessed of their lands and resources.⁵³ A strong feature of the dialogue that has taken place between Māori and the Crown during the past year is the clear assertion by Māori of their right to be self-determining and self-sustaining, and as part of that, of the rights and obligations to exercise guardianship over such resources. On occa-

53 Grace, above n 34, 64.

sions those rights are afforded priority, but those occasions are relatively rare. This is part of the reason why Māori continue to call for a more meaningful relationship with the Crown as Treaty partner. This review began by revisiting the *Lands* case in which the Court of Appeal considered the nature of the Crown-Māori relationship twenty years ago. The case was also revisited in the Courts and the Waitangi Tribunal this year in relation to the Crown's Treaty settlement policies. For some the *Lands* case remains a cause for considerable concern as an undermining of rangatira-tanga and the tangata whenua systems of law and government that existed in this country prior to colonisation. For others, concerns are more about the protection mechanisms established as a result of that case that seem illusory in the light of recent criticisms concerning the Crown's Treaty settlement policies, particularly those involving Crown forest lands. In the year past, Māori have reasserted their right to participate on their own terms and for their own purposes in recent debates on climate change and bioprospecting respectively, both as citizens of Aotearoa/New Zealand, and as tangata whenua, the indigenous people of this land.

VII. GLOSSARY OF MĀORI TERMS

awa	river
hapū	subtribe
hui	meeting, assembly
iwi	tribe
kaitiakitanga	guardianship, stewardship
kaupapa	purpose, objectives
kōrero	dialogue
mana	prestige, power, authority
Māori	the indigenous peoples of Aotearoa/New Zealand
mātauranga Māori	customary systems of knowledge including tikanga and reo (language)
maunga	mountain
mauri	life force, life principle
Pākehā	people of European descent
papakāinga	place on which to establish homes
Papatūānuku	Earth mother
rangatira	Chief
Ranginui	Sky Father
raupatu	confiscation
reo	language
rohe	region, area
rongoa	remedy
tangata whenua	people of the land
taonga	treasured, prized possessions
tapu	sacred
tikanga Māori	laws, ethics and customs of the Māori
tino rangatiratanga	a term sourced from the word 'rangatira' meaning chief, and used in the Māori text of the Treaty of Waitangi 1840 literally meaning unqualified exercise of chieftainship. The corresponding term used in the English version

of the Treaty is ‘full and exclusive possession’ of all resources and things valuable to Māori.

tupuna	ancestor
waka	canoe, or kinship group based on affiliation to canoe
whakahaere	governing
whakapapa	genealogy
whānau	family, descent group
whanaungatanga	relationships
whenua	land

THE CONTRIBUTION OF THE
NEW ZEALAND REFUGEE STATUS APPEALS AUTHORITY
TO INTERNATIONAL REFUGEE JURISPRUDENCE:
A SUBMISSION TO BOTH ACKNOWLEDGE THE CONTRIBUTION
OF THE AUTHORITY AND TO ADVOCATE FOR ITS RETENTION

BY DOUG TENNENT*

I. THE REFUGEE STATUS APPEAL AUTHORITY WITHIN THE
NEW ZEALAND LEGAL FRAMEWORK

New Zealand is one of 142 states having ratified the 1951 *Convention Relating to the Status of Refugees* [the Refugee Convention] and its 1967 *Protocol Relating to the Status of Refugees* [the Protocol]. In so doing New Zealand committed itself to an important framework to both promote human rights and provide protection for victims of human rights violations. These goals are achieved inter alia, by ratifying states granting asylum to people accorded refugee status and affording them the protection of those deemed to be refugees in accordance with Article 1(2). A refugee is defined as a person who has:

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The circumstances placing a person within the parameters of the definition does not; however, mean that the person will be accorded refugee, or ongoing refugee, status. Status will be denied or continue to apply under the circumstances set out in clauses C–F of Article 1 of the Refugee

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Convention¹ thereby making refugee determination complex, challenging and at times difficult.² Essentially refugee status is determined in the following two ways:

A) *Mandated refugees*

The *United Nations High Commissioner for Refugees* [UNHCR] accords refugee status where people are, for example, living in refugee camps. These people are known as UNHCR ‘mandated refugees’ and once mandated refugee status is accorded countries such as New Zealand grant asylum to fulfil refugee quotas.³

B) *Convention refugees*

New Zealand government agencies must determine whether to grant refugee status in accordance with the terms of the Refugee Convention after consideration of claims of people who, upon arrival to New Zealand or at some later date, claim refugee status. Appellants accorded status in this manner are known as ‘convention refugees’.⁴

The statutory framework for determining status under this head is found in Part 6A (ss 129A–129ZB) of the Immigration Act 1987 [the Act] as inserted on 1 October 1999 by the Immigration Amendment Act 1999 s 40. Section 129A states:

The object of this Part is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention.

Under the Act refugee claims are initially assessed and determined by a Refugee Status Officer, [RSO] being an employee of the Department of Labour designated by the Chief Executive to undertake refugee status determination.⁵ Where refugee status is declined by the RSO the appellant has the right to appeal that decision to the Refugee Status Appeals Authority [the RSAA]. The statutory provisions guiding the work of the RSAA are set out in Schedule 3C ss 129N–129T of the Act.⁶ While the RSAA may comprise one member, the chairperson has the discretion to direct that more than one member hear the appeal.⁷ Further, if appropriate – this is usually in more com-

1 These circumstances include:

- persons who while meeting the requirements of the refugee definition are already receiving assistance from the United Nations (e.g. Palestinian refugees);
- people who while initially meeting the requirements of the refugee definition can no longer hold this status on the basis that the circumstances of his/her country of habitual residence which gave rise to the refugee status no longer exist;
- persons who while initially meeting the requirements of the refugee definition cannot be accorded this status on the basis that there are serious reasons for believing that the person has committed a crime against peace, a war crime, a crime against humanity, a serious non political crime outside of the country in which he is seeking asylum, or is responsible for an act which is contrary to the purposes and principles of the United Nations.

2 The fact that determinations can at times be difficult has been acknowledged by Toohey J in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 386 (Mason CJ), 398 (Dawson J), 405 (Toohey J), 414 (Gaudron J), 432 (McHugh J) (HCA).

3 The yearly refugee quota is determined by the Department of Labour and Immigration New Zealand. Last year New Zealand granted refugee status to people who had been child soldiers in Myanmar.

4 The terms ‘applicant’, ‘appellant’ and ‘claimant’ for the purpose of this paper, are synonymous.

5 For the role and functions of RSOs see Immigration Act 1987 Part 6A ss 129E–129M.

6 Essentially dealing with the RSAA composition and terms of reference.

7 Immigration Act 1987 s 129N(4)–(5).

plicated appeals – a representative of the UNHCR can be present in an ex-officio status to provide assistance in refugee determination.⁸

The RSAA from its outset has always emphasised the non-adversarial nature of its proceedings and that its practice is to conduct a detailed and lengthy examination of all appellants and witnesses called.⁹ This practice acknowledges the special situation of refugee appellants who have often had to flee their country of nationality or habitual residence in haste and in fear of their lives. The need to be non-adversarial, careful and thorough in refugee determinations is further acknowledged in the Act according the RSAA the powers of a Commission of Inquiry.¹⁰ Under s 129D of the Act RSOs and the RSAA are required to act in a manner that is ‘consistent with New Zealand’s obligations under the Refugee Convention.’

It is suggested that this statutory obligation provides the Refugee Convention with an interesting status. Traditionally for ratified international instruments to be accorded the status of domestic law it is necessary for the provisions of the instrument to be enacted into domestic legislation.¹¹ Ratified instruments – without further domestic enactment – can however be used to assist the courts in interpreting domestic legislation.¹² Indeed if at all possible the domestic courts should adopt an interpretation which is in accord with the obligations as set out in the relevant international treaty.¹³ The New Zealand legislature, while not incorporating the Refugee Convention into domestic law but in establishing a statutory framework which requires compliance with the Refugee Convention, provides the Refugee Convention with an interesting legal status in New Zealand. This statutory framework has enabled the RSAA to conduct its work:

- in a manner which enables it to focus solely on obligations under the Refugee Convention thereby enabling it to be totally ‘true’ to the Refugee Convention;¹⁴
- in a manner which makes full use of judicial decisions and academic commentary from a vast range of jurisdictions and international scholarship.

This has assisted in providing the RSAA the scope and depth to undertake refugee determinations in such a way as to enable the RSAA to make a significant contribution to international refugee jurisprudence. The purpose of this paper is to acknowledge this contribution.

More specifically this paper will focus on the RSAA’s contribution in justifying refugee status in two differing situations. Firstly: where persecution comes from non-state agents and where the state is not complicit in, or does not directly condone, the persecution. Secondly: in consideration of how the RSAA has acknowledged that people persecuted on the basis of sexual orientation or gender discrimination can, in certain circumstances, be acknowledged to be members of ‘a particular social group’ facing persecution and thereby warranting refugee status.

Acknowledgement of the contribution of the RSAA has come from significant judicial bodies and leading international scholars in the field.¹⁵ It is important to note the acknowledgement given by Professor James Hathaway about the contribution of the RSAA.

8 Ibid s 129(N)(3)(B).

9 *Decision 523/92*, 12.

10 Immigration Act 1987 Sch 3 C cl 7: powers of a Commission of Inquiry as set out under the Commissions of Inquiry Act 1908.

11 This is generally referred to as the ‘principle of transformation’.

12 *R v Secretary of State for the Home Department Ex parte Brind* [1991] AC 696; [1991] All ER 720, 723.

13 *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 28 ALR 353.

14 E.g. it is not required to take account of obligations contained in other conventions.

15 E.g. House of Lords and Australian High Court.

Professor Hathaway writes:

The New Zealand Refugee Status Appeal Authority is second to none in the world today for the clarity of reasoning, for its constant concern to reconcile principle to hard realities. It has provided leadership to the rest of the world on hard refugee law issues.¹⁶

Using the comments of Professor Hathaway's acknowledgement as a basis to consider the workings and contribution of the RSAA to international refugee jurisprudence, the framework which the RSAA has adopted to determine refugee claims will be considered. This will be followed by a discussion and assessment of the work and contribution of the RSAA in the areas of carefully extending the scope of the Refugee Convention with regards to a 'particular social group' and in acknowledging that persecution from non state agents can still come within the parameters of the Refugee Convention in certain circumstances.

The paper will conclude with some general comments and acknowledgements concerning the contribution of the RSAA.

II. FRAMEWORK TO DETERMINE REFUGEE CLAIMS

The RSAA has over the years worked very hard to develop an appropriate framework to determine refugee claims in a manner which is in accord with the Refugee Convention, thus ensuring that New Zealand is fulfilling its international obligations. The work of the RSAA has received acknowledgement for its clarity of reasoning. It is suggested that this clarity can be attributed, in some degree, to the procedural and evidential framework it has developed. This framework has been developed through:

- careful consideration of the content of the Refugee Convention in particular Article 1(C);
- a critical overview of influential comparative refugee decisions to determine appropriateness as to guidance or precedent setting in a particular field;
- an acknowledgement of the special and often difficult circumstances facing refugee appellants; and
- considering the above to achieve a fair and appropriate balance between core human rights protection obligations of the Refugee Convention on the one hand, and the required realisation that there are justifiable limits to this protection on the other.

This is reflected in the view that the refugee scheme has been deemed to be 'surrogate or substitute protection' activated only upon a failure of national protection.¹⁷ The approach of a review body in determining refugee claims is therefore of key importance. There is a clear requirement to construct a framework which ensures compliance with the Refugee Convention in a manner which is fair and flexible while at the same time accurate. 'Accurate', in this sense, means working within the accepted parameters of the Refugee Convention, while at the same time remembering it is a 'living document'¹⁸ needing to be appropriately applied to new situations reflective of the constant changing state of global affairs.

The RSAA has adopted an interpretative approach to the Refugee Convention in accord with 1969 Vienna Convention on the Law of Treaties [VCLT] Article 31 which provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.

16 Personal correspondence between Professor Hathaway and author.

17 James Hathaway *The Law of Refugee Status* (1991), 135.

18 *R v Secretary of State for the Home Department, Ex parte Adan* (unreported, 23 July 1999) Laws LJ paras 71–72.

In considering and determining an appeal from a decision of an RSO the RSAA has to establish whether a appellant has a well founded fear of being persecuted within the meaning of the Refugee Convention. This raises two important issues central to refugee determination:

- a) the standard of proof required to establish the fear is well founded; and
- b) where the onus or responsibility to show that that the fear is well founded for Refugee Convention reasons lies.

A) *Required standard of proof*

Initially the RSAA approached a claim through four questions:

1. Are the appellants genuinely in fear?
2. If so, is it a fear of persecution?
3. If so, is that fear well-founded?
4. If so, is the persecution they fear persecution for a Convention reason? ¹⁹

The RSAA was however quick to appreciate the danger that this approach could on occasion lead to a material misdirection. Too much focus was placed on the subjective views of the appellant rather than on what the objective facts justified.²⁰ The RSAA was therefore prepared to critique its own position and develop a more appropriate approach. In developing a new framework the RSAA was guided by a number of international decisions but in particular the House of Lords in *R v Secretary of State for the Home Department, Ex parte Sivakumaran*²¹ and Australian High Court in *Chan v Minister for Immigration and Ethnic Affairs*.²²

The contribution of *Sivakumaran* is that it emphasises the objective element of refugee definition.²³ Lord Keith noted the fear of persecution needed to be ‘objectively’ determined by reference to the circumstances at the time prevailing in the applicant’s place of habitual residence.²⁴ Lord Templeman stated it is not for the appellant to decide whether the danger of persecution exists but for that decision to be taken by the country in which the appellant seeks asylum.²⁵ This led Lord Goff to say that the appropriate ‘enquiry should be made whether the subjective fear of the applicant is objectively justified.’²⁶

Therefore, while the subjective fear of the appellant is not sufficient in itself to determine refugee status, it is still important. It is the subjective fear which has, in most cases, led the appellant to make a claim. For this reason the normal approach of the RSAA when hearing the claim is to commence by explaining the refugee definition to the appellant together with the importance of the appellant telling the truth. The appellant or representative makes submissions and produces relevant evidence. The RSAA then examines the appellant and the appellant’s case, concerns, and affairs are carefully considered.²⁷

¹⁹ This was the approach that was adopted in the very first decision of the Authority, *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991).

²⁰ *Refugee Appeal No. 70074/96 Re ELLM* (17 Sept 1996), 11.

²¹ *R v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958 cited in 70074/96 above n 20.

²² *Chan* above n 2.

²³ *Sivakumaran* above n 21.

²⁴ *Sivakumaran* *ibid* 992G.

²⁵ *Ibid* 996D.

²⁶ *Ibid* 1000D [Emphasis added].

²⁷ 523/92 above n 9.

The role of the RSAA is – through consideration of the credibility of the appellant together with other appropriate evidence and information – to determine whether these fears are objectively justified. To assist in such an enquiry the RSAA is accorded the powers of a Commission of Enquiry.

The RSAA has to objectively consider whether fear is ‘well founded’. In determining what is meant by ‘well founded’ the RSAA has adopted the approach taken by the Australian High Court in *Chan*.²⁸ Well founded is to be determined through asking if the appellant faces a ‘real chance’ of persecution. In so doing the RSAA is distinguishing itself from the ‘reasonable chance’ or ‘good grounds’ approach taken in jurisdictions such as Canada and the United Kingdom.²⁹ The foundation for the position of the Australian High Court can be found in the writings of Grahl-Madsen in *The Status of Refugees in International Law*³⁰ where he writes that in determining well founded fear;

the real test is the assessment of the likelihood of the applicant becoming a victim of persecution upon his return to his country of origin. If there is a real chance that he will suffer persecution, that is reason good enough, and his ‘fear’ is ‘well-founded’.

In *Chan* Mason CJ, in adopting the ‘real chance’ approach, noted that it conveyed the notion of substantial as distinct from a remote chance of being persecuted.³¹ Mc Hugh J in his decision concurred with the Chief Justice and acknowledged the position taken by the United States Supreme Court in *Immigration and Naturalization Service v Cardoza-Fonseca*³² that a substantial chance of harm can exist if there is only a 10 per cent chance that a appellant will be shot, tortured or otherwise persecuted. It was a far fetched possibility of persecution which was to be excluded.³³ As Toohey J notes, while one is not weighing the prospects of persecution it is necessary at the same time to discount what is remote or insubstantial.³⁴

This makes sense. One can imagine a scenario in a country where there is a serious breakdown of law and order meaning that the chance of state protection in persecutory type situations is questionable. Further, a person might attract a certain degree of hatred which could be converted into persecution because of certain religious or political views. However should it be difficult (if not impossible) to postulate a situation where that hatred would be converted to persecution and where state protection would be unlikely available then it could be said that there does not exist a real or substantial chance of persecution.

The RSAA sees the ‘real chance’ approach as providing clarity and simplicity of application in a determination process³⁵ in that it avoids the dangers inherent in formulating ‘possibilities’ and ‘likelihoods.’³⁶ In so saying, the RSAA still acknowledges the position taken by various judicial bodies that if there is only a 10 per cent possibility of serious harm being inflicted the standard of proof required for refugee status has been met.³⁷ However, it proceeds to say that it is undesirable

28 *Chan* above n 2.

29 523/92 above n 9, 15.

30 A Grahl-Madsen *The Status of Refugees in International Law* Vol 1 (1966) 181.

31 *Chan* above n 2, 388–389.

32 *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 94 L.Ed 2d 434.

33 *Chan* above n 2, 429.

34 *Chan* *ibid*, 407.

35 523/92 above n 9, 35.

36 *Refugee Appeal No. 71404/99* (29 October 1999), 15.

37 523/92 above n 9, 22.

to express chances in percentages. As noted there are inherent dangers in formulating ‘possibilities’ or ‘likelihoods’.

The RSAA has, over the years, been able to effectively apply the ‘real chance’ criteria in determining refugee claims. This is done in the context of the refugee definition through:

- carefully considering the submissions of the appellant, assessing the appellant’s credibility and considering evidence both at its disposal and, if appropriate, seeking further information including particulars about the country concerned; and
- considering possible scenarios the appellant might encounter if returning to their country of habitual residence.³⁸

This, the RSAA acknowledges, will involve normative judgements which go beyond mere fact finding.³⁹ Where this occurs in a manner based on the above approach it enables the inevitable problem of ‘evidentiary voids’⁴⁰ which are going to be present in refugee claims, to be addressed in a fair and reasonable manner. While some determinations are more complex and difficult than others, this is an inherent part of the work of a review tribunal.

The adoption of the objective and real chance approach has enabled the RSAA to construct the following two step framework to determine refugee claims under the Refugee Convention:

On the facts as found by the decision-maker:

1. Objectively, is there a real chance of the refugee appellant being persecuted if returned to the country of nationality?
2. If the answer is Yes, is there a Convention reason for that persecution?⁴¹

It is submitted that this clear framework developed through guidance from different academic texts and judicial decisions enables clarity of reasoning – one of the reasons Professor Hathaway holds the RSAA in such high regard.⁴²

38 Such an example can be found in *Refugee Appeal No .17462/99* (27 Sept 1999) [2000] NZAR 545; [2000] INLR 608. A Tamil youth and his family been ill treated for a number of years because of their ethnicity. The parents died, the whereabouts of two brothers was unknown and a brother and sister had been granted refugee status in Germany and the Czech Republic respectively. The family had been subjected to attack by the Liberation Tigers of Tamil Eelam (LTTE). When the appellant moved to Colombo he was arbitrarily arrested and beaten. In considering possible scenarios if he were to return to Sri Lanka it was clear it was still dangerous. He had been identified and mistreated by the security forces and the RSAA accepted this as being an indication of the fate which may await him should he have to return. Further the country information provided to the RSAA indicated Sri Lankan security forces carry out mass arrests of Tamils in Colombo – the main targets being young Tamil men and women. (The claimant was 23.)

39 Ibid.

40 This was a phase adopted by Professor Hathaway in *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada*. (December 1993) 6, 57.

41 70074/96 above n 20, 14.

42 It could also be said that the approach taken by the RSAA is ad idem with the ‘Michigan Guidelines on Well-Founded Fear’ (2005) 26 *Michigan Journal of International Law* 493 These Guidelines arose out of the *Third Colloquium On Challenges In International Refugee Law* and with the guidelines. However, it can also be said that with the two step test and its manner of conducting hearings the RSAA has stamped its individual mark on determining refugee applications.

B) Onus of establishing a claim

The RSAA has always taken the clear position the appellant shoulders the obligation of establishing the claim. The facts on which the claim is based lie peculiarly within the knowledge of the appellant.⁴³ If the decision maker was required to carry out an investigation without the appellant's assistance, the door to abuse would be opened.⁴⁴ The appellant's obligation is also acknowledged in the *Universal Declaration of Human Rights Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [the UN Handbook].⁴⁵ The obligation has been codified in the Act. Section 129P states:

It is the responsibility of an appellant to establish the claim, and the appellant must ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are provided to the Authority before it makes its decision on the appeal.

This reflects the requirement of the appellant to act in good faith, a principle central to the Refugee Convention.⁴⁶

The RSAA supports this position on the basis responsibility is mitigated by three principal factors:

1. Threshold of 'real chance'

The threshold of 'real chance of persecution' is low and recognises the concern noted by a number of authors and commentators that owing to the hasty and unscheduled manner in which appellants have to leave their country of habitual residence they will in many cases have had no opportunity to collect documents and other relevant materials to support their claim.⁴⁷

2. Benefit of doubt

The RSAA adopts the principle of the benefit of doubt, which is central to refugee law, liberally. Where an appellant authority determining refugee claims is unable to reach a decision about status, the decision should go in favour of the appellant. This, again, acknowledges the unique situation of refugee appellants in bringing a claim. In this way the RSAA was able to distinguish an appeal *de novo* (rehearing) in the refugee context from generic appeals of the same nature.

In *Shotover Gorge Jet Boat v Jamieson*⁴⁸ Cooke P stated;

[I]f in the end the appellate Court could not make up its mind as to what was the right decision, the decision under appeal would, I think, stand.

As the RSAA noted the benefit of the doubt principle requires that '[i]f at the conclusion of the hearing the Authority cannot make up its mind as to whether the appellant is a refugee ... a decision in favour of the appellant to be given.'⁴⁹

43 523/92 above n 9, 11.

44 523/92, *ibid.*

45 HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para 196 opines 'It is a general legal principle that the burden of proof lies on the person submitting a claim.'

46 523/92 above n 9, 11.

47 See for example Grahl-Madsen above n 30, 145–146.

48 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437.

49 523/92 above n 9, 10.

3. *Conduct of proceedings*

The Authority conducts its proceedings in a non adversarial manner. This enables the enquiry to be shared between the appellant and the decision maker. Here the RSAA is fully ad idem with the UN Handbook which states:

[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.⁵⁰

This position has been fortified by the RSAA having the powers of a Commission of Enquiry. This is however qualified by the RSAA position that the powers are facilitative rather than mandatory.⁵¹ The RSAA does not provide criteria it follows to decide whether such powers are to be revoked.

Perhaps this is an area where the jurisprudence still requires development and it could be said the credibility of the appellant would have a considerable influence.

The RSAA, in taking a non adversarial approach to claims and applying a low threshold further mitigated by the liberal application of the benefit of doubt has adopted a fair and reasonable approach in determining refugee status. On the one hand it acknowledges the genuine and unique situation of refugee appellants. On the other it accepts there are limitations to the granting of refugee status and it should not be granted in situations where only some far fetched possibility of persecution exists.

The application of this framework will now be considered focusing firstly on the manner in which the RSAA has approached the issue of persecution generally and when undertaken by non state agents. Secondly, on how the authority has compellingly justified people facing persecution on the basis of sexual orientation and gender discrimination can be deemed a 'particular social group' thereby justifying refugee status.

III. MEANING OF PERSECUTION AND FAILURE OF STATE PROTECTION

The RSAA in acknowledging Article 1A(2) does not contain a definition of persecution has clearly taken the position that it is inappropriate to apply a dictionary definition to determine meaning.⁵² Like other international judicial bodies it has followed the interpretation approach of VCLT Article 31 being that the particular convention in question be interpreted in good faith in accordance with the ordinary meaning of terms in context and light of the convention's object and purpose.⁵³ By so doing, the RSAA has aligned itself with the approach taken by the Canadian Supreme Court in *A-G v Ward*⁵⁴ that underlying the Refugee Convention is the international community's commitment to the assurance of basic human rights without discrimination.⁵⁵ Persecution from the perspective of international human rights protection has two important considerations. First is the matter of state protection which, as stated by La Forest J in *Ward*, 'International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an indi-

50 UN Handbook para 196.

51 *Refugee Appeal No. 71729/99* (2001) NZAR 183.

52 *71427/99* above n 38.

53 Section 3 Interpretation Of Treaties Article 31 *General rule of interpretation*.

54 *Canada (A-G) v Ward* [1993] 2 SCR 689.

55 *Ward* *ibid*, 733.

vidual is a national.⁵⁶ It is clear ‘the international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged.’⁵⁷ As so articulately stated by Professor James Hathaway ‘the refugee scheme as “surrogate or substitute protection”, activated only upon failure of national protection.’⁵⁸

The second consideration arises from the first and asks what amounts to the failure of state protection? There are two integral parts to this consideration. Is there a presumption of state protection? And can persecution by non state agents come within the ambit of the Refugee Convention?

The failure of state protection goes to the heart of the meaning of persecution. Professor Hathaway views this as being determined by actions which deny human dignity in any way. However, what is the appropriate threshold to determine whether actions which deny human dignity amount to persecution? It is the sustained or systematic denial of core human rights.⁵⁹

Core human rights, according to Professor Hathaway are those contained in the *International Bill of Rights* [IBR] comprising the *Universal Declaration of Human Rights* [UDHR] and, by virtue of their almost universal accession, the *International Covenant of Civil and Political Rights* [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights* [ICESCR].⁶⁰

The IBR has been the progenitor for many more specific human rights accords such as the *International Convention on the Elimination of All Forms of Racial Discrimination* [ICERD]; the *Convention on the Elimination of All Forms of Discrimination Against Women* [CEDAW] and the *Convention on the Rights of the Child* [CRC].

The RSAA in aligning itself with this approach as acknowledges the universal application of these human rights. As stated in *Decision 71427/99* ‘the universality of the International Bill of Rights, CERD, CEDAW and the CRC will not permit social, cultural or religious practices in a country of origin from escaping assessment according to international human rights standards.’⁶¹ The RSAA in clearly distancing itself from a cultural relativist approach.⁶²

The term ‘sustained or systemic denial of core human rights’ is significant. Denial of core human rights implies discrimination. The RSAA has held that when determining refugee claims inspiration can be found in ‘discrimination concepts’.⁶³ But is discrimination in itself sufficient to establish persecution? The RSAA has been firm in drawing a clear distinction between a breach of human rights (discrimination) and persecution.⁶⁴ The purpose of refugee law is not to protect people against *all* forms of harm. If it were, the Refugee Convention would become a potential haven for any person able to show they were victim of *some form* of discrimination.

Rather, refugee recognition is restricted to situations where the maltreatment which has been inflicted or is anticipated to be inflicted is demonstrative of a breakdown of national protection.⁶⁵

56 Ward *ibid*, 709.

57 *Ibid*.

58 Hathaway above n 17 [emphasis added].

59 Hathaway above n 17, 104–108 as adopted in *Refugee Appeal No. 2039/93* (12 February 1996), 15.

60 *Refugee Appeal No. 2039/93*; *Refugee Appeal No. 70133/96*; and *Refugee Appeal No. 71569/99*.

61 71427/99 above n 39, 25 and *Refugee Appeal No. 72558/01 and 72559/01*, 46.

62 For more detail on the RSAA’s position on cultural relativism see ‘particular social group’ below.

63 *Refugee Appeal No. 1312/93 Re GJ* (30 Aug 1995), 27.

64 71404/99 above n 36, 65–67.

65 *Refugee Appeal No. 135/92 Re RS* (18 June 1993), 24–25 adopted in *Refugee Appeal No. 11/91 Re S* (5 September 1991) and in *Refugee Appeal No. 18/92 Re JS* (5 August 1992) cited in 523/92 above n 9, 27. In taking this approach the Authority is concurring with James Hathaway. *Law of Refugee Status* 104.

While one identified breach of human rights does not amount to persecution, the cumulative effect of a number of breaches may.⁶⁶ This was the situation with the female appellant from the Islamic Republic of Iran in *Decision 71427/99*. In noting the various laws in Iran relating to the institutionalised and state-sanctioned discrimination against women which were deemed to be disenfranchising, the RSAA concluded that the cumulative effect of these breaches on the appellant amounted to ‘persecution in the sense of a sustained or systemic violation of basic human rights.’⁶⁷

In determining whether a breach of core human rights is ‘sustained or systemic violation of human rights’ the RSAA has accepted that a appellant should not have to engage in self denial in order to avoid persecution if such self denial were to amount to a breach of core human rights. Ongoing denial would amount to sustained or systemic violation.⁶⁸ This is especially so with practising homosexuals. Sexual orientation has been held by the RSAA to be fundamental to a person’s identity. To suggest – as has been the position by some refugee appeal tribunals – a person can avoid persecution through self restraint is unacceptable.⁶⁹ This would require a person to exist in a state of induced self-oppression.⁷⁰

How then is the level of state protection to be assessed in order to see whether it amounts to failure on the part of the state to provide protection? Here the RSAA has concurred with the approach taken by the Canadian Supreme Court in *Ward*. While there might exist in a appellant’s home country a system of state protection which the state maintains it is willing to operate, this, in itself is not sufficient to demonstrate state protection. If it can be shown the system of protection provided and operated is not able to prevent a real chance of persecution refugee status should not be denied.⁷¹ Citing *La Forest J* in *Ward*:

[I]t would seem to defeat the purpose of international protection if a appellant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.⁷²

The presence of a system of protection accompanied by a reasonable willingness of the state to operate it has been held to amount to an adequate system of state protection for Refugee Convention purposes.⁷³ The RSAA, in distancing itself from this approach, took the view that to interpret convention obligations in such a manner failed to ensure there was some objective assessment as to whether or not there is a real risk of persecution. As such it is at odds with the ‘fundamental obligation of non-refoulement’ contained in Article 33(1).⁷⁴

The RSAA does however take the position that any determination of refugee status starts with a presumption of state protection – again concurring with *Ward*. The presumption stems from the security of nationals as the essence of sovereignty.⁷⁵ Therefore, absent a situation of complete

66 *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 16.

67 *Decision 71427/99*, 35.

68 Rodger Haines QC ‘The Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention’ Faculty of Law, University of Auckland. Spring Seminar Series: September 2004 page 11.

69 This was the position adopted in *R v Secretary of State for the Home Department, Ex Parte Binbasi* [1989] Imm AR 595 (QBD).

70 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, para 130.

71 *Ward* above n 54, 724.

72 *Ibid*.

73 House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 (HL).

74 Above n 39, 30.

75 *Ward* above n 54, 724–726.

breakdown of state apparatus; or where the state admits its inability to protect its nationals, it is necessary for evidence to rebut the presumption.⁷⁶

The position that persecution amounts to sustained or systemic denial of core human rights through failure by the state to provide protection justified the acceptance of the formula used for determining the persecution element of the refugee definition. Namely *Persecution = Serious harm + The Failure of State Protection*.⁷⁷ In accepting this formula the RSAA concurs with Hathaway that risk of serious harm is an anticipatory risk in that '[t]he issue is not the fact of the past persecution, but rather whether "that which happened in the past may happen in the future."⁷⁸ Past persecution can therefore, in appropriate circumstances, provide an excellent indication of future risk.⁷⁹ This is especially so where evidence clearly shows past persecution and the country information indicates no change in circumstances since the appellant has left the country of habitual residence.⁸⁰

IV. DOES PERSECUTION NEED TO COME FROM THE STATE OR STATE COMPLICITY?

The RSAA noted in *Decision 2039/93* that Germany, Sweden and France 'have restricted the application of the concept of agents of persecution to the extent that refugee status is only granted to victims of persecution by state authorities or by other actors encouraged or tolerated by the state.'⁸¹ These countries are subscribing to what is referred to as the 'accountability theory' which 'limits the classes of case in which a appellant might obtain refugee status under the Geneva Convention to situations where the persecution alleged can be attributed to the State.'⁸²

The RSAA has clearly distanced itself from such an interpretative approach and instead takes the position that since persecution signifies sustained or systemic violation of core human rights demonstrative of a failure of state protection; this does not require that the state need be an agent of the persecution.⁸³ Justification relates directly to the definition of refugee in Article 1(C): namely; that the appellant is 'unable' or 'unwilling' to avail himself of protection of the country. As noted in *Ward*:

The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution.⁸⁴

And further:

76 The extent of the evidence to advance the rebuttal of the presumption would depend upon the individual circumstances of each case noting in particular the circumstances of the claimant and what evidentiary support can be reasonably expected from them.

77 This was the formula that was adopted in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653F (HL); and *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 515H (HL)

78 Hathaway *Law of Refugee Status* (1991) 88 and *Refugee Appeal No. 70366/97*, 47.

79 *70366/97*, 21.

80 *17462/99* above n 38. The Tamil appellant had received extreme treatment at the hands of security forces and the country information provided suggested there had been no significant change in the approach of the security forces since the appellant left.

81 *2039/93*, 15.

82 *Adan* above n 18, para 43.

83 *71427/99* above n 39, 28.

84 *Ward* above n 54, 716–7.

[I]n the case of ‘inability’, protection is denied to the appellant, whereas when the appellant is ‘unwilling’, he or she opts not to approach the state by reason of his or her fear on an enumerated basis. In either case, the state’s involvement in the persecution is not a necessary consideration. This factor is relevant, rather, in the determination of whether a fear of persecution exists.⁸⁵

Therefore state complicity in persecution is not a pre requisite to a valid refugee claim.⁸⁶ What is important is the approach of the state to the persecution. In not making any effective intervention the state is either directly or indirectly encouraging the persecution or is unable or powerless to prevent it.⁸⁷

While in its decisions following *Ward* the RSAA has referred to *Ward* to support its position that state complicity is not a requirement to establish refugee status under the Refugee Convention, the RSAA has taken this position from its earliest hearings in 1991.⁸⁸ Failure of state protection is an essential element of persecution as applied under the Refugee Convention⁸⁹ and the RSAA accepts that there are four situations in which it can be said that there is a failure of state protection:

- (a) Persecution committed by the state concerned.
- (b) Persecution condoned by the state concerned.
- (c) Persecution tolerated by the state concerned.
- (d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.⁹⁰

The RSAA, in defining these situations, is making two contributions to refugee jurisprudence. Firstly it is providing clear categories where the failure of state protection is relevant to refugee determination. Secondly it is emphasising the important factor is not state complicity to persecution but rather the failure of the state to afford protection. This goes directly to the purpose of refugee protection being the provision of surrogate protection activated upon the failure of national protection. However included is a situation in which the state either refuses or is unable to grant protection. Therefore failure of state protection is relevant both where there is an absence of state complicity and also where the state is not condoning the persecution.

This raises a number of possibilities where non state persecution is relevant to refugee status. Persecution from non state agents can still come within the parameters of the Refugee Convention in appropriate circumstances. The RSAA’s categorisation of situations represents a significant contribution to international refugee jurisprudence, having been cited with approval in *Minister for Immigration v Khawar*⁹¹ and acknowledged by Professor Hathaway as effectively reconciling principle to hard realities. The significant contribution of the RSAA is worthy of further discussion.⁹²

85 Ibid 720 [emphasis added].

86 *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 17–18.

87 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA), 258.

88 71427/99, 29. It could be said that *Ward* above n 54 amounts to a confirmation of the RSAA’s position.

89 Ibid.

90 Ibid.

91 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574, paras 114–125.

92 The significance of the situational application of certain principles cannot be emphasised strongly enough.

V. CONTRIBUTION OF THE RSAA IN CLARIFYING THE MEANING OF
'PARTICULAR SOCIAL GROUP' AND APPLICATION TO SEXUAL ORIENTATION
AND GENDER DISCRIMINATION

One of the Refugee Convention reasons for refugee status is that of having a well founded fear of being persecuted for 'being a member of a particular social group.' The RSAA has, over the years, given considerable attention to this ground. The first such decision included consideration of the historical reasons for the inclusion of the ground.⁹³ It came about by a Swedish amendment (A/Conf.2/9) tabled by Mr Petren during the 1951 drafting of the Treaty.⁹⁴ Mr Petren wished to make two general observations on Article 1 stating:

experience had shown that certain refugees had been persecuted because they belonged to particular social group ... Such cases existed, and it would be as well to mention them explicitly.⁹⁵

The amendment was adopted without debate.⁹⁶ In the opinion of Grahl-Madsen⁹⁷ the membership of a particular social group was added as an afterthought in that the notion of social group is of broader application than the combined notions of racial, ethnic and religious groups, and would to stop a possible gap – an approach which has found both judicial and academic acceptance.

In *Ward*⁹⁸ it was acknowledged 'the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups.'⁹⁹ Maryellen Fullerton also saw particular social group as filling a noticeable gap in the categories of victims of persecution.¹⁰⁰

Noting Professor Hathaway's view that the RSAA has been able to reconcile principle to hard realities it is worthwhile to consider the more significant decisions of the RSAA concerning particular social group and to whom this reason has been applied. Consideration reveals how the RSAA;

- has carefully chosen the appropriate judicial and academic commentary to adopt or at least be guided by; and
- has made subsequent developments in the discussion of particular social group based on the foundational writings and decisions from which it found initial guidance and inspiration; and
- has acknowledged that persecution for reason of membership of a particular social group can overlap with other grounds; and
- suggested how this overlapping should be best dealt with; and
- has effectively applied the particular social group ground to situations of gender discrimination and sexual orientation.

93 *Refugee Appeal No. 3/91*, 74.

94 *Decision 3/97*, 75.

95 Statements of Mr Petren of Sweden, UN Doc A/CONF.2/SR 3 at 14, November 19, 1951.

96 It was adopted on 16 July 1951 by fourteen votes to none, with eight abstentions: A/Conf. 2/9.

97 Grahl-Madsen above n 30, 219–20

98 *Ward* above n 54, 732.

99 *Ibid.*

100 M Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany' (1990) 4 *Georgetown Immigration Law Journal* 381 and M Fullerton, 'A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group' (1993) 26 *Cornell International Law Journal* 505, 534.

The decisions considered include people at opposition to the China One-Child Family Policy,¹⁰¹ and facing persecution for reasons of sexual orientation,¹⁰² and because of gender.¹⁰³

In *Decision 3/91* the RSAA considered whether people opposed to the one child policy formed a particular social group. Detailed consideration of the essential elements of a particular social group for Refugee Convention purposes was undertaken. This consideration became the foundation stone upon which subsequent decisions have developed. As stated:

Generally speaking ... it can be said that the New Zealand jurisprudence to date has necessarily developed on a case by case or incremental basis and the present decision should be seen as part of that ongoing process. Without exception, we have followed and applied *Matter of Acosta* as well as the opinions of both Hathaway and Goodwin-Gill.¹⁰⁴

Goodwin-Gill saw a social group as being brought together by certain unifying features being a 'combination of matters of choice with other matters over which members of the group have no control'¹⁰⁵ It is these features which distinguish the group and make them susceptible to persecution. What Goodwin-Gill also sees to be of central relevance is the perception of the persecutor to this group.¹⁰⁶ What notice do state authorities take of this group? This is a key element to providing the group with its identity.¹⁰⁷

The US Board of Immigration Appeal *Acosta*¹⁰⁸ was clearly influenced by the writings of Goodwin-Gill. The Board in *Acosta* saw the doctrine of *ejusdem generis*, meaning literally, 'of the same kind', to be of importance in construing the phrase 'membership of a particular social group.'¹⁰⁹ Consideration of the 'race', 'religion', 'nationality', and 'political opinion' grounds for persecution showed that persecution is based upon 'immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed.'¹¹⁰

Building on this framework Hathaway formulated the groups as:

- (1) groups defined by an innate, unalterable characteristic;
- (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and
- (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it.

Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.¹¹¹

101 *3/91*.

102 *1312/93*.

103 *1312/93* and *71427/99*.

104 *3/91*, 92. It is in the *Law of Refugee Status* where Professor Hathaway provides a thorough and seminal academic discussion on the law relating to refugees.

105 *Ibid*, 80.

106 Goodwin-Gill. *The Refugee in International Law* (1983) 30–31.

107 *Ibid*.

108 *Acosta, In re* (1985) 19 I & N 211.

109 *Ibid*.

110 *Ibid*.

111 Hathaway, 161.

The particular social group must therefore be definable by reference to a shared characteristic of its members 'fundamental to their identity'.¹¹² The definition of is wide enough to cover people who face persecution within the parameters of the Refugee Convention, namely linking the fear of persecution to their civil and political status, without it becoming an all embracing net enabling virtually anyone seeking refugee status to align themselves to some group which may be at odds with authorities. The RSAA, in adopting Hathaway's formulation, takes the view that if a unifying immutable characteristic of a group invites persecution, this characteristic should be enough to give the group cognoscibility for the purposes of refugee status.¹¹³

Of significance is the linkage of persecution to civil or political status. In other words persecution is linked to a violation of core human rights and such a violation involves discrimination.

The RSAA has subsequently developed its consideration of particular social group by determining its relevant application to claims relating to sexual orientation and gender. It is the effective application of the refugee definition to such situations which is one of the most significant contributions of the RSAA. It further bears witness to James Hathaway's assertion that the RSAA is able to reconcile principle to hard reality. The three decisions to be considered in depth all involve appellants originating from Iran.

A) *Sexual Orientation*

Decision 1312/93 concerns a claim made by a homosexual and member of the banned communist Tudeh Party. This discussion will focus only on the appellant's homosexuality.

Since arriving in New Zealand and seeking refugee status, the appellant had become a practising homosexual.¹¹⁴ The RSAA undertook a considerable literature research into the treatment of homosexuals in Iran and established that homosexuals, or persons suspected or accused of being homosexuals, are 'punished with extreme severity'.¹¹⁵ It was clear therefore that he had a well founded fear of persecution. The issue was whether the persecution feared by the appellant was, as the appellant claimed, for a convention reason. This led to further consideration and development of the meaning and application of 'particular social group' within the refugee context.

Since *Decision 3/92* the Canadian Supreme Court had given judgment in *Ward*. The influence this decision has had upon the RSAA and the justification for this influence illustrates the ap-

112 Hathaway above n 17, *ibid*.

113 Above n 93 at 41. What is also interesting in this case is that to determine whether or not the claimant could claim persecution for reason of being a member of a particular social group, the Authority felt that it was appropriate to ask four questions;

1. What is the particular social group in question?
2. Does that group have a distinct identity in the eyes of:
 - a) The community at large; and/or
 - b) The agents of persecution.
3. Do members of the group in question share a common immutable characteristic, i.e. a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Expressed in a shorthand way, is the group definable by reference to a shared characteristic of its members which is fundamental to their identity?
4. Is there a link or causal connection between the fear of persecution and the civil or political status of the members of the group.

114 *1312/93*, 15.

115 *Ibid* 24.

proach of the RSAA to develop jurisprudence surrounding an issue on an incremental and case by case basis finding guidance and inspiration from appropriate decisions.

Two matters from *Ward* had particular influence on the RSAA. The first was the support accorded to Hathaway's position that the Refugee Convention does not apply to all individuals who have a well founded fear of persecution and hence it was not appropriate to adopt a definition of particular social group which was all embracing. While insertion of particular social group was to cover any possible lacuna left by the other four groups:

this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been superfluous; the definition of 'refugee' could have been limited to individuals who have a well-founded fear of persecution without more. The drafter's decision to list these bases was intended to function as another built-in limitation to the obligations of signatory states.¹¹⁶

The second was (again, Hathaway's position adopted in *Ward*) that the determination of persecution must be considered in the context of core human rights.¹¹⁷ There must be a link between the harm feared to the appellant's socio-political situation and resultant marginalisation.¹¹⁸ *Ward* explicitly recognised that underlying the Refugee Convention is the international community's commitment to the assurance of basic human rights without discrimination.¹¹⁹ The RSAA observed that in distilling the contents of the head of 'particular social group' it is appropriate to find inspiration in discrimination concepts.¹²⁰ To do so it is necessary to consider the core norms of international human rights. Hathaway initially identified the relevant core human rights as those contained in the IBR, ICCPR, and ICESCR.¹²¹ Hathaway has subsequently argued that more recent international instruments such as the CRC are also relevant in determining core human rights norms. Clearly discrimination occurs when a person is denied a core human right by virtue of membership of a particular social group.

An analysis of the ICCPR and other relevant instruments led the RSAA to conclude that no specific provision was made for the protection of the rights of homosexuals.¹²² However, the anti-discrimination provisions of the ICCPR are sufficiently broad to apply to sexual orientation. These included Article 2 – the right to basic rights without distinction of any kind such ... sex; Article 17 – the right not to be subjected to arbitrary or unlawful interference with ... privacy; and Article 26.

Discussed was the United Nations Human Rights Committee [UNHCR] first communication concerning Australia under the First Optional Protocol to the ICCPR: *Toonen v Australia*.¹²³ *Toonen* was a complaint to the UNHCR about Tasmanian laws criminalising sexual relations between consenting males. It was acknowledged by the UNHCR that the prohibiting laws were a breach of Article 17 privacy. The UNHCR found that reference to sex in the other articles should be taken

116 *Ward* above n 54, 732.

117 Hathaway, 136.

118 1312/93, 14.

119 *Ward* above n 54, 733–739.

120 1312/93, 27.

121 Hathaway above n 17, 106.

122 1312/93, 36–7.

123 Communication no. 488/1992; CCPR/C/50/D/488/1992, 4 April 1994.

as including sexual orientation.¹²⁴ To this extent discrimination on the basis of sexual orientation could be held to be a violation of basic core human rights under the Refugee Convention.

The RSAA was also prepared to accept that, as the claim was being heard within New Zealand jurisdiction, the Human Rights Act 1993 [HRA] s 21(1)(m) prohibiting discrimination on the grounds of sexual orientation in the fields of employment, access to places, vehicles and facilities, and provision of goods and services was of significance. The RSAA has some reservations as to the relevance of domestic law when applying international human rights law in the refugee context. However it prepared to follow the Canadian example in *Ward*.¹²⁵ While not specifically stated, a relevant consideration was that the appellant only became a practising homosexual upon arriving in New Zealand where legislation was in place to support practising homosexuals.

The RSAA then proceeded to a cross jurisdictional analysis of decisions concerning sexual orientation. It found jurisprudence in this regard to be somewhat confusing. Some jurisdictions emphasised the internal characteristics of gay people to determine membership of a particular social group – a clear example being *Ward*. The Canadian Supreme Court had acknowledged one of the categories of a particular social group as outlined in *Acosta* was groups defined by an innate or unchangeable characteristic. Such a category would clearly include individuals facing fear of persecution on the basis of sexual orientation.

Other countries such as Germany favoured what was referred to as an ‘objective observer’ approach.¹²⁶ This approach asks how an objective observer would view the treatment of homosexuals in a country such as Iran?¹²⁷ Such an observer would clearly see homosexuals are treated as an undesirable group and as such should constitute a particular social group within the Refugee Convention.¹²⁸ The RSAA understandably expressed reservations about the ‘objective observer’ test in that the making of societal attitudes as determinative of the existence of a particular social group could potentially enlarge the social group category to include any person with some shared characteristic which society had strong feelings about.¹²⁹

In the United States of America the relevant decisions relating to sexual orientation and social group have either emphasised the immutable characteristic¹³⁰ or the voluntary associational aspect¹³¹ namely members associating because of their shared common characteristic. The RSAA did not see the two USA approaches as irreconcilable because ‘sexual orientation is either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.’¹³² Hence, the social group argument would succeed under either head.

Given the various viewpoints and acknowledging the contributions from both the Canadian and USA jurisdictions, the RSAA proceeded to establish a framework that clearly justifies the

124 1312/93, 39.

125 The RSAA however made it clear that this decision did not establish a precedent for other cases.

126 1312/93, 46.

127 This observation comes from a article by Maryellen Fullerton; Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany’ (1990) 4 *Geo Immigra.L.J* 381, 409.

128 *Ibid.*

129 1312/93, 60.

130 *Matter of Acosta* (BIA Interim Decision 2986, March 1, 1985).

131 *Sanchez-Trujillo v Immigration and Naturalisation Service* 801 F. 2d 1571 (9th Cir. 1986).

132 1312/93, 57 [emphasis in original].

inclusion of sexual orientation as the focus for establishing a particular social group in certain circumstances.

The justification is well reasoned and based on the following points;

- i) the Refugee Convention grounds forming the reason for persecution focus on the appellants civil and political rights;
- ii) the *Acosta* interpretation of particular social group, in emphasising the ‘same kind’ aspect of a group in question, sees the same kind characteristic requiring that there be an internal defining characteristic shared by members of a particular social group;
- iii) the internal defining characteristic is present when the members of the group share a characteristic beyond their power to change, or when the shared characteristic is so fundamental to their identity or conscience that it should not be required to be changed; and
- iv) when members of such a social group have a well founded fear of harm because of what they believe or what they are, the reason for the harm becomes connected to breaches of civil and political rights. As such they are actions which deny human dignity and therefore should as Hathaway notes¹³³ and as approved in *Ward*,¹³⁴ be the concern of refugee law.

The nexus between harm and membership of a particular social group established in this way achieves two things. Firstly it maintains the social group within reasonably clear and well defined parameters. Secondly it acknowledges Goodwin-Gill’s contribution in regard to the position of the persecutor.¹³⁵ The RSAA highlight that ‘the expert evidence establishes that the situation for homosexuals in Iran is a particularly dangerous one.’¹³⁶ They are a group who because of a clear immutable characteristic (sexual orientation) ‘have been singled out by [Ayatollah] Khomeini and others as a corrupt and dangerous manifestation of “Westification”.’¹³⁷ This immutable characteristic being something so fundamental to their identity is something which should not be required to be changed. As such there was a well founded fear of persecution.

In this regard the perception of the persecutor becomes a vital element in establishing the nexus between well founded fear which is for reason of being a member of a particular social group.

RSAA *Decision 1312/93*¹³⁸ has been cited with approval by the House of Lords in *Islam v Secretary of State for the Home Department*, and *Regina v Immigration Appeal Tribunal & another ex parte Shah (A.P.)*.¹³⁹ Lord Steyn noted how the RSAA had applied the reasoning of *Acosta* to justify the position that homosexuals are capable of constituting a particular social group within the meaning of Article 1A(2) in appropriate circumstances.¹⁴⁰ In considering the decision to be an ‘impressive judgment’ Lord Steyn acknowledges the influence decisions from various jurisdictions had on the formulation of the decision.

The decision and subsequent endorsement illustrate the ability of the RSAA to acknowledge and critically assess all of relevant cross jurisdictional decisions and human rights instruments. From this extensive and often confusing array of material, the RSAA has been able to identify decisions and articles which both acknowledge the human dignity focus of refugee law, while at the same time realising that there must be limits to its application. The adoption of appropriate materi-

133 Hathaway, 108.

134 *Ward* above n 54, 733.

135 Hathaway above n 16.

136 Above n 63 at 34.

137 1312/93, 62.

138 Reported as *Re G.J.* [1998] INLR 387.

139 [consolidated appeals] (1999) 2WLR 1015 (House of Lords).

140 *Ibid.*

als has enabled the development of a framework for determination of refugee status which is thoroughly justified, clear and which can be, and indeed has been, adopted in other jurisdictions. In so doing it is bearing witness to Hathaway's acknowledgement that the RSAA is able to reconcile principle (Refugee Convention and associated law) with hard reality. The framework identifies the centrality of the immutable characteristic shared by membership the group.

The next step is to determine whether this characteristic is innate or alternatively whether the requirement to change would undermine the core human rights (human dignity) of members of the group. It then notes the significance of how the group is seen by officials.¹⁴¹ Does the official position to that group establish a well founded fear (real chance) of persecution by virtue of membership of that group?

B) Social Group and Gender discrimination

The RSAA established sexual orientation can, in appropriate circumstances, constitute a particular social group for the purposes of the Refugee Convention. In considering whether gender can also constitute a particular social group two decisions are of significance – 2039/93 and 71427/99 which both concerned applicant females from Iran.¹⁴²

It is important to firstly provide some factual background to these applications.

The appellant in *Decision 2039/93* experienced pressure from two angles. Her family had involvement with a liberation movement known as the Khuzestan Liberation Movement. Some family members had been leading personalities in the movement and as a result the appellant was constantly under suspicion. While working as an anaesthetist's technician she would, on a weekly basis, be summoned to the Komitech (Islamic Revolutionary Committee) for questioning. A member of the operating theatre team was a Komitech 'spy' and everything the appellant did and said was subject to surveillance. Summoning occurred for a number of years and the constant pressure harassed and humiliated her, eventually becoming unbearable.

The pressure on the appellant from her family is reflected by the control women are subjected to in traditional Iranian families. They are taught to serve others and to treat parents, older brothers, senior members of the family, her husband and his family with respect. Marriages are arranged and controlled by men and based on power rather than equality. Any departure from the required behaviour of women within marriage is treated very seriously. For example when a cousin of hers married a person who was deemed to be an unacceptable outsider a threat was made to kill the cousin. This threat was carried out after the cousin separated from this outsider. Another cousin's husband discovered upon her wedding night she was not a virgin. She was subsequently found to be pregnant and the husband made it clear that he was not the father of the child. She was decapitated by the husband two days after the birth of the child. The husband spent six months in prison and was commended by the family for the action that he had taken to restore the family honour.

The appellant, since arriving in New Zealand, had an unplanned pregnancy which was terminated. If she were to return to Iran and be forced to marry she would be discovered as not a virgin on her wedding night and probably killed.

141 In this regard the Authority is clearly disassociating itself with a position that if a homosexual were to exhibit self constraint the 'real chance' of persecution would not exist. See Rodger Haines. *The Domestic Application of International Human Rights Standards in New Zealand: The Refugee Convention*. Faculty of Law, University of Auckland. Spring Seminar Series: September 2004.

142 It is appropriate to acknowledge the detailed and sensitive manner in which the RSAA has detailed the facts of these decisions.

After all the experiences the appellant had gone through she experienced a 'self awareness process' which made her opposed to the rules governing social organisation and conduct in Arab society, and, in particular, the rules to subordinate women to men.

In *Decision 71427/99* the issue again related to marriage with the appellant a victim of serious domestic violence. The marriage was arranged which was not unusual. However the appellant described being treated like a prisoner and beaten regularly. When pregnant the husband refused to allow her out of the household for tests and checkups despite serious health issues. The beatings intensified. The husband also had another relationship and brought the other woman home. The appellant was locked in a room while the pair had sex. When the appellant went into labour her husband refused to take her to hospital and the appellant's mother in law took her. After the birth of her son she was told the boy had died. The appellant's husband had sold the baby to a couple who were unaware that the child's mother was alive and well. The husband then sent the appellant back to her parents.

Divorce proceedings were difficult owing to the interference and influence of the husband. It was only during the divorce the appellant discovered her child was alive. Even after the divorce the husband instigated Pasdars (Revolutionary Guards) under his control to embark on a campaign of harassment resulting in the appellant being repeatedly arrested, humiliated and beaten.

By the time the appellant was reunited with her son he was almost six years old. She entered into a new relationship and married, resulting in her first husband renewing his harassment. It was decided they would leave Iran. The appellant bribed an official in the passport office to add her child to her passport and left Iran for Turkey. Her second husband was to join them but from Turkey the appellant was unable to contact her second husband or her parents and in fear, she travelled to New Zealand with the help of an agent. At the airport she sought refugee status. At the time of appeal the appellant's second husband remained in Iran. His passport had been confiscated and he had been placed on a blacklist forbidding him from leaving the country. The first husband has arranged for a warrant for the arrest of the appellant.

It can be seen from both these cases that the women had not only faced ill treatment but return to Iran would lead to arrest or even death.¹⁴³ In both of these decisions the RSAA undertook a careful consideration of the status of women in Iranian society and how this is supported through the political framework.

The control that is exerted over women has already been mentioned and the patriarchal nature of society, together with inferior status accorded to women was also set out in the decisions. Two examples are provided:

First, the value of blood money, which is based on how much a person would have earned in a lifetime. It is twice as much in the case of a murdered man as in the case of a woman.¹⁴⁴ Secondly, penal code stipulates the number of witnesses required to prove a crime is higher if the witnesses are female.¹⁴⁵ The official attitude to domestic violence is 'one of condonation, if not complicity'¹⁴⁶ with the abrogation of the Family Protection Act (which did accord women some protection) by the [Ayatollah] Khomeini regime.¹⁴⁷ Additionally women's educational opportunities had been restricted; they had been excluded

143 This would have been the case for the appellant in *Refugee Appeal No. 2039/93* when it became apparent that she was not a virgin.

144 *71427/99*, 7.

145 *71427/99*, 8.

146 *71427/99*, 9.

147 Ann Mayer, *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 111–112 cited in *71427/99*, 24.

from a spectrum of prestigious jobs; practically eliminated from politics and government; denied a say in the legal order and subjected to very strict dress codes.¹⁴⁸ The Islamic principle of inferiority of women had 'the basis of the policy of a despotic state that uses extreme forms of violence in order to regulate male/female relations on the basis of Islamic dogmas.'¹⁴⁹

The overview of relevant material led the RSAA to conclude that there existed in Iran a general refusal 'to recognise women as full, equal human beings who deserve the same rights and freedoms as men' and the 'denial of the right of a woman to function as an autonomous and independent individual has enormous implications at every level.'¹⁵⁰ It subjected them to a wide range of discriminatory laws and treatment.¹⁵¹

In linking this discrimination to the Refugee Convention the authority reinforced its earlier position in *Decision 2039/93* that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard.¹⁵² The RSAA further adopted Hathaway's position that the IBR is essential to an understanding of the minimum duty owed by a state to its nationals.¹⁵³ This place of significance accorded to IBR Hathaway believes, derives from the extraordinary consensus achieved by the IBR 'on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords.'¹⁵⁴

Consideration of the specific situations of both of the appellants would suggest breaches of some central articles of the ICCPR. These include; Article 17 – the right to privacy, Article 6 – the right to life (arbitrary deprivation of life at the hands of Iranian males); Article 18 – freedom of thought, conscience and religion; Article 7 – the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (breach of the dress code can incur at least 74 lashes),¹⁵⁵ Article 23 – the right not to marry without free and full consent. While each of these individually amount to discrimination, the cumulative effect the RSAA held, amounted to a finding of persecution in the sense of a sustained or systemic violation of basic human rights.

This is further substantiated by the evidential findings of the RSAA. In the case of one appellant, not being a virgin at marriage would probably lead to death. An arrest warrant was issued for another. The pressure of forced compliance with codes and requirements fundamentally at odds with one's own conscience, beliefs, and deeply held convictions. And an appellant faced with ongoing pressure of weekly harassment and interrogations. These are but a few of the realities appellants faced.

In reaching the conclusion that the subjection of the appellants to such treatment amounts to a sustained and systematic violation of human rights the RSAA necessarily addressed the issue of cultural relativity. In particular it addressed two misconceptions. Namely, that it is 'wrong to

148 Mayer, *Ibid.*

149 Shahrzad Mojab *Women from Iran* A paper delivered at the CRDD Workshop of Women Refugee Claimants, Toronto, June 21, 1990 cited in *2039/93* 4 and 10 cited in *2039/93*, 35–36.

150 *2039/93*, 25.

151 *2039/93*, 38. In making these statements it is important to note that the RSAA is in no way making a general criticism of Islam. Rather its concern is the manner in which the ruling elite in Iran had manipulated the official version of Islam to enforce their own conservative and fundamentalist viewpoints.

152 Hathaway, 108.

153 Hathaway, 106.

154 Hathaway, 106.

155 D L Neal, 'Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum' (1988) 20 *Columbia Human Rights Law Review* 203, 217–222 cited in *Decision 2039/93*, 23.

judge “Islamic” states by “Western standards” and ‘the claim that somehow “Islam” itself is irreconcilable with human rights.’¹⁵⁶ Two points were advanced to effectively counter any claim justifying a cultural relativist position in refugee determinations and the imposition of Western superiority.

First was that the ‘use of international rights standards as norms in critical examinations of Islamic human rights schemes and restrictions on human rights’ are based on the ‘premise that peoples in the West and the East share a common humanity, which means that they are equally deserving of rights and freedoms.’¹⁵⁷

Second is that claims about cultural relativism and Western superiority was a point advanced mostly by states (usually those facing criticism for their human rights standards) and by liberal scholars. Such a claim is rarely advanced by the oppressed, who are anxious to benefit from perceived universal standards.¹⁵⁸

The comprehensive overview of the plight of women in Iranian society led the RSAA to conclude the two appellants had a well founded fear of persecution. It is in establishing the nexus to one of the Refugee Conventions grounds where arguably the RSAA makes its greatest contribution to international refugee jurisprudence. The ‘theocratic nature of the current regime in Iran,’¹⁵⁹ its use of Islamic law and Islamic morality to deny women equality with men and to advance and justify a wide range of discriminatory law¹⁶⁰ has already been outlined. When applied to the individual circumstances of the two appellants, including clear opposition to key aspects of the regime, the persecution of the appellants would have come within the religion and political opinion grounds.¹⁶¹

However the RSAA also considered whether both appellants could be accorded refugee status as members of a ‘particular social group’. It was recognised in *Decision 2039/93* that this is ‘not an area from free difficulty’ and consequently ‘too often gender issues are deliberately, but unjustifiably, avoided in the refugee context.’¹⁶² It was feared that an approach to refugee determination unjustifiably favouring the political opinion ground to the exclusion of the social group ground ‘will tend to reinforce the male gender bias often complained of by female asylum seekers, and inhibit the development of a refugee jurisprudence which properly recognises and accommodates gender issues within the legitimate bounds of the Refugee Convention.’¹⁶³ The possibility of overlapping Refugee Convention grounds requires identification of the principal or strongest ground. A claim may well come within the traditional religious or political reasons. However, if there are gender issues bringing the claim within the particular social group category the claim *should* additionally be considered under this head. Only by so doing can refugee jurisprudence develop in a

156 2039/93, 18.

157 A E Mayer, *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 7–8.

158 R Higgins, *Problems and Process: International Law And How We Use It* (1994) 96–97 who goes on to say: ‘Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial.’

159 2039/93, 35.

160 Mayer, above n 147 at 111–112.

161 2039/93, 35 and 41; 71427/99 41 and 51.

162 2039/93, 41–42.

163 *Ibid.*

manner appropriate to gender based persecution. The RSAA emphasises that fairness requires the *strongest* ground be identified and acknowledged.

In determining *Decision 2039/93* the RSAA focused on the appellants deeply held beliefs, convictions and values. They were found to be fundamentally at odds with the power structure in Iran which actively promoted inferiority of women. A number of women in Iran shared these convictions which are connected to fundamental civil and political rights and consequently their identity, dignity and existence as a human being. The appellant belonged to a social group (women) who, through their commitment to certain basic values rooted in core anti discrimination human rights principles, reject or oppose the way in which women are treated in Iran, and the attendant power structure perpetuated and reinforced by an 'Islamist' justification. To require such women to surrender to them would not only be abhorrent but place them at risk of serious harm both by the state and at the hands of male family members. The appellant was therefore a member of a particular social group facing the risk of serious harm. The *Decision 2039/93* appellant faced a real risk of serious harm through objecting to state policy and because family involvement in a liberation group. The risk of harm was directly related to the actions of the state.

The appellant in *Decision 71427/99* faced the real risk of serious harm from her husband, his family and the people he could influence. However the overarching reason for such treatment is that women in Iran are fundamentally disenfranchised and marginalised by the state – a shared immutable internal defining characteristic. Support for this position is found in *Shah*.¹⁶⁴ The House of Lords, considering women in Pakistan, held women could form a particular social group because they are discriminated against and unprotected by the state. Size of the group should not be a limiting factor particularly as the claim is country specific. What is required is the anticipated harm is for reason of being a member of that group.

Persecution is *Serious Harm + The Failure of State Protection*. Where serious harm comes from a non state agent the persecutory actions may be tolerated by the state or while not tolerated, the state either refuses or is unable to offer adequate protection. Refugee status can be established under particular social group where nexus can be established to either of the two limbs namely serious harm (on Refugee Convention grounds) or failure of state protection (on Refugee Convention grounds). It is not necessary to satisfy both as Convention Refugee grounds. Where risk of serious harm is not on a Refugee Convention ground, failure of state protection *is* such a ground and the nexus requirement is satisfied. The failure of state protection without threat or actuality of serious harm is not capable of amounting to persecution. Persecution is the *combination of two constructs* – serious harm and failure of state protection – both must be present. But, and most importantly, only serious harm *or* failure of state protection must be on a Refugee Convention ground.

In *Decision 71427/99* the nexus could not be found as serious harm was serious domestic violence which occurs in all countries. However the nexus was proven through failure of the state to protect the appellant. Lack of protection stemmed from the fact that women in Iran are fundamentally disenfranchised and marginalised by the state by active condonation, if not complicity. Refugee status was accorded because of the state failure to protect and as such goes to the core of the purpose of refugee law being to provide a form of 'surrogate or substitute protection' activated upon failure of state protection. Failure to accord the appellant refugee protection would be undermine the whole purpose of the Refugee Convention.

164 *Shah* above n 40.

Justice Kirby adopted this framework in *Khawar* which involved a female applicant from Pakistan. The appellant had suffered extreme violence at the hands of her husband and attempts to gain state protection from the police, as an agent of the state, was futile. A considerable amount of material was presented showing a particularly vulnerable group of women in Pakistan. Women in dispute with their husbands and husband's families were unable to call on male support and protection. They were subjected to, or threatened by, stove burnings and other extreme actions as a means of getting rid of them. Despite extreme mistreatment they were unable to secure effective protection from the police or agencies of the law. Kirby notes that when the focus of the harm inflicted upon women is a result of domestic conflicts by their husbands no Refugee Convention ground exists as there is no nexus. The nexus arises when the focus shifts the failure of state protection. The appellant was able to show a well founded fear of being persecuted as state protection was not available to her as a member of a particular social group.

The contribution of the RSAA is significant. It clearly and compellingly demonstrates how a person not directly persecuted by the state can be accorded refugee status. This has been done by acknowledging the two essential constructs of persecution – *Serious Harm + the Failure of State Protection*. Both constructs are essential but different. If only one of the two arise on Refugee Convention grounds, the nexus requirement central to the refugee definition is satisfied. However the RSAA has taken a second step and set out a framework for determining how refugee status can be determined in a manner ad idem with the Refugee Convention and reinforcing the underlying core principles of refugee law.

Additionally the RSSA has established that gender based persecution can, in appropriate circumstances, amount to persecution within the parameters of the refugee definition. The RSAA has both acknowledged and taken effective steps to address criticism that gender based discrimination is not being accorded appropriate attention by refugee review bodies. It has acknowledging that gender discrimination should *always* be identified by authorities when it is an appropriate consideration. And, when gender discrimination provides the *strongest* ground of nexus as its significance must be identified to ensure the appropriate determination of refugee status. The formulation of the framework has achieved a careful and appropriate balance between ensuring refugee status is granted in appropriate situations in accordance with refugee law on the one hand yet while upholding the limitations contained in the Refugee Convention on the other. To be declared a refugee on the basis of facing serious harm for reason of being a member of a particular social group it must be shown that members of this social group share a common immutable characteristic either be beyond the power of the individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed.

In the discussed decisions the immutable characteristic is that of being women. It cannot be changed. Appellant women from Iran were disenfranchised and marginalised. Risk of serious harm came from either agents of the state, or private individuals who actions and activities were condoned by the state.

Such an approach to membership of a social group enables appropriate refugee determination in accordance with the refugee definition while at the same time not allowing the concept to be so all embracing it becomes meaningless. While the inclusion of 'particular social group' was

intended to fill the gap (lacuna) this did not mean any association bound by some common thread would be included as a social group under the Refugee Convention.

In short the RSAA has very articulately justified the inclusion of sexual orientation and gender for refugee determinations in appropriate claims. It has done so completely in accord with the framework of the Refugee Convention drawing selectively upon a significant amount of cross jurisdictional material in justification. The RSAA has developed a practical framework adopted and followed by the Australian High Court.¹⁶⁵

VI. CONCLUDING COMMENTS

The contribution of the RSAA is significant and acknowledged in two situations. Firstly the justification that persecution from non state agents can come within the parameters of the Refugee Convention definition in certain specified and limited situations. Secondly in holding that in appropriate circumstances people persecuted because of sexual orientation or gender discrimination could be deemed to comprise a 'particular social group' hence warranting refugee status. The RSAA has done this in a manner which ensured the purpose of the Refugee Convention is given effect: namely to provide surrogate protection to people who are denied their human dignity through the sustained or systemic denial of core human rights. In determining people with a well founded fear of persecution from non state agents can be accorded refugee status if either the *Serious Harm + the Failure of State Protection* is for reason of a refugee ground, the RSAA has established gender discrimination as the basis of a particular social group in circumstances where domestic violence is condoned by the state. This in turn provides appropriate protection to people facing such persecution.

In undertaking its work in this manner the RSAA is acknowledging the English Court of Appeal in *Ex parte Adan* which held that the Refugee Convention is a living convention according appropriate protection for refugees in changing circumstances of the present and future world. The RSAA has in no way modified or compromised the convention definition. Rather it has acknowledged the limitations of protection accorded to people who face persecution where there is a failure of state protection. The restricting mechanisms contained in the Refugee Convention reflect the international community's intention not to offer a haven for *all* suffering individuals. The RSAA interpreted the Refugee Convention in good faith and in accordance with its purpose, mindful that such purpose is to provide human rights protection in *certain specified circumstances*. By working within the parameters the RSAA has effectively addressed the tension between adopting a purposive approach while remaining aware of application limitation.

The RSAA approach has enabled it to make a significant contribution to refugee law. Its careful and incremental development of refugee jurisprudence is based on appropriate guidance taken from key international refugee decisions and academic commentary together with its own experience. The two step framework allows the RSAA to consider refugee claims through clarity of reasoning and logical development of refugee jurisprudence in particular situations. The RSAA is able to reconcile principle to hard realities and, by so doing, is able to provide leadership in matters such as particular social group considerations.

165 Affirmed in 'Michigan Guidelines on Nexus to a Convention Ground General considerations point 8' The Michigan Guidelines on Well-Founded Fear, 26 *Michigan Journal of International Law*. 493 (2005).

VII. COMPLEMENTARY ROLES – RSAA AND RRA

The RSAA occasionally declines refugee status in situations where appellants show well founded fear of persecution if returned to their country of habitual residence. This occurs either because of the need to invoke the exclusion clause under Article 1F¹⁶⁶ or because persecution was not for reason of a refugee ground. In *A, B & C (a family of Peru) v Chief Executive of the Department of Labour*¹⁶⁷ the appellant had been a member of the Peruvian Police Force and as part of an anti terrorism unit taken part in activity involving acts of torture. When a particular anti Government group became aware of his involvement in the anti terrorist activities, attacks were initiated against the appellant and his family. The RSAA acknowledged the fact that the appellant had a well founded fear of persecution if he were to return to Peru but in seeing it necessary to invoke the exclusion clause declined him refugee status on the basis that he had been involved in crimes against humanity.¹⁶⁸

Likewise in another matter a female appellant had established that she and her child had a well founded fear of persecution if she were to return to South Africa. Refugee Status was however declined because the reason for the well founded fear could not be linked to one of the Refugee Convention reasons.¹⁶⁹

Both of these appellants made successful appeals to the Removal Review Authority [RRA].¹⁷⁰ The RRA considers appeals on the basis there are ‘exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.’¹⁷¹ This test to determine such claims was discussed in *Patel v Removal Review Authority & Anor*¹⁷² and held to be a ‘stern test’ which sets a ‘high threshold’. It starts with the premise the appellants are in New Zealand unlawfully and are seeking an exemption. In *Nikoo v Removal Review Authority*¹⁷³ McGechan J held ‘exceptional’ to refer to circumstances which were very unusual. Despite the fact the threshold for determining appeals is very high and the RSAA considers the matters ‘on the papers’ rather than conducting a full hearing¹⁷⁴ the restrictions which are part of the Refugee Convention namely the exclusion clauses and the nexus requirement are not included. As stated in *A, B. & C*:

The categories of ‘exceptional circumstances’ need not be closed, and cannot be for ultimately all must depend upon a full consideration of the actual circumstances of the particular case.¹⁷⁵

166 Article 1F – The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

167 *A v The Chief Executive, Department of Labour Alt cit A, B & C (a family from Peru) v Chief Executive Department of Labour* [2001] NZAR 981.

168 *Decision 2511/95*.

169 This was a hearing before the RRA AAS5475.

170 The Removal Review Authority is an independent judicial body established under the Immigration Act 1987. It hears appeals on the papers against the requirement for a person who is unlawfully in New Zealand to leave New Zealand.

171 Immigration Act 1987 s 47(3).

172 *Patel v Removal Review Authority & Anor* [2000] NZAR 200, 204.

173 *Nikoo v Removal Review Authority* [1994] NZAR 509, 519.

174 Immigration Act 1987 s 50.

175 *A, B & C* above n 169, 992.

When determining an appeal the RRA is able to use the evidential findings of the RSAA but must consider them under a completely different statutory framework.¹⁷⁶ Under the statutory framework the RSAA decided in favour of the appellants in both of these matters as the danger of returning to Peru and South Africa had been clearly established. The RRA however was not restricted by exclusion clauses or nexus requirements.

These decisions illustrate the complementary role the RRA provides to the RSAA. The RSAA is able to focus solely upon the determination of appeals against the parameters of the Refugee Convention thereby ensuring protection of human rights in the manner intended. For those appellants whose circumstances reveal genuine humanitarian/human rights concerns but do not come within the parameters of the Refugee Convention appropriate relief can be provided through the RRA.¹⁷⁷ New Zealand is therefore, able to fulfil its international obligations not only under the Refugee Convention but other international instruments as well. The complementary role performed by these authorities is therefore not only effective but ensures on the one hand refugee determinations being appropriately considered while on the other hand that appropriate relief is provided to people having genuine humanitarian concerns.

VIII. FINAL ACKNOWLEDGEMENT

In acknowledging the contribution of the RSAA Hathaway writes:

It would be a tragedy not only for New Zealand but for the broader refugee protection community were the role of the Refugee Status Appeal Authority to be diminished.¹⁷⁸

The RSAA has offered significant leadership in a difficult and complex decision making area. As Ema Altken¹⁷⁹ noted in her 2005 Annual Report for the RSAA, 'Refugee appeal decisions are difficult and complex ... demanding a high standard of professionalism and fairness ... to reach ... "a possible life-and-death decision extracted from shreds of evidence".' The detail and care of decisions discussed above highlight the RSAA's professionalism and absolute commitment to applying the Refugee Convention in a fair manner.

In *Tavita v Minister of Immigration*,¹⁸⁰ consideration was given to the fulfilment of New Zealand's international obligations contained in the various ratified international instruments. The former President of the Court of Appeal Sir Robin Cook described the Human Rights Committee as a judicial body of high standing.¹⁸¹

176 Ibid 991.

177 For example the RRA can clearly focus upon Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which requires 1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Unlike the Refugee Convention the protection contained in this clause is absolute and is not constrained by exclusion clauses (Article 1 F of the Refugee Convention) or concerns about State Security. (Article 33 (2) of the Refugee Convention).

178 Hathaway n 16.

179 Former Chair, RSAA Annual Report 2005 available at http://www.nzrefugeeappeals.govt.nz/Pages/ref_2005annual-report.aspx.

180 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266.

181 This is the Committee established to supervise the International Covenant on Civil and Political Rights. Under an Optional Protocol to the Convention individuals under the jurisdiction of States who have ratified the Convention and its Optional Protocol make a complaint to this committee if it considers that rights contained under the Covenant have been breached. Article 2 of the Protocol requires however that the individual has firstly exhausted all domestic remedies.

It is submitted the same acknowledgement should be accorded the RSAA. Such acknowledgement is justified by the contribution the RSAA has made to international refugee jurisprudence as evidenced through its decisions but also the acknowledgement of senior judicial bodies such as the British House of Lords and High Court of Australia and senior academic commentators such as Professor James Hathaway.

It is hoped this contribution is acknowledged by the New Zealand Government: not only to ensure the continuation of the work and contribution of the RSAA but see that it is appropriately supported and provided for.

DISTINGUISHING ELIAS CJ FROM ‘RADICAL MAORI’, WITH SOPHOCLES’ *ANTIGONE* AS AN ANALOGICAL SOURCE

BY RICHARD DAWSON*

In 2004, during a speech marking the 150th anniversary of the opening of the New Zealand Parliament, the Hon Michael Cullen, Deputy Prime Minister, identified a resemblance between Elias CJ and those whom he called ‘radical Maori’. The resemblance resides in their disposition to challenge the ‘settled doctrine that New Zealand is a sovereign state in which sovereignty is exercised by Parliament as the supreme maker of law.’¹ In this article a case is made that the resemblance is superficial and that we will do well to distinguish Elias CJ from ‘radical Maori’. Also, it is argued that Cullen’s sovereignty-talk deeply resembles that of ‘radical Maori’.

In this attempt at reconstituting resemblance and distinction the ancient Greek tragedian Sophocles is called upon. In 2004, Elias CJ quoted this assessment of Sophocles: ‘Who saw life steadily, and saw it whole.’² Elias CJ spoke of a fellow Judge of the High Court (Neil Williamson) who tried to do so in his life, and she then remarked that ‘so should we all’.³ From this we may take it that lawyers can benefit from reading Sophocles. This article offers a reading of Sophocles’ play *Antigone* in combination with a reading of talk concerning sovereignty and so-called ‘radical Maori’. To avoid setting up a straw person and to render the length of this article manageable our ‘radical Maori’ will be one person, Ani Mikaere, who currently holds the position of Director of Maori Laws and Philosophy at Te Wananga o Ruakawa. The reader will have to judge for herself or himself if this selection is appropriate.

A remark about genre blurring is as follows. As a common law lawyer might be expected to appreciate well, texts are always read in relation to other texts that serve as points of reference. Patterns of similarity and difference, that is, the recognition that the text one is reading is like these and not those, establish the reader’s sense of genre. Writing within the conventions of a genre allows one to talk with a great deal being left unsaid, for genre establishes a dialogical relationship with other texts and genres.⁴ This paper, in the spirit of various contributors to the law and literature movement, seeks to set different genres in dialogue.⁵ ‘Law is like literature’, our various analogical imaginations say. What are the possibilities here?

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1 Hon M Cullen, ‘Speech to the 150th Anniversary of the New Zealand Parliament Address to Her Excellency the Governor-General.’ (2004) 16 *New Zealand Parliamentary Debates*, 13192.

2 Rt Hon Dame S Elias, ‘The Next Revisit’: Judicial Independence Seven Years On’ (2004) 10 *Canterbury Law Review* 219.

3 Ibid 228.

4 These remarks on genre draw from C A Newsom, *The Book of Job: A Contest of Moral Imaginations* (2003) 16–21.

5 A founding text for this movement is J B White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973).

Why might someone want to use an analogy for talking about law? Why not simply say what the law *is*? Joseph Vining has asked a similar question about the nature of legal analysis. His response reflects a sense of the pervasiveness of analogies:

We could try to say directly what legal analysis is. But any direct approach would slip rapidly into demonstration. Legal analysis is this, we could say, and run through a course of professional training. Even then we would be only halfway to understanding, because legal analysis would not have been placed in our minds. It would in fact be left at the mercy of the analogies that do lurk there, for nothing in our minds is unplaced, rightly or wrongly.⁶

This paper is intended as a contribution to talk about what the law is. In doing so, it seeks to do some replacing.

Some preliminary remarks on Sophocles' play may be helpful here, especially to those unfamiliar with it. Many readers of *Antigone* have remarked on how key words are sites of struggle, with each of the principal characters seeking to control their meaning. In one introduction to the play, we are informed:

The play offers conflicting definitions, explicit or implicit, of the basic terms of the human condition: friend and enemy, citizen and ruler, father and son, male and female, justice and injustice, ... and even ... conflicting judgments of what is *anthrōpos*, a human being – powerful or helpless, something 'wonderful' or 'terrible' (both of these, meanings of the same word, *deinon*). Not only are the definitions in conflict, but the terms themselves become ambiguous ...⁷

Sophocles suggests, through the experiences of his characters, that language is a fluid, inherited resource that undergoes change whilst in use. Characters reconstitute themselves as they remake their languages. Sophocles' sense of language as a shared inheritance has affinities with the work of legal philosopher Thomas Eisele, especially his essay *The Legal Imagination and Language*.⁸ 'The language of the law', he writes, 'is established and precedes us, so we grow into it. It is passed on, so it connects us with our future as well as our past. It is our inheritance, so we use it or abuse it to our credit or detriment.'⁹ Eisele lives by an organic sense of language, which is associated with a similar sense of the self. At the level of character, a person is what she or he says. What is said is associated with tones of voice. What tones can we tune into and then modify so as to speak for our 'selves'?

We can read *Antigone* as an edifying discourse on the activity of politico-legal judgment as an ethical art. Martha Nussbaum, in her 1986 book *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, suggests as much with this imagery of the spider's wisdom:

The Sophoclean soul is ... like Heraclitus' image of the *psuche*: a spider sitting in the middle of its web, able to feel and respond to any tug in any part of the complicated structure. It advances its understanding of life and of itself not by a Platonic movement from the particular to the universal, from the perceived world to a simpler, clearer world, but by hovering in thought and imagination around the enigmatic complexities of the seen particular ... , seated in the middle of its web of connections, responsive to the pull of each separate thread The image of learning expressed in this style ... stresses responsiveness and attention to complexity; it discourages the search for the simple and, above all, for the reductive.¹⁰

6 J Vining, *The Authoritative and the Authoritarian* (1986) 27.

7 C Segal, 'Introduction' in *Sophocles' Antigone* (R Gibbons and C Segal, trans.) (2003) 6.

8 T D Eisele, 'The Legal Imagination and Language: A Philosophical Criticism' (1976) 47 *University of Colorado Law Review* 363.

9 Ibid 368.

10 M C Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (1986) 69.

This imagery fits well with the process of what law and literature pioneer James Boyd White has called ‘intellectual integration’.¹¹ This is the putting together of fragments (texts and events) not for the purpose of assimilating them to a single image or a single set of rules but for tentatively contemplating similarity and difference and for engaging with tensions between the particular and the general. Such a process has seemingly obvious pertinence for lawyers and non-lawyers alike who take the pursuit of social unity *and* diversity seriously.

I. TAKING SIDES: US AGAINST THEM

In Greek mythology, following Oedipus’ death, his daughter Antigone returned to the city of Thebes, where her brothers Eteocles and Polynices were contesting supremacy. The brothers had agreed to share the rule of Thebes, but Eteocles broke the agreement. Polynices tried to regain this share of the throne by attacking the city. During the battle, Eteocles and Polynices killed each other. Creon, the new king, has to make a judgment on how to treat the two bodies – similarly or differently. His judgment is the departure point for Sophocles’ play *Antigone*.¹²

Sophocles has Creon at the outset living by the metaphor of the city as a ship. We hear this metaphor when Creon speaks to the Chorus, which is comprised of Theban elders Creon summoned ‘to conference together’.¹³ Speaking on ‘the practice of authority and rule’,¹⁴ he says: ‘If I saw doom instead of deliverance / Marching against my fellow citizens, / I would not be silent, nor would I love / An enemy of my land as a close friend – / Knowing that this ship keeps us safe, and only / When it sails upright can we choose friends for ourselves.’¹⁵ Against the background of this imagery, Creon hands down his judgment on the two bodies. Eteocles is to be buried with great honour: ‘Eteocles, who fell fighting in defence of the city, / Fighting gallantly, is to be honoured with burial / And with all the rites due to the noble dead.’¹⁶ Polynices, deemed to be an ‘enemy’ of the polis, is to be treated differently. ‘Polynices, / Who came ... to burn and destroy / His fatherland and the gods of his fatherland, / To drink the blood of his kin, to make them slaves – / He is to have no grave, no burial, / No mourning from anyone; it is forbidden. / He is to be left unburied, left to be eaten / By dogs and vultures, a horror for all to see.’¹⁷ The Chorus respond in brief: ‘Creon, son of Menoeceus, / You have given your judgment for the friend and for the enemy. / As for those that are dead, so for us who remain, / Your will is law.’¹⁸

In the prologue, Sophocles presents Antigone as one who considers family connections to be of immense importance in matters of life and death. In an intimate address to her sister Ismene, Antigone says, ‘O sister! Ismene dear, dear sister Ismene! / ... Have you heard how our dearest are being treated like enemies?’¹⁹ Antigone invites Ismene to resist Creon, even though ‘The punish-

11 J B White, *Justice as Translation: Essays in Legal and Cultural Criticism* (1990), 3–21.

12 In this article the source texts are Sophocles, *The Theban Plays* (E F Watling, trans.) 1947; and Sophocles, *Antigone*, above n 7.

13 Watling *ibid* 130.

14 *Ibid* 131.

15 Gibbons and Segal, above n 7, 62.

16 Watling, above n 12, 131.

17 *Ibid*.

18 *Ibid* 132.

19 *Ibid* 126.

ment for disobedience is death by stoning.²⁰ In an absolutist tone, Antigone insists that Creon 'has no right to keep me from my own.'²¹ Ismene is not persuaded about Antigone's proposed action. She suggests deferring to customs concerning the place of women in politics: 'O think, Antigone; we are women; it is not for us / To fight against men; our rulers are stronger than we / And we must obey in this, or in worse than this. / May the dead forgive me, I can do no other / But as I am commanded; to do more is madness.'²² Without trying to persuade her to change her mind, Antigone immediately turns against Ismene: 'No; then I will not ask you for your help. / Nor would I thank you for it, if you gave it. / ... Live, if you will; / Live, and defy the holiest laws of heaven.'²³

Antigone evidently is certain she knows what she wants and how to get it. She does not stop for a moment to explore, through conversation, the complex topic of 'forgiveness' raised by Ismene, a topic that offers to bridge between the simplistic friend enemy dualism.²⁴ Later, by way of a taunt, Antigone asks Ismene, 'Is not [Creon] the one you care for?'²⁵ The answer could be a resounding 'yes' without implying that Ismene does not feel the same or any less 'care' for Antigone. The issue at stake is not necessarily one in which Ismene is forced to take one of two sides, with an unbridgeable gulf between them. Antigone treats her sister in the way modern economists commonly model economic actors, namely as machines capable of unequivocally ranking alternatives open to them.²⁶ But this model is built on a vast set of assumptions about the world, including the existence of 'full information' and a mechanistic view of language with which to name a world of discrete 'things'. These assumptions, perhaps needless to say, are contestable. Antigone talks as if she is omniscient, even knowing the 'holiest laws of heaven'. She does not invite Ismene to converse on what seems obviously contestable.

Antigone is caught in the act of disobedience and she admits to knowing of his decree and to daring to contravene it:

It was not Zeus who made that proclamation
 To me; nor was it Justice, who resides
 In the same house with the gods below the earth,
 Who put in place for men such laws as yours.
 Nor did I think your proclamation so strong
 That you, a mortal, could overrule the laws
 Of the gods, that are unwritten and unfailing.
 For these laws live not now or yesterday
 But always, and no one knows how long ago
 They appeared. And therefore I did not intend

20 Ibid 127.

21 Ibid 128.

22 Ibid.

23 Ibid 128.

24 M W Blundell, *Helping Friends and Harming Enemies: A Study in Sophocles and Greek Ethics* (1989) 112–14.

25 Watling, above n 12, 141.

26 A C DeSerpa, *Microeconomic Theory: Issues and Applications* (1988) 84–90.

To pay the penalty among the gods

For being frightened of the will of a man.²⁷

What might have been the reaction of the contemporary Athenian audience, or at least Sophocles' ideal audience, to Antigone's claim? One seemingly reasonable answer is as follows. 'Yes, there are indeed unwritten laws of the gods that no mortals can overrule, but what makes Antigone think that she knows what they are better than the polis, and what gives her the authority to claim that Creon's proclamation contravenes them?'²⁸

How will Creon respond to Antigone's claim? Who will he become in his interaction with her? What are the possibilities? Will he, for example, try to befriend Antigone, perhaps by adopting a manner resembling the Socratic method? This would mean beginning a conversation with a set of searching questions, with a view to helping Antigone learn that she does not know something that she thinks she knows, to humble her?²⁹ But this would be to invite a kind of friendship that Antigone, or at least a self within her, might be daunted by.³⁰ Or will Creon, as the 'enemy' Antigone has defined him in relation to herself, talk to her in the manner she talked to him?

With family connections in mind, the Chorus immediately offers this reading of Antigone's claim: 'She shows her father's stubborn spirit.'³¹ But what about the accuracy or legitimacy of her claim about 'the laws / Of the gods'? On this question the Chorus is silent. What are we to make of this silence?

Creon senses before him an obstinate figure: 'Understand that rigid wills are those / Most apt to fall.'³² Avoiding her claim about the standing of the unwritten laws, Creon turns their dispute into a gender issue: 'First, this girl knew very well / How to be insolent and break the laws / That have been set. And then her second outrage / Was that she gloried in what she did and then / She laughed at having done it. I must be / No man at all, in fact, and she must be / The man, if power like this can rest in her / And go unpunished.'³³ Whilst Creon stresses an essential difference between himself and her, one may sense Antigone's certainty and absoluteness expressed in his speech. Creon does not hesitate to condemn her to death.

Antigone insists that she will have an honourable death, and that she is not alone in believing so: 'All these / Would say that what I did was honourable, / But fear locks up their lips.'³⁴ Creon invites no discussion about this claim about what others think about the tension between Antigone and himself. Instead, he declares, 'You are wrong. None of my subjects thinks as you do.'³⁵ Ismene, however, enters to offer support for her sister. Creon dismisses her: 'I do believe the creatures both are mad; / One lately crazed, the other from her birth.'³⁶ Ismene then raises an awkward

27 Gibbons and Segal, above n 7, 73.

28 I am paraphrasing here from C Sourvinou-Inwood, 'Assumptions and the Creation of Meaning: Reading Sophocles' *Antigone*' (1989) 59 *Journal of Hellenic Studies* 134, 143.

29 For a discussion on various facets of the Socratic method in the context of the law school, see T D Eisele, 'Bitter Knowledge: Socrates and Teaching by Disillusionment' (1994) 45 *Mercer Law Review* 587.

30 On the challenges of a Socratic friendship in the context of the law school, see T D Eisele, 'Must Virtue Be Taught' (1987) 37 *Journal of Legal Education* 495.

31 Watling, above n 12, 139.

32 Gibbons and Segal, above n 7, 74.

33 Ibid.

34 Watling, above n 12, 139–40.

35 Ibid 140.

36 Ibid 141.

matter of family connections: 'You could not take her – kill your own son's bride?'³⁷ Ismene here is referring to Haemon, who is betrothed to Antigone. For Creon, however, Antigone is readily replaceable: 'Oh, there are other fields for him to plough.'³⁸ This harsh agricultural metaphor, perhaps needless to say, devalues women generally and also refuses to acknowledge the particularity of Antigone.³⁹

Creon's agricultural metaphor, along with his earlier sailing metaphor, is resonant with the opening of the Chorus' famous *Ode on Man*, a celebration of the civilizing power of human reason:

At many things – wonders, / Terrors – we feel awe,
 But at nothing more / Than at man. This
 Being sails the gray- / White sea running before
 Winter storm-winds, he / Scuds beneath high
 Waves surging over him / On each side;
 And Gaia, the Earth, / Forever undestroyed and
 Unwearing, highest of / All the gods, he
 Wears away, year / After year as his plows
 Cross ceaselessly / Back and forth, turning
 Her soil with the / Offspring of horses.⁴⁰

'Man', the most wonderful, terrible, awesome of creatures has used 'his' powers to invent sailing, agriculture and animal husbandry to dominate the earth. Creon, we have heard, extends this imagery to women.

Later in the *Ode on Man* there appears to be boasting on language: 'He has taught himself / Speech and thoughts.'⁴¹ Creon, who echoes this secular rationalism, speaks as if the language he uses is a perfect instrument for his own sovereign speech and action, a transparent medium for the pronouncement of laws. Sophocles' *Antigone*, however, offers a different sense of language, a sense that becomes more apparent as the drama unfolds. In the *Ode on Man*, after speaking of the resourcefulness of man, mention is made of one insurmountable obstacle, namely Death: 'Only from / Hades will he not / Procure some means of Escape.'⁴² Perhaps Creon will come to learn that his language is in a sense dead, and that there has been a certain deadness in himself?

Haemon enters, and he suggests to his father that he (Creon) should be concerned about the way his own actions will be judged by the larger community: 'On every side I hear voices of pity / For this poor girl, doomed to the cruellest death, / And most unjust, that ever woman suffered / For an honourable action – burying a brother / Who was killed in battle.'⁴³ With the aid of a chal-

37 Ibid.

38 Ibid 141.

39 A W Saxonhouse, *Fear of Diversity: The Birth of Political Science in Ancient Greek Thought* (1992) 73.

40 Gibbons and Segal, above n 7, 68.

41 Ibid 69.

42 Ibid 69.

43 Watling, above n 12, 145.

lenging sailing metaphor, Haemon suggests that Creon would do well to avoid a quick judgment, lest his capacity for thought is impaired by a commitment to it:

Father, there is nothing I can prize above
 Your happiness and well-being. What greater good
 Can any son desire? Can any father
 Desire more from his son? Therefore I say,
 Let not your first thought be your only thought.
 Think if there cannot be some other way.
 Surely, to think your own the only wisdom,
 And yours the only word, the only will,
 Betrays a shallow spirit, an empty heart.
 It is no weakness for the wisest man
 To learn when he is wrong, know when to yield.
 So, on the margin of a flooded river
 Trees bending to the torrent live unbroken,
 While those that strain against it are snapped off.
 A sailor has to tack and slacken sheets
 Before the gale, or find himself capsized.⁴⁴

The Chorus, evidently persuaded at least to some degree by this speech, respond by saying, ‘There is something to be said, my lord, for his point of view, / And for yours as well; there is much to be said on both sides.’⁴⁵ The Chorus thus invites all parties involved to move beyond a mechanistic and authoritarian talk centered on supposedly clear and simple rules. Can Creon acknowledge some complexity in the situation that is before him?⁴⁶ Can he speak in a different, conversational voice? Has he listened, really listened, to what has just been said to him?

Creon, apparently completely unmoved by the Chorus and by Haemon’s speech, ignores his warning. He images himself as one who has nothing to learn from his son: ‘Am I to take lessons at my time of life / From a fellow of his age?’⁴⁷ Haemon tries to converse, but cannot do so alone:

CREON: Would you call it right to admire an act of disobedience?

HAEMON: Not if the act were also dishonourable.

CREON: And was not this woman’s action dishonourable?

HAEMON: The people of Thebes think not.

44 Ibid.

45 Ibid 145–6.

46 Georg Hegel, in nineteenth century readings of *Antigone*, adopted a similar view. He claimed that both Creon and Antigone are right in principle, but that each of their conflicting principles is of limited validity. For a discussion of Hegel’s work, see G Steiner, *Antigones* (1984) 37–42.

47 Watling, above n 12, 146.

CREON: The people of Thebes!

Since when do I take my orders from the people of Thebes?

HAEMON: Isn't that rather a childish thing to say?

CREON: No. I am king, and responsible only to myself.

HAEMON: A one-man state? What sort of state is that?

CREON: Why, does not every state belong to its ruler?

HAEMON: You'd be an excellent king – on a desert island.

CREON: Of course, if you're on the woman's side –

HAEMON: No, no –

Unless you're the woman. It's you I am fighting for.

CREON: What, villain, when every word you speak is against me?⁴⁸

Creon here fails to sense that there is more to the dispute than simply one 'side' versus another. Creon, who seems unable to imagine Antigone as someone other than a 'woman', lacks a certain capacity for sympathetic understanding, or a recognition of the limits of language, that would enable appreciation that what Haemon means with 'every word' may be at least slightly different from what he himself means. Creon, that is to say, seems unable to read well. Something significant may well be getting 'lost in translation', and Creon fails to question himself and/or Haemon on the fidelity of his own translation. Perhaps Creon does not know how to ask the pertinent questions? Perhaps Creon does not know how to befriend himself and/or Haemon? Creon ultimately has demanded unquestioning loyalty from Haemon (and all others), and as such an authoritarian relationship is established, one in which his son is merely a means to an end, which is some abstract, static social order.

Creon, who at least for the moment is a tyrant, turns to the matter of punishing Antigone. 'I'll have her taken to a desert place / Where no man ever walked, and there walled up / Inside a cave, alive, with food enough / To acquit ourselves of the blood-guiltiness / That else would lie upon our commonwealth.'⁴⁹ As Antigone proceeds to her rocky tomb, the Chorus tells her she is 'autonomos'; she 'lives by her own law.'⁵⁰ In the context of the play this means that Antigone has put herself 'apolis', outside the city, by not letting the laws of the city influence her action. Such autonomy is a form of hubris. Sophocles' *Antigone* is known for this novel usage of the word autonomy.⁵¹ The roots of the word can be traced back to the vocabulary of interstate relationships – evidently coined by weaker states in the process of attempting to inhibit the arbitrary exercise of force by a stronger state over them.⁵² Sophocles applied the adjective to Antigone, using it not to suggest what we today commonly take to be praise but to condemn.

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In the late 1980s, Ani Mikaere was a student at Victoria University School of Law and was about begin a career as a legal academic. After a brief time at the University of Auckland she moved

48 Ibid.

49 Ibid 147.

50 Quoted in B M W Knox, *The Heroic Temper: Studies in Sophoclean Tragedy* (1964) 66.

51 See, for example, P M Lines, 'Antigone's Flaw' (1999) 12 *Humanitas* 4, 10.

52 M Ostwald, *Autonomia: Its Genesis and Early History* (1982) 1.

south to the University of Waikato. Whilst at Waikato, in the spirit of contemporary law school pedagogy that includes narrative and storytelling,⁵³ she tried to bring together ‘the personal’ and ‘the academic’ in a participant observer’s reading on the ‘bicultural commitment’ at Waikato Law School. On her early expectations about Waikato, Mikaere tells her readers:

[W]hen I came to Waikato, the prospect of being required to give life to an institutional commitment to biculturalism was exciting. While it was not at all clear what this bicultural commitment would mean in terms of our teaching, the prevailing view appeared to be that the school should not only offer specialist courses which focused on Maori concerns, but that it should also strive to include Maori perspectives and content into all of its courses, so that those perspectives would not become marginalised.⁵⁴

This is a ‘view’ with which Mikaere agreed. She co-taught the core courses Legal Systems and Jurisprudence with such a view, ‘consciously developing them to ensure that Maori material and perspectives form an integral part of their content.’⁵⁵ Her experience and expectations, however, far from matched:

Teaching experience in these courses have led me to reassess my view on what a commitment to biculturalism should require from us in our teaching. I have seen that putting Māori and Pākehā students into the same learning environment and then introducing Māori content can create an extremely culturally unsafe situation for Māori students, and for myself Teaching this material to non Māori students may be putting our own knowledge at risk of exploitation and manipulation by those who do not recognise its worth. And there is, of course, the further possibility that in educating our oppressors about ourselves, we simply enhance their ability to oppress us.

I hasten to add that none of what I have said is intended as a personal attack on any member of my classes, nor on any of my academic colleagues. Very few of them, if any, deliberately set out to cause offence. It is just that their life experiences are so far removed from those of Māori that they are blissfully unaware of the implications of what they say, of the damage that they are capable of causing.

Moreover, in view of the genuine difficulties that a number of Pākehā students have with learning about such matters as colonisation I have come to question whether I am the right person to be teaching them such material. As I have already said I cannot relate to their guilt or to their hostility and I do not see it as my job to do so.⁵⁶

With echoes of Antigone’s and Creon’s world of one ‘side’ versus another, Mikaere draws a bright line between the ‘oppressors’ and the oppressed, between ‘Pakeha’ and ‘Maori’, and ‘them’ and ‘us’. Are the ‘life experiences’ of ‘Pakeha’ and ‘Maori’ really so different, ‘so far removed’, from each other? How might Mikaere respond to, say, a self identified Ngai Tahu student whom senses that her or his own ‘life experiences’ are ‘so far removed’ from Mikaere’s, and as such she or he does not accept Mikaere’s talk about how one experiences life as a ‘Maori’?

Perhaps Mikaere could have better utilized her analogical imagination in trying to get ‘Pakeha’ to understand what she was driving at about colonisation? She does not stop to question herself whether ‘the genuine difficulties that a number of Pakeha students have with learning about such matters as colonisation’ arise not so much from the topic itself but the manner in which she has framed it. Perhaps the ‘hostility’ expressed by these students was associated not with ‘guilt’ but

53 For references see N T Martin, ‘Allegory from the Cave: A Story about a Mis-educated Profession and the Paradoxical Prescription’ (2005) 9 *Lewis and Clark Law Review* 381.

54 A Mikaere, ‘Rhetoric, Reality and Recrimination: Striving to Fulfill the Bicultural Commitment at Waikato Law School’ (1998) 3 *He Pukenga Kōrero* 4, 11–12.

55 *Ibid.*, 12.

56 *Ibid.*

by the relationship she establishes with her students? Does she give her students the same kind of 'autonomy' she grants to herself? Perhaps Mikaere would have done well to illuminate when, in talking about students and colleagues, the terms 'Pakeha' or 'Maori' are irrelevant? When, or which contexts, is the present writer not a 'Pakeha' to her, but a fellow human being, jointly involved in the activity of trying to make sense of what it might be to be human? Perhaps Mikaere is tangled up with the term 'Pakeha' and her 'Maori' correlative in a manner resembling Creon with 'woman' and 'man'?

Like Creon and Antigone, Mikaere uses language as if it is a transparent conveyer of meaning, a perfect instrument for expressing what she wants to say. Her own background, however, offers her possibilities for acknowledging the ways in which language entangles and misleads. As a child, Mikaere tells us, she was 'singled out for the attention of every primary school inspector who visited our classroom and told to "keep up the good work".'⁵⁷ Later in life Mikaere came to conclude that with this pattern she was being 'held up as an example of successful assimilation.'⁵⁸ As a 'further twist' to the story:

I should add that my academic ability was often attributed to my Pākehā (Australian) mother. The fact that both she and my Māori father were veterinary surgeons who had excelled in their tertiary studies rarely featured in the assumptions that were made about the source of my abilities. Few could see beyond the colour of each of my parents, automatically associating academic success with the white parent.⁵⁹

Why does Mikaere fail to draw attention to the inadequacies of dichotomies such as 'Maori' and 'Pakeha'? It seems to me to be readily imaginable that as a young person Mikaere wondered why a child born of a 'Pakeha' mother and a 'Maori' father, or vice versa, is to be considered 'Maori' rather than 'Pakeha'. Is there a silenced voice within her?

Hearing Mikaere talk about her parents' occupation brings to mind Socrates, or at least Plato's Socrates in the *Theaetetus*.⁶⁰ Socrates famously had a mother who was a midwife, and this relationship had some considerable influence on his analogical imagination.⁶¹ Socrates made no claim to be able to give birth to true 'ideas' but he said he could help deliver the ideas of others and then, through a conversation of analogical reasoning, jointly judge, as 'friends', their 'truth'.⁶² The Mikaere we have heard differs markedly from this Socrates, for she, at least in my reading of her own account, fails to befriend not only her students but also herself.

Confidently using the inherited binary language, Mikaere came to the 'conclusion' that in order to fulfill the 'bicultural commitment' at Waikato Law School some degree of institutional separation and autonomy is required:

[F]or some purposes, Māori and Pākehā students would best be taught separately. For example, the material in legal systems on the usurpation of Māori law by Pākehā law should be taught to Māori students by Māori lecturers, and to Pākehā students by Pākehā lecturers. This would enable Māori staff to employ their energies where they are most needed – amongst Māori students. It would also require Pākehā lecturers to take responsibility for Pākehā students' learning, and for helping them through the problems that they, as Pākehā, have with such material. It should not be the job of Māori staff to expose ourselves and our students to Pākehā students' racism and guilt. It should be added that such an approach would not

57 Ibid.

58 Ibid.

59 Ibid.

60 For a discussion of this text see D Sedley, *The Midwife of Platonism: Text and Subtext in Plato's Theaetetus* (2004).

61 See J Tomin, 'Socratic Midwifery' (1987) 37 *Classical Quarterly* 97.

62 See N Melchert, *The Great Conversation* (1999) 61.

preclude the Māori and the Pākehā streams from coming together for particular topics or even to discuss the topics which they have been lectured on separately. A healthy exchange of views would still be possible, and desirable, and could be factored in through the use of tutorials or regular combined lectures.⁶³

What sort of activity might this ‘healthy exchange of views’ come to resemble? Some educators ‘make a distinction between “really talking” and what they consider to be didactic talk in which the speaker’s intention is to hold forth rather than to share’ views.⁶⁴ In didactic talk, each participant may report experience, but there is no attempt among participants to commune to arrive at some new, integrated, tentatively and imperfectly shared understanding. ‘Really talking’ requires careful listening, and this requires a disposition of openness, without which there is no genuine relationship worthy of the name.⁶⁵ Does Mikaere speak about her students as one whom is open to learning from them?

Let us now directly turn to the Treaty. In 1990, when she held a newly created lectureship at the Auckland University Law School, Mikaere wrote a review of the 1989 volume entitled *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, edited by Hugh Kawharu. Her review challenged what she perceived as the ‘imbalance’ of the ‘content’:

Virtually all the contributors either explicitly base their views on the assumption that the signing of the Treaty coupled with the surrounding events resulted in the cession of sovereignty as provided by the Pakeha text, or at very least they appear not to regard it as being an issue. Since this in effect involves a denial of the concept of *te tino rangatiratanga* as guaranteed by the second article of the Maori text, and considering the crucial role that this guarantee played in securing the agreement of the Maori signatories, the paucity of discussion on this point is extraordinary. Only two writers satisfactorily acknowledge the implications raised by the differences between the two texts. Walker for example notes that the Maori chiefs continued to believe they were sovereign ‘notwithstanding the meaning the colonizer chose to read into the Treaty of Waitangi as a transfer of sovereignty.’ Williams points out that the English text envisaged ‘a transfer of power, leaving the Crown as sovereign and Maori as subjects’ while the Maori text was about ‘a sharing of power and authority.’ [Citations omitted]⁶⁶

What does ‘the cessation of sovereignty’ mean? Might not this mean a different ‘thing’ to different people, whether the people are ‘Maori’ or ‘Pakeha’ or both or neither? Perhaps Mikaere has absorbed a (colonial?) way of talking about sovereignty as an abstract ‘concept’, as a ‘thing’, without being aware of it?⁶⁷ Is Mikaere passively accepting an inherited language and thus failing to develop her own voice?

Notice how Mikaere talks about ‘the differences’ between the two texts as if everyone should be able to see them.⁶⁸ Such talk reflects and invites a commitment to a sense that ‘the meaning’ of the English text is an objective reality and that ‘the meaning’ of the Maori text is an objective reality too, and the two don’t match. If Mikaere were able to resist thingifying sovereignty she would

63 Mikaere, above n 54, 12.

64 M F Belenky, B M Clinchy, N R Goldberger, and J M Tarule, *Women’s Ways of Knowing: The Development of Self, Voice, and Mind* (1986) 144.

65 G C Fiumara, *The Other Side of Language: A Philosophy of Listening* (1990) 28.

66 A Mikaere, ‘Book Review’ (1990) 14, 1 *New Zealand Universities Law Review* 97.

67 This ‘thing’ talk is part of the legacy of *Wi Parata* – see R Dawson, *Waitangi, Law, and Justice: A Literary and Conversational Turn* (2006) 59.

68 In doing so she is a participant in a long institution – see R Dawson, *ibid*, chapter 3; and R Dawson, ‘Waitangi, Translation, and Metaphor’ (2005) 2 (New Series) *Sites: A Journal of Social Anthropology & Cultural Studies* 33.

be in a position to begin to construct similarities between the two texts.⁶⁹ In doing so, she would be beginning a conversation, rather than handing down declarations, as Sophocles' Antigone and Creon did to each other and to others. (In a recent essay Mikaere expresses contempt for the two Treaty composers and for the English text. 'While Williams and Busby must surely have been aware of the differences between the two texts, it seems extraordinary that we should today reward their deceit by paying the English text any attention whatsoever.'⁷⁰ With this 'must' Mikaere sounds to me like the unjust Creon when he condemned Antigone to death.)

Mikaere continued her review of the Kawharu collection as follows:

It is probably not surprising that academic lawyers consider the matter of sovereignty as long since settled, for to regard it otherwise would be to question the legitimacy of the system of which they form an integral part. The possibility of a concept of sovereignty that is different to that known to English law is apparently beyond the comprehension of the legally trained mind. McHugh insists that '[u]nder the rules behind our present constitutional arrangements there can be no such thing as a residual legal sovereignty in the Maori tribes from which any rangatiratanga can be derived.' Inexplicably, it is assumed that tino rangatiratanga can legitimately be defined with reference to English concepts of constitutional law. It is apparently unthinkable that sovereignty as ceded in the Pakeha text should be defined with reference to tino rangatiratanga, despite the fact that the Maori signatories had no clear conception of the term sovereignty but signed largely on the understanding that in doing so they were ensuring the preservation of their rangatiratanga.

It is ironical, though, to find that in these times of so called increased awareness of Treaty issues, the majority of the Maori contributors continue to frame their discussion within the parameters of the debate as defined by 150 years of Pakeha legal thought ...

... [F]or any reader seeking a balanced and realistic analysis of the relationship between Crown and tangata whenua which looks beyond the rhetoric of recent government and judicial statements to assess the true nature of political power and who holds it in Aotearoa, this book will be inadequate.⁷¹

If to 'think like a lawyer' is to accept as an axiom there are at least two 'sides' to every issue or argument, then nothing is ever 'settled', including the meaning of 'sovereignty'. Asking fundamental questions of the kind I am doing here is not to 'question the legitimacy of the system' but to contribute to the evolution of a way of talking; that is, to help make an already open, evolving process better. 'Better' for me includes hearing voices that go unheard, and hearing heard voices with a more discriminating ear, trained by authorities such as Sophocles. Mikaere seems to me to be committed to the view that 'the system', namely 'English law', is an object. In this respect she ironically resembles McHugh, who talks about a system of 'rules' that are 'behind' the 'constitutional arrangements'. This commitment, like the grand claim to be able to look 'beyond the rhetoric' of utterances to see what is 'true', it seems to me, is a conversation-stopper. What can happen when there is no conversation?

69 For a discussion about the vices of thingifying sovereignty see P M Brennan, 'Against Sovereignty: A Cautionary Note on the Normative Power of the Actual' (2006) 82 *Notre Dame Law Review* 101, 102–4.

70 A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Maori' in M Belgrave, M Kawharu, and D Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2005) 330, 340.

71 A Mikaere, above n 66, 98–101.

II. JUSTICE AS INTEGRATIVE CONVERSATION

As Antigone leaves the stage, Teiresias, who is a blind prophet, comes unsummoned to give Creon advice about the present situation in Thebes. ‘At my seat of divination, where I sit / These many years to read the signs of heaven, / An unfamiliar sound came to my ears / Of birds in vicious combat, savage cries / In strange outlandish language ... / Full of foreboding then I made the test / Of sacrifice upon the alter fire. / There was no answering flame.’⁷² All this Teiresias reads as a mortal sickness in the city, a sickness Creon, its leader, is responsible for. He repeats Haemon’s ‘advice about taking advice’.⁷³ Creon’s authoritarian, tyrannical self responds: ‘[A]ll the gold of India will not buy / A tomb for yonder traitor. No. Let the eagles / Carry his carcass up to the throne of Zeus; / Even that would not be sacrilege enough / To frighten me from my determination / Not to allow this burial.’⁷⁴ Creon’s rigidity reveals his ‘self identification with divinity rather than humanity’.⁷⁵

Unheard as an adviser, Teiresias now speaks with a different voice. He speaks in the voice he is known for, as a prophet:

Then hear this. Ere the chariot of the sun
Has rounded once or twice his wheeling way,
You shall have given a son of your own loins
To death, in payment for death – two debts to pay:
One for the life that you have sent to death,
The life you have abominably entombed;
One for the dead still lying above ground
Unburied, unhonoured, unblest by the gods below.
You cannot alter this. The gods themselves
Cannot undo it. It follows of necessity
From what you have done
... The time shall come,
And soon, when your house will be filled with the lamentation
Of men and of women; and every neighbouring city
Will be goaded to fury against you, for upon them
Too the pollution falls when dogs and vultures
Bring the defilement of blood to their hearths and altars.⁷⁶

Creon is responsible for having brought about an awful disintegration of the cosmos, and he is to be punished severely.

When the Chorus reminds Creon that the prophet has always been right in the past, Creon reluctantly yields. He sets out to release Antigone from her tomb.

Meanwhile, Haemon has rushed to Antigone, who has acted with little regard for him or for their relationship, only to find that she has hanged herself, after she experienced self doubt and considered the possibility of being in the wrong.⁷⁷ When his father arrives at the tomb, lamenting Haemon spits in his face and unsuccessfully tries to kill his father before killing himself with a sword. Creon is devastated by this loss. We hear cries of woe that are indistinguishable from the

72 Watling, above n 12, 152–3.

73 P J Euben, *Corrupting Youth: Political Education, Democratic Culture, and Political Theory* (1997) 163.

74 Watling, above n 12, 154.

75 R W Bushnell, *Prophesying Tragedy: Sign and Voice in Sophocles’ Theban Plays* (1988) 59.

76 Watling, above n 12, 154–5.

77 F Budelmann, *The Language of Sophocles: Communitality, Communication and Involvement* (2000) 178.

cries of female wailing.⁷⁸ We then hear self criticism: 'O the curse of my stubborn will! ... I learn in sorrow. Upon my head / God has delivered this heavy punishment / Has struck me down in the ways of wickedness, / And trod my gladness under foot. / Such is the bitter affliction of mortal man.'⁷⁹ The Chorus can only offer simple justice talk: 'You have learned justice, though it comes too late.'⁸⁰

There is more suffering to come. The Messenger has relayed news of Hameon's suicide to Eurydice, Creon's wife. She had turned and left without a word. In trying to make sense of her departure the Messenger says to the Chorus, 'The best that I can hope / Is that she would not sorrow for her son / Before us all, but vents her grief in private / Among her women. She is too wise, I think, / To take a false step rashly.'⁸¹ This talk comes from the practice of domesticating female lament, keeping it from flowing into the public, masculine world.⁸² The Chorus questions the Messenger's judgment on Eurydice's judgment: 'Yet there is danger in unnatural silence / No less than in excess of lamentation.'⁸³ Eurydice, Creon learns, has taken a sword to her heart, killing herself. Creon utters a nautical metaphor, which links up with his opening 'ship as state' metaphor at the outset, 'O harbor of Death, hard to cleanse. / Why? Why do you destroy me?'⁸⁴ Creon's piloting has steered to destruction, to a harbour choked and contaminated with corpses. For Creon, this is almost beyond his capacity to comprehend: 'Is there no sword for me, / To end this misery?'⁸⁵

What sense are we to make of this tragic ending? What is the 'justice' that Creon is said to have learned? Did the gods' punishment of Creon amount to the vindication of Antigone? It seems to me that these are three of many questions Sophocles invites his audience to ask themselves and one another, to begin a deep conversation. Sophocles makes it impossible for a careful, non-imperialistic reader to use key terms such as 'justice', 'law', 'love', 'enemy', 'friend', 'man', 'woman', as though they carried their own meaning. He invites his reader to become a self-conscious composer of meaning, weaving together fragments and threads he has provided in the play. Language, Sophocles defines in part through his own composition, is non-mechanistic, involving interdependencies between words that are complex and contextual. As with a societal constitution, the whole is more than the sum of the parts. The highest art arguably is to compose a temporary and tentative unity given the diverse parts of which it is comprised.

Concerning the Chorus' use of 'justice', I take this to mean a certain kind of equality. Both Creon and Antigone had an equal interest in maintaining a community, and this meant that their thought about what they wanted and who they were must acknowledge their interdependence. This acknowledgment would have led both to think very differently of themselves and other their situation when they met face-to-face to talk about the treatment of Polynices' body. Their interchange could have resembled an activity that in modern times can go by the name 'equality under law'.⁸⁶

78 Gibbons and Segal, above n 7, 135.

79 Watling, above n 12, 160.

80 Quoted in T G Phelps, 'Narratives of Disobedience: Breaking/Changing the Law' (1990) 40 *Journal of Legal Education* 133, 138.

81 Watling, above n 12, 159.

82 C Segal, *Sophocles' Tragic World: Divinity, Nature, Society* (1995) 126.

83 Watling, above n 12, 159.

84 Quoted in R F Goheen, *The Imagery of Sophocles' Antigone: A Study of Poetic Language and Structure* (1951), 49.

85 Watling, above n 12, 161.

86 Here I draw from White's work in another context, J B White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984) 91.

Here we have an open hearing in which one story is tested against another, with no meta-story that resolves the differences. Doing justice may be said to begin in an integrative conversation.

* * *

In 1995, in an essay entitled *The Treaty of Waitangi and the Separation of Powers*, Sian Elias (as she then was) offered some innovative materials for sovereignty-talk in New Zealand. She directly challenged the supreme conversation-stopper, namely the doctrine of parliamentary sovereignty:

The Treaty itself is silent both as to the manner of exercise of the Crown's powers of sovereignty or kawatanga and as to the systems by which it was to perform its Treaty obligations. It is clear that the compact was seen and marketed by the missionaries as a personal one between the Queen and the Chiefs. There was no suggestion that the Queen herself was constitutionally unable to exercise the kawatanga the Chiefs conferred upon her. The notion of Parliamentary supremacy was not mentioned ... Theories of Parliamentary supremacy developed in England are grounded firmly in English history and in particular the struggles between King and Parliament of the 17th century, they are not compelled by fundamental legal principle or by logic. On any view, the Treaty of Waitangi is critical in the history of New Zealand and its constitutional development. The application of theories based on historical tradition which is only in part ours should not be assumed.⁸⁷

As Sophocles seemingly understood so well, it is generally harder to sense what is absent than to sense what is present. A vital contribution to Waitangi-talk here, apart from the non-absolutist manner of her talk, is Elias' oral-aural emphasis. To repeat with emphasis added, 'The Treaty itself is *silent* both as to the manner of exercise of the Crown's powers of sovereignty or kawatanga and as to the systems by which it was to perform its Treaty obligations.' This remark opens up possibilities for a large conversation that until then had been closed, perhaps largely due to unreflective customary practice.

Elias continued her engagement with the doctrine of parliamentary sovereignty as follows:

It seems to me that it is time to recognise that the notion of arbitrary Parliamentary sovereignty represents an obsolete and inadequate idea of the New Zealand constitution. It fails to take account not only of the place of the Treaty in New Zealand history but also of developing principles of international law. The Treaty requires to be recognised as fundamental to our constitutional system by reason of its status as a compact with the indigenous peoples of New Zealand and because of the vulnerability of the indigenous people and the increasing international concern for their protection.⁸⁸

Absent from Elias' sovereignty-talk are abstract definitions of sovereignty. This silence brings political philosopher Rob Walker to mind when he says, 'the very attempt to treat sovereignty as a matter of definition and legal principle encourages a certain amnesia about its historical and culturally specific character.'⁸⁹ As one whom takes historical circumstances seriously, Elias may well have sought to discourage such amnesia.

Elias next turned to the topic of democracy. For her, 'The arguments against judicial review based on democratic considerations seem largely overstated.' By way of expansion:

Judicial review itself is a check against erosion of democratic values, a function the more important the less controlled the legislature. The judicial process may also serve a democratic ideal not adequately protected by representatives of the majority of the day. Further, the judicial process is itself, or has the potential to be, highly participatory.⁹⁰

87 S Elias, 'The Treaty of Waitangi and the Separation of Powers in New Zealand' in B D Gray and R B McClintock (eds), *Courts and Policy: Checking the Balance* (1995) 206 at 213.

88 Ibid 224.

89 R B J Walker, *Inside/Outside: International Relations as Political Theory* (1993) 166.

90 Elias, above n 87, 228.

For Elias, as it was for the Warren Court that unanimously judged racial segregation to be unconstitutional,⁹¹ some degree of meaningful political legal social inclusiveness may be thought of as a precondition for a well functioning democracy. Elias evidently could readily imagine the judiciary invalidating legislative action in order to secure the standing of the indigenous peoples, based on claims relating to the Treaty. Such an act would completely undermine the authority of the *Wi Parata* judgment, which deemed Crown acts to be non reviewable, unless the Crown said so or conceded as much in legislation.⁹²

In all that she said in her 1995 essay, Elias invites a considerable challenge to our legal cum linguistic-cultural inheritance. She would continue to invite this challenge. In her 2000 Oration *Constitutions and Courts*, Elias, now Elias CJ, talked about 'some reassessment of traditional notions of Parliamentary sovereignty.'⁹³ Acknowledging that 'some will view this development with alarm, increasingly it has come to be recognised that the notion of arbitrary Parliamentary sovereignty within its area of formal competence represents an obsolete and inadequate idea of the constitutions of both Australia and New Zealand.' She does not stop there: 'Indeed, it is questionable whether it ever represented an adequate idea of even the competence of the English Parliament.'⁹⁴ The Sophoclean Elias CJ imagines constitutions as 'living' and as beyond fully capturing in words: 'it needs to be recognised that no written text will capture the constitution as a whole.'⁹⁵

Against this image of a living constitution, Elias CJ offers an image of the possibility of a dead constitution:

Constitutional brinkmanship between courts and the legislature is dangerous for everyone. It is also ... based on an inadequate notion of law as a hierarchy of static precepts. An adequate view of law in the 21st century needs to release us from the conceptual shackles of supremacist theory, so that we may develop a rule of law based upon shared principle, rather than armed stand off.⁹⁶

If Eteocles and Polynices had let go of their supremacy talk, Creon would never have had to decide about burying two bodies – and Sophocles would not have had a tragedy to write.

The matter of how to avoid such a tragedy, as Sophocles knew well, is the material of justice talk. Elias CJ went on to indicate that she takes the word 'justice' that is in her 'Chief Justice' title seriously:

It seems to me that the role of the courts arises from an authentic and deep-seated view in the community that justice ultimately must be vindicated in actual cases. The thirst for justice springs from a shared ethical value that justice matters. As Sir Stephen Sedley points out, it is impossible to prove *why* it is that justice in this sense matters. What is important is the existence of the 'moral sensibility which says that it does'.⁹⁷

On an intimately related topic, Elias CJ suggested that that which goes by the phrase 'the rule of law' could be, and should be, a pattern of structured and disciplined and open judgments.⁹⁸

91 *Brown v. Board of Education* (1954) 347 US 483. Elias would later come to talk about the *Brown* case – see Rt Hon Dame S Elias, 'Equality Under Law' (2005) 13 *Waikato Law Review* 1, 1, 2 and 13.

92 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

93 Rt Hon Dame Sian Elias GNZM, *Constitutions and Courts* (2000) 12.

94 *Ibid.*

95 *Ibid* 14; quotation omitted.

96 *Ibid* 16.

97 *Ibid* 20, quoting Rt. Hon. Lord Justice Sir Stephen Sedley *Freedom, Law and Justice* (1999) 41.

98 *Ibid* 16-17.

In 2003, Elias CJ revisited the topic of the Treaty and parliamentary sovereignty. She did so as contribution to a series organised by the Institute for Comparative and International Law at the University of Melbourne on *Sovereignty in the 21st Century*. In the opening section of her paper, subtitled ‘Another Spin on the Merry Go Round’, she suggests that vibrant conversations on the topic require escaping from certain habits of thought:

I want ... to talk about where our constitutions are today and say something about the way they might be going. I will suggest that a fixation with parliamentary sovereignty and the relative democratic merits of parliament and the courts to the exclusion of a wider perspective is impoverishing our constitutional thinking. I want to avoid the labels of supremacy and activism and protestations of democratic legitimacy. I want to suggest that our own political institutions and community expectations have moved on from a monolithic and obsolete view of the fundamentals of law as a quest for the power that trumps. And I want to suggest that it is time we too moved on to consider our constitutional arrangements without distorting them through the lens of command.⁹⁹

Good conversation, Elias CJ personally suggests (with the repeated use of the pronoun ‘I’), requires attention to the limits of an inherited language and to the plurality of lenses for looking at constitutions.

Later in her talk, in a general discussion on sovereignty, Elias CJ suggested that the absolute in law is obsolete. She expressed approval with a British constitutional lawyer who had this to say about legal principles: ‘Indeed, the first principle is that no principle should be over stressed or pushed to its limits.’ This advice, which readers of the *Antigone* would readily appreciate, translated into the present topic is as follows: ‘It is precisely the Royal absolutism of the Renaissance which, renewed and transformed into parliamentary absolutism, has destroyed our capacity for constitutional thought by asking over and over again the same question, who ultimately has the sovereign power? And insisting on an answer.’¹⁰⁰ As has often been remarked, ask the wrong question, you get the wrong answer. This would seem to be the problem with a significant amount of theorizing in constitutional law concerning relations between the branches of government.

It is also a problem with much talk about the Treaty. Here, on the powers of ‘sovereignty’ or ‘kawanatanga’, Elias CJ writes:

This kawanatanga was a transliteration of Governor and was known to Maori from the model of Pontius Pilate in the Bible. In 1861 the retired first Chief Justice of New Zealand, William Martin, suggested that the powers ceded to the Queen by the chiefs were only those necessary for the establishment of settled government and law. ‘In return they retained what they understood full well – the “tino rangatiratanga” (full chiefship), in respect of all their lands.’

On this argument, the sovereignty obtained by the British Crown was a sovereignty qualified by the Treaty. It has not been treated as so qualified as a matter of domestic law. But the elements of our unwritten constitution have never been fully explored to date. We have assumed the application of the doctrine of parliamentary sovereignty in New Zealand. Why, is not clear.¹⁰¹

Elias CJ here, echoing her 1995 essay, suggests that the doctrine of parliamentary sovereignty that has come into operation has done so without apparent deliberate thought and against good authority. For her, a key issue that needs to be worked out is the *limits* to the sovereign powers of the Crown in Parliament. Elias CJ’s talk, by my reading, is more complex and more integrated than a

99 Rt Hon Dame S Elias, ‘Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round’, (2003) 14 *Public Law Review* 148, 149–50.

100 Ibid 150 citing F Mount *The British Constitution Now* (1992) 81.

101 Ibid 153.

great deal of past and present Treaty law talk, which typically is presented in terms of a clash of 'sovereign' rights, each stated *absolutely*, with no evident way to reconcile them. Her talk makes for the possibility for the parties to the Treaty to talk together, and to end much talking past each other, or at least to better understand and live with difference.

Elias CJ expressed a broad, evolutionary and conversational sense of the law at the opening of the Supreme Court on 1 July 2004. In a speech marking this institutional evolution, she spoke of justice not by talking abstractly about law as a system of rules or about judges without biases and preconceptions but by locating the Court in the flow of history and of traditions and by offering insights into the activity of engaging with the past:

What we should celebrate is the aspiration for the delivery of justice which has prompted the creation of the Court. Those aspirations have been with us from the very beginning. In February 1840 at Waitangi much of the debate was about law and its administration. I doubt whether any country was founded with such expectations of law as ours.

The creation of a final Court of Appeal in New Zealand furthers those aspirations for justice ... The Act setting up the Court ... identifies a statutory purpose of better understanding of New Zealand conditions, history and traditions. In addition we may hope to obtain greater understanding of the role of courts and some of the constitutional balances referred to in the Act. The obscurity of our appellate arrangements to date has not helped such understanding. Following the establishment of the Court, there are signs of greater interest in engagement on the constitution and the role of the courts in it. And that is very much to be welcomed.

There are then opportunities to be taken and expectations to be met by the Court – and there are shoals to be avoided. It would be wrong not to acknowledge at this time the anxieties that have been expressed about this step. And the sincerity of those views. In the end, they can only be answered by the performance of the Court

Those who worry about upheaval in our law may not understand how conservative judicial method must be even in a common law system. No judgment is isolated from the existing order. A judge must always ensure that a decision fits within it, both to achieve a just solution for the parties and to maintain the order for future cases, which can only be dimly foreseen. Judicial decisions must be legitimate. That means they must always be justified through reasons. Only through reasons is fidelity to the judicial obligation to do right according to law demonstrated. Courts cannot have agendas. They respond to actual controversies brought before them by real litigants. And their judgments must be their own vindication. But judgments will not convince if they stray from established doctrine and precedent except for sound reason, laid out for all to assess.

The reference to New Zealand's history and traditions in the statute does not prompt any wholesale reassessment of our law. The history and traditions of the common law are our history and traditions too. So too are the Great Charters of England, such as Magna Carta. In its origin, this history and tradition predates European knowledge of New Zealand by centuries. To that extent it is an inherited tradition. But to a substantial extent English law is not inherited history but part of our own direct history. Sir Kenneth Keith has pointed out that the last volume of Blackstones Commentaries was published in the year Captain James Cook made landfall in New Zealand in 1769 ...

In these Islands we have other traditions. Some were shaped by our history as a country already occupied by Maori. Lord John Russell writing to Hobson at the end of 1840 described them as a people in whom 'the arts of government have made some progress ... with usages having the character and authority of law' ... English law adapted to meet those local conditions and customs.

Other traditions arose from the experiences of our young country. The circumstances of settlement meant that we have always depended heavily upon statute law. As a result we have traditionally paid close atten-

tion to the context of statutes and have had no difficulty in accepting that both statutes and common law operate within a single legal system and that the task of the courts is to ensure that they work together. A less suspicious, more cooperative approach to legislation than applies in some other common law jurisdictions is our way.

All of these strands of history and memory contribute to a distinctive New Zealand legal tradition. The Supreme Court is set up to operate consciously within it, not to tear it down.¹⁰²

Who is this person speaking? Who are the people she is speaking to? What is the relationship between the communicants? What does the Chief Justice do? What does the Court do? What do other members of her profession do? Where does she place law on the map of human activities?¹⁰³

Elias CJ identifies herself as located in a field of human relations. She speaks on behalf of the Court, a collection of people who will talk certain ways to certain people, authorized to do so by a statute created by the government. A principal goal of the talk, she suggests, is justice, which is concerned with relations between people and between peoples. Courts 'respond to actual controversies brought before them by real litigants', and they seek to persuade, or 'convince', these litigants with reasoned judgments, done with consideration of 'fidelity to the judicial obligation to do right according to law ...'. Litigants are not abstract, isolated actors but people who have emerged from particular 'traditions' and 'customs' and 'experiences' and 'circumstances'. The Courts are, she suggests, something of a meeting-place for people with diverse backgrounds, all of which should be treated with respect by being given a place to stand.

Elias CJ identifies herself as located in the flow of time. Certain dates have particular significance to her: 1215, 1769, 1840, and 2004. A judge, she says, is concerned with the past, with 'established doctrine and precedent', and with the present and the future, with maintaining the existing order 'for future cases'. There is a sense, she suggests here, that past and present and future are tied together, in the sense of being parts of a larger whole. The meaning of the statute setting up the Court, she suggests, is linked to the background against which it was a performance: cutting ties with the Privy Council was a response to changing conditions, of perceived 'obscurity of our appellate arrangements'.

Elias CJ identifies herself as engaged in the pursuit and creation of knowledge. The Act establishing the Court identifies a purpose of 'better understanding of New Zealand conditions, history and traditions.' This involves attuning oneself to a variety of 'experiences' and 'circumstances'. She expresses 'hope to obtain greater understanding of the role of Courts and some of the constitutional balances referred to in the Act.' Courts produce 'reasons' to justify judicial decisions, 'laid out for all to access'; 'their judgments must be their own vindication.' The Supreme Court 'is set up to operate consciously within' various 'strands of history and memory' and thus to reconstitute 'a distinctive New Zealand legal tradition.' Thus the kind of knowledge the Court is concerned with is of a humanistic kind, seeking not the precision and clarity of mathematical thought but a provisional and tentative putting together into wholes of what would otherwise be fragmentary.¹⁰⁴ This is an activity sometimes called integration, which is disassociated from a schema in which the whole is equal to the sum of the parts.

In all of this, Elias CJ, by my reading of her speech, addresses her audience as fellow performers, as conversational partners, involved in the remembering and the reconstituting of a living and

102 Rt Hon S Elias, 'Opening of the Supreme Court of New Zealand' (2004) *New Zealand Law Journal* 291, 291–4.

103 These questions and my response to them have been heavily influenced by K Boulding, *The Image: Knowledge in Life and Society* (1956).

104 This description draws from J B White, *From Expectations to Experience* (1999), chapter 8.

ever changing nation. She engages us as fellow members of a nation on a journey, the destination of which is to be worked out in what is a collective enterprise.

What, may we take from Elias CJ's speech, is the law? It may be thought of as a set of institutions, collections of people talking about certain issues in certain ways, institutions that create 'expectations' for the way officials and citizens act, or ought to act. Courts give attention to texts made by others in the past – treaties, charters, statutes, judicial opinions, classic books, and so on – deemed to be authoritative and to texts and utterances and gestures made by people in the present involved in 'actual controversies brought before them.' Litigants arrange material relevant to a controversy into narratives. Judges listen and respond with a narrative that weaves these narratives together in some way or another. The judgment is a 'performance', one that gives meaning to key terms such as 'fidelity' and 'just' and 'sound reason', a performance that takes the path of the law in one direction rather than another.

The fundamental question of law, in this schema, concerns how all parties may do justice to each other, an activity that requires that all parties take responsibility for giving meaning to justice. This places a demand on a community to somehow integrate a multiplicity of voices without falling apart, which is what happens when, as Sophocles showed so well, some voices go unheard or are not given any or due weight. This activity of integration is the material of a complex conversation, a conversation that we as members of a nation have a vital interest in not just sustaining but enriching.

III. CONVERSATION-STOPPING

We now come to the Hon Michael Cullen's speech marking the 150th anniversary of the opening of the New Zealand Parliament, in which he confronted Elias CJ's utterances on parliamentary sovereignty. After giving a brief outline of the evolution of the Colonial Parliament, Cullen went on to talk about the relation between Parliament and the Courts:

[I]t would now seem to be settled doctrine that New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed ...

There is an increasing tendency to challenge the exercise of this sovereignty. This comes not just from some radical Māori, who argue that sovereignty has never been legally acquired in New Zealand; it also comes from within the heart of New Zealand's judiciary. Our own Chief Justice has put it ...: "we have assumed the application of the doctrine of parliamentary sovereignty in New Zealand—why, is not clear."

There is interesting academic literature that can be used to back such a view ... but it is not a view that I accept. In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government ...

A half-pie Americanisation of our judicial system would serve no one in the long term, even though it might seem attractive to particular groups of litigants in the short term. I certainly hope we do not continue down that track. In a democratic society, politicians may be, and are, dismissed. Their work may be undone as a result of the popular will. Judges, on the other hand, are all but undismissible, and certainly not for the views that they hold or the judgments that they arrive at, or for cleaning up after the consequences of their own decisions ...

Governments, of whatever stripe, do not favour judicial activism. They almost inevitably favour a strict constructivist approach, because it involves far fewer political or fiscal risks.¹⁰⁵

Cullen here, with his strongly voiced supremacy talk, and possibly with a hint of the brinkmanship that Elias CJ would have us stay clear of, begins by inferring that one of us, namely 'our own Chief Justice', is one of them, namely 'radical Maori'. By the end of his story, we sense that Cullen has failed to engage with Elias CJ's reasoning questioning the doctrine of parliamentary sovereignty, which involved the circumstances of the existence of the Treaty. And he has ignored her invitation to be sensitive to labels such as 'supremacy' and 'activism' and to the different uses to which 'democracy' can be put. Cullen has rejected the activity of conversation. Like Creon, he appears to demand of his audience that they grant authority only to his own declarative utterances.

Cullen offers not even a footnote of reasoning on why he does 'not accept' the 'interesting academic literature' that could stand as an authority for Elias CJ's 'view' on parliamentary sovereignty. His silence reminds me of Nietzsche's talk about reasoning as a weapon of the weak, to be used against people who are strong enough not to give reasons.¹⁰⁶

Cullen gives us no clue as to why he does not apply the label 'activist' to the judiciary from the 1870s in its reading of the Treaty that contributed to consequences Cullen's administration sees the need to be 'cleaning up' in the present so called Treaty Settlements Process. He gives us no insights as to where his imagination went in the process of coming to his confident conclusion that a 'half-pie Americanisation of our judicial system would serve no one in the long term.' Like Antigone when she scolded her sister for not siding with her against Creon, Cullen suggests that we have the knowledge to unequivocally rank alternatives to us.

Cullen seems to imagine the law as a kind of machine that is made of inter-connected parts. These parts include rules that fit together and work in mechanical ways and that can be talked about with precision. All this assumes, against what Sophocles has offered to teach, that language is another machine, a transparent one that is free of culture, one that enables a 'strict constructivist approach'.

Elias CJ imagines the law differently than Cullen. She is aware that she imagines the law, for she knows that lenses of one kind or another are involved; he talks as if the law is there for all to see, through a flawless glass. As exemplified in her own arguments above, Elias CJ images the lawyer as one who engages in argument of a conversational kind, especially about the meaning of a set of authoritative texts: treaties, constitutions, statutes, judicial opinions, and so on. Cullen offers not conversation but assertions about the way things are. His ideal audience is a collection of subjects who will readily submit to his 'plain' words, like the subjects Creon desired.

Like any human being, a judge cannot avoid being 'activist' in the sense of making choices. These will include classifying and defining, ultimately choosing and remaking a language, which is in constant change along with the culture it is associated with. To suggest or claim that all cases can be neutrally slotted into some fixed set rules is to suggest or claim the unattainable and to promote the masking of value judgments. What goes by the phrase 'the rule of law' could be, and in my view should be, a pattern of structured and disciplined and open judgments.¹⁰⁷ This is the activity Elias CJ has promoted and continues to do so, an activity quite different to an unattainable

105 Cullen, above n 192-3.

106 See E Garver, *For The Sake of Argument: Practical Reasoning, Character and the Ethics of Belief* (2004) 30.

107 See M J Radin 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781.

mechanistic law in which the judge formally declares what the correct rule is, and thereby stops a conversation.

IV. CONCLUDING REMARKS

For the Hon. Michael Cullen, 'sovereignty' evidently is not a term that permits varying degrees. Parliament, for him, can no more be a little bit 'sovereign' than Socrates' mother could have been a little bit pregnant.¹⁰⁸ Ani Mikaere seems to me to also live by some such analogy. Neither Cullen nor Mikaere seem to be aware that they themselves imagine sovereignty this way: they both talk as though sovereignty *is* the way they see it. Elias CJ, on the other hand, seems to me to be aware of the analogy and to be in pursuit of a better one.

By my reading of *Antigone*, its composer Sophocles sought to define and celebrate law as an inherited conversation, one which he sought to enrich with a greater diversity of voices. When are we in the activity of conversation? This activity may be taken to be a communication pattern resembling a dance, one in which the partners are in a reciprocal transformation. Anne Morrow Lindbergh, in her 1955 book *Gift from the Sea*, is the source of this analogy:

A good relationship has a pattern like a dance ... The partners do not need to hold on tightly, because they move confidently in the same pattern, intricate but gay and swift and free, like a country dance of Mozart's. To touch heavily would be to arrest the pattern and freeze the movement, to check the endlessly changing beauty of its unfolding. There is no place here for the possessive clutch, the clinging arm, the heavy hand; only the barest touch in passing. Now arm in arm, now face to face, now back to back – it does not matter which. Because they know they are partners moving to the same rhythm, creating a pattern together, and being invisibly nourished by it.¹⁰⁹

We witnessed both Antigone and Creon with a possessive clutch and a heavy hand, and this brought not mutual nourishment but mutual destruction. What kind of movements are Cullen and Mikaere and Elias CJ inviting or compelling? Mikaere, who perhaps understandably may fear the continued assimilation of indigene voices, seems gripped by a certain kind of self possession and fearful of such conversation. Cullen's unreasoned assertion that 'Parliament may need to be more assertive in defence of its own sovereignty' indicates a similar aversion to conversation. Both Cullen's and Mikaere's respective agendas in sovereignty-talk would seem to render anyone who disagrees with them to be unworthy of becoming a conversational partner. As it stands now, what both of them say about sovereignty, and what they do not say in regard to its limits, seems remarkably similar. One difference between them resides in their respective audiences. Elias CJ can be distinguished from both to the extent that she has issued an invitation to these audiences to converse.

¹⁰⁸ For this pregnancy analogy I am indebted to J N Rakove, 'Making a Hash of Sovereignty' (1998) 2 *Green Bag* 35, 38.

¹⁰⁹ A M Lindbergh, *Gift from the Sea* (1955; 1983) 104.

SHAREHOLDERS – FICTION, RIGHTS, AND REMEDIES

BY PHILIP GARDYNE*

I. THESIS STATEMENT

The company fiction provides for economic and social benefits, via the light handed regulatory approach to company law. Shareholder intervention supports and challenges the fiction. The Companies Act 1993 (the Act) maintains the fiction by prescribing shareholder rights and obligations. Just and equitable intervention via the Court is necessary to maintain the fiction and best interests of the company.¹ This intervention enhances accountability and protects against an unconscionable breach of a shareholder's *reasonable expectation*, but challenges the fiction.²

II. INTRODUCTION

The Act provides for the incorporation, organisation and operation of companies by defining the shareholder relationship with the purpose of encouraging efficient and responsible management.³ The Act is light handed and enabling,⁴ it is not a code, but deems the company a 'separate legal personality'⁵ distinct from its shareholders.⁶

This paper examines shareholder access to intervention in the context of the legal personality *fiction* perpetuated through the Act.⁷ It is acknowledged that there is an inevitable nexus between the rights of shareholders and the obligations of directors'.⁸

The question is to what extent can shareholders legitimately ensure the best interests of the company?

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1 Companies Act 1993 [CA], ss 70, 172, 174(2).

2 CA, Part IX.

3 CA, Long Title.

4 Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders', (1998) 57 *Cambridge Law Journal* 554, 585.

5 *Meridian Global Funds Management Asia Ltd v The Securities Commission* [1995] 3 NZLR 7, 11. Held that '[a] company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person.'

6 CA, ss 5, 126.

7 This paper is not a complete analysis of the corporate personality concept. Corporate personality is discussed in J Farrar, *Corporate Governance in Australia and New Zealand* (Melbourne: Oxford University Press, 2001) at pp 20–41. In sum, Farrar contends, 'Salomon's recognition of the concept of the corporation as a legal person is formal reasoning with value and policy consequences that were not adequately addressed ... A corporation is the legal personification of a firm that is a social institution ... To refer to Salomon's principle in discussing corporate theory is simply to recognise it as a starting point for reasoning rather than a statement of comprehensive doctrine.' 40–1.

8 An examination of directors' duties is outside the scope of this paper.

A. *Shareholders' rights in the company context.*

A share is a property interest in a company,⁹ there are rights attached to shares.¹⁰ Shareholders elect directors to the board to manage and promote the *best interests* of the company, but this is a nebulous concept.¹¹ Section 131(1) of the Act mandates:

a director of a company, ... must act in good faith and in what the director believes to be the best interests of the company.¹²

The obligation prescribes an equitable and subjective test, but it is a duty owed to the company not the shareholder personally.¹³ This distinction continues the fiction of a separate legal personality established in *Salomon v Salomon & Co. Ltd.*¹⁴

The extent that shareholder interests determine the best interests of the company tests the *fiction* of separate legal personality. The blend of statutory prescription, common law, and equitable oversight helps define relationships around the fiction. To perpetuate the fiction the Act prescribes constraints on shareholder enforcement rights.¹⁵ Shareholders,¹⁶ through Part IX of the Act, may apply to the Court to uphold the company's best interests.

The prescriptive nature of the shareholder's 'bundle of rights'¹⁷ reinforces the fiction. The rights restrict shareholder intervention,¹⁸ limit shareholder liability,¹⁹ and only guarantee shareholders a share in the residual surplus liquidated assets.²⁰ The rights enabling direct involvement in the management of the company are limited.²¹ Effectively, outside casting a vote, shareholders must apply to the Court to intervene in the company's management.²²

The Act prohibits shareholders from taking a *personal* action directly against a director for breach of the duty to act in good faith.²³ Shareholders must seek leave via the Court for an *in-junction* or *derivative* action to ensure the company's best interests.²⁴ Leave to intervene is tested against the prudent business person rationale.²⁵ The rationale for shareholder intervention on behalf of the company is enhanced accountability and responsible management.

9 CA, s 35.

10 CA, s 36.

11 J Palmer, 'Understanding the Director's Fiduciary Obligation' (2006) 12 *New Zealand Business Law Quarterly* 315.

12 CA, s 131(1).

13 CA, s 169(3).

14 *Salomon v Salomon & Co. Ltd* [1897] AC 22.

15 CA, Part IX.

16 'Shareholder' is used in the context of s 96 of the Act, it does not include persons who maybe deemed both shareholders and directors unless expressly stated, see s 126.

17 Grantham above n 4 at 582.

18 CA, Part IX.

19 CA, ss 7, 98, 99, 100 and Hansmann & Kraakman, 'The essential role of organisational law', (2000) 110 *Yale Law Journal* 387, in Grantham & Rickett *Company and Securities Law Commentary and Materials* (2002), 96, state in the context of contractarianism, that limited liability is the strongest type of defensive asset partitioning.

20 CA, s 36(1)(b) & (c).

21 CA, Part IX.

22 CA, s 128.

23 CA, ss 69(1), 169(3).

24 CA, ss 64, 165.

25 CA, s 165(2); and *Virj v Boyle* [1995] 3 NZLR 763, 765.

The Act also enables *just and equitable* intervention via the Court as a necessary means of maintaining the best interests of the company.²⁶ Issues centre on the nature of the relationships of the participants and their various obligations and expectations within the fiction.

Apart from intervention sought on behalf of the company, shareholders may personally seek just and equitable intervention via ss 70, 172, or 174. This equitable intervention centres on the obligation of *good faith* or shareholders' *reasonable expectations*. This juxtaposition of the enabling 'light handed'²⁷ and equitable provisions indirectly encourages efficient and responsible management, allowing shareholders access to remedial intervention.

B. *The focus and structure of the paper*

This paper focuses on appreciating the conceptual nexus of the company *fiction* from the shareholders' *rights*, and *remedies* perspective. Therefore, as Taylor and Berkahn contend, this mostly concerns relationships in small to medium sized enterprises (SMEs).²⁸ The reason for this is that SMEs are prevalent in New Zealand,²⁹ and are likely to be *closely held* companies.³⁰ Notwithstanding this, the Act does not distinguish between *private* and *publicly listed* companies.³¹

One consequence of a closely held company relationship is arguably shareholders enjoy greater transparency with increased access to information about the company. Information equals power, which is a critical factor in the context of ensuring compliance. As Berkahn suggests:

[t]he arguments in favour of a significant role for public enforcement agencies are based primarily on the assumption that private parties have insufficient information and influence on (and therefore little interest in) the internal workings of companies. These factors affect their ability and motivation to successfully enforce corporate rights and duties. Such arguments are only relevant to large, widely held companies, but not to smaller, closely held ones.³²

²⁶ CA, ss 70, 172, 174(2).

²⁷ Grantham above n 4 at 585 asserts, '[h]istorically, the state sought to achieve its goals for company law through a strategy of 'command and control' Increasingly, the state has turned to indirect means to achieve its goals. This approach, known variously as constitutive, responsive or light handed regulation, seeks to achieve regulatory goals by creating a self balancing system that creates, and relies upon, incentives for the individuals involved to bring about the desired result or conduct'(footnotes omitted).

²⁸ Taylor, 'The Derivative Action in the Companies Act 1993: An Empirical Study' (2006) 22 *New Zealand University Law Review* 333, 360–1 and Berkahn, *Regulatory and Enabling Approaches to Corporate Law Enforcement*, (Christchurch: The Centre for Commercial and Corporate Law Inc., 2006), 17.

²⁹ Ministry for Economic Development Manatu Ohanga, *SME's in New Zealand: Structure and Dynamics – 2007*, (2007), Ministry for Economic Development, available at <http://www.med.govt.nz/templates/MultipageDocument-Page___28566.aspx> (last accessed 17 August 2007), where it is said '96% of enterprises employ 19 or fewer people ... 87% of enterprises employ 5 or fewer people Firms with 5 or fewer employees accounted for 11% of all employees 11% of people in the labour force were self employed, as at March 2006.' Note the available statistics do not distinguish the form of the enterprise (i.e. Partnership, Sole Trader, or Company).

³⁰ The term *closely held* is derived from the tax treatment afforded in the Income Tax Act 1994 and the Financial Reporting Act 1993. A closely held company has 50% of the voting entitlement held by five or less persons who are shareholders. For this paper it is sufficient to infer from the Ministry for Economic Development findings that 87% of the all enterprises are probably closely held.

³¹ *Latimer Holdings Ltd v Sea Holdings NZ Ltd* [2005] 2 NZLR 328, paras 98 & 111.

³² Berkahn above n 28 at 17.

This is the rationale for regulating *continuous disclosure* paradigms in *publicly listed* companies.³³ *Listed* companies are subject to a number of other regulatory regimes like, the Securities Act 1978, Securities Markets Act 1988, and the New Zealand Stock Exchange *listing rules*.³⁴ However, this paper does not examine shareholder rights as prescribed under those regulatory paradigms.

What this paper pragmatically examines is the paradigm of shareholder intervention in the context of the Act. There are three sections to the paper.

The first section is critical to understanding the founding conceptual nexus. This section outlines the concept of corporate personality, the company's best interests, and a summary of the shareholders' rights within the light handed regulatory system. This section discusses the nature of the obligation owed to shareholders. The section identifies the two distinct regimes enacted to ensure shareholder rights and expectations.

The second section examines the provisions in Part IX of the Act. The focus is on ss 64, 165, 170, 172, and 174 because they are the blunt statutory instruments that allow shareholder oversight and intervention. The section references the valuable empirical analysis of Berkahn³⁵ and Taylor.³⁶

The final section makes a brief comparative analysis and discusses the remedial potential of shareholder intervention. This section draws together the problematic conceptual relationships and rationales that perpetuate the fiction.

III. THE FOUNDATION CONCEPTS

What is the foundation of the Act? The New Zealand Law Commission (NZLC) considers the proper focus of company law is internal regulation.³⁷ The NZLC suggests the purpose of the Act is 'striking a balance between enabling use of the company form and regulating to prevent its abuse.'³⁸ The fiction of the company founded in the Act synthesises managerialism, contractarianism, and communitarian reasoning.³⁹ Only a simple contextual overview of these theories is included, as analysis is beyond the scope of this paper.

Managerialism contends that the company is an institution with the interests of ownership separated from the power of control. The premise is that shares equate to company ownership, and separating control attenuates accountability. The issue is regulating the potential power of the company, an omnipotent economic institution.⁴⁰ Managerialism focuses on the tensions between the interests of owners and management. Berle and Means caution:

33 Securities Markets Amendment Act 2002, promulgated the continuous disclosure regulation in the Securities Markets Act 1988 effectively from the 1 December 2002.

34 Ministry of Economic Development Manatu Ohanga *Securities Legislation Bill Regulations, Discussion Document*, March 2006, available at <http://www.med.govt.nz/upload/32930/bill-regs-disc.pdf> (26 August 2006) and New Zealand Stock Exchange Ltd (NZX), available at <http://www.nzx.co.nz> (9 October 2006).

35 Berkahn above n 28 at 17.

36 Taylor above n 28.

37 NZLC, *Company Law Reform and Restatement, Report No. 9*, (NZLC R9), (1989), 4.

38 *Ibid* at 5.

39 MJ Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (2001), 31–38, 70–73 and Grantham above n 19 at 54–108, 241–249.

40 Berle & Means in Grantham above n 19 at 58–64.

[a] great concentration of power and ... a diversity of interest raise the long fought issue of power and its regulation – of interest and its protection.⁴¹

The result Grantham and Rickett aver is:

[n]o individual shareholder had either the power or the incentive to exercise control ... [S]hareholders' rational passivity effectively freed corporate management from direct oversight and accountability to shareholders.⁴²

Managerialism argues that the public nature of the company 'justifie[s] and mandate[s] a role for the State in regulating the affairs.'⁴³

The contractarian contention describes the company as a *nexus of contracts*, a fiction of private ordering between various human participants.⁴⁴ The premise is that shareholders own the company and managements efforts are directed to benefiting shareholder interests. The argument is there is limited justification for State intervention in private ordering. Easterbrook and Fischel argue:

reference ... [to the nexus of contracts] is just shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out amongst themselves.⁴⁵

The issue is as Cheffins contends, '[t]he nexus of contracts characterization is at odds with the legal conceptualization of a company.'⁴⁶

Communitarianism accedes accountability to a greater range of stakeholders, accepting 'the company's economic wealth and social and political power affects many others than merely those contractually related to the company.'⁴⁷ As Millon states:

communitarians differ from contractarians ... in their greater willingness to use legal intervention to overcome the transaction costs and market failures that impede self protection through contract.⁴⁸

Therefore, communitarianism is the foundation of *corporate social responsibility* and *stakeholder* theories.⁴⁹ This paper does not focus on these issues. The incorporation of environmental and employment aspects (to name just two), are issues addressed by the State in independent legislation outside the scope of this analysis.⁵⁰

41 Ibid at 62.

42 Grantham above n 19 at 54.

43 Ibid at 55.

44 Ibid at 55, 77–101.

45 Easterbrook & Fischel 'The corporate contract' (1989) 89 *Columbia Law Review* 1416, in Grantham above n 19 at 80.

46 Cheffins, *Company Law: Theory, Structure and Operation*, (Oxford: Clarendon, 1997) in Grantham above n 19 at 77.

47 Grantham above n 19 at 101.

48 Millon, 'New directions in corporate law: Communitarians, contractarians and the crisis in corporate law' (1993) *Washington & Lee Law Review* 1373 in Grantham above n 19 at 102.

49 P Kotler and N Lee *Corporate Social Responsibility* (New Jersey: John Wiley & Sons Ltd, 2005), 3. State, '[c]orporate social responsibility is a commitment to improve community well being through discretionary business practices and contributions of corporate resources.'

50 Resource Management Act 1991 and Employment Relations Act 2000.

The theoretical spheres

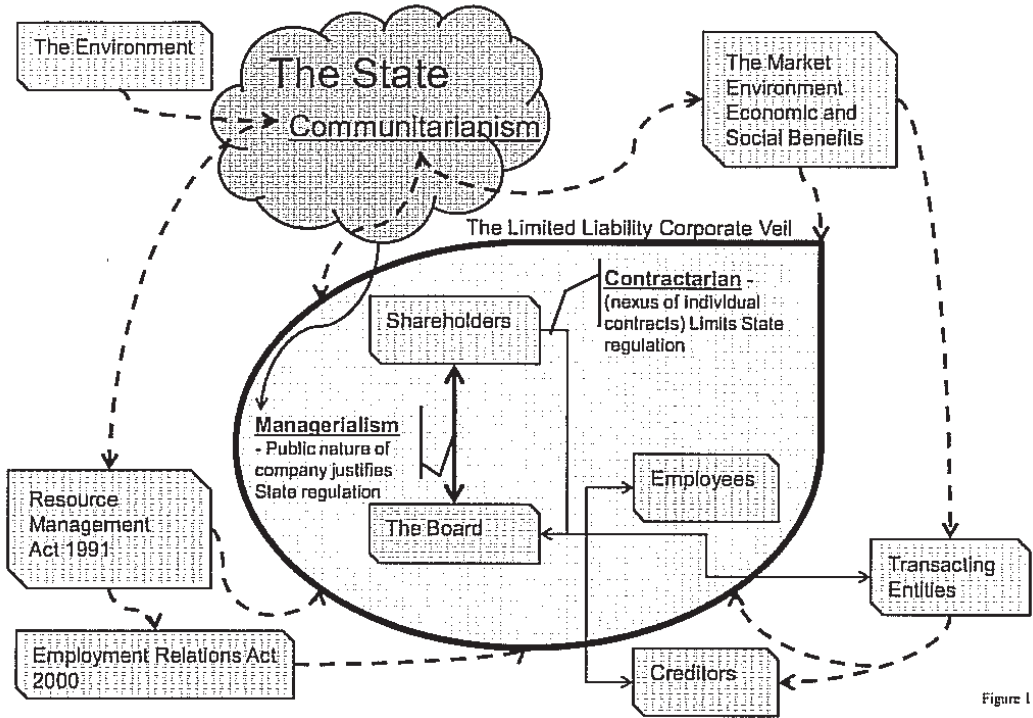


Figure 1

Figure 1 shows the different perspectives from managerialism, contractarianism, to communitarianism.

Mindful of the above theoretical perspectives, what is the pragmatic affect of the company form from the shareholder’s perspective?

It is suggested that:

the position and influence of shareholders has undoubtedly undergone a radical change. Where shareholders once stood at the centre of the corporate universe, with the undisputed right to control the management and direction of the company and to have it run for their exclusive benefit, this century shareholders have become little more than bystanders ... the law has rejected or limited those rights which were crucial to the shareholders’ claim to proprietorship.⁵¹

The Act engenders aspects of managerialism, contractarianism and communitarianism. How then does the Act ‘define the relationships between companies and the directors, shareholders, and creditors’?⁵²

A. *Separate legal personality from the shareholder perspective*

Based on Farrar’s assertion referenced in footnote 7 to this paper, the starting point is the pragmatic fiction of separate legal personality summarised in Lord Macnaghten’s speech in *Salomon*:

51 Grantham above n 4 at 575.

52 CA, Long Title (c).

[t]he company is at law a different person altogether from the subscribers ... the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided for by the Act.⁵³

From New Zealand's perspective, the Privy Council accepted and followed the *Salomon* principle in *Lee v Lee's Air Farming Limited*.⁵⁴ In *Wairau Energy Centre v First Fishing Company Ltd*⁵⁵ the Court of Appeal stated:

[a] company is a distinct personality from its members. A contract by the members is not a contract by the company.⁵⁶

Section 15 of the Act deems that the company is a legal entity separate from its shareholders. Support for the principle is located in s 128, which mandates the board manage the company, and in ss 7 to 100, which prescribes limits on the shareholder's financial liability, subject to the company's constitution.

The consequence of the separate legal entity fiction is the *veil* of incorporation. The exercise of shareholder rights occurs mostly behind the veil, highlighting the important distinction between the company's internal relationships and external interactions. As Grantham asserts:

[t]he function of much of company law is thus to forge an analogy between the company and natural persons and to identify when and which natural persons are to be treated as though they were the company. *(footnote omitted)*⁵⁷

This paper is concerned with the affect of shareholder rights, particularly in the context of just and equitable oversight. The analysis is mindful of Lord Wilberforce's recognition of:

the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure ... The 'just and equitable' provision ... does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations ... which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.⁵⁸

Lord Wilberforce's reasoning is adopted in *Thomas v H W Thomas Ltd, (Thomas)*⁵⁹ the seminal Court of Appeal authority for s 174. The result is that the separate entity fiction is indirectly subject to equitable intervention. This point is examined further throughout the paper.

B. What is the nature of shareholder rights?

The Act prescribes, '[a] share in a company is personal property.'⁶⁰ The Act defines property to include 'tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims.'⁶¹ What is the nature of the rights attached to this property interest? Section 36 of the Act is the foundation for identifying the basic substantive rights in a share. A share is a

53 *Salomon v Salomon & Co. Ltd* [1897] AC 22, 51.

54 *Lee v Lee's Air Farming Limited* [1961] NZLR 325.

55 *Wairau Energy Centre v First Fishing Company Ltd*. (1991) 5 NZCLC 67379.

56 *Ibid* at 67, 383.

57 Grantham, above n 4 at 576.

58 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379.

59 *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686, 694.

60 CA, s 35.

61 CA, s 2.

residual claim to a proportion of the company's assets, not full ownership of the company. This statement acknowledges that a share includes all eleven elements of the *rights claims* mooted by Honoré⁶² as necessary for full ownership. The assertion is the full *bundle of rights* in a share relate only to the *share* itself.⁶³

Restricting a share to a bundle of rights, legitimises the company as a separate legal entity distinct from its shareholders. This is a change from the earlier ownership and *quasi-partnership* rationales.⁶⁴ The shift in paradigm limits the shareholder to a 'voice in both the management and structure of the company'.⁶⁵ Therefore, restricting shareholder rights introduces risk. The NZLC in *Company Law Reform and Restatement Report No. 9* (NZLC R9) identifies that:

shareholders are at risk from the abuses of power by directors. [However, the NZLC asserts] [c]ompany law is largely concerned with containing the risk of abuse within acceptable bounds while not undermining the substantial benefits for investors and for society in general ...⁶⁶

However, there is some protection for shareholders. Parts VI, VII and IX of the Act prescribe the procedural rights associated with shares. The shift away from the persistence of shareholder *ownership of the company* is accommodated by the increased, albeit light handed, oversight by the state.⁶⁷ As Grantham asserts:

shareholders are particularly well suited to serve as an agent of the state as their incentives largely coincide with those of the state. The state's concern to see that companies are managed efficiently and fairly are goals which shareholders as residual claimants also share, albeit for different reasons ... Shareholders are vested with rights not as a consequence of their status, though they are intended to pursue their self interest. Rights are vested in shareholders so that they may perform tasks that would otherwise be undertaken by the state directly.⁶⁸

Shareholders exercise their rights and influence internal relations through voting. Sections 104 to 107, 109, 120 to 122, and 124 prescribe the general extent of shareholder rights to vote and influence the direction of the company. It is important to distinguish the right to vote from the right to manage. The Act prescribes that, subject to the company's constitution, management of the company must be 'by, or under the direction or supervision of, the board of the company'.⁶⁹ Directors via the board are directly responsible for controlling the company.⁷⁰ Shareholders resolutions appoint members to the board.⁷¹ To ensure accountability, the Board 'must call an annual meeting of shareholders'.⁷²

62 Honoré cited in Becker, *Property Rights* (1997), 19 in University of Waikato, *Laws203 Jurisprudence 2005 Materials Book*, 57.

63 Becker, above n 62 at 57. The eleven elements of full ownership are: right to possess, to use, to manage, to the income, to the capital, to security, a power of transmissibility, the absence of term, a prohibition of harmful use, liability to execution, and a residuary character.

64 Grantham, above n 4 at 582.

65 Ibid.

66 NZLC R9, 7.

67 Grantham above n 4 at 554, asserts, 'As owners, shareholders were entitled to control the management of the company and to the exclusive benefit of the company's activities. Ownership also served to legitimate the corporate form itself.'

68 Ibid at 586.

69 CA, s 128.

70 CA, ss 27, 128(1) and *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, 526–527.

71 CA, s 36(1)(a).

72 CA, s 120.

The board is subject to review, with the Act prescribing that shareholders ‘must [be] allow[ed] a reasonable opportunity ... to question, discuss, or comment on the management of the company.’⁷³ The argument is that the in house right to review management is in the company’s, the shareholders, and indirectly the State’s interests. Similarly, a shareholder resolution ensures communication of the collective interest to the board who manage the company. There is ostensibly no intrusion upon the separate entity fiction in these circumstances.

The issue is if shareholders undertake roles outside those prescribed in the Act on behalf of the company. Anecdotally, the distinction between the role of shareholder and the board or company is easily discernable in publicly listed companies; the penumbra exists in respect to closely held companies with the perception of shareholders performing other duties. The undertaking of other duties may deem the shareholder a director as prescribed in s 126(1)(c).

The question is ‘whether there has been an assumption of responsibility, actual or imputed.’⁷⁴ Natural persons may act on behalf of the company (as agent, director, or employee), or independently. For clarification, an appreciation of the law relating to vicarious liability, agency, identification and attribution is necessary. Examination of these concepts is outside the scope of this paper. It is sufficient to note the significant attribution rationale enunciated in *Meridian Global Funds Management Asia Ltd v Securities Commission (Meridian)*,⁷⁵ and refer to s 18 of the Act. In summary, Lord Hoffmann avers:

[i]t is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company ... These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency.⁷⁶

In sum, shareholders do not own the company; they have a ‘constitutional position in the company’s scheme.’⁷⁷ A full share (as opposed to a preference or different class of share)⁷⁸ entitles the holder to vote and oversee the company’s structure and management. In this respect, the shareholder may encourage responsible management and help define what constitutes the company’s best interests.

C. *What is the company’s best interest?*

The best interests concept is nebulous, with the nexus being the collective expectation of the shareholders. Generically the company’s best interest is its ability to continue functioning and achieve its objectives. The NZLC concluded in NZLC R9, that there is confusion over:

whether ‘the best interests of the company’, which is the concept which underlies director accountability, requires assessment of ‘the company’ as the collective shareholders or as the enterprise itself.⁷⁹

73 CA, s 109(1).

74 *Trevor Ivory Ltd* above n 70 at 527.

75 *Meridian* above n 5.

76 *Meridian* Ibid at 11–12.

77 NZLC R9 above n 37 at 46.

78 CA, s 37.

79 NZLC R9 above n 37 at 45.

The NZLC also notes that shareholder interests do not completely coincide with the company's interests, and that shareholder interests require protection from potential management abuses.⁸⁰ Clearly, managerialist concepts and the effects of self interest are evident in the reasoning. The NZLC suggests the solution is a hierarchy of interests.⁸¹

Consequently, the director's obligation to the company is broadly fiduciary in nature, incorporating a discretionary element as evinced in the purpose of the Act:

(d) To encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders ... against the abuse of management power;⁸²

Part VIII of the Act enacts the directors fundamental duties, specifically s 131(1) prescribes a subjective fiduciary obligation, mandating that:

a director of a company, ... must act in good faith and in what the director believes to be the best interests of the company.⁸³

What constitutes the company's best interest is not enunciated in the Act. Palmer argues the inherent issue with the concept is the presumption that identifying the company and its best interests is readily ascertainable.⁸⁴

Historically, the company's interests were indistinguishable from its shareholder owners. Practically, the shareholder's interests are foremost during company formation, but as the company evolves, the interests of stakeholders become more relevant. This change mirrors the shift from managerialism through to the contemporary communitarian understanding of the company. As Palmer suggests:

[d]etermining the interests of a company ... requires reference to the interests of interested parties, otherwise known as the stakeholders, and the attribution of those interests to the company.⁸⁵

The Act's long title states, 'the value of the company [is] as a means of achieving economic and social benefits.'⁸⁶ It is therefore arguable that *stakeholder* interests may form part of the company's interests. As Corfield argues:

[e]conomic support for... [stakeholder] theory arises from the view that long term profitability of the company is dependent on more than just concentration on shareholder wealth.⁸⁷

This reasoning is central to the doctrine of maximising *shareholder value*. Notably, a central tenet remains long term *profitability*. Therefore, it is possible to argue that a company, as a separate legal entity, is interested primarily in financial survival and that this is recognised in the Act. Obviously, there is minimal economic or social benefit in companies trading while insolvent and inefficiently consuming resources.

80 Ibid at 46.

81 Ibid at 46–7.

82 CA, Long Title (d).

83 CA, s 131(1).

84 J Palmer, 'Understanding the Director's Fiduciary Obligation' (2006) 12 *New Zealand Business Law Quarterly* 315, 315.

85 Ibid at 335.

86 CA, Long Title (a).

87 A Corfield, 'The Stakeholder Theory and its Future in Australian Corporate Governance: A Preliminary Analysis' (1998) 10 *Bond Law Review*, 213, 213.

Rationally, the company's interest is to return a profit and increase net asset value. Solvency is integral to ensuring economic and social benefits through the company; it is a fundamental consideration for responsible management. The solvency obligation mandates continual financial monitoring in the context of the Financial Reporting Act 1993 (FRA) and assessment of all other material matters that ought to be known to affect the company's value.⁸⁸ Compliance with the *solvency test* is not restricted to provisions specifically referencing it;⁸⁹ solvency is an overarching concept. As Baragwanath J avers:

the basic concept of the 1993 reform — abandonment of share capital as the fundamental element of a company in favour of a solvency requirement ... is to be inferred from the whole scheme of the Act.⁹⁰

Satisfaction of the solvency test is mandatory prior to shareholders receiving distributions.⁹¹ Also as previously noted, a share equates to entitlement in the surplus assets after liquidation. Therefore, shareholders self interest corresponds with the State's promotion of the company as a financially viable economic entity. As Palmer states:

[o]ne ... reason ... offered for identifying shareholders as the relevant body of persons from which to ascertain the company's interests is that shareholders are the indirect enforcers of the State's interest in the existence and survival of companies.⁹²

Notwithstanding the stakeholder perspective, the practical reality is that the shareholder's self interest is more readily discernable than anyone else's. This paper argues as Palmer concludes pragmatically:

shareholders' interests are taken to be the relevant interest because, when considered broadly, upholding those interests is the most effective way of ensuring that management is held accountable.⁹³

Consequently, the company's interests align with the shareholders. Therefore, it is in the State's interest to regulate the extent of shareholder rights, and thereby indirectly regulate the company. The issue is ensuring accountability, because unlimited shareholder rights would seriously erode the fiction, and possibly enable ratification of self interested undesirable actions.⁹⁴ The Act therefore 'vest[s] rights in shareholders where to do so serves the regulatory goals of the state.'⁹⁵ Thus, the platform exists for equitable intervention.

88 CA, ss 4, 194.

89 CA, s 4.

90 *Mountfort v Tasman Pacific Airlines of NZ Ltd* [2006] 1 NZLR 104, 112.

91 CA, ss 4, 52, 55, 56.

92 Palmer above n 84 at 329.

93 *Ibid* at 335.

94 CA, s 177 and Grantham above n 4 at 586.

95 Grantham above n 4 at 586.

IV. EQUITABLE CONSIDERATIONS

In part IX of the Act there are several provisions allowing just and equitable intervention or consequential relief.⁹⁶ It is accepted and recently affirmed in *Chirnside v Fay*,⁹⁷ that equity intervenes to correct when required.⁹⁸ As Glover states:

[e]quity is not normally concerned with the universal good: the scope of its attention is usually limited to the circumstances in which individual actors are placed ... E]quitable principles ... allow the law giver a lot of leeway to consider the justice of the case.⁹⁹

A. *What are the relevant equitable obligations in company law?*

Equitable intervention or judicious intercession ensures society's moral standard is maintained within relationships.¹⁰⁰ Acknowledging Lord Atkin's *neighbourhood principle*,¹⁰¹ Finn contends, that moral standard's exist along a *continuum* from selfishness to selfless neighbourhood cooperation. Finn identifies three 'dominant shades on a spectrum'¹⁰² as rationale for equitable intervention, 'unconscionability',¹⁰³ 'good faith',¹⁰⁴ and 'fiduciary'.¹⁰⁵ *Dominant shades* best describes the indeterminate nature and boundaries of the individual standards.

A selfless fiduciary duty is most likely to exist within *traditional fiduciary relationships* of loyalty.¹⁰⁶ To a lesser extent, a fiduciary duty may exist outside traditional norms between parties that knowingly enter and maintain relationships of substance founded on loyalty, vulnerability, reliance, or expectation.¹⁰⁷ It is possible for a fiduciary duty to exist concurrently in contract or tort.¹⁰⁸ It is least probable that a fiduciary duty will exist where the parties are *at arms length* or do not require mutual trust and confidence in their dealing.¹⁰⁹ The essential factor is the parties' *reasonable expectation*, 'an amalgam of actual expectations and judicial prescription.'¹¹⁰ Notwith-

96 CA, ss 64, 170, 172, 174.

97 *Chirnside v Fay* [2007] 1 NZLR 433.

98 *Ibid* at 460. Blanchard & Tipping JJ aver 'equity imposes an obligation to eschew self interest when the circumstances require. The obligation does not arise only when expressly undertaken.'

99 Glover, *Commercial Equity – Fiduciary Relationships*, (1995) para 1.5.

100 Finn, 'Commerce, The common law and morality' *Melbourne University Law Review* 17 (1989), where it is conceded that morality is a diverse and changing standard and 'legal censure does not ... parallel moral censure', 87.

101 *Donoghue v Stevenson* [1932] AC 562, 580.

102 Finn, 'The Fiduciary Principle' in TJ Youdan, (ed) *Equity, Fiduciaries and Trusts* (Toronto: Cresswell, 1993), 3.

103 *Ibid*, Unconscionability accedes one party's self interested pursuit in deference to another, but not their unconscionable exploitation.

104 *Ibid*, Good faith restricts one party's self interested pursuit to having regard to the legitimate interests of the other party.

105 *Ibid*, Fiduciary decrees a selfless undivided loyalty to the principal.

106 See the traditional Solicitor Client relationship discussed in *Farrington v Rowe McBride & Partners* [1985] 1NZLR 83, 89.

107 *Chirnside v Fay* [2004] 3NZLR 637, 646–7 at paras 50–51.

108 *Watson v Dolmark Industries Ltd* [1992] 3NZLR 311; *United Dominions Corporation v Brian Pty Ltd* (1985) 60 ALR 741; *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41, 97 and Butler, A. *Equity and Trusts in New Zealand* (2003), 14.2.5, 349–50; 36.4.1, 1080.

109 *Hospital Products* above n 108, 67 and 72; *Arklow Investments Ltd v MacLean* [2000] 2NZLR 1.

110 Finn above n 102, at 6.

standing the above, the fiduciary duty is imposed;¹¹¹ the imposing of a fiduciary duty is the exception.¹¹² In context, director's duties to the company impose analogous fiduciary obligations.

As previously noted, s 131(1) of the Act mandates directors act in good faith. Finn contends the obligation of good faith is equivocal, requiring independent recognition as a unifying principle.¹¹³ Butler suggests the 'debate over good faith ... is ... more appropriately resolved on the contractual, rather than the equitable, side of the dividing line.'¹¹⁴ What is clear is that good faith is a concept seeking clear recognition. Finn argues good faith encapsulates three elements:

- [1] the promotion of cooperation between parties to a relationship;
- [2] the curtailment of the use of one's power over another; and
- [3] the extraction of 'neighbourhood' responsibilities in a relationship.¹¹⁵

The third standard on the continuum is *unconscionability*. Finn contends, unconscionability is concerned with relationships analogous to contract, where the parties are expected to look after their own interests between themselves, but where one party *knows* and exploits the relative disadvantage of the other who is unable to protect their own interest.¹¹⁶ It is not possible to catalogue all the likely instances, but there is an element of unfairness within unconscionable conduct. A breach occurs where it is unconscionable for the stronger party to knowingly manipulate or take advantage of the vulnerable weaker party.¹¹⁷ Unconscionability, Glover cautions may be changing with the development of restitution. Glover suggests:

[e]xamination of the *fairness of outcomes* may be supplanting equity's traditional concern with the *quality of conduct* ... Traditional equitable liability for unconscionable dealing is based on defendant's fault. Conduct is assessed. Restitutionary liability, ... is a strict liability thing according to the most theoretical expositions. Restitution reverses enrichment according to 'unjust' criteria ...¹¹⁸

Mindful of the good faith debate, this paper recognises the important distinction between the imposition of the director's *good faith* obligation to the company, and the company's obligation to shareholders. *Latimer Holdings Ltd v SEA Holdings NZ Ltd (Latimer)*¹¹⁹ highlights the distinction. The Court held in respect to the prejudice provision in s 174:

[t]he operative words of the provision express a general principle which is directed to 'an unjust detriment to the interests of a member of the company' ... That test is an objective one ... Relief can be given even if the conduct complained of does not involve a want of good faith or a lack of probity. [Emphasis added]¹²⁰

Referring to unjust detriment raises the concept of unjust enrichment and restorative justice, central considerations in the law of restitution. A thorough analysis of the law of restitution is outside the scope of this paper. It is sufficient to note restitution is seen as the 'law's remedial response to

111 Ibid at 54.

112 *Disher v Farnworth* [1993] 3NZLR 390, (CA), 399.

113 Finn (1993) above n 102, at 11 & 24.

114 Butler, *Equity and Trust in New Zealand* (Wellington: Brookers Ltd, 2003) at 36.4.1, 1078.

115 Finn (1993) above n 102, at 11.

116 Ibid at 6.

117 *Nichols v Jessup* [1986] 1 NZLR 226, 233 & 235.

118 Glover, 'Equity and Restitution' in P Parkinson, (ed) *The Principles of Equity*, (Sydney: LBC Information Services, 1996) at 106.

119 *Latimer* above n 31.

120 Ibid at 346–7.

some other cause of action'.¹²¹ The principle of fairness and justice is central in actions for restitution.¹²² There are three fundamental elements:

1. the defendant is enriched,
2. the enrichment is at the plaintiff's expense, and
3. the enrichment is unjust.¹²³

The critical concepts are *unjust* and *enrichment*. Unjust is a term largely unconstrained, implying illegitimacy or an action lacking legal sufficiency.¹²⁴ Enrichment is analogous to recognising a benefit or gain, the issue is the nature, quantification, and realisation of the enrichment.¹²⁵ *Unjust enrichment* is the unifying foundation of restitution law.¹²⁶ As Lord Hope of Craighead states:

[t]he essence of [unjust enrichment] ... is that it is unjust for a person to retain a benefit ... received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive.¹²⁷

In sum, imposing an equitable obligation on the shareholder relationship is a consequence of reposed loyalty, the parties' reasonable expectations, or the existence of known vulnerability and potential for manipulation. Where there is a cause of action, the Court may consider it *just and equitable* to remedy the *unjust enrichment* as it thinks fit.

V. Summary

The shareholder relationship to the company is complex. Figure 2 depicts the complexity of the relationship in the context of the fiction and intervention paradigms.

121 Grantham & Rickett, *Restitution Commentary and Materials*, (2001), 19.

122 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211, 230.

123 Grantham (2001) above n 121 at 77.

124 *Ibid* at 40–1 & 78.

125 *Ibid* at 79.

126 *National Bank of New Zealand Ltd* above n 122 at 215.

127 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 408.

Shareholders influence on the company fiction

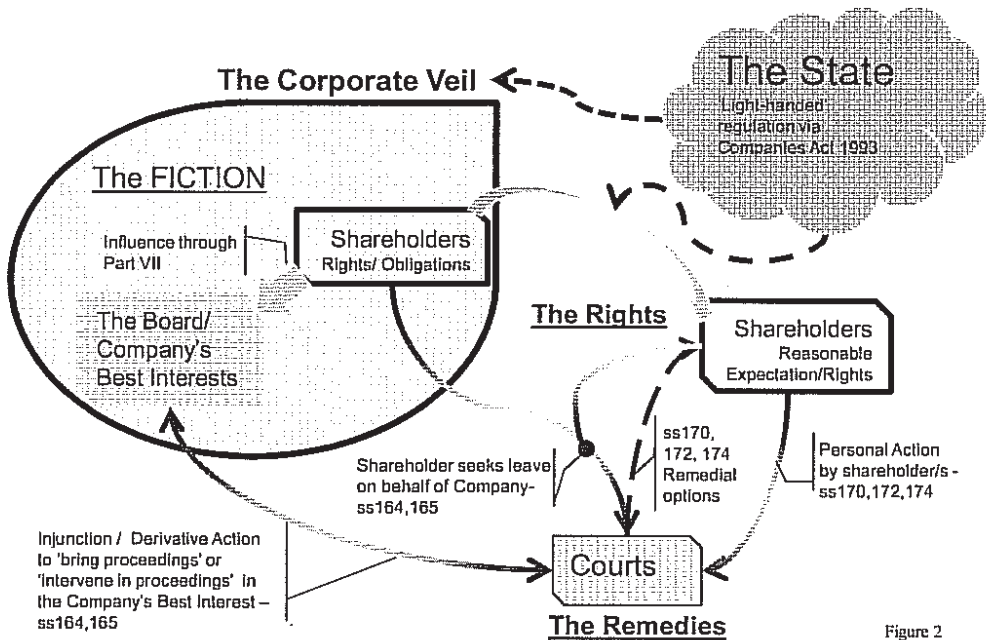


Figure 2

Figure 2 depicts the relationship between the problematic concepts: corporate personality, best interests, shareholder rights, and remedial intervention.

Shareholders are shown behind the corporate veil and in front of it. Within the veil, shareholders influence the board and company's interest in accord with their rights in Part VII of the Act. Shareholders are able to initiate an injunction or derivative action on behalf of the company from inside of the veil. Outside the veil, shareholders seek to personally enforce rights against the company via the Court where it is just and equitable. The argument is the State sanctions shareholder intervention in the company fiction. The light handed regulatory model relies on the shareholder's self interest indirectly corresponding with the overall economic rationale. Shareholders are ideally positioned (particularly in SMEs or closely held companies) to monitor and encourage responsible management. Typically, the Court is the central mechanism for shareholder action when internal management mechanisms fail. Intervention via the Court preserves the fiction and monitors the use of the blunt injunction and derivative instruments in the interests of the company. Section two describes and examines the prevalent use of these remedial instruments.

VI.

This section examines the application of the enforcement provisions in Part IX of the Act from the shareholder's perspective. There are two distinct categories of intervention in Part IX. The first category prescribes intervention on behalf of the company. The second category allows shareholders the right to initiate personal actions against the company or its directors. The analysis

examines the specific provisions in the context of the recent empirical studies by Berkahn¹²⁸ and Taylor.¹²⁹ The contention of this paper is the *enforcement* provisions are remedial and therefore principally restorative in nature.

VII. INJUNCTIONS AND DERIVATIVE ACTIONS

Injunctions and derivative actions represent the initial foray outside the veil in the remedial process that ensures the best interests of the company. Injunctions and derivative actions are central to the State's light handed regulatory rationale. These provisions grant a shareholder or director standing to engage the objective assistance of the Court, independent of the company's management. They are blunt instruments to deter irresponsible management.

A. *Injunctions*

In the Act, the s 164 injunction is in essence an independent discretionary equitable remedy and not ancillary to equity.¹³⁰ An injunction is the independent action of an individual affecting control over the company's conduct. Section 164 authorises the company, a director, shareholder, or 'entitled person'¹³¹ to make an application to the Court for a *restraining* injunction.¹³² The purpose of an injunction is to prohibit or prevent the company or a director from continuing or engaging in conduct that contravenes the company's constitution, the Financial Reporting Act 1993 (FRA), or the Act.¹³³ Therefore, shareholders have standing to petition the Court in either their own or the company's the best interests, with the intention of prohibiting or preventing *unauthorised* conduct.

The conduct in question must be contemplated or occurring; the Court cannot make an order to prohibit conduct that is finished.¹³⁴ The Court has discretion to grant either a final or interim order.¹³⁵ While the jurisdiction is statutory, the Court is likely to have regard to the 'two stage balancing test'¹³⁶ incorporating the overall interests of justice.¹³⁷ The Court upon granting an injunction may also grant any 'consequential relief as it thinks fit.'¹³⁸

Berkahn's empirical study focuses on the *public versus private* debate in regulatory approaches to corporate law.¹³⁹ The New Zealand data analysed was collected from *New Zealand Company*

128 Berkahn above n 28.

129 Taylor above n 28.

130 *JJ International Ltd & Ors v Streetsmart Ltd & Ors* (2005) 9 NZCLC 263,784 para 19.

131 CA, s 2.

132 CA, s 164(1) & (2).

133 CA, s 164(1).

134 CA, s 164(4).

135 CA, s 164(5).

136 *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, 510.

137 *JJ* above n 130 at [21]; *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* (unreported, Court of Appeal, 3 August 2005, CA70/05), paras 91–93 and *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, 142.

138 CA, s 164(3).

139 Berkahn above n 28.

Law Cases and the inherent limitation is that action must result in at least one judgment.¹⁴⁰ Applications considered or commenced but not proceeded with escape capture.

Berkahn's analysis discloses that in the period 1986–93 eight injunctions were *commenced*.¹⁴¹ Of the eight, shareholders initiated two. Berkahn classified the shareholder initiated injunctions as relating to 'inadequate notice of meeting [and] restraining entry into service contract with director.'¹⁴² In the following 1994–98 period there were four injunctions initiated. Shareholders initiated one injunction in respect to 'restraining share forfeiture'.¹⁴³ In the period 1999–2002 there were three shareholder initiated injunctions. They related respectively to restraining share transfers, share issue, and voting by interested shareholder.¹⁴⁴

Interestingly, following the periods identified in Berkahn's empirical analysis, Keane J commented in *JJ International Ltd & Ors v Streetsmart Ltd & Ors (JJ)*¹⁴⁵ '[t]here is no New Zealand case of which I am aware in which s 164, in particular has been applied.'¹⁴⁶

JJ related to an incorporated joint venture Smart Recycling Ltd. The shareholders were JJ International Ltd (The principle shareholder being Forbes) and Streetsmart Ltd (The principle shareholder being Christian). Justice Keane's judgment focuses extensively on the relationships between Forbes and Christian, presumably because their actions are attributed to the shareholder companies. That shareholder relationship, soured to the extent of a complete rift. Mr Christian acted unilaterally in ejecting Forbes from the premises and firing the manager Newman. JJ International Ltd and Forbes sought both interim and permanent injunctive relief in accord with s 164. One issue was whether to restore Newman as manager and therefore restore the apparent 'state of corporate dysfunction.'¹⁴⁷

Justice Keane referenced Palmer J's reasoning in *Australian Securities Commission v Mauer-Swisse Securities Ltd*,¹⁴⁸ before acceding that an injunction must ultimately contemplate its utility or purpose.¹⁴⁹ Justice Keane concluded:

[t]he s 164 power is conferred to provide a remedy where the integrity of a company is being or is likely to be compromised, unless that would be futile, or the company is trading at an increasing loss.¹⁵⁰

In *JJ* the Court granted an interim order in the terms applied for pending a fixture. In *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd (Shell)*¹⁵¹ the Court of Appeal in an obiter comment stated:

[s]ection 164 has received little attention in New Zealand. In *JJ International Limited v Streetsmart Limited* ... Keane J ... accepted that the s 164 jurisdiction was independent of the normal equitable jurisdiction and was to be exercised for the purposes of the Act, so that the Court was not constrained by the usual equitable considerations. This did not mean, however, that the balance of convenience and interests of

140 Ibid at 8.

141 Ibid at 113.

142 Ibid at 113–4.

143 Ibid at 116.

144 Ibid at 119.

145 *JJ* above n 130.

146 Ibid at para 17.

147 Ibid at paras 12 and 23.

148 *Australian Securities Commission v Mauer-Swisse Securities Ltd* (2002) 42 ACSR 605.

149 *JJ* above n 130 at para 19.

150 Ibid at para 47.

151 *Shell* above n 137.

justice tests were to be ignored, although they assumed less importance. We note these conclusions were reached without argument against the contention that s 164 mandated a different approach.¹⁵²

In sum, there are limited instances of remedial action via s 164. The reality is the provision is not fully tested. The provision is there to ensure compliance with the Act, constitution, or FRA. Arguably, the best interests and integrity of the company are the main concern in light of the fiction. Any consideration given to shareholder interests is secondary to those of the company. Therefore, shareholder detriment will need to be sufficiently serious and outside other remedial options to offset a legitimate company interest. It is probable that the Court will have regard to the equitable principles expressed in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd (Klissers)*¹⁵³ but will not be constrained by them.

B. Derivative actions

The derivative action paradigm is designed to ensure that there is judicial scrutiny of the shareholder *democracy*. A derivative action allows either a shareholder or director to apply to initiate litigation in the best interests of the company. The provision acts as a deterrent for future wrongdoers within the company and as a method for remedying harm done to the company. The relevant inter related sections in the Act are:

- s 165 Derivative Actions,
- s 166 Costs of Derivative Action to be met by company,
- s 167 Powers of Court where leave granted, and
- s 168 Compromise, Settlement, or Withdrawal of Derivative Actions.

The derivative action is the only provision in which the shareholder is ‘entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company.’¹⁵⁴ Only a director or shareholder has standing under this provision.¹⁵⁵ An application for a derivative action is granted at the Court’s discretion subject to mandatory requirements.¹⁵⁶

The first mandatory prescription is the evaluation principles the Court shall have regard to, they are:

- (a) The likelihood of the proceedings succeeding:
- (b) The costs of the proceedings in relation to the relief likely to be obtained:
- (c) Any action already taken by the company or related company to obtain relief:
- (d) The interests of the company or related company in the proceedings being commenced, continued, defended, or discontinued, as the case may be.(emphasis added)¹⁵⁷

152 Ibid at para 92.

153 *Klissers* above n 137.

154 CA, s 165(6).

155 CA, s 163 (A shareholder’s or director’s personal representative may apply), s 165(1).

156 CA, s 165(1), (2), & (3).

157 CA, s 165(2).

Subsection 165(2) mirrors s 209X(2) in the earlier Companies Act 1955. Subsection 165(2)(a) identifies that a derivative action is not a trial on the merits.¹⁵⁸ The subsection is the genesis for adopting from *Smith v Croft*¹⁵⁹ the *prudent business person* test.¹⁶⁰

*Virji*¹⁶¹ dealt with a derivative application under s 209X of the Companies Act 1955. As Fisher J noted:

[t]he gravamen of the complaint ... is that Mr Boyle is effectively diverting away from the original business custom and other benefits which ought to have remained ...¹⁶²

*Virji*¹⁶³ is the seminal decision, in which Fisher J held a derivative action is not an interim trial on the merits, and that the test is the prudent business person test. Justice Fisher avers:

[t]he appropriate test is that which would be exercised by a prudent business person in the conduct of ... [their] own affairs when deciding to bring a claim. Such a decision requires one to consider such matters as the amount at stake, the apparent strength of the claim, likely costs and the prospect of executing any judgment.¹⁶⁴

The test described by Fisher J aligns with the factors in s 165(2) and incorporates elements within the general experience of the Court. The argument against the inclusion of a prudent business person test is that the Court is required to exercise a degree of business reasoning. This arguably requires an understanding of specific market and economic factors as applicable to the circumstances. On balance, the prudent business person test is an adequate measure to offset indiscriminate or blunt use of the derivative instrument. Mindful of the potential argument that the shareholder's majority reflects the prudent business persons position, the Court's function is to objectively evaluate the conduct without the bias of self interest.

As an aside, Fisher J commented that in principle simultaneous derivative and oppression claims were possible before reserving leave and urging the parties to seek mediation.¹⁶⁵

A important factor in considering a derivative application, is that the Court is restricted to granting leave only where:

- (a) The company ... does not intend to bring, diligently continue or defend, or discontinue the proceedings ... or
- (b) It is in the *interests of the company* ... that the conduct of the proceedings should not be left to the directors or to determination of the shareholders as a whole.(emphasis added)¹⁶⁶

The purpose of this subsection is to mitigate situations where the democratic majority's self interest usurps the best interests of the company. The section reflects the State's light handed regulatory role while conceding the wider economic benefits of *stakeholder* interests. The provision

158 *Virji v Boyle* [1995] 3 NZLR 763 (*Virji*).

159 *Smith v Croft* [1986] 1 WLR 580, 590.

160 *Virji* above n 158 at 765.

161 *Ibid* at 765.

162 *Ibid* at 764.

163 *Ibid* at 765.

164 *Ibid*.

165 *Virji* above n 158 at 767–8 and *Bendall v Marshall & Ors* (2005) 9 NZCLC 263 772, Wild J followed *Virji* at [6].

166 CA, s 165(3).

recognises the right to ratification¹⁶⁷ and the previous limitations under the common law rule in *Foss v Harbottle*.¹⁶⁸

The applicant is obligated to serve notice of the application on the company.¹⁶⁹ Upon notification, the company must inform the court of its intention ‘to bring, continue, defend, or discontinue the proceedings.’¹⁷⁰ The company ‘may appear and be heard.’¹⁷¹

Sections 166 to 168 address procedural matters and ensure continued judicial scrutiny upon granting a derivative action. On application from the shareholder or director, to whom leave is granted, the Court may order that the company meet part or all reasonable costs.¹⁷² Section 167 allows the Court the opportunity to structure and control the nature of the intended proceedings, this scope is not limited. Section 168 ensures that subsequent to a grant of leave, no proceedings are *settled* without the Courts approval. This provision illustrates that the overall rationale for the derivative action is to ensure the company’s best interests.

Berkahn’s empirical analysis discloses that in the period between 1986–93 there were two derivative actions *commenced*.¹⁷³ The nature of those causes of action were, a shareholder initiated ‘[r]ecovery of debt owed to company’¹⁷⁴ and a directors claim in respect to an ‘[i]nvalid appointment of receiver.’¹⁷⁵

Berkahn’s analysis for the 1994–98 period shows an increase in the number of litigation actions *commenced*. There were five derivative action applications commenced by shareholders under s 165.¹⁷⁶ The nature of those applications were ‘[d]irector’s conflict of interest’, two claims of ‘[b]reach of fiduciary duties’, ‘[e]xcessive director’s salaries’, and ‘[m]isappropriation of company funds.’¹⁷⁷ Similarly, there were three director initiated derivative applications.¹⁷⁸ They were for ‘[b]reach of fiduciary duties ... [d]irector’s conflict of interest, ... [and] ... [u]nauthorised use of company funds.’¹⁷⁹

In the 1999–2002 period there were four shareholder initiated derivative applications. Two allege *director conflict of interest* and two *breaches of fiduciary duty*.¹⁸⁰ In the same period, Berkahn records two director initiated derivative actions. Those applications alleged *breach of shareholders agreement* and *misleading or deceptive conduct*.¹⁸¹

In comparison, Taylor analysed derivative application proceedings for the 1994–2006 period.¹⁸² Taylor’s analysis focuses on searching electronic databases for relevant authorities and sub-

167 CA, s 177.

168 *Foss v Harbottle* (1843) 2 Hare 461, 492.

169 CA, s 165(4).

170 CA, s 165(5)(b).

171 CA, s 165(5)(a).

172 CA, s 166.

173 Berkahn above n 28 at 113.

174 *Ibid*.

175 *Ibid*.

176 *Ibid* at 116.

177 *Ibid*.

178 *Ibid*.

179 *Ibid*.

180 *Ibid* at 119.

181 *Ibid*.

182 Taylor above n 28.

jecting those authorities to analysis under eight headings.¹⁸³ Taylor's analysis discloses a number of very interesting facts. Foremost is that 91.3 per cent of the 23 derivative applications were from *closely held* companies.¹⁸⁴ Further, that approximately 40 per cent of the applicants were shareholders, 50 per cent shareholder/director, and ten per cent directors.¹⁸⁵ Taylor identifies that:

[a] clear majority of ... [the proposed claims against defendants] allege that directors are in breach of a duty owed to the company. A further point of note is the lack of sole reliance by applicants on directors' duties as specified in the Companies Act 1993: a significant proportion of claims (70.8 [per cent] ...) are based wholly on or in part on the fiduciary duties imposed on directors in equity.¹⁸⁶

Taylor's tabulation shows 59 per cent of the defendants were directors, with 22 per cent of the defendants being shareholders (nine of the 41 claims).¹⁸⁷ This statistic merits further discussion in the context of the fiction.

An analysis of the *shareholder as defendant* data discloses the following the claims alleged were:

- [i] Breach of alleged fiduciary duty – 1
- [ii] Recovery of overdrawn current account and breach of contract – 1
- [iii] Recovery of unpaid share purchase price and term loan – 1
- [iv] Negligence as bailee of company property –2
- [v] Unauthorised receipt of funds from company bank account – 1
- [vi] Breach of shareholders agreement – 1
- [vii] Knowing receipt and/or knowing assistance with respect to breach of duty by company director –1¹⁸⁸

In all but three (ii, iii and vi) of the alleged claims, if established, the errant shareholder has assumed an obligation arguably outside the *normal* shareholder role. The limitation in this assertion is the generic nature of the summarised allegations recorded. One inference from the shareholder initiated applications is that neither the company, nor a director, were commencing the action. The assumption is the applicants were in minority positions.

The two final statistics that Taylor discloses are notable from a practical perspective. The first is that 69.6 per cent of the derivative applications were successful.¹⁸⁹ The second interesting fact is summarised by Taylor:

[i]t appears that in only one instance has an applicant obtained a judgment in a subsequent derivative action and the action been successful.¹⁹⁰

That case is *Kawhia Offshore Services Ltd v Rutherford (Kawhia)*.¹⁹¹ In *Kawhia*, Rutherford a managing director converted a maturing business opportunity away from the company for per-

183 Ibid.

184 Ibid at 351, (Table 1).

185 Ibid at 352, (Table 3).

186 Ibid at 353.

187 Ibid at 353 (Table 4).

188 Taylor above n 28 at 353 (Table 6).

189 Ibid at 354 (Table 7).

190 Ibid at 356.

191 *Kawhia Offshore Services Ltd v Rutherford* (unreported, High Court Hamilton 24 April 2004, CP61/99).

sonal benefit, breaching the fiduciary obligation to act in good faith and in the company's best interests. The Court held both Rutherford and the related Marine Mooring Consultants Ltd were liable to account for profits.¹⁹²

In sum, a shareholder has standing to apply for a derivative action. The derivative application is not a substantive hearing on the merits. The Court exercises its residual discretion to control unfair use of the blunt interim instrument. The Court must consider the matters in subs 165(2) and (3). The test is whether a prudent business person would take the action.¹⁹³ Leave is granted where the company itself is not actively engaged or contemplating proceedings, or there is sufficient risk of a majority self interest conflict arising to warrant judicial oversight.

IX. PERSONAL ACTIONS BY SHAREHOLDERS

Initiating a personal action is the strongest statement by a shareholder of the right to protect their self interest and reasonable expectation. The predominant personal statutory remedy is the *prejudiced shareholder* provision.¹⁹⁴ There are four general statutory provisions a shareholder may invoke.¹⁹⁵

A. *The general provisions*

Three of the personal remedy options indirectly enforce the company or board to act. Section 170 authorises shareholders to apply in spite of the prescription in s 169, where it is just and equitable, for an order requiring a director to act in the interests of the company.¹⁹⁶ Relief is available under this provision as the Court thinks fit.¹⁹⁷ Section 172 is similar but the order granted is directed to the board.¹⁹⁸ Section 171 authorises an action against the company to enforce a duty owed to shareholders. This section should be read in conjunction with s 169. Database searches did not identify any judgments relating to these provisions. Arguably, this is because ss 64, 165 and 174 provide ample scope for equitable intervention.

B. *Prejudiced shareholders*

Section 174(1) allows a shareholder, former shareholder, or *entitled person* to apply to the Court for an order where prejudicial conduct is alleged. The provision allows an application for past, present, or anticipated conduct. The conduct complained of must be 'oppressive, unfairly discriminatory, or unfairly prejudicial'¹⁹⁹ to a shareholder, former shareholder, or entitled person.

The Court has a just and equitable discretion to consider in making any order it thinks fit.²⁰⁰ The Act prescribes some of the remedial options, but the list is not exhaustive.²⁰¹ The Court may

192 Ibid at para 79.

193 *Virj* above n 158 at 765; *MacFarlane v Barlow* (1997) 8 NZCLC 261 471 and *Re Mega-Merger Housing Ltd* (unreported, High Court Auckland, 16 November 2004, CIV 2004-404-1453).

194 CA, s 174.

195 CA, ss 70-172, 174.

196 CA, s 170.

197 CA.

198 CA, s 172.

199 CA, s 174(1)

200 CA, s 174(2)

201 CA.

order that the company or any other person, acquire the shares, or pay compensation.²⁰² The Court may regulate the company's future conduct or alter its constitution.²⁰³ The Court may appoint a receiver, rectify records, put the company into liquidation, or set aside an action.²⁰⁴ The company must be a party to proceedings for the Court to make an order against it.²⁰⁵ Section 175 prescribes 13 general circumstances where conduct is deemed prejudicial. The Court of Appeal avers, 'the section ... [is] remedial and enabling ... designed to transcend the limitations of the former law.'²⁰⁶ It is suggested the concern is whether the section prescribes a sufficiently principled approach for commercial reality.

Berkahn's empirical analysis discloses that between 1986–93 there were 11 *oppression* actions, six lodged by shareholders and five by director/shareholders'.²⁰⁷ The actions under s 209 of the Companies Act 1955 were for, share allotment, sale to director at undervalue, share forfeiture, directors acting in own interests, management deadlock, preferring majority interests over minority, and withholding dividends.²⁰⁸

The corresponding analysis for 1994–98 shows there were ten s 174 applications.²⁰⁹ Shareholders lodged two applications, one for share forfeiture, and the other for excessive director salaries. The eight director/shareholder actions were for conflict of interest, exclusion from management, and financial mismanagement.²¹⁰

Analysis for 1999–2002 shows there were 14 s 174 applications.²¹¹ *Shareholders* lodged two applications, one for excessive director salary and inadequate dividend, and the other for delaying a requested meeting.²¹² The twelve director/shareholder actions were for conflict of interest, inadequate dividends, exclusion from management, financial mismanagement/ diversion of funds, and management deadlock.²¹³

It is clear from Berkahn's data that there is a marked increase in the number of actions taken despite the shorter time period. The other trend observed is the prevalence of director/shareholder initiated actions. This reflects a greater involvement and understanding of the company's management by director/shareholder's.

Taylor's analysis for 1984–94 discloses that there were 23 claims for oppression, with 65.2 per cent coming from closely held companies.²¹⁴ Similarly, in the 1994–2006 period there were 25 claims, with 93.1 per cent lodged against closely held companies.²¹⁵

The statistics of both Berkahn and Taylor indicate that claims under the *oppression* remedy are popular when compared to injunctions or derivative actions discussed earlier. A potential explana-

202 CA, s 174(2)(a) & (b).

203 CA, s 174(2)(c) & (d).

204 CA, s 174(2)(e)–(h).

205 CA, s 174(3).

206 *Latimer* above n 31 at para 64.

207 Berkahn above n 28 at 113.

208 *Ibid.*

209 *Ibid* at 116.

210 *Ibid.*

211 *Ibid* at 119.

212 *Ibid.*

213 *Ibid.*

214 Taylor above n 28 at 356.

215 *Ibid* at 358.

tion is the strong self interest perspective associated with the claim and the broad interpretation of the section.

In 2005, the Court of Appeal in *Latimer*²¹⁶ noted there were British empirical studies but were not aware of any similar study on *oppression* proceedings in New Zealand.²¹⁷ The Court stated, in that respect, there have been:

close to 50 decisions of our Courts since legislation of this character was created. There has been no concern expressed in those judgments as to the essential approach adopted in *Thomas*.²¹⁸

*Thomas*²¹⁹ is the seminal case; the case acknowledges Lord Wilberforce's equitable intervention rationale in *Ebrahimi v Westbourne Galleries Ltd*.²²⁰ Justice Richardson's judgment explored the background of the analogous s 209 of the Companies Act 1955, before analysing the operative terminology. The Court's discussion and ruling remains relevant.²²¹ In *Thomas* it was held that the expressions *oppressive*, *unfairly discriminatory*, and *unfairly prejudicial* overlap, and should be read together.²²² Further, that:

they reflect the underlying concern of the subsection that *conduct of the company which is unjustly detrimental to any member of the company* whatever form it takes and whether it adversely affects all members alike or discriminates against some only *is a legitimate foundation for a complaint* (emphasis added)

²²³

Justice Richardson, reconciled the three *compendious* expressions in subsection (1) with the just and equitable standard in subsection (2) by focusing on the essential overlapping expressions.²²⁴ Importantly, in applying a balancing test of potentially conflicting interests, it was stated that, '[f]airness cannot be assessed in a vacuum or simply from one member's point of view.'²²⁵ *Thomas* has received all round affirmation as remaining good authority for s 174. As noted, the Court of Appeal in *Latimer* held, [t]wenty years after *Thomas*, in our view the general approach laid down ... is still appropriate'.²²⁶ *Latimer* affirmed that:

[t]he operative words [s 174] express a general principle which is directed to 'an unjust detriment to the interests of a member of the company'.²²⁷

Latimer did consider the reasoning in *O'Neill v Phillips*²²⁸ before distinguishing the stricter *legitimate expectation* from the preferred *reasonable expectation* test.²²⁹ The Court noted the developing trend in company law toward a greater recognition of shareholder rights.²³⁰ In *Lusk v Archive*

²¹⁶ *Latimer* above n 31.

²¹⁷ *Ibid*.

²¹⁸ *Ibid*.

²¹⁹ *Thomas* above n 59.

²²⁰ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379.

²²¹ *Latimer* above n 31 at para 112.

²²² *Thomas* above n 59 at 693.

²²³ *Ibid* at 693.

²²⁴ *Ibid*.

²²⁵ *Ibid* at 694.

²²⁶ *Latimer* above n 31 at para 112.

²²⁷ *Ibid* at [113].

²²⁸ *O'Neill v Phillips* [1999] 1 WLR 1092.

²²⁹ *Latimer* above n 31 at para 96.

²³⁰ *Ibid* at para 110.

*Security Ltd (Lusk)*²³¹ Gallen J referenced the Privy Council's upholding of Henry J's reasoning under the previous provision in *Vujnovich v Vujnovich*²³² and Lord Wilberforce's discussion. Justice Gallen noted:

the necessity to take into account the different rights, expectations and obligations of the constituent shareholders, but [also] that these may be considered in terms of considerations of a personal character arising between one individual and another. There is also a certain emphasis on the expectations and what is contemplated by the parties at the initiation of the relationship.²³³

Notably, in both *Thomas* and *Latimer* the Court did not find that the minority shareholders were *unjustly prejudiced*. In *Thomas* the minimal dividend policy, balanced against the increasing capital investment and appellant's failure to investigate alternative exit options, did not equate to being *locked in*.²³⁴ In *Latimer* the appellant shareholders were found to have invested in the company with their *eyes open* and aware of the management strategy. Notably the Court concluded:

the appellants seek not just exit, but exit conferring upon them a handsome profit (in a relatively short time) for their investment. What they are really seeking, is to achieve through the Court what they cannot achieve through the market ... They cannot legitimately look to this Court to generate their profit for them.²³⁵

This equitable reasoning is analogous to,²³⁶ but not conflated with, the reasoning employed in terms of unjust enrichment. It is unjust for the shareholder appellant to profit in circumstances where there is an appreciation of the risk and no unconscionable conduct. This reasoning also accords with s 169(2), prohibiting personal action simply for effected share value as a result of *proper* company action. The focus on exit options links the reasonable expectation of shareholders and the objective economic rationale of the fiction. The rationale for just intervention is to protect against abuses of influence or control.

X. SUMMARY

Three prevalent shareholder remedies allow the shareholder to independently apply to the Court to exercise their rights and expectations. The injunction paradigm is used the least; it is restricted to continuing or contemplated company conduct. The derivative action relies on a prudent business person test where there is the risk of self interest or conflict within the company, impeding the company ensuring proper proceedings. The oppression provision allows a shareholder a just and equitable personal remedy. It negates the possibility of *fraud against the minority* ensuring the shareholder's reasonable expectations.

231 *Lusk v Archive Security Ltd* (1991) 5 NZCLC 66 979.

232 *Vujnovich v Vujnovich* [1989] 3 NZLR 513.

233 *Lusk* above n 231 at 66 988.

234 *Thomas* above n 59 at 696.

235 *Latimer* above n 31 at paras 122–123.

236 Equitable in that it follows the maxims; 'equity follows the law', 'equality is equity', and 'equity will not allow a statute to be made the instrument of fraud.'

XI.

This section will address two further related issues before concluding. The first is a brief identification of the comparative Australian provisions. The second draws the discussion together by focusing on shareholder remedies.

XII. THE CORPORATIONS ACT 2001

Unsurprisingly, the regulatory regime prescribed by the Australian Corporations Act 2001 (Commonwealth) (the CA01) is similar to that in New Zealand. The paradigm distinguishes between the *general law*, the CA01, and contractual regimes affecting company law.²³⁷ There is a statutory injunction available against a person via s 1324 for a breach of the CA01. This section focuses on the actions of individual's not the company itself.

Whereas s 236 of the CA01 codifies a similar prescription as s 165(1) in the New Zealand derivative action. Section 237(2) of the CA01 addresses the granting of leave. The provision expands on the test prescribed in s 165(3) of the New Zealand Act. The important additional feature is the recognition of the elements of good faith and the company's best interests in the provision.²³⁸ The inclusion of these tests tends to negate action taken for a collateral purpose.²³⁹ Section 237(3) of the CA01 prescribes the rebuttable presumptions for the Court to consider. The rationale of s 237 is expressed in the explanatory memorandum which states, its intention is:

to strike a balance between the need to provide a real avenue for applications to seek redress on behalf of a company where it fails to do so and the need to prevent actions proceeding which have little likelihood of success.²⁴⁰

This in effect is the objective of the *prudent business person* test prescribed in s 165(2) of the New Zealand Act and interpreted by Fisher J in *Virj*.

The CA01 prescribes an oppression remedy at s 232. Standing under the section is expansive. There are two limbs to the section covering actual or proposed conduct. Effectively the conduct must be either:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members ...²⁴¹

In respect to subsection (e), Richardson J's contention in *Thomas* that the three expressions overlap was followed in *Re George Raymond Pty Ltd; Salter v Gilbertson*.²⁴² The distinguishing feature in the CA01 is subsection 232(d), effectively combining the director's duty under s 131 and with the oppression remedy in s 174 in the New Zealand Act. The remedies available via s 231(1) of the CA01 for breaching s 232 are analogous to s 174(2) of the Act. Notably, both the New Zealand and Australian jurisdiction refer to the reasoning of Lord Wilberforce in *Ebrahimi* discussed above.

²³⁷ S Woodward, H Bird, & S Sievers, *Corporations Law in principle* (Sydney: Lawbook Co, 2005), 261–6 and H Ford, R Austin, & I Ramsay, *Ford's Principles of Corporations Law* (2003), 545–6.

²³⁸ Corporations Act 2001, s 237(2)(b)&(c).

²³⁹ *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ASCR 313 and *Charlton v Barber* (2003) 47 ASCR 31.

²⁴⁰ Corporations Act 2001, s 237, Explanatory Memorandum.

²⁴¹ Corporations Act 2001, s 232(d)&(e).

²⁴² *Re George Raymond Pty Ltd* and *Salter v Gilbertson* (2000) 18 ACLC 85, 90.

By way of comparison, Berkahn's Australian analysis identifies that; in 1986–93 shareholders or director/shareholders commenced eight injunctions, four derivative actions and 30 oppression applications.²⁴³ In the 1994–98 period similarly there were four derivative actions, and 12 oppression actions.²⁴⁴ For the 1999–2002 period there were two injunctions, eight derivative actions, and ten oppression actions.²⁴⁵ The trend is clearly the preference for actions alleging oppression.

In summary, the provisions in the CA01 present a greater challenge to the company fiction than the New Zealand regime. Shareholders may initiate independent action against other members or the company without first seeking judicial oversight. Notwithstanding, there are options for compensation for frivolous claims.

XIII. SHAREHOLDER REMEDIES – THE DUTY IN SUMMARY

The primary focus of the Act is to achieve economic and social benefits by ensuring the company's best interests. The company's best interests align with the shareholders. The duty to ensure the company's best interests is one of the directors' fiduciary duties to the company. Prescriptive shareholder rights and obligations ensure there is accountability while restricting the scope for intervention. Part IX of the Act prescribes the platform for statutory and equitable intervention. The empirical studies show that from the shareholder's perspective, Part IX provisions are critical, if not always effective.

The potential remedies in Part IX are extensive. There is a nexus between the shareholder's relationship to the company and the nature of the remedial action available. Shareholders are not owners, nor are they owed a fiduciary obligation. Whether the contractarian or communitarian model describes the shareholder relationship, the concession is that the relationship incorporates a reasonable expectation. The concept of reasonable expectation is contractual. Further, when shareholders enter a shareholder company relationship it is at a known relative *disadvantage* to the company and the board. Notwithstanding that, the company is expected to act in its own interests; this interest may align with the shareholders, who are expected to look after their own interests.

Premised on that understanding, the relationship of the shareholder to the company is analogous to Finn's third standard on the continuum, requiring *fairness* to the disadvantaged party and avoidance of unconscionable conduct.

Without conflating the three separate provisions and their respective tests, unconscionable conduct is the critical factor in any just and equitable assessment. There is then an argument for the inclusion of an unjust enrichment rationale also as the basis for shareholder remedies. Unjust enrichment is the central foundation for the law of restitution. Restitution principles adequately address *unjust detriment* and ensure reasonable expectations.²⁴⁶ In *Latimer* the Court noted it is not appropriate for shareholders to unjustly profit via a Court action.²⁴⁷ The courts are disposed to finding a remedy that in the first instance maintains the company fiction. The remedies prescribed in s 174(2) are expansive. The acquisition of shares is the most prevalent remedy.²⁴⁸ The reality

243 Berkahn above n 28 at 122–3.

244 *Ibid* at 126–7.

245 *Ibid* at 130.

246 *Latimer* above n 31 at para 113.

247 *Ibid* at para 123.

248 *Lusk* above n 231 at 66994; *Cornes v Kawerau Hotel (1994) Ltd* (1999) 8 NZCLC 261817, 261826; *Re Environmental Products (New Zealand) Ltd* and *Power v Sands* (2005) 9 NZCLC 263779, para 72.

is that some situations dictate that the company is unable to continue and winding up is the only option.²⁴⁹

XIV. CONCLUSION

This paper has endeavoured to highlight the practical nexus between maintaining the concept of the company fiction and ensuring shareholders reasonable expectations. The problematic concepts include, the company fiction, identifying the company's best interests, and just and equitable intervention.

The Act's light handed regulatory regime relies on robust shareholder remedies to promote the economic and social benefits of the company fiction. Shareholder monitoring encourages responsible management. There is a presumption of shareholder self interests within the Act, whether through voting or applying for an injunction, derivative action, or ultimately a remedy for oppression.

Shareholders are able to initiate an injunction or derivative action on behalf of the company from inside of the veil. Outside the veil, shareholders seek to personally enforce rights against the company via the Court where it is just and equitable.

The State sanctions shareholder intervention in the company fiction. Intervention via the Court preserves the fiction and monitors the use of the *blunt* injunction and derivative instruments in the interests of the company. The balance is established through just and equitable oversight. As Lord Wilberforce's seminal speech identifies, equity will pierce the corporate veil to acknowledge the rights existing behind the barrier.²⁵⁰

²⁴⁹ *Vujnovich* above n 232 at 519.

²⁵⁰ *Ebrahimi* above n 220 at 379.

PRIVATISATION OF LABOUR STANDARDS UNDER CORPORATE SOCIAL RESPONSIBILITY AND SOCIAL REPORTING IN NEW ZEALAND

BY DURGESHREE D. RAMAN*

I. INTRODUCTION

The protection of labour rights has traditionally been the responsibility of governments, first starting at national level and then gradually becoming a subject in the international arena. With globalisation, as the influence and reach of corporations have grown, labour standards have become stagnated. In order to deal with and address this problem, first, the essay demonstrates how labour standards, the so called second generation rights, can be better dealt with privately by bringing them under the ambit of corporate social responsibility. And secondly, how voluntary social reporting can be an effective means for corporations to demonstrate social responsibility for the protection of labour standards within the private sector, both internationally and in New Zealand.

II. DEALING WITH LABOUR STANDARDS PRIVATELY

Labour Standards¹ seek to promote a regime whereby workers' rights are protected and balanced against profit maximisation by corporations. In order to demonstrate how labour standards can be better dealt with privately, it is important to look at the concept of sustainable development, the notion of corporate social responsibility and social reporting very closely.

III. THE SUSTAINABLE CORPORATION

Before embarking on an explanation of what a sustainable corporation might be, it is important to first look at the meaning of 'sustainable development.' There are many definitions but the landmark definition first appearing in 1987 states, 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'² It has been suggested that the current form of capitalism is not sustainable because it is driven only by economic factors and not social or environmental concerns.³ However, sustainable development seeks to create a balance between economic, social and environmental issues so that in the long term, the

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1 Currently there are four core labour standards, eight fundamental Conventions and four priority Conventions, which promote labour standards globally. See International Labour Organisation, *Core Labour Standards Handbook: Guidelines, Handbooks and Manuals* (2006) and International Labour Organisation, *Rules of the Game: A Brief Introduction to International Labour Standards* (2005) 12–13.

2 The World Commission on Environment and Development [WCED], *Our Common Future* (1987) 8.

3 A Henriques and J Richardson (eds), *The Triple Bottom Line, Does It All Add Up?: Assessing the Sustainability of Business and CSR* (2004) 73.

environment has been interfered with as little as possible, stakeholders' trust has been earned and the business has been profitable.⁴ *Agenda 21* recognises the crucial role business and industries, including transnational corporations, could play towards sustainable development.⁵

Our Common Future (commonly known as the Brundtland Report) gave anecdotal suggestions as to what a sustainable corporation might look like. An interpretation of the text reveals that the following characteristics must be present if a corporation has grasped the concept of sustainable development. A sustainable corporation is one that:⁶ (1) Recognises the need to share managerial skills and the technical know how with host countries; (2) Pursues profit seeking objectives within a framework of long term sustainable development; (3) Helps strengthen the bargaining posture and response of host countries; (4) Contributes to the economic development of the least developed countries; (5) Follows the same environmental standards in host countries as they do in home countries; (6) Shares information with the host countries; (7) Complies with international measures such as codes of conduct dealing with objectives of sustainable development; and (8) Deals with all problems and takes special responsibilities where required.

A. *The Business Case for Sustainable Development*

There are many cases that can be made for sustainable development:⁷ moral, ethical, religious and environmental. However, for the purpose of this essay, the focus will be on the business case, which seeks to explain why a company may opt to contribute towards sustainable development. The business case for sustainable development rests upon ten building blocks:⁸ (1) The market, which ought to be fully utilized;⁹(2) The right policies and frameworks, be they legal and/or regulatory, which govern and encourage sustainable progress;¹⁰ (3) Eco-efficiency;¹¹(4) Corporate social responsibility;¹² (5) Transformation, in accordance with a broader corporate vision (as

4 New Zealand Business Council for Sustainable Development [NZBCSD], *Our Mission and Aims* available at <<http://nzbcسد.org.nz/mission.asp>>.

5 Note that at this time sustainable development only concerned itself with environmental issues. The social dimension came into play later. UNEP, *Agenda 21* (1992) [Chapter 30: Strengthening the Role of Business and Industry] available at <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=52&ArticleID=78&l=en>>.

6 WCED above n 2 at 85–87. Also see Sustainable Business Network, *What is a Sustainable Business* (2007) available at <<http://www.sustainable.org.nz/resource.asp?id=90>>.

7 World Business Council for Sustainable Development [WBCSD], *The Business Case for Sustainable Development: Making a Difference Toward the Johannesburg Summit 2002 and Beyond* (2001) 2 available at <<http://basd.free.fr/docs/documents/business-case.pdf>>.

8 C Holliday, Jr. S Schmidheiny and P Watts, *Walking the Talk: The Business Case for Sustainable Development* (2002) 40, 58–60, 83, 103, 125–126, 150, 174–175, 193, 218, 241–242.

9 The market has to be open, competitive and rightly framed so that efficiency and innovation, which are both necessities for sustainable human progress, can be achieved and comparative advantage honoured. An example of this is free trade.

10 One of the ways sustainable progress can be measured is through triple bottom line reporting by the business sector.

11 Eco efficiency has been defined as being 'achieved by the delivery of competitively priced goods and services that satisfy human needs and bring quality of life, while progressively reducing ecological impacts and resource intensity throughout the life cycle, to a level at least in line with the Earth's estimated carrying capacity.' WBCSD, *Eco-Efficiency: Creating More Value with Less Impact* (2000) 9 available at <www.wbcسد.org/includes/getTarget.asp?type=d&id=ODkwMQ>. Internalising costs is one of the ways of promoting eco efficiency for example via the polluter pays principle which simply means that if one pollutes, one has to pay.

12 This concept is dealt with in detail in the later part of this essay.

moulded by sustainable development);¹³ (6) Moving from stakeholder dialogues to partnerships;¹⁴ (7) Informing and providing choice to the ‘green’ and/or ethical consumer;¹⁵ (8) Innovation;¹⁶ (9) Reflecting the worth of the earth through pricing mechanisms, efficiency and conservation;¹⁷ and (10) Making markets work for all by pursuing poverty reduction and/or contribution towards economic growth.¹⁸ While these building blocks are theoretical, a practical experience as to the business case for sustainability has been offered by the Shell Company. These are:¹⁹ protection of the ‘licence to operate,’ cost reduction and increase of return on capital, reduction of negative impacts of corporate operations, entry into new markets, improvement in market position, innovation, new partnerships, improved corporate reputation, increase in shareholder value, acquisition of consumer trust and confidence, and employee retention and effectiveness. Hence both theory and practice support the business case for sustainable development. In order to implement the goals of sustainable business practices it is important to ‘[a]ctively promote corporate responsibility and accountability ... and support continuous improvement in corporate practices in all countries.’²⁰ One way these goals can be met is through triple bottom line reporting.

B. *Triple Bottom Line*

Traditionally, corporations have been expected to report only on financial matters. ‘Triple bottom line’ reporting (also referred to as ‘sustainable development reporting’ or ‘sustainability reporting’) was coined by John Elkington to refer to the notion that corporations wanting to become sustainable or contribute towards sustainable development had to move away from the single practice of doing just financial reporting and recognise their responsibilities towards society and the environment and commit to environmental and social reporting.²¹ While there is some mandatory

13 Engagement with social reporting is a very good way for a corporate to demonstrate that it recognizes its wider responsibility towards its employees and other stakeholders and not only concerned with serving the shareholders’ financial interests.

14 Partnership with stakeholders is an area where businesses still lack experience. A good example is forming partnerships with NGOs which can create trust between the local community and the company.

15 ‘Green’ and ethical consumerism is on the rise. Such consumerism is important because it achieves sustainability through the market by: improving the quality of life; reducing negative impacts of production; and increasing the shareholder value of sustainable corporations. Hence information sharing plays an important role.

16 Innovation is not about consuming less but differently and that is efficiently. For example, we can consume more electricity but by producing less carbon.

17 A classic example of this is when dealing with the issue of climate change, whereby we become efficient, conservative and adopt policies like the polluter pays principle.

18 Sharing profits with its employees by paying decent wages is one of the best ways that businesses can make a contribution towards poverty reduction.

19 Shell, *Contributing to Sustainable Development: A Management Primer* (2001) 23.

20 This is one of the goals in the WSSD’s Plan of Implementation. WSSD 2002, *Plan of Implementation of the WSSD* (2002) para 45 available at <www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>.

21 R Gray and M Milne, ‘Sustainability Reporting: Who’s Kidding Whom?’ (2002) 81 *Chartered Accountants Journal* 66, 67.

triple bottom reporting requirements in some countries,²² there is no comprehensive legislation concerned with accounting, reporting and auditing of a triple bottom line report.

Triple bottom line is about managing risks involved in the operation of the business. This includes management of social risks, which inter alia concern labour standards. A classic example of the kind of disastrous impacts due to failure to take precautions (as demanded by labour standards) can have on businesses as has been demonstrated by the *Bhopal* case.²³ Strategic management of social risks is made easier with social accounting, which makes social accounting good for bottom line. According to the Shell Company, what is good for bottom line is good for corporations because it creates shareholder value, increases our ability to attract and retain the best people, and enhances the confidence of investors who provide capital for corporations and expect a fair return.²⁴ Social accounting and reporting is governed by the concept of corporate social responsibility.

C. Corporate Social Responsibility

Whether corporations have an obligation to behave in a socially responsible manner in addition to making profits has been a subject of debate in America since 1932.²⁵ While the traditional 'profit maximization' perception remains, there is growing awareness that corporations have a wider responsibility, a social responsibility, labelled as 'corporate social responsibility' or CSR.²⁶ CSR has been defined as: 'the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life.'²⁷

22 On 15 May 2001, France became the first country in the world to make triple bottom line reporting mandatory for its companies. By application of the Code of Commerce, the following social information must appear in the report of the Board or of the Executive Board: Total workforce, recruitment, redundancies and their motives, overtime, sub contracted labour, and (if need be) information relating to staff reduction and employment safeguard plans, to the efforts made for staff redeployment, reemployment and subsequent accompanying measures; Organisation of working hours, duration for full time and part time wage earning employees, absenteeism and its motives; Wages and their evolution, welfare costs, the professional equality between women and men; Industrial relations and the assessment of collective bargaining agreements; Health and safety conditions; Training; Employment and integration of disabled workers; Company benefits and social schemes; and Importance of sub contracting. The European Business Campaign, *France – Empowering Stakeholders: France Meets Growing Demands for Information on the Social and Environmental Performance of Companies* available at <<http://www.csrcampaign.org/publications/Excellencereport2002/France/>>. Due to the inability to read and interpret French in English, this article was heavily relied on for the interpretation of the French law.

23 *Union Carbide Corporation v Union of India* (1989) 1 SCC 674. Also M Memon, *Documents and Court Opinions on Bhopal Gas Leak Disaster Case* (1991).

24 Shell above n 19.

25 J Tolmie, 'Corporate Social Responsibility' (1992) 15 *University of New South Wales Law Journal* 268.

26 G Frynas and S Pegg (eds), *Transnational Corporations and Human Rights* (2003) 8.

27 WBCSD, *Corporate Social Responsibility: Making Good Business Sense* (2000) 10 available at <www.ingroup.com.au/pdf/csr2000.pdf>.

Today the argument in favour of good treatment and high wages for workers constitutes socially responsible behaviour²⁸ with an ‘enlightened self interest’ (as stated by BP’s chief executive Lord John Browne).²⁹

1. *The Debate on Corporate Social Responsibility*

There are two major issues of concern regarding the concept of CSR: (1) whether companies can really be socially responsible and if so, (2) whether they should be allowed to regulate themselves.

A rather extreme view is that ‘companies cannot be socially responsible’;³⁰ that the concept of corporate social responsibility is unattainable because the ultimate aim is profit maximisation. The other not so extreme view recognises that while some tangible social and environmental benefits are gained through CSR, CSR has very limited scope to protect social and environmental interests from corporate harm because there is no imperative for corporations to put their shareholder’s financial interests above other stakeholders.³¹

However, there is nothing in corporate law which states that all other responsibilities ought to be ignored in discharging those owed to shareholders. Hence, the concept of CSR goes beyond the traditional ‘profit maximization’ viewpoint by its broader outlook of the corporation’s impact on society and the environment. This is because corporations will often find that their freedom to do business is being increasingly constrained by emerging social movements.³² An ideal example is the worldwide abolishment of slavery. The emerging consensus within the global civil society around the values of labour standards and the social expectation they generate has evolved faster than the corporate response.³³ What the concept of corporate social responsibility aims to do is to fill the gap that has been created between social expectations and corporate performance. It further aims to reduce the negative externalities of corporate operations which it has on the social and the environmental dimensions of sustainable development. In other words the notion of CSR compels corporations to bear the responsibility of ‘corporate citizenship,’ which denotes that, like citizens, corporations also have duties as well as rights.

Business drivers for corporate social responsibility are diverse, comprising economic and ethical reasons.³⁴ The main driver for CSR is improved corporate reputation.³⁵ Reputation is a corporation’s most important asset.³⁶ Protection of reputation facilitates the necessary consumer and governmental ‘consent’ to enter into new markets.³⁷ Damage to reputation can have not only short term profitability impacts but also impact on long term expansion plans. Once damaged, it can be

28 Socially responsible behaviour can be described as, ‘an action which goes beyond the legal or regulatory minimum standard with the end of some perceived good rather than the maximisation of profits.’ C Slaughter, ‘Corporate Social Responsibility: A New Perspective’ (1997) 18 *The Company Lawyer* 316, 321.

29 T Burke and J Bakan, ‘Corporate Social Responsibility: The Debate’ (2005) 35 *The Ecologist* 28, 29.

30 Henriques above n 3 at 73.

31 Burke above n 29.

32 J Elkington, *Cannibals with Forks: The Triple Bottom Line of the 21st Century Business* (1998) 86.

33 Frynas above n 26 at 85.

34 KPMG, *International Survey of Corporate Responsibility Reporting 2005* (2005) 5 available at <cc.europa.eu/employment_social/soc-dial/csr/060403/kpmgsurvey2005_en.pdf>.

35 S John and S Thomson, *New Activism and the Corporate Response* (2003) 131.

36 A Weiss, *Managing Corporate Reputation* (2000) available at <<http://www.pwc.com/extweb/indissue.nsf/docid/36DF551F67A0291C85256A3900083554>>.

37 John above n 35 at 132.

very difficult for a company to clean up its image. One example is the Shell Company which suffered a bad reputation after the Nigerian government hung nine environmental activists in a joint effort by the government and Shell to suppress a movement for environmental justice, recognition of human rights and economic justice.³⁸ As a result of bad publicity, the Royal Dutch/Shell Group of Companies revised its 1976 Statement of General Business Principles in 1997 to reflect greater concern for social and environmental issues.³⁹ There is a range of activism that can take place against such corporate behaviour, such as:⁴⁰ online campaigning, telephone campaigns, emails or displays in public arenas and through the media, legal action, boycotts, and lobbying and tactics used not only to target the corporations but anyone associated with them – including directors and shareholders. For example a corporation, engaged in abusing labour standards could experience what is termed as the ‘spotlight effect’.⁴¹ When a corporation enjoys a good reputation, other drivers of CSR include:⁴² increased sales and market share, strengthened brand positioning, increased ability to attract, motivate and retain employees, decreased operating costs and increased appeal to investors and financial analysts. An obligation to act bona fide in the best interests of the corporation is a basic fiduciary duty of any director of any corporation.⁴³ That obligation is owed to the shareholders of the corporation⁴⁴ whose interests are benefited by any increase in shareholder value or other benefit. Therefore, it should be a director’s duty to take CSR into account.

The other view is that CSR has managed to convince people that because corporations are socially responsible, corporations can and should be trusted to self regulate.⁴⁵ It has been argued that CSR can never be a substitute for effective legal regulation because when a company is not regulated the company’s financial interest takes over everything.⁴⁶ It has been stated that it is virtually implausible that a corporation could be responsible in an irresponsible system where no laws are passed to make corporations act in ‘responsible’ ways.⁴⁷

However, not all legal regulation is effective. Companies will be able to and could be trusted to regulate themselves through the adoption of voluntary codes of conduct and through social reporting (as will be discussed in the following chapter). The benefit of CSR over regulation is that it will be better able to identify and deal with social problems the corporation itself creates.⁴⁸ In the case of labour, companies will be better able to incorporate labour standards codes in the company’s voluntary code of conduct, which will better suit the needs of its employees. CSR could conform to suit individual needs of each corporation’s employees and be well informed of what those needs are. Flexibility would allow codes of conduct to be modified with the changing needs

38 Essential Action, *Shell in Nigeria: What are the Issues?* available at <<http://www.essentialaction.org/shell/issues.html#Why%20boycott>>.

39 Frynas above n 26 at 111.

40 John above n 35 at 6, 7, 9, 266–269.

41 ‘Spotlight effect’ is when corporations realize that the benefits of lower cost labour have been weighed against the bad publicity and consumer backlash that their engagement in human rights abuses could generate. Debora Spar, ‘The Spotlight and the Bottom Line: How Multinationals Export Human Rights’ (1998) 77 *Foreign Affairs* 7.

42 P Kotler and N Lee, *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause* (2005) 10–11.

43 J Farrar, *Corporate Governance in Australia and New Zealand* (2001) 103–105.

44 Farrar *ibid* at 106.

45 Burke above n 29 at 29.

46 The state intends to protect the other stakeholders’ interests in the company through regulation.

47 Henriques above n 3 at 73.

48 Tolmie above n 25 at 276.

of employees and changing times. CSR offers speedy responses to any problems that employees may face. Regulation of corporate practices may not offer the remedy needed. In fact, CSR is more focused on precautionary measures rather than remedy based approaches, which makes it more appealing to both the corporations and the stakeholders.

The European Union (EU) has issued a White Paper on CSR⁴⁹ in which it has concluded that so far a voluntary approach is preferable. In some cases, voluntary standards do become the precursor of legislation especially if standard practices are widely accepted and practiced. Ultimately, an effective labour rights regime will comprise binding international laws and an international agency with real enforcement powers. However, since that is not the case at the moment, a voluntary mechanism may well work. What is needed is not a regulatory regime for CSR but a standardised approach which can achieve sustainable development. The World Business Council for Sustainable Development and the International Chamber of Commerce believe that businesses can deliver sustainability through corporate self regulation⁵⁰ which can be done with the adoption of codes of conduct and social reporting.

D. *Corporate Codes of Conduct*

Currently there is no international law on the regulation of the Transnational Corporations (TNCs). What are in place are private codes of conduct. A private 'code of conduct' is a written policy, or statement of principles, intended to serve as the basis for a commitment to particular corporate conduct.⁵¹ Such codes of conduct have strengths and limitations. Strengths are:⁵² they work effectively for corporations where law enforcement is weak, they avoid the process of drafting an international code, the standards set reflect the needs and values of the company and they promote good reputation of the company. Common criticisms include:⁵³ inadequate or lack of enforcement, compliance and monitoring mechanisms, they often do not involve any penalties for non compliance and a code of conduct for a particular TNC may not be applicable across the board especially if it means additional costs. However, it is useful to note that, in the long run, such costs may outweigh the benefits obtained from having a good reputation. The International Labour Organisation (ILO) has found that the proliferation of such diverse private codes of conduct addresses some, but not all, core labour standards.⁵⁴ Creating a labour rights regime fully effective in upholding all core labour standards remains far from achievable. For codes of conduct to be effective, they must be properly implemented and verified. The verification should be developed and performed following carefully defined standards and rules to apply to the organisations and individuals undertaking the so called 'social auditing' (which will be covered in more detail in the later part of this

49 Communication of the Commission on the EU strategy to promote CSR, *Corporate Social Responsibility: a Business Contribution to Sustainable Development* Commission of the European Communities, 2 July 2002. available at <http://ewindows.eu.org/Industry/Reporting/ccc__corporate_responsibility/csr_eu_strategy.pdf>.

50 CorpWatch, Holding Corporations Accountable, *NGOs to Monitor Business Group's Plans for Earth Summit II* (2001) available at <<http://www.corpwatch.org/article.php?id=929>>.

51 M Urminsky (ed), *Self-Regulation in the Workplace: Codes of Conduct, Social Labeling and Socially Responsible Investment* (2001) Management and Corporate Citizenship Programme Job Creation and Enterprise Development Department 13 available at <http://www.ilo.org/dyn/empent/docs/F1936481553/1_mcc_wp.pdf>.

52 Frynas above n 26 at 61.

53 Frynas above n 26 at 62, 63 & 181.

54 ILO, *Corporate Codes of Conduct* available at <<http://www.itcilo.it/english/actrav/telearn/global/ilo/code/main.htm>>.

essay). While social auditing can solve the problem of implementation and monitoring of such codes, standardisation will help ensure that international labour standards are realised through these voluntary private codes of conduct.

1. *Standardisation of Corporate Codes of Conduct*

On 15 January 1999, the European Parliament adopted a Resolution on 'EU standards for European enterprises operating in developing countries: towards a European Code of Conduct' calling for a European corporate code of conduct to contribute to a greater standardisation of voluntary codes of conduct. Such a code would be based on international standards and the establishment of a European Monitoring Platform, including provisions on complaint procedures and remedial action.⁵⁵ Currently there are no international standards on corporate codes of conduct. Codes of conduct on labour standards should be built on those being promoted by the ILO. However, codes should not be restricted to the ILO labour standards. Rather they should be considered as an absolute minimum. A socially responsible corporation would go beyond such standards (since the ILO standards are adopted by ILO only through consensus) to safeguard its employees rights.

Social reporting would not be difficult if the codes of conduct were imposed on corporations by law. However, because they are voluntary, the expectation is that corporations will be transparent and accountable in demonstrating to the general public just how socially responsible they really are! This is so even if the codes of conduct were self imposed and standardised. Hence, the importance of social reporting.

E. *Corporate Social Reporting*

In the late 1960s and early 1970s, many different concepts were developed in the United States and some of the EU countries under the headings of 'corporate social accounting' and 'corporate social audit.'⁵⁶ The intention at the time was to systematically collect, regularly document, and publicly discuss socially relevant information about business activities. However these terms often led to false expectations. They tended to be misinterpreted as referring to a kind of completely quantifiable societal impact accounting.⁵⁷ To avoid misunderstanding and to expand the scope of the models, the broader and more flexible term 'social reporting' was introduced.⁵⁸

Traditional reporting and accounting are based on the entity concept (the economic nature of the organisation) and assumes the concept of going concern (that the entity will continue to operate indefinitely).⁵⁹ However, while social reporting does not ignore the entity concept, it does not assume going concern either, as it is through the concept of corporate social responsibility that a corporation seeks the 'licence to operate.' Social accounting aims to assess the impact of a corporation on people, both internally and externally; i.e. all its stakeholders. Coverage of social topics is discussed by almost two thirds of the corporations, generally, in one or more of four areas:⁶⁰

55 *Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct* [1999] OJ C 104/180.

56 A Antal et al, *Corporate Social Reporting Revisited*, (FS II 02–105) (2002) 1 available at <<http://skylla.wz-berlin.de/pdf/2002/ii02-105.pdf>>.

57 Antal et al *ibid* at 1–2.

58 Antal et al *ibid* at 2.

59 Gray above n 21 at 68.

60 KPMG above n 34 at 5.

core labour standards, working conditions, community involvement and philanthropy.⁶¹ While the majority of companies express their commitment to these issues, reporting social performance remains sketchy. There are several limitations to the existing studies on corporate social disclosures. First, most of the studies involve social disclosures through annual reports and press releases rather than stand alone social reports.⁶² Second, when corporations disclose information in general, it may be strategically oriented to repair lost goodwill or to improve reputation rather than to be transparent and accountable to the general public.⁶³ The aim of the social reports are (supposedly) to achieve corporate social responsiveness by promoting:⁶⁴ informed corporate decisions with full understanding of the implications of any action or behaviour, accountability to the general public through ‘optimal truthful disclosure’,⁶⁵ an understanding of stakeholder expectations and a measurement of progress towards meeting those expectations. Overall, such a reporting system will allow corporations to pursue their profit objective but not in a manner that is responsive to the expectations of society.

1. *Towards Mandatory Social Reporting?*

Voluntary measures do not necessarily make a system unsustainable or irresponsible. However social reporting should not be about the public relations of corporations, glossy reports or extra curricular activities.⁶⁶ Social reporting should be about fundamental analysis of the impact a corporation has on the society in which it operates and on the other stakeholders (in this case employees) and bringing about change in behaviour in the interests of sustainable development.⁶⁷ Although voluntary social reporting is on the rise, if the regime fails to address societal expectations in order to determine corporations’ social responsibilities, then a mandatory system may be necessary. For a voluntary social reporting regime to work, it must be a generally accepted practice, widespread and with reporting of the highest standards.

The EU’s Social Policy Agenda 2006–2010⁶⁸ has already called for social reform. For its agenda on CSR, the European Commission will bring forward proposals to establish mandatory social reporting for all EU companies in their operations in the EU and globally. The EU is of the view that voluntary initiatives are not enough to reverse the unsustainable impacts of corporate activities or to meet the standards set by existing global initiatives. The EU feels that it must take strong action to adopt binding legislation on CSR. This would ensure that all EU companies respect agreed international norms and standards for achieving sustainable development. It is crucial that

61 Philanthropy is a company’s financial contribution towards resolving a social problem. Craig Sasse and Ryan Trahan, ‘Rethinking the New Corporate Philanthropy’ (2007) 50 *Business Horizons* 29.

62 D Hess and T Dunfee, *The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution* available at <<http://lgst.wharton.upenn.edu/dunfeet/Documents/Articles/Kasky-Nike%20TWDfinal1-2005.pdf>>.

63 Hess *ibid*.

64 D Hess, ‘Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness’ (1999) 25 *Journal of Corporate Law* 41.

65 Hess above n 62.

66 Solidar Briefing, *Corporate Social Responsibility: International Action for International Change* (2003) 1 available at <<http://www.solidar.org/English/pdf/CSR%20International.pdf>>.

67 Solidar Briefing *ibid* at 1.

68 Social Platform, *Social Policy Agenda 2006–2010: Proposals from the Social Platform* (2004) available at <<http://www.cev.be/Documents/Social%20Policy%20Agenda%202006-2010%20SocPlatform.pdf>>.

business activities urgently and significantly reduce their negative impacts and work to increase positive benefits.

Advantages of legislation are:⁶⁹ less exploitation of labour, less bribery and corruption, legal consequences for breaches of legal obligations, promotion of a level playing field, good for business (such as reputation, human resources, branding and making it easier to locate in new communities), could help to improve profitability, growth and sustainability, some areas such as downsizing could help to redress the balance between companies and their employees, difficult for rogue companies to compete through lower standards and the wider community would benefit as companies reach out to the key issue of underdevelopment around the world.

Disadvantages of legislation are:⁷⁰ additional bureaucracy with rising costs for observance and costs of operation could rise above those required for continued profitability and sustainability. Critics already argue that the CSR of companies is simply to make a profit (and legislation would increase the vocalization of these concerns) and reporting criteria in its constant evolution vary so much by company.

Hence a mandatory system may not necessarily be the answer at this stage. What is suggested for now is that the experiments with mandatory reporting systems currently underway in Europe be closely studied in order to determine the more viable option. However, since voluntary social reporting is still widely practiced by those who do so, Hess has suggested that the way to achieve stakeholder expectations in such a system is through public policy supporting the production and integrity of corporate social reports, which can be achieved through:⁷¹ (1) greater standardization, (2) third party assurance and (3) liability rules for false or misleading statements. All these will be explored in turn.

2. Standardised Reporting

Currently there are no agreed set of international guidelines for corporate social reporting. The European Commission's Green Paper on the development of a European framework for encouraging corporate social responsibility advocates reaching an international consensus on reporting. It acknowledges that a 'global consensus needs to evolve on the type of information to be disclosed, the reporting format to be used, and the reliability of the evaluation and audit procedure.'⁷² Currently, few corporations do social reporting and those that do may be inconsistent in doing so. Even if they do report, the report may not cover every aspect of workers' rights and working conditions. Poor standards of reporting means that either the information disclosed in the report is done strategically, which does not properly reveal the extent to which the corporation is complying with labour standards and/or the report cannot be accurately interpreted. In other words, the quality of the social reports may not compare with the standard of financial reporting obligations and disclosure. One explanation offered for there being no standard for social reporting is because the nature of each report depends upon the variety of issues it covers, the range of stakehold-

69 M Hopkins, *Corporate Social Responsibility: an Issues Paper*, Policy Integration Department World Commission on the Social Dimension of Globalization, International Labour Office, Working Paper No. 27, (2004) 7 available at <http://www.ilo.org/public/english/bureau/integration/download/publicat/4_3_285_wcsdg-wp-27.pdf>.

70 Hopkins *ibid* at 8.

71 Hess above n 62.

72 Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibility* (2001) available at <http://portal.etsi.org/public-interest/Documents/policy%20documents/SocialResponsibility/com2001_366.pdf>.

ers for whom it is intended and what the reporting organisation is trying to achieve.⁷³ However, standardisation is inevitable if the problem of strategic disclosure is to be overcome. Standardisation requires that all social reports contain disclosure on specified matters, thereby preventing selective disclosure. It also requires reports to be presented in a manner that allows for comparison with other corporations' social reports. Once reports are standardised, the corporations would not be able to omit any information unfavourable to the company in any given time. It also requires consistent reporting over time. Social reporting is not a 'one off rubber stamp'.⁷⁴ For this purpose, Global Reporting Initiative (GRI) could be used as a standard social reporting format.

GRI⁷⁵ is an international social auditing and reporting mechanism which has pioneered triple bottom line reporting.⁷⁶ Its guidelines provide a framework of appropriate indicators of performance that identify and require corporations to report on many of the issues that have been identified as important to stakeholder groups.⁷⁷ GRI separates corporate performance into economic, environmental and social indicators. Social performance indicators concern an organisation's impacts on the social systems within which it operates.⁷⁸ They are grouped into three clusters:⁷⁹ labour practices (e.g., diversity, employee health and safety), human rights (e.g., child labour, compliance issues) and broader social issues affecting consumers, communities, and other stakeholders (e.g., bribery and corruption, community relations). However, because many social issues are not easily quantifiable, GRI requests qualitative information where appropriate. Social reporting on labour standards can be further standardized with the adoption of Social Accountability 8000 (SA8000) where specific disclosures regarding labour standards are required.

SA8000 Standard is primarily concerned with workplace practices and the need for companies to comply with national labour laws and international labour standards. It was in response to the diversity of codes of conduct that Social Accountability International developed a system for independently verifying corporate compliance with labour standards, based on key elements of the ILO's conventions and the management systems of the International Organisation for Standardisation.⁸⁰ It specifies that a social report on labour standards should include:⁸¹ child labour, forced labour, health and safety, collective bargaining, discrimination, disciplinary practices, compensation, and management systems.

GRI and SA8000 are complementary.⁸² While GRI provides companies with specific indicators and an overall reporting structure for economic, environmental and social performance, SA8000 adds elements necessary for social auditing and helps companies track progress of workplace performance. To date, nearly 1,000 organisations in over sixty countries are involved with

73 Henriques above n 3 at 24.

74 Solidar Briefing above n 66 at 2.

75 The GRI Guidelines are essentially becoming the equivalent of Generally Accepted Accounting Principles for social reporting.

76 D Leipziger, *The Corporate Responsibility Code Book* (2003) 425.

77 S Cooper, *Corporate Social Performance: A Stakeholder Approach* (2004) 11.

78 Global Reporting Initiative, *Sustainability Reporting Guidelines 2002* (2002) 51 available at <www.epeat.net/Docs/GRI_guidelines.pdf>.

79 Cooper *ibid*.

80 Commission of the European Communities above n 72 at 17.

81 Social Accountability International, *Overview of SA8000* (2007) available at <<http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473>>.

82 Social Accountability International, *GRI SA 8000 Comparison (Case Study)* (2005) available at <<http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=61>>.

sustainability reporting using the GRI guidelines⁸³ and there are currently 1,315 SA8000 certified facilities in sixty three different countries and seventy different industries, employing 647,203 labourers.⁸⁴

3. *Audit of Social Reports*

For any reporting to be meaningful, there has to be some independent accountability mechanisms or standards in place to hold company reporting in check. Such standards should provide clear guidance to auditors on their roles and responsibilities while at the same time increasing the credibility of the social reports.⁸⁵ The purpose of social auditing is for a corporation to assess its social performance in relation to society's expectations. Independent assurance remains a valuable part of reporting. Hence the auditors of social reports are to be independent from the corporation. The percentage of social reports that are independently audited is quite low. However, according to KPMG, the number of reports with assurance statements have increased.⁸⁶

Social auditor independence requires specific standards. Initiatives such as the Institute of Social and Ethical AccountAbility's AA1000.⁸⁷ Standards such as AA1000 Assurance Standard, for social or sustainability report auditing, should be taken into account. Launched only on 25 March 2003, in 2004 a reported 101 organisations and assurance providers were using the AA1000 Assurance Standard. The AA1000 Assurance Standard is based upon three so called 'Assurance Principles':⁸⁸ 'materiality',⁸⁹ 'completeness'⁹⁰ and 'responsiveness'.⁹¹ For the Association of Chartered Certified Accountants Awards for Sustainability Reporting 2005, the winners of both the 'best sustainability report' and the 'best social report' were members and users of the AA1000 Assurance Standard.⁹² It has already been suggested that the AA1000 Assurance Standard fundamentally complements the GRI (and the SA8000) by providing a basis for independent third parties to assure and verify sustainability, or more specifically social reporting, in order to prevent publication of misleading reports.

83 Global Reporting Initiative, *About GRI-What We Do* (2007) available at <<http://www.globalreporting.org/AboutGRI/WhatWeDo/>>.

84 Social Accountability International, *SA8000-Certified Facilities Summary Statistics* (2007) available at <<http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=745>>.

85 Hess above n 62.

86 Social Accountability International above n 34 at 5.

87 Institute of Social and Ethical AccountAbility, *AA1000 Series: AA1000 Assurance Standard* (2003). available at <<http://www.accountability21.net/default.aspx?id=122>>.

88 Institute of Social and Ethical AccountAbility *ibid*.

89 The report covers all the areas of performance that enables stakeholders to judge the organisation's sustainability performance.

90 The information disclosed has to be complete and accurate enough to assess and understand the organisation's performance in all these areas.

91 The organization has to respond coherently and consistently to stakeholders' concerns and interests.

92 Institute of Social and Ethical AccountAbility, *News and Events: AccountAbility Members and AA1000AS Adopter among the winners at this year's ACCA Awards for Sustainability Reporting* (23 February 2005) available at <<http://www.accountability.org.uk/news/default.asp?id=150>>.

4. *Liability for Misleading Reports*

Misleading statements can be classified as false advertisements, for which a corporation could incur liability as in *Kasky v Nike*.⁹³ However, damage to a company's reputation, a highly valuable asset, can mean more damage than any liability imposed by a court. Hence I would disagree that there ought to be laws for misleading reports. Problems can be overcome by social auditor independence plus activism (as has been discussed earlier). This is so as not to discourage voluntary social reporting which is so widely practiced by corporations and are on the rise, not only globally but in New Zealand as well.

IV. IMPACT OF CSR ON NEW ZEALAND CORPORATIONS

There are fifteen statutory provisions in the NZ legislation that have grasped the concept of CSR by imposing an obligation upon Crown entities to exhibit a 'sense of social responsibility.'⁹⁴ While local councils do not have to exhibit a sense of social responsibility, they have a legal obligation to promote 'social responsibility.'⁹⁵ Of these fifteen statutes, only four talk about the principle of being a 'good employer.'⁹⁶ The 'good employer' provisions provide that an employer, as necessary for fair and proper treatment of employees in all aspects of their employment, must provide:⁹⁷ good and safe working conditions, an equal employment opportunities programme, impartial selection of suitably qualified persons for appointment, and opportunities for the enhancement of the abilities of individual employees. The 'good employer' must also recognise:⁹⁸ the aims and aspirations and employment requirements, the cultural differences of ethnic or minority groups, employment requirements of women, employment requirements of persons with disabilities, aims and aspirations of Maori people, employment requirements of Maori people and the need for greater involvement of Maori people in the Public Service. While not all statutory reference to the principle of being a 'good employer' is defined, reference to this principle currently appears in a variety of public, private and local Acts and are included in a number of Bills currently under consideration by Parliament. It is important to note however, that this obligation is seen outside the concept of corporate social responsibility since social responsibility is generally attributed to serve the interests of the local community members in which these entities operate, not the employees that they

93 *Kasky v Nike* 27 Cal 4th 939 (SCt Cal, 2002).

94 Crown Research Institutes Act 1992 s 5(1)(f); Health and Disability Services Act 1993 s 11(3)(a); Housing Corporation Amendment Act 2001 s 3B(a)(i); Housing Restructuring (Income Related Rents) Amendment Act 2000 s 3(1)(a); Land Transport Management Amendment Act 2004 s 68(2); Local Government Act 2002 s 59(1)(c); Local Government (Auckland) Amendment Act 2004 s 8(2); New Zealand Public Health and Disability Act 2000 s 22(1)(g); Public Trust Act 2001 s 9(e); Racing Act 2003 s 9(2)(b); Radio New Zealand Act 1995 s 8(1); Reserve Bank of New Zealand Act 1989 s 169; Southland Electricity Act 1993 s 4(1)(c); State Owned Enterprises Act 1986 s 4(1)(c); Television New Zealand Act 2003 s 12(3)(c).

95 Standards Amendment Act 2006 s 10(1)(f).

96 Local Government Act 2002 s 59(1)(b); Local Government (Auckland) Amendment Act 2004 s 8(3)(f); New Zealand Public Health and Disability Act 2000 s 22(1)(k); and Health and Disability Services Act 1993 s 11(3)(c).

97 First appeared in State Sector Act 1988 s 56(2) and later adopted by other legislations as well the most recent being Lawyers and Conveyancers Act 2006, Schedule 5, s (7)(2).

98 *Ibid.*

employ.⁹⁹ While the private business sector is not obligated by the concept of social responsibility, their behaviour is governed by the principles of 'good employer' and 'good faith.'¹⁰⁰

The business sector is not expressly required by law to be a 'good employer.' However, it has been held by Judge Colgan that the principle of being a 'good employer' applies 'expressly or by common law, as much to non State sector employers as to the public service.'¹⁰¹ The principle of being a good employer requires that they act in 'good faith,' which affects all aspects of the employment environment and the employment relationship.¹⁰² The principle of 'good faith' has not been defined statutorily but it certainly goes beyond the mutual obligation not to breach 'trust and confidence' of their employees.¹⁰³ The duty of good faith 'requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative, and supportive.'¹⁰⁴

Hence, while the concept of corporate social responsibility has not been expressly extended to legally govern employment relations both within the business and public sectors, it is not fully absent from legislation and can be implied to operate under the principles of 'good employer' and 'good faith'. In fact under the Crown Entities Act some employers are actually required to include in their annual report information to demonstrate compliance with the obligation to be a good employer.¹⁰⁵ While New Zealand businesses do not have a similar obligation¹⁰⁶ except for financial reporting,¹⁰⁷ nevertheless this does not prevent local businesses from demonstrating that they can be socially responsible.

A. *Codes of Conduct for New Zealand Businesses?*

There are very few local businesses who have adopted codes of conduct for dealing with employment relations in New Zealand. The reason is that the labour regime in New Zealand is heavily regulated via seventeen pieces of legislation in total.¹⁰⁸ Hence a voluntary measure is not required as legal obligations owed to employees are already imposed on the business sector. Nevertheless, because local businesses setting up businesses abroad are not bound by legal obligations to be a

99 Crown Research Institutes Act 1992 s 5(1)(e); Housing Restructuring (Income Related Rents) Amendment Act 2000 s 3(1)(d); Local Government Act 2002 s 59(1)(b); New Zealand Public Health and Disability Act 2000 s 22(1)(k); Public Trust Act 2001 s 9(d); Reserve Bank of New Zealand Act 1989 s 168; Southland Electricity Act 1993 s 4(1)(b); State Owned Enterprises Act 1986 s 4(1)(b).

100 Employment Relations Amendment Act (No 2) 2004 s 4(1).

101 *French v Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325, 349 para 98.

102 Employment Relations Act 2000 ss 3 & 4.

103 Employment Relations Amendment Act (No 2) 2004 s 5(1)(1A)(1)(a).

104 Charles Baird, 'Back Toward Surfdom in New Zealand' (2004) 54 *Freeman* 47.

105 Crown Entities Act 2004 s 151(1)(g).

106 The only information legally required regarding employees in the annual reports are employees' remuneration. Companies Act 1993 211(1)(g).

107 As required under the Financial Reporting Act 1993.

108 The labour regime is governed by: Accident Rehabilitation and Compensation Insurance Act 1992; Accident Insurance (Transitional Provisions) Act 2000; Disabled Persons Employment Promotion Act 1960; Employment Relations Act 2000; Equal Pay Act 1972; Fair Trading Act 1986; Health and Safety in Employment Act 1992; Holidays Act 2003; Human Rights Act 1993; Industry Training Act 1992; Minimum Wage Act 1983; Parental Leave and Employment Protection Act 1987; Privacy Act 1993; Protected Disclosures Act 2000; State Sector Act 1988; Volunteers Employment Protection Act 1973; and Wages Protection Act 1983.

'good employer' and to act in 'good faith' off shore, they may want to engage in social reporting to demonstrate that they are socially responsible both at home and abroad. Even though New Zealanders are more concerned with New Zealand's 'clean green' image than with social reporting because of the tight labour regime in New Zealand, they may still expect that social reports on labour standards are made available to them if local companies are based in overseas countries especially in those with low labour standards. Therefore, accountability for labour rights may not necessarily be in regard to employment issues at home but abroad. More so in the developing countries. So far, New Zealand examples of social indicators regarding employees include:¹⁰⁹ staff satisfaction, lost time injuries, health and safety, staff pride, investment in sabbatical fellowships, staff training, perception of work flexibility, staff turnover, workforce diversity and perceptions of job security. These are but a few of the social indicators identified by SA8000. Even if local businesses do not have voluntary codes of conduct, those thinking of setting up business abroad should think about adopting standardised codes of conduct that incorporate labour standards so they can engage in standardised social reporting.

B. *Standards of Social Reporting in New Zealand*

Social reporting in New Zealand remains voluntary.¹¹⁰ Thus there is no set of guidelines for standardised social reporting on labour standards. The social reporting regime within the business sector in New Zealand is actively encouraged and supported by the New Zealand Business Council for Sustainable Development (NZBCSD) and the Ministry for the Environment. The NZBCSD, in collaboration with the Ministry for the Environment, has produced 'Business Guide to Sustainable Development Reporting: Making a Difference for a Sustainable New Zealand' (Business Guide to Sustainable Development Reporting)¹¹¹ as a guideline to help New Zealand businesses in the preparation of triple bottom line or sustainable development reports. This Guide employs the principles of GRI for development of indicators for accounting and reporting and the AA1000 framework for generating stakeholder engagement.¹¹² Out of 54 members of NZBCSD, 19 companies are actively involved in sustainable development reporting.¹¹³ An overview of the four case studies, chosen by the NZBCSD for sustainable development reporting, show either a mere reference to workplace standards policy and its assessment in general,¹¹⁴ or include specific social

109 NZBCSD, *Sustainable Development Indicators from GRI* (2007) available at <<http://www.nzbcscd.org.nz/sdr/content.asp?id=80>>.

110 A review of the Financial Reporting Act 1993 did propose that it may be appropriate to set standards for non financial measures be reported however this has not eventuated as yet. Ministry of the Environment, *III: Financial Reporting Standards*, (2004) [79] available at <http://www.med.govt.nz/templates/MultipageDocumentPage___3740.aspx#P291_66882>. Also The Warehouse has demanded legislative actions to make sustainable development reporting mandatory however this has been opposed by a taskforce of the Institute of Chartered Accountants of New Zealand. New Zealand Business Roundtable, *Making Sense of Sustainable Development* (2002) 2 available at <http://www.nzbr.org.nz/documents/speeches/speeches-2002/making_sense_development.pdf>.

111 NZBCSD, *Business Guide to Sustainable Development Reporting: Making a Difference for a Sustainable New Zealand* (2002) available at <http://www.nzbcscd.org.nz/sdr/SDR_Guide.pdf>.

112 NZBCSD *ibid* at 18 and 19.

113 NZBCSD, *Sustainable Development: Member Involvement* (2007) available at <<http://www.nzbcscd.org.nz/sdr/content.asp?id=95>>.

114 The Warehouse, *2006 Society and Environment* (2006) 19-22 available at <<http://www.thewarehouse.co.nz/Content.aspx?id=100000285>>.

performance indicators regarding labour standards or policy, ranging from one to seven pages,¹¹⁵ indicating that even with the guidelines, sustainable development reports are far from reaching any standards in New Zealand yet. However, it is expected that the content of Sustainability Reports will bend towards more quantitative reporting over time, to enable comparisons to be made against a previous year's reports or comparative organisations.¹¹⁶

C. Fonterra – A Local Case Study

Fonterra Co-Operative Group Ltd (Fonterra) is New Zealand's largest company and exporter. It offers a wide range of employment opportunities in over 140 countries, with more than 20,000 roles across the globe. It signed an agreement committing itself to international labour standards for its employees in 2002, which applies to Fonterra and to its subsidiaries globally.¹¹⁷ Upon signing this agreement, Fonterra's chief executive Craig Norgate said, 'Our company is focussed on the highest possible standards of ... social performance. We see no contradiction between [financial, environmental and social] measures of performance. They are entirely complementary ...'¹¹⁸ The agreement commits Fonterra to:¹¹⁹ respect the principles in various key ILO Conventions including the right to freedom of association and collective bargaining for all its employees, provide safe and healthy working conditions for its employees and shall not use child labour, forced or compulsory labour or discriminate against any person in respect of their employment, provide affected employees' trade unions with relevant information and to consult with these unions when it contemplates changes to business activities likely to result in a loss of jobs. The New Zealand Council of Trade Union's president Ross Wilson said that the agreement was 'an important signpost to the sort of behaviour being expected of responsible corporations operating on a multinational scale.'¹²⁰

Fonterra has also adopted a business code of conduct titled 'The Way We Work – Fonterra's Business Code of Conduct',¹²¹ which deals with values and principles in all business matters

115 Urgent Couriers Limited, *Sustainable Development Report for Urgent Couriers Limited* (2001) 8–14 available at <http://www.nzbcso.org.nz/_attachments/Urgent%5FCouriers%5FSDR%2Edoc>; Landcare Research Mannaki Whenua, 2006: *Annual Report* (2006) available at <http://www.landcareresearch.co.nz/publications/annualreport_0506/>; Sanford Limited, *Sustainable Development Report 2003* (2003) 70–76 available at <http://www.nzbcso.org.nz/_attachments/Sanford%5F2003%5FSDR%2Epdf>; and MWH New Zealand Ltd, *Sustainable Development Report Year Ending December 2004* (2004) 5–9 available at <<http://www.mwhglobal.co.nz/Files/MWHSusDevReport2004.pdf>>.

116 J Leong and M Werner, 'Profit vs. Passion: Triple Bottom Line Reporting' (2005) 1 *Ianorth&south New Zealand & the World of Internal Auditing: a Newsletter for Internal Auditors in New Zealand* 4 available at <<http://www.iianz.co.nz/members/resources/Newsletter%20September2005.pdf>>.

117 Fonterra Co-operative Group Ltd, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers' Association and New Zealand Dairy Workers Union Incorporated, *Fonterra and International and New Zealand Unions Sign Agreement on Labour Standards and Changes in Business Activities Affecting Employment* (2002) available at <http://www.nzbcso.org.nz/_attachments/union%5Fagreement%2Epdf>.

118 C Norgate, 'Remarks at Signing of Agreement with IUF and New Zealand Dairy Workers' Union' (Speech delivered at the Beehive Foyer, Parliament Buildings, Wellington, 8 April 2002) available at <http://www.nzbcso.org.nz/_attachments/Norgate%5FUnion%5FSpeech%2Epdf>.

119 Norgate *ibid*.

120 M Dearnaley, 'Global Giant Signs for Workers' Rights', *New Zealand Herald* (Auckland), 10 April 2002.

121 This code is not available online but see Fonterra, *Corporate Governance: Ethics* (2007) available at <<http://www.fonterra.com/wps/wcm/connect/fonterra.com/fonterra.com/Our+Business/Fonterra+at+a+Glance/Financial+and+Statutory+Information/Corporate+Governance/Ethics>>.

including employment issues such as: moral courage and leadership, dignity and respect, work environment and hours of work, fair treatment and diversity, harassment, health and safety, child labour and privacy. This Code of Conduct is not limited to any particular country or plant but governs Fonterra's ethical conduct in all its operations and does not act as a substitute for its policies.¹²² While it is clear that Fonterra has taken steps to become socially responsible towards its employees, it has not taken similar steps to make optimal truthful disclosure.

A review of Fonterra's 2005–2006 Annual Report reveals that while Fonterra has made reference to its Code of Conduct, it has not identified any social indicators to disclose its social performance in a meaningful way.¹²³ In other words, Fonterra is not engaging in social reporting or sustainable development reporting in accordance with the guidelines provided under Business Guide to Sustainable Development Reporting despite being involved in the sustainable development reporting initiative undertaken by the NZBCSD. Since there is no significant disclosure, meaningful social independent auditing is also inevitably absent.

Therefore, while Fonterra has signed up for labour standards, has voluntarily adopted a Code of Conduct and has made efforts to include a social performance dimension in its annual report, it is still far from producing a comprehensive sustainable development report, as would be desirable especially if Fonterra wants to compete within a framework of sustainable development. However, actions taken by Fonterra so far are indicative of a climate change for local businesses in New Zealand operating abroad, who want to be seen as socially responsible because they know that it makes business sense to do so.

V. CONCLUSION

While labour standards have found a new protector, the corporations have also discovered an added value for business in the 21st century. High on the corporate agenda will be a focus on sustainable development, triple bottom line reporting, auditor independence and socially responsible business practices. The ethics of the voluntary codes of conduct and social accountability and reporting, which now constitute a key feature of globalisation, will not go away. Rather the need for accountability and transparency will continue to grow. The faster the corporations close the gap between societal expectations and its performance, the more likely it will be able to sustain itself long term. The essence of the 'business case' for corporations is to be socially responsible and the privatisation of labour standards.

122 Fonterra, *2005–2006 Annual Report* (2006) 41 available at <<http://www.fonterra.com/wps/wcm/connect/06a3ed00452c4bd39baedf873d7e2c80/05-06FonterraAnnualReportFinal.pdf?MOD=AJPERES>>.

123 Fonterra *ibid*.

BOOK REVIEW

ELECTRONIC EVIDENCE: DISCLOSURE, DISCOVERY & ADMISSIBILITY, by Stephen Mason (General Editor), LexisNexis Butterworths, 2007, lxxiv and 551 pp including index. New Zealand price \$359 (hardcover).

Increasingly much of what is tendered in courts as evidence depends to some extent on digital technology. This book is the result of a significant endeavour to provide insights for legal personnel and students into the complexities of electronic evidence. As the preface notes, lawyers and judges now routinely deal with digital evidence, often despite being unaware that they do so. Accordingly, the book advises that as electronic evidence pervades all areas of law, lawyers must ensure they are acquainted with its intricacies. Add to this the somewhat alarming way in which virtual world disputes are being litigated in real world courts, and it becomes increasingly difficult to argue that electronic evidence is a specialist area of legal practice.

The range of available electronic evidence is vast – the preface gives a number of examples ranging from the regularly relied upon email, to videos taken on mobile phones, to the use of spyware in an industrial espionage case. There are innumerable others, and New Zealand readers will immediately think of our own notorious examples. Mark Lundy's mobile phone helped to pinpoint his whereabouts at the time his wife and daughter were murdered, and one of the central facts at issue in the Bain trial was who left the infamous message on the family's computer.

The book is edited by Stephen Mason who also contributes the first four chapters on general matters such as sources and characteristics of digital evidence; investigation and examination of digital evidence; and laying the evidential foundations. The remaining chapters are written by specialist contributors, all of which bar one cover jurisdictional approaches to the issue of electronic evidence. The exception is Chapter Five, by Dr Damian Schofield and Lorna Goodwin, on graphical technology in the courts.

Chapter One provides a necessary explanation of the technical issues involved, greatly assisted by the comprehensive glossary that precedes it. While most of us may know how to use a computer, understanding how one works is an entirely different matter. Yet assessing and using the electronic evidence available in any given case requires at least a rudimentary knowledge of the sources of digital evidence. Thus, Chapter One canvasses the basic principles including those involved in information storage and retrieval; the different types of files found on a computer including system and program files, temporary and cache files and deleted files; and some of the particular problems that are created by, for example, malicious software and encryption techniques. In respect of the latter Mason provides an interesting example. While one ordinarily thinks of encryption as beneficial in terms of security of data when engaging in online banking, for instance, it is also used by persons engaging in criminal activity to hide their activities when using the internet and email. Obviously this poses problems for investigators, who need to ascertain the content of encrypted files. In a child pornography case, *United States of America v Hersh aka Mario* (United States Court of Appeals for the Eleventh Circuit No 00-14592 July 17, 2002 before Anderson and Marcus, Circuit Judges, and Middlebrooks, District Judge), a Zip disk containing encrypted files was found in Hersh's possession. On Hersh's computer, investigators found software used to encrypt the files on the Zip disk. Obtaining a partial source code from the

manufacturer, the investigators were able to interpret certain information about the files on the Zip disk, including file names containing words that were consistent with child pornography. The list of files was compared against a government database of child pornography, which revealed that 120 of the files on Hersh's disk matched names on the database, and 22 of those had the same number of computer bytes as the files on the database. Thus, even though decryption was not possible, investigators established a sufficient link between the files possessed by Hersh and evidence of child pornography already known to authorities.

Chapter One also notes that the computer clock figures large in digital evidence. Again the cases of Lundy and Bain provide New Zealand examples in which the times computers were turned on or off were relevant to establishing times of death. Mason illustrates by reference to the notorious English case of Harold Shipman, the doctor convicted for intentionally killing a large number of his patients. It was alleged that Shipman altered medical records after the killings to give the appearance that the patients had been ill for a time prior to death. An expert gave evidence that it was possible to alter information in the records and then change the date of the computer clock to hide the fact that the alterations had been made. As Harold Shipman discovered in the course of his prosecution, while it is possible to change the clock on the computer to hide the fact that records have been retrospectively altered, it is almost impossible to hide, at least from a forensic examiner, the fact that the clock itself had been changed.

Thus, as the book makes clear, computers can produce large quantities of evidence even where every attempt is made to delete or hide files. For instance, investigators can look for evidence of email traffic, long after emails have been deleted. Furthermore, a great deal of skill is required to remove all traces of activity, and such skill is rare.

In continuing to lay the foundations for an understanding of electronic evidence, Chapter Two discusses the characteristics of electronic evidence, noting firstly the distinction between analogue and digital forms of data. One of the significant characteristics of digital data is its metadata, or 'data about data' such as when a document was created, by whom (ostensibly), the file type, and when it was last modified. Metadata, in digital documents, is generally hidden from the text viewed on a screen but such information is crucial in interpreting the evidential value of the digital data.

Compared with other forms of forensic analysis, the investigation and examination techniques associated with digital evidence are still quite new. Chapter Three looks at the role that experts play in identifying, gathering, analyzing and preserving digital evidence. Mason notes that there is recognition within the field of the need to distinguish between the different roles an investigator may have in these areas. He refers to three broad categories of personnel engaged in digital evidence forensics – technicians who responsible for gathering data, examiners who process particular kinds of evidence, and investigators who have responsibility for the overall investigation – each of which requires distinct levels of training.

This thread is picked up again in the next chapter, with the point that in order to establish the reliability of digital data, it is necessary to ensure that the relevant witness is qualified. Chapter Four thus canvasses evidential issues and the challenges inherent in laying a foundation for such evidence, particularly where authenticity and reliability questions arise. Mason also clears up a common misunderstanding in noting that it is not always so that intricate details of a computer's operating system are required for electronic evidence to be admitted. He points to email as an example – the fact that email can be forged is not a ground for such evidence to be automatically excluded, as in that regard there is nothing distinguishing emails from paper documents in their susceptibility to alteration or forgery.

With a topic this technically complex, particularly in a book of this length, there is a risk of the text becoming tedious. Mason avoids this by infusing the subject with vivid examples, such as the ones referred to above. This allows the reader to engage more readily with the subject matter, and is a skill also demonstrated to varying degrees by other authors.

In the first of the chapters authored by specialist contributors, Dr Damian Schofield and Lorna Goodwin tackle the use of graphical technology to present evidence in Court, noting that the increase in the use of such technology is supported by research that suggests that jury members retain a greater proportion of visually presented information than information orally presented. The authors refer to a number of cases in which computer-generated animations, for instance crime scene reconstructions, were used to explain the issues to juries.

Chapters Six to Sixteen cover, in alphabetical order, the evidential issues arising and relevant law applicable in Australia, Canada, England and Wales, Hong Kong, India, Ireland, New Zealand, Scotland, Singapore, South Africa, and USA. The wide-ranging coverage is one of the book's strengths, bearing in mind that while all jurisdictions covered have a common law basis, there is significant variance in approach to evidential issues. While Mason notes that the section on England and Wales is larger than the others due to the publisher's requirements, the remaining chapters do not suffer in terms of depth. There is a shift in style, but this is expected in a book to which a number of authors contribute, and it does not detract from the readability of the book.

New Zealand's approach to electronic evidence is covered in Chapter Twelve which is authored by Laura O'Gorman, a partner at Buddle Findlay. O'Gorman records the passing of the Evidence Act 2006, which has subsequently (on 1 August 2007) come into force. Interestingly, since the Act's commencement one of the Court of Appeal's first decisions under the Act, *R v Petricevich* [2007] NZCA 325, concerns the admissibility of evidence of text messages used to identify an alleged drug dealer.

O'Gorman points out that in New Zealand there are guidelines for electronic crime investigation which prevent police officers involved in conducting searches from examining any electronic equipment found. Instead any such equipment is to be removed and examined by forensic experts. This is due to the fact, as pointed out earlier in Chapter Four, reliability issues arise if the person giving evidence of the data gathered is not qualified to do so.

As O'Gorman points out, in New Zealand at least much of the wording in statutes is intended to be technology-neutral, so that it can be applied in an ambulatory way. The desirability of this approach is supported by the authors of Chapter Ten (India). Manisha T Karia and Tejas D Karia refer to the recognition by the Indian Supreme Court that if the law does not respond to the needs of a changing society progress can be stifled. The law must therefore adapt to the speed of technological change. While it is true that many of the general admissibility principles apply to electronic evidence as they do to other types of evidence, because digital evidence is so pervasive, complex, and less readily understood than other types of evidence, it is essential that lawyers litigating in any field develop an understanding of what electronic evidence may be available, what its limitations are, and how it is to be presented in Court. Accordingly, this book is a timely addition to the range of available Evidence texts. It also dispels many of the common misconceptions about the nature of electronic evidence which, combined with the plethora of examples provided, serves to make the subject matter much easier to comprehend and manage.

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