

WAIKATO LAW REVIEW

TAUMAURI

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EDITOR'S INTRODUCTION

Welcome to the 2008 edition of the Waikato Law Review! I am pleased to be able to present a selection of interesting and diverse articles from established, if not renowned, legal academics as well as from practitioners and emerging academic authors. I am especially grateful to those authors who have followed through on previous articles and have written updates and sequels. One in particular, on the issue of high country leases, by John Page and Ann Brower, keeps us up to date with developments since the publication of last year's Waikato Law Review. From Queensland comes a second insight into the continuing development of innovative teaching using all the available technological resources by Tracey Carver and Tina Cockburn. Nearer to home is the latest contribution from Linda Te Aho on contemporary Māori law and society.

Several themes are apparent in this year's Review. The first of these concerns the legal profession. The Hon Justice Paul Heath's Harkness Henry lecture, is on the judge's role in 'hard cases' and following that we have Professor Webb's article on professionalism, Morne Olivier's piece on the Supreme Court and Les Arthur's paper on solicitors' professional liability. Brenda Midson, Rebecca Rose, Thomas Gibbons and Juliet Chevalier-Watts examine issues arising out of existing aspects of law while Andy Schmulow, Chye-ching Huang, Richard Annandale, Isabel Flay and Jeremy Upton highlight areas that are ripe for potential reform.

I would like to acknowledge the continuing support of Harkness Henry & Co. Also I want to thank Janine Pickering for her unfailing good nature in the face of adversity and her invaluable help in the preparation of the Waikato Law Review. I also owe a debt of gratitude to the authors from New Zealand and around the world for their contributions and to all those who acted as referees.

Sue Tappenden
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THE HARKNESS HENRY LECTURE

HARD CASES AND BAD LAW

THE HON JUSTICE PAUL HEATH*

I. INTRODUCTION

'Hard cases make bad law' is a well known legal phrase. It describes a difficult case which might cause the clarity (or purity) of the law to be obscured by exceptions and strained interpretations, designed to achieve justice in a particular case. The underlying idea expressed in the phrase is the need for all courts to apply statutes and binding precedents in a manner that produces consistency in the application of the law.

Some Judges have balked at the notion that statute and precedent could be applied to produce an unjust result. Those Judges who subscribe to that view would put the proposition differently: 'Bad law makes hard cases'. In *Re Vandervell's Trusts (No 2)*,¹ Lord Denning MR said:

[Hard cases make bad law] is a maxim which is quite misleading. It should be deleted from our vocabulary. It comes to this: 'Unjust decisions make good law'; whereas they do nothing of the kind. Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it.

I was sworn in as a Judge of the High Court of New Zealand at Hamilton in April 2002, having practised (primarily) as a commercial litigator for some 20 years. In the latter part of my career at the Bar, between 1997 and 2002, I had served (initially) as a Consultant and (later) a Commissioner at the Law Commission. I thought my experience as an advocate, an adviser and as someone engaged in law reform was an adequate foundation to understand the nature of the judicial role. I was mistaken. I soon discovered that there are aspects of the judicial role that are obscured from non-judicial eyes.

With the confidence exhibited only by inexperience, I expressed the view, at my swearing-in, that an important facet of judicial decision-making was the need to ensure predictability of outcome. My experiences with the Law Commission had led me to the view that courts were ill-equipped to make difficult policy decisions, primarily because parties to particular litigation are interested in winning, not in developing the law; for that reason relevant policy information is rarely available. Further, Courts lack the benefit of wider consultative procedures available to policy makers or Parliamentary select committees.

When I was invited to give this lecture, I thought this might be an appropriate time to reflect on those initial views and to ask whether, after six and a half years on the Bench, I adhere to them. Do I remain in the 'hard cases make bad law' camp? Or, have I gone over to the other side?

* Judge of the High Court of New Zealand, Auckland. I thank Hayley Derrick, LLB (Hons)(Waikato), Judge's Clerk, High Court Auckland for her assistance in the preparation of this paper.

1 [1974] Ch 308 (CA), 322.

This is not a scholarly paper. My purpose is to explore the nature of the judicial role, both at first instance and on appeal, and consider various approaches to the judicial task. In doing so, I have drawn upon the approaches of two long-serving Judges of the Court of Appeal and the writings of another Judge of that Court and an academic.

II. THE JUDICIAL TASK

Many judges, far more experienced and eminent than I, have written or spoken about approaches to the task of judging. On occasion the term ‘judicial philosophy’ is used; on others, the more mundane phrase ‘judicial method’ suffices. However the issue is characterised, the approach that a Judge brings (consciously or subconsciously) to his or her role undoubtedly affects the nature and quality of his or her decisions.

As the Chief Justice of Canada, Rt Hon Beverley McLachlin, observed during the course of a lecture at this University in 2003, while Judges must be ‘impartial’, they remain ‘inescapably human, possessed of the loyalties and passions, the convictions and preconceptions that are the gifts and afflictions of humanity’.²

Increasingly, the Judges of the higher Courts³ come from different backgrounds and have very different life experiences. We are each the products of our own upbringing. In addition, more women now sit on the Benches of these Courts and bring a different (and positive) perspective to cases they hear. Gone are the days when a small group of men from privileged backgrounds and (usually) ‘prestigious’ schools sat in judgment on all New Zealanders.

III. THE COOKE AND RICHARDSON VIEWPOINTS

Towards the end of the twentieth century, two Judges dominated the New Zealand legal landscape. Each spent over 20 years of his working life as a Judge of the Court of Appeal. For about 19 years, they sat together, as members of that Court, on many important cases that were heard during the tumultuous changes in New Zealand society that followed the 1984 General Election.⁴ While they had different approaches to the judicial task, those differences probably brought the best out of each of them. It was also a time when, for all practical purposes, the Court of Appeal was our final appellate court.

Robin Cooke was appointed a Judge of the Supreme Court of New Zealand⁵ on 8 November 1972. He was appointed as a permanent member of the Court of Appeal on 20 May 1976, becoming President of the Court on 1 May 1986. Sir Robin retired as a Judge of the Court of Appeal on 16 February 1996, following his ennoblement. For the rest of his judicial career, exceptionally, Lord Cooke of Thorndon sat as a member of the House of Lords and the Privy Council. His last sitting day in the Privy Council was 9 May 2002, fittingly on an appeal from New Zealand.⁶

Ivor Richardson was appointed to the Supreme Court on 28 February 1977. After a very short time in that office, he was appointed as a permanent Judge of the Court of Appeal on 7 October

2 A Canadian Judgment: The Lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003 (Law Foundation 2004)1.

3 By which I mean the High Court, the Court of Appeal and the Supreme Court.

4 The most important of which was probably the Māori lands case: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

5 As the High Court was then known.

6 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

1977. After Lord Cooke retired on 11 April 1996, Sir Ivor Richardson assumed the Presidency of the Court of Appeal. He continued in that role until his retirement on 23 May 2002.⁷

Lord Cooke's approach to judging is synonymous with 'fairness'.⁸ He opined that the judicial process involves 'the search... for the solution that seems fair and just after balancing all the relevant considerations'.⁹ Lord Cooke's view was that the whole of the common law was 'judicial legislation'.¹⁰ He said, on one occasion 'Every judicial decision, to some extent, makes law, since cases cannot be decided by computer, but the great majority are not concerned with frontiers of legal development'.¹¹

To Lord Cooke, 'fairness' was not only the touchstone of judicial decision-making, it was a core principle of all law-making – whether common law or legislation:¹²

All rules of law ultimately represent the view of their creators, whether the legislature or the judiciary, as to what is fair and just; and on most occasions when there is a particular dispute requiring the elucidation of a rule of law, or its application in particular circumstances, a Judge can hardly avoid attributing to it what is, in his or her opinion, as fair and just an operation as is reasonably possible in those circumstances.

Many of Lord Cooke's critics focussed on what they regarded as the uncertainty inherent in an individualised approach to judging cases. But, Lord Cooke's approach was much more rigorous than mere application of the Chancellor's foot. In 1989, Lord Cooke described his judicial approach as follows:¹³

There is now a more open acknowledgement that deciding a new point may not be primarily a process of deduction; and that the search is rather for the solution that seems fair and just after balancing all the relevant considerations. Some lawyers, possibly many lawyers, find this disturbing. It affronts their sense of hope or ideal that the law exists apart from the individuals who make it. Probably lawyers of that school of thought would accept that at some stage the law was made by judges, but at least subconsciously they hold the belief that the time of all that has now very largely passed. They find plausible support for their position in the appeal to certainty.

It is very easy to say that if judges decide according to their view of what is fair, the law ceases to be certain. The Chancellor's foot is readily rejected as a criterion, but without consideration of how far differences in the length of human feet are significant in relation to the object to be measured. In truth, however, the cases as regards which that kind of argument is raised are usually cases where the law is uncertain: the person appealing to certainty is really appealing for the more conservative solution. The apparently black-and-white rules to be found in *Anson on Contracts* have been just as productive of litigation as, for instance, the present evolving principles about constructive trusts.

And, in one of his Hamlyn Lectures in 1996, Lord Cooke said:¹⁴

7 Incidentally, having been admitted to the Bar in September 1978 and appointed to the Bench in April 2002, there was never a time, during my career at the Bar, when Sir Ivor was not on the Court of Appeal.

8 Sir Robin Cooke, 'Fairness' (1989) 19 *Victoria University of Wellington Law Review* 421.

9 *Ibid.*, 422.

10 P Spiller, *New Zealand Court of Appeal 1958-1996: A History* (2002), 125.

11 Sir Robin Cooke, 'Dynamics of the Common Law' [1990] *New Zealand Law Journal* 261, 262.

12 Sir Robin Cooke 'The Discretionary Heart of Administrative Law' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 205.

13 Sir Robin Cooke, 'Fairness' above n 8, 422-423.

14 Sir Robin Cooke 'Turning Points of the Common Law' Hamlyn Lectures, (1997), 'The Temptation of Elegance Revisited', 60-61.

The common law is always uncertain at its edges. As far as I know, it has never been demonstrated that there is less litigation in judicial climates where certainty is upheld as a priceless asset, a god, than in those where a more liberal approach prevails for the time being.

Lord Cooke recognised the danger of a purely subjective notion of fairness. He met that point by linking ‘fairness’ to the current social context of the day:¹⁵

For fairness to work as an effective criterion, it is necessary that the society have a more-or-less common set of values and that this value be high among them. While New Zealand is in many respects a vocal and divided society, and while some members of the society achieve prominence by being vocal in attempts to make it more divided, I think that the ideal of fairness and a sense of what it requires in particular cases is quite strongly evident.

...

Indeed one is beginning to suspect that the criterion of fairness can produce more certainty than the *a priori* arguments of technically learned lawyers. In a democratic and egalitarian society, and New Zealand sets out to be and largely is (though regrettably less than affluent), it may be that once the facts of any given case have been fully elicited most people would agree on the fair result. If the law provides that answer, it satisfies proper expectations. *To the extent that the law produces a result that is not fair in a particular case, the law has failed. Bad law makes hard cases.* (Emphasis added).

Sir Ivor Richardson has been described as having ‘a more restrained concept of the role of the Court’¹⁶ than Lord Cooke. In his historical survey of the permanent Court of Appeal from its inception, in 1958 until 1996, Professor Spiller observed that Sir Ivor was influenced by his experience with Government Ministries and officers, quoting him as saying in an interview that each branch of Government should ‘stick to its last’.¹⁷

Professor Spiller reported that Sir Ivor was considerably more reluctant to depart from long-standing case-law, particularly that emanating from high authority in New Zealand and England, as a result of his scepticism about idiosyncratic judging, based on notions of fairness. Sir Ivor preferred to limit his approach to established principles.¹⁸

Sir Ivor Richardson’s more conservative approach was grounded in what he saw as the need for order, certainty and stability in society:¹⁹

People need to know where they stand, and what the law expects of them if they are to be able to plan their affairs with some assurance that they are not running into legal snares. So the body of legal decisions of the past should be a reasonably reliable guide for them in that respect.

He saw the use of precedent as particularly important in providing such certainty:²⁰

Judges, of all people, must respect precedent, even if not in a blinkered way. They must recognise that any legal change through the adjudication process, however just, is at the expense of some certainty and predictability and may defeat some legitimate expectations.

Yet Sir Ivor Richardson agreed with Lord Cooke’s view that, on occasion, it was necessary to refine or change legal principles, through judicial decisions, to reflect societal changes. Their judgments in *Invercargill City Council v Hamlin* amply demonstrate that point.²¹

15 Sir Robin Cooke, ‘Fairness’ above n 8, 423.

16 Spiller, above n 10, 136.

17 Ibid, and fn 241.

18 Interview with Richardson J, 13 February 1998, in Spiller, above n 10, 139.

19 Sir Ivor Richardson, ‘The Role of an Appellate Judge’ (1981) 5 *Otago Law Review* 1, 8.

20 Sir Ivor Richardson, ‘Judges as Lawmakers in the 1990s’ (1986) 12 *Monash Law Review* 35, 39.

21 [1994] 3 NZLR 513 (CA).

In a speech given to the Annual Judges' Conference in Auckland in January 1991, Sir Ivor said:²²

... [T]he values underlying particular legal principles need to be continually reassessed, modified, and in some cases replaced, to reflect contemporary thinking. This need to re-examine is particularly true where society itself has gone through or is going through a marked change. And to function effectively courts cannot afford to be too far ahead or too far behind in their thinking.

If a judge is to make these value judgments, it seems to me important that he should have a frame of reference against which to probe and test the economic and social questions involved. The identification of community values and their reflection in judicial decisions is relatively straightforward where society is homogenous and there is a single set of values which are held by a great majority of people. That is where there is a clear consensus. And there may be a consensus in relation to particular issues but not to others. The problem of identifying community values and reflecting them in judicial decisions becomes much more difficult where society is clearly divided on the particular issues: where there are different sets of values – whether economic, moral, political or social – which are strongly, even tenaciously, held. In so acting, judges are shaping the law to meet the aspirations and necessities of the times. Thus, speaking now of New Zealand, we must recognise that affirmative government is no longer such a strong feature of New Zealand life; that change and continuity sit uneasily together; that we are a multicultural society and in many areas we cannot draw on universally accepted values; and that justice in the abstract cannot always be achieved. In some cases, social awareness is just as important as technical competence.

Sir Ivor was conscious that a Judge, faced with divided social values, may simply affirm one set of values and reject another.²³ Acknowledging that the adversary system 'does not readily allow for an extensive societal inquiry', Sir Ivor accepted the 'need for great care' when a Judge expressed views on social policy and public interest issues, based on the limited arguments and information furnished by parties to particular litigation.²⁴ During his time on the Bench, Sir Ivor often emphasised the need for better empirical data on which to base decisions having any significant element of policy.

IV. TWO OTHER VIEWS

Rt Hon E W Thomas QC,²⁵ (to whom I refer by his former judicial title, Thomas J) has written extensively and learnedly about the judicial role. In a recent book, he launched a strong attack on what he termed 'the formalist judge'.²⁶ The term 'formalism' was used to describe 'the notion that law is represented by a series of rules, all of which must be applied uncritically to new cases'. He said:²⁷

[J]udicial initiative and innovation are sacrificed to the false idol of certainty in the law. At the very least, the creativity necessary to ensure justice in the individual case and to keep the law in step with contemporary requirements is diverted into the futile exercise of seeking to distinguish unwelcome argu-

22 Sir Ivor Richardson, 'Changing Needs for Judicial Decision-making' (1991) 1 *Journal of Judicial Administration* 61, 64-65.

23 Sir Ivor Richardson, 'The Role of an Appellate Judge', above n 19, 8-9.

24 Sir Ivor Richardson, 'Judges as Lawmakers in the 1990s', above n 20, 39.

25 A Judge of the Court of Appeal between 1995 and 2001 and an Acting Judge of the Supreme Court, from 2004 until 2006.

26 E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) particularly at chapter 3.

27 *Ibid* 140.

ments allegedly backed by authority or to otherwise rationalise a decision within the present rule-driven framework.

While acknowledging that consistency in decision-making is ‘a self-evident virtue’, alongside the fundamental precept that like cases should be decided alike, Thomas J opined that the use of precedent places limits on judicial autonomy:²⁸

Judges of a precedent-oriented bent do not have the independence or freedom to ensure that justice is done in the instant case or that the law is developed to meet society’s needs and expectations. Conversely, judges who are not hide-bound by precedent can seek to give effect to the sense of fairness or sentiment of justice rooted in the community. To the best of their ability, judges can endeavour to convert the abstract notion of justice with no specific content into the stuff that will shape their value judgment in a particular case. Having eschewed undue adherence to precedent, they are not impeded in an undertaking, which is vital if the law is to command the respect and confidence of the community which it serves.

He continued:²⁹

Legal analysis cannot divorce itself from policy considerations and politics is not inherently irrational. Nor can formalism find its justification by seeking to be equated with legal method and analysis. No judge, formalist or non-formalist, is free from the adjudicative discipline to which the judiciary is subject. But that adjudicative discipline is properly to be seen as the framework for judicial reasoning, and not a substitute for it. *There is nothing intrinsic to legal method and analysis that requires a rule or precedent to be applied without re-evaluating its utility or fairness. What is required is that the process of re-examination be a reasoned process articulated openly by the Judge.*

With reference to ‘societal expectations of the law’, Thomas J’s view is that people know and expect that the law will adapt to change.³⁰

A contrary view can be found in Professor Watts’ pungent article, ‘The Judge as Casual Law-maker’³¹ Professor Watts accepted that he was precisely the type of formalist to whom Thomas J had referred. In Professor Watts’ view, a Judge who engages illegitimately in lawmaking should be seen as ‘activist’.³²

In his article, Professor Watts considered particular cases, as examples of what he regards as ‘over-reaching’ judicial conduct. In his view, the decisions he discusses are nothing less than judicial legislation, by which unelected Judges usurp the role of Parliament.³³

Professor Watts paints a different picture (to that advanced by Thomas J) to what he terms ‘judicial lawmaking’. He said:³⁴

Litigants have always reluctantly accepted that much may turn on the Judge they get; some Judges make errors by being not flexible enough of mind, some by being too flexible. But that is one thing. I doubt that litigants would take any more kindly in 2001, than in 1901 or 1801, to statements of the following sort, were a Judge to feel inclined to advertise his or her lawmaking function: ‘I am entering judgment against you. It is true that at the time you acted you did so in accordance with the law. However, in my view that law was so unjust that I am now going to apply a different rule to your conduct. This remains justice according to law, since I have retrospective lawmaking powers.

28 Ibid 141.

29 Ibid, 57.

30 Thomas, above n 26, 149.

31 Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (2001) 175 ff.

32 Ibid, 208-209.

33 Two particular cases discussed are *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA).

34 Ibid, 195.

Professor Watts is an unashamed advocate of the value of precedent. He sees the properly exercised application of precedent as ‘an essential part of argumentation and its by-product is often the light it throws on problems of the type under consideration’.³⁵

Nor is Professor Watts convinced that there is a need for Judges to develop the law in relation to a changing society:³⁶

There is room for scepticism, then, as to the extent to which social and political change, and alternatively changes in the ‘standards, needs, and expectations of the community’, to use Thomas J’s phrase, require the judiciary to alter the law, especially the private law. *As often as not, the activist Judge is simply discontented with old solutions to old problems. And there is certainly not community consensus about many of the changes to private law that have been attempted to be wrought in recent times, within either the legal or wider communities. It is further arguable that some of the expectations that have been created in the community are ones created by the Judges themselves.* (Emphasis added)

An even more scathing response to Thomas J’s views came from a review of his book by Richard Ekins, a part-time jurisprudence lecturer at Auckland University and (then) D Phil student at Oxford University. He stated:³⁷

Thomas’ method is profoundly hostile to the point of law and would, if adopted, collapse adjudication in the courts to official discretion. The judge’s duty to uphold the law entails subjecting his or her will to that law. *And it is wilful departure from the law, and from the reasoning that identifies the law, that marks out the vice of judicial activism.* (Emphasis added).

The views expressed by Thomas J and Professor Watts are diametrically opposed. Neither seeks to hide the contempt he holds for the approach to the judicial task espoused by the other. That is clear from Thomas J’s references to the ‘formalist’ and Professor Watts’ references to the ‘activist’. In context, both are pejorative terms. With respect, each term is useful only to identify a particular approach; of themselves the words provide no definition of the ideas for which they are labels.

I venture two comments that are relevant to the views of both Thomas J and Professor Watts.

- a) First, although they critique the opposing view with vigour, their criticisms are also expressed with rigour. The blunt expression of considered views can often be helpful in identifying precisely why people disagree on a given topic.
- b) Second, while the ‘formalist’ Judge is attacked by Thomas J because of a perceived ‘uncritical’ application of precedent to new facts,³⁸ Professor Watts criticises the use of personal views to inform the more objective judicial task.³⁹ Assuming a *critical application* of precedent and an *impartial and dispassionate* approach to the judicial role, I consider their differences are reflected in the approaches of Lord Cooke and Sir Ivor Richardson, to which I have already referred.

35 Bigwood, above n 31, 205-6.

36 Ibid, 210.

37 R Ekins, ‘Book Review: The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles’ [2006] *Public Law* 870.

38 Thomas, above n 26, 140.

39 Bigwood, above n 31, 210.

V. SOME ASPECTS OF 'PARLIAMENTARY SOVEREIGNTY'

The differing views of Thomas J and Professor Watts can, at least in part, be seen as turning on the firm opinion each holds about the roles of Parliament and the judiciary as 'lawmakers'.

To what extent is a particular Judge's approach to the judicial role informed by his or her view of Parliament's legislative function? New Zealand Courts, unlike their counterparts in Australia and Canada, have no power to review primary legislation or to strike it down as invalid. While there is a power to make a declaration that specific legislation is inconsistent with the terms of the New Zealand Bill of Rights Act 1990 (the Bill of Rights),⁴⁰ it has been held that the High Court cannot entertain an application for judicial review of the Attorney-General's decision not to bring to the attention of the House of Representatives (pursuant to s 7 of the Bill of Rights) provisions of a Bill which are said to be inconsistent with rights and freedoms contained in the Bill of Rights.⁴¹ The rationale for that view is the non-justiciability of Parliamentary processes.

When the Supreme Court of New Zealand replaced the Privy Council as New Zealand's final court of appeal, in 2003, a curious provision was inserted into the legislation. Section 3(2) of the Supreme Court Act 2003 provides:

3 Purpose

(2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law *and the sovereignty of Parliament*. (Emphasis added).

In an article published after the Supreme Court Act was passed, Petra Butler asked two obvious questions:⁴²

- a) Why did Parliament feel compelled to state the obvious?
- b) How could the Supreme Court Act curtail Parliamentary sovereignty?

The answers to those questions can be found in the Select Committee report that led to enactment of the Supreme Court Act, about which Petra Butler wrote:⁴³

The Justice and Electoral Committee proposed section 3(2) as a response to concerns National and ACT Party members of the Committee held about *judicial activism*. What is the basis for this fear of judicial activism as an alleged threat to parliamentary sovereignty? *Recent judicial decisions on Treaty of Waitangi issues have drawn critical reaction from Members of Parliament alleging judicial activism*. Some court decisions and academic writing in recent years questioning the ambit and the state of the doctrine of parliamentary sovereignty might also have disturbed some Members of Parliament. *The area of human rights is an area traditionally associated with an activist court*. (Emphasis added; footnotes omitted).

What were the issues that concerned the relevant Members of Parliament? I suggest that (in no particular order) three sources of concern can be identified.

40 Rishworth, Huscroft, Optican and Mahoney, *The New Zealand Bill of Rights (2003)* 833-837.

41 *Boscawen v Attorney-General* (High Court Wellington, CIV 2007-485-2418, 20 June 2008, Clifford J). Note: this judgment is under appeal.

42 Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35 *Victoria University of Wellington Law Review* 341.

43 *Ibid.*, 342.

The first springs from a line of cases in which Lord Cooke had expressed the opinion that there may be some rights which are so fundamental that not even Parliament could abrogate them.⁴⁴ Lord Cooke said:

Nor is it in dispute that, if the meaning of the statutory language is sufficiently clear, the New Zealand Parliament can make a person compellable to answer questions on certain subjects from an official - again in the sense that a refusal to answer may result in penalties. *I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.* The subject has been touched on in *Fraser v State Services Commission* [1984] 1 NZLR 116; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *L v M* [1979] 2 NZLR 519, 527. And see F A Mann, 'Britain's Bill of Rights', (1978) 94 LQR 512. There is of course no suggestion of literal compulsion in the present case. (Emphasis added).

The second arose out of comments made by Stephen Franks MP that the Chief Justice ought to have recused herself from hearing *Attorney-General v Ngati Apa*⁴⁵ (the 'Foreshore and Seabed case') because she had previously shown professional interest in the subject matter of the case 'and the boldness of the decision'.⁴⁶ If Mr Franks were right, any Judge who has shown an interest or expertise in a particular area of law might be required to disqualify himself or herself from sitting on a specific case; particularly if a 'bold' decision were likely! Plainly, the proposition that a Judge who knows a good deal about the area of law with which he or she is dealing must be disqualified from hearing such a case cannot be sustained.

The third was a speech given by the Chief Justice, Dame Sian Elias, at the University of Melbourne on 19 March 2003,⁴⁷ around the time the Supreme Court Act was making its way through the Parliamentary processes. The speech does not purport to express a firm view on the application of the doctrine of Parliamentary Sovereignty in New Zealand. Rather, it raises questions over whether, and if so to what extent, the principle was adopted when rights and powers of 'sovereignty' ('Kawanatanga') were granted when the Treaty of Waitangi was signed in 1840. I suspect that, to the extent that this speech influenced the thinking of Members of Parliament, it is an unfortunate example of assuming that comments made while thinking aloud equate to the expression of a considered opinion.

Dame Sian, in exploring those issues, said:

....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. It is not a necessary feature of the possession of territorial sovereignty as the limitations based by written constitutions on the powers of representative assemblies in many commonwealth countries makes clear. The doctrine is a 'distinctively English principle which has no counterpart in Scottish constitutional law'.

...

The question whether the sovereignty of the New Zealand Parliament is limited by our history is therefore a topic of more than academic interest. Māori claims are currently being managed through a political process of settlements. They may avoid the need for such questions to be explored through the courts. In

44 For example, see *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 (CA), 398, in the context of statutory limits placed on the privilege against self-incrimination.

45 [2003] 3 NZLR 643 (CA).

46 36 NZPD 8549-8550 10 September 2003.

47 Sovereignty in the 21st Century: 'Another Spin on the Merry-Go-Round' (2003) 14 *Public Law Review* 148.

the political process the government has been assisted by reports of the Waitangi Tribunal, a body set up in 1975 to advise the Crown on claims of Treaty breach and on the 'practical application' of the Treaty.

VI. PARLIAMENT AND THE COURTS

Some members of society accuse Judges of being out of touch with prevailing community values in deciding cases that come before them. There are equally resonant criticisms if a judge were thought to be usurping the legislative role of Parliament. What is the proper function of a Judge?

The starting point for determining the proper scope of the judicial function is the judicial oath every Judge swears on his or her appointment to the Bench. The judicial oath is prescribed by s 18 of the Oaths and Declarations Act 1957:

18 Judicial oath

The oath in this Act referred to as the Judicial Oath shall be in the form following, that is to say:

I, , swear that I will well and truly serve Her [or His] Majesty [specify as above], Her [or His] heirs and successors, according to law, in the office of ; and I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will. So help me God.

The 'law' to which s 18 refers must include statute, common law and principles of equity. So, the starting point is an acknowledgement that Judges will 'do right to all manner of people after the laws and usages of New Zealand'.

In addition, at least so far as the High Court is concerned, all jurisdiction necessary to administer the laws of New Zealand is conferred upon it.⁴⁸ This includes the Court's inherent jurisdiction, something that may be exercised if not inconsistent with the terms of any statute or subordinate legislation.⁴⁹

The next point to consider involves Parliamentary directions to the Court on how statutes are to be interpreted. The literal approach to statutory interpretation gave way, long ago, to one designed to find the 'mischief' at which the provision was aimed and to interpret the statute in a manner that would give effect to its underlying policy.⁵⁰ That approach was reinforced in the Interpretation Act 1999, s 5:

5 Ascertaining meaning of legislation

- (1) Enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

The Court is also required, where appropriate, to give a meaning to a statute that is consistent with the fundamental rights and freedoms conferred by the Bill of Rights Act. Section 6 of the Bill of Rights provides:

6 Interpretation consistent with Bill of Rights to be preferred

⁴⁸ *Judicature Act* 1908 s 16.

⁴⁹ For example, see *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC), [35] and [36].

⁵⁰ *Acts Interpretation Act* 1924, s 5(j).

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The Bill of Rights contains other directions to the courts that, necessarily, require the courts to make policy judgments on (usually) incomplete information. For example, s 4 of the Bill of Rights prevents a Court from declining to apply a statutory provision ‘by reason only that the provision is inconsistent with any provision of’ the Bill of Rights but s 5 entitles the Court to embark upon consideration of whether the rights and freedoms contained in the Bill of Rights are limited through legal provisions that can be ‘demonstrably justified in a free and democratic society’.

Short of an ability to strike down legislation, it is difficult to imagine a more far reaching power being conferred on a court than to determine what limitations on rights can be regarded as ‘demonstrably justified in a free and democratic society’.⁵¹ Such a decision could never be much more than an individual Judge’s value judgment. It is not an issue readily capable of explanation through empirical research.

The principle of Parliamentary Sovereignty is not one that requires extensive discussion today. Its relevance is in providing context for the inter-relationship among the three branches of government: Parliament, the Executive and the Judiciary. In *Hobson v Attorney-General*,⁵² I expressed the following thoughts:

- (a) The Constitution Act 1986 recognises the three branches of government: Parliament, the Executive and the judiciary: see Parts 2, 3 and 4 of that Act.
- (b) Each branch of government ought to defer to the proper role of another in appropriate circumstances. For that reason, generally the Courts will not embark on inquiries into decisions of the Executive in cases involving such issues as national security (see *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at pp 403 – 406; cf the dissenting view of Thomas J at pp 410 – 412) or areas properly within the purview of Parliament (see Article 9 of the Bill of Rights 1688 (UK)) and *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC)).
- (c) The proper deference shown by one branch of government to another is, itself, part of a dynamic process by which the constitutional institutions each act to check and balance the actions of others. In some ways it is the perceived likely response of one branch of government to the actions of another that provides the constraint that inhibits one branch from straying into the proper arena of another.

The interaction between the Parliamentary and Judicial branches of Government must be viewed in the light of experience of the way in which the Mixed Member Proportional (MMP) Parliamentary system works. I raise two issues for consideration:

- (a) First, in contentious legislation there will be a temptation to fudge the words of a statutory provision to achieve enactment, particularly if aligned political parties have different views on the policy underlying the particular provision. This phenomenon is not too different from the commercial negotiation of a contract, where a key term is not stated with clarity because, while each party is seeking different things, each wants the ‘deal’ to proceed.
- (b) Second, if the Courts were to leave an issue to Parliament to resolve, the likelihood of that happening quickly will turn more on the political urgency of solving the problem than on the need for a solution. That makes the decision about what to leave to Parliament a more difficult one to make.

Is Lord Cooke right when he suggests that, in extreme situations, a Court might lawfully over-ride the will of Parliament? My natural instinct is to say ‘no’. But, I wonder if the door to that possibility should be closed.

⁵¹ See *R v Hansen* [2007] 3 NZLR 1 (SC) for a detailed discussion on this issue.

⁵² [2005] 2 NZLR 220, [123]-[125].

Let us assume, many years into the future, a General Election is held. One party, for reasons associated with particular issues of the day, obtains 80 per cent of the popular vote, putting it in a position to repeal provisions of the Electoral Act 1956 that are entrenched. The new government convenes Parliament and passes a statute which repeals the Electoral Act 1956 and replaces it with one that states that that political party shall govern the country in perpetuity, with no further elections being held.

The serious question I pose for you is this: if that were to occur would you expect the courts to apply that legislation uncritically? Or, would you expect the Court to intervene to protect our democracy? If the answer to the first question were 'yes', the effect would be to leave any attempt to reclaim democratic structures to an insurgency. In an extreme situation such as that, it may be necessary to consider very carefully whether the doctrine of Parliamentary Sovereignty has outer limits.

VII. FINDING ONE'S OWN JUDICIAL APPROACH

What is clear from the discussion so far is that there are a series of competing values, all of which may, in appropriate cases, be drawn upon to justify differing views as to the role of judges.

I now try to draw together the various themes and views I have expressed to ask myself whether, after six and a half years on the Bench, I adhere to my original views on the importance of predictability in the law.

In the District Court the great majority of judicial work is undertaken by applying settled law to facts found by a judge or jury. There are few cases in which a District Court Judge will not be bound by authority. However, because of the nature of much of its summary jurisdiction, it is often possible for District Court Judges to 'do justice' more readily, in an individualised sense, for the very reason that their decisions are not generally cited as precedent in future cases.

In the High Court, one faces the practical application of settled law to the facts in the vast majority of cases with which one deals each year. As an educated guess, I would doubt whether more than 2-3 per cent of cases in any given year involve any consideration of whether to develop the law. And, it may be surprising to you to learn that in just over six and a half years I can point to over 1200 decisions which I have written or to which I have been party which were noted on LexisNexis' LINX Plus when I searched on 30 September 2008. That demonstrates the volume of cases with which High Court Judges are dealing.

When one sits as a first instance judge there can be a temptation to mould legal principles to fit the needs of individual cases, even to the extent of distinguishing authorities because of what one might call a very special set of facts. On appeal, that is much more difficult to do. Sitting as an appellate judge in the High Court (or, occasionally, on the Court of Appeal), I have found consistency and predictability to be the most important values in the majority of cases.

An appellate Court has two discrete functions. The first is that of 'error correction'. In other words, did the lower Court err in the law it applied, in determining facts or in applying the law to the facts. The second is development of the law, a much rarer species of case, even in the Court of Appeal.

Particularly when sitting as an appellate judge, one is conscious that the principles expressed will be relied upon by practitioners in advising clients how to behave in the future. In cases such as that, the observations made by both Sir Ivor Richardson and Professor Watts about constraints on judicial development of the law are apposite.

By way of example, when dealing with an appeal from the Family Court or the Environment Court, a High Court Judge must accept that, for most practical purposes, he or she is providing binding authority to be applied in the relevant court. That is because, in percentage terms, very few of the appeals to the High Court go on to be considered in either the Court of Appeal or the Supreme Court.

One of the problems with an individualised approach to judging civil cases is that lawyers find it difficult to advise confidently on settlement because so much turns on what facts will be found and on what legal basis the Court may respond to them. I recall appearing in an appeal in the Court of Appeal in the late 1980s in which my client had been faced with 18 causes of action. One of the Judges (neither Lord Cooke nor Sir Ivor Richardson) asked me to put that to one side and suggested we look at the case 'in the round'. Sounding (I suspect) rather terse and exasperated, my response was 'What do you mean: 'in the round'? My client has responded specifically to 18 causes of action, what do you mean: 'in the round'?' I never got an answer.

The individualised approach often leads to longer and more expensive hearings and can offer a false hope to the party with the less stable argument that it will succeed. Rightly or wrongly, I know that was the view of many in the commercial Bar in the late 1980s and early 1990s, when the Court of Appeal began to apply more readily equitable principles (particularly the constructive trust) to commercial arrangements.⁵³

A particular problem arising from the introduction of equitable remedies into commercial arrangements (specifically when the remedial constructive trust is involved) is that the priorities on insolvency are skewed in favour of someone whose merit seems high but without the Court having any information about the merits of all others who participate in the insolvent entity's assets. On hearing evidence from Claimant A, a Court may well consider that fairness and good conscience requires a proprietary remedy. But, if granted, that removes Claimant A from the creditors to participate in the distribution of the insolvent entity's assets on a rateable basis. Claimants B, C, D and E may have even more compelling cases, but the Court does not have their stories to compare with Claimant A.

There are three other factors that impinge on the ability of Courts to develop the law:

- (a) The quality of counsel appearing in the particular case.
- (b) Any tactical objectives of the parties involved; neither may be prepared to argue in favour of logical development for reasons of self-interest.
- (c) Development of the law, based on contemporary social values, becomes more difficult as New Zealand becomes, increasingly, a multi-cultural society. For example, in Auckland, a not insignificant number of High Court civil proceedings involve parties from China or Korea.

There will be occasions when development of the law is not only unavoidable, but desirable. Novel cases can and do arise. The further the case goes up the judicial hierarchy, the more refined the arguments get and the greater the element of policy involved. That is why, in important cases in the Court of Appeal and in decisions of the Supreme Court, senior appellate judges differ on appropriate outcomes. Generally, it is the choice of one policy solution over another that leads to a parting of the ways.

53 As examples of the 'constructive trust' issue, see *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 (CA) and [1991] 385 (PC) and *Liggett v Kensington* [1993] 1 NZLR 257 (CA), reversed at [1994] 3 NZLR 385 (PC).

A useful case study on this topic is *R v Hines*.⁵⁴ That case involved a question of witness anonymity. The Crown intended to call a person to give eye witness evidence of an event that led to the accused being charged with attempted murder and wounding with intent to cause grievous bodily harm. Those involved in the incident were members of a gang. Mr Hines was, in fact, its President.

The witness was, understandably, concerned about retribution and was only prepared to give evidence if his name and identifying particulars were suppressed. Equally unsurprisingly, counsel for Mr Hines would not agree to that being done because of the constraints on the ability to mount a defence to the charge, based on an inability to obtain information about the witness' likely credibility or reliability.

At the time *Hines* was decided, there was no statute dealing with witness anonymity. The issue in *Hines* was whether the Court of Appeal should develop the law to provide a basis for a witness to give evidence anonymously, or whether it should be left for a recommendation by the Law Commission (then seized of the issue) or legislation through Parliament. Since *Hines* the law has changed. Relevant provisions are contained in ss 110-119 of the Evidence Act 2006, in part, as a result of the Law Commission's recommendations.

By a majority of three to two, the Court of Appeal declined to develop the law judicially. What follows is a brief summary of the reasons why the majority took that view and the opposing reasons articulated by the two dissenting judges.

The majority views were expressed by Richardson P (on behalf of himself and Keith J) and Blanchard J.

Richardson P and Keith J gave three reasons why the court should not develop a new common law rule:

- a) The empirical material before the court did not provide 'a clear picture of the gravity and extent of the social problem that the rule would address' and there was 'no analysis of the number or proportion of such cases where the identity of the witness was not known to the defence.' Without that material it was not possible to determine the extent to which witness identity was a real issue, to assess the gravity and extent of any problem and to determine an appropriate response.⁵⁵
- b) The difficulties in fashioning a new common law rule, particularly in light of an existing statutory provision relating to anonymous evidence from undercover police officers, militated against curial development, of the law.⁵⁶
- c) Because the Law Commission had already issued a discussion paper it was preferable that the public interest questions were determined through an appropriate policy development process.

Blanchard J concluded that it was premature for the courts to make a fundamental change to the law. In his view, the Court 'should not be driven by a particularly hard case ... into pre-empting the consideration of the problem by the Law Commission as part of its general study of the laws of evidence and criminal procedure'.⁵⁷ The Judge was also concerned about the inadequacy of information provided by counsel and the lack of empirical information of the type to which Richardson P had referred.⁵⁸

Gault and Thomas JJ dissented.

54 [1997] 3 NZLR 529 (CA).

55 *Ibid.*, 550.

56 *Ibid.*

57 *Ibid.*, 588.

58 *Ibid.*

Gault J was prepared to review earlier decisions to develop the law. His Honour emphasised that this was not an area of the law where conduct can be said to have been undertaken in reliance on certainty in the law. Nor did Gault J consider that the court should ‘abdicate responsibility’ for addressing the issue if ‘there is injustice capable of being alleviated’.⁵⁹ His Honour would not have waited for the Law Commission because he considered ‘the policy issues identified in the draft [Law Commission] report seem to me no less appropriate for consideration by judges experienced in trial and appellate work than for the processes of the Law Commission’.⁶⁰

Thomas J wrote at length. His judgment, on the issue of when an appellate court should act in circumstances such as this, is instructive and repays study.⁶¹ The essence of Thomas J’s judgment can be found in two paragraphs which I set out below:⁶²

I entertain no doubt that this is an appropriate occasion for the Court to rule on the issue of witness anonymity. It would be an abrogation of its traditional responsibility to leave it to Parliament when the Courts have retained an inherent jurisdiction to guard and promote the due administration of justice according to law. When, as is the case with Witness A, witnesses are intimidated and genuinely fearful of being exposed to the risk of serious physical harm and will not, and cannot be expected to, give evidence without their identity being withheld from the accused, the due administration of justice is in jeopardy. A situation has been created which calls for a response from the Court if it is to fulfil its function of guarding and promoting the due administration of criminal justice.

...

For the most part the willingness of the Courts to effect a change in the law when required rather than leaving it to Parliament will or should follow from a pragmatic appreciation of which institution is the appropriate body to effect the change and not simply be a response conditioned by the doctrine of precedent or an understated perception of the role of the Courts. But I do not consider that any difficult question of where to draw the line between Parliament and the Court’s responsibilities arises in this case. The Courts have traditionally defined and redefined the criminal law, more *particularly the rules of procedure and evidence relating to the administration of criminal justice. No area of the law might be thought to be more squarely within the Court’s province. What other institution is better equipped to define the requirements of a fair trial? Or what other body is better appointed to prescribe the scope and limits of individual rights in the area of criminal law? In enacting the Bill of Rights, Parliament has effectively acknowledged this to be so. Moreover, it must rank as an unacceptably stilted view of the Court’s traditional role in this area of the law to restrict it to the ingrained defence of the criminal law’s historical safeguards and not their greater definition or redefinition to ensure the law is kept abreast of the times and serves the interests of justice.* (Emphasis added).

Those two paragraphs do not do justice to the views expressed in Thomas J’s judgment, but time does not enable me to set them out in more detail.

Development of the law, in my view, is permissible if there are two or more policy choices open to solve a particular problem *and* there is uncertainty in the law that needs clarification.

To develop the law, I think it is necessary, first, to be satisfied that to do so will not put someone at risk of a retrospective liability, particularly if any risk could have been covered by insurance. In other words, in cases where people have not ordered their lives based on existing principles or rules there is greater latitude for judicial development of the law. But there will always be

59 Ibid, 553.

60 Ibid.

61 Ibid, 577-583.

62 Ibid, 579-580.

a need for caution; to ensure that the policy-maker's fear of 'unintended consequences' does not materialise.

Some of you may ask, why should unelected Judges be entitled to develop the law in that way. There are two answers. First, someone has to, if Parliament has not and is unlikely to in the near future. Second, the Judges are appointed by the Attorney-General (almost invariably a member of the Executive) to make decisions on such issues. The Attorney, in appointing the Judges, is well aware of the Court's role in developing the common law and in addressing some of the interpretation issues to which I have referred.

I return to my own position. Predictability is, in my view, the most important factor in cases where a particular branch of the civil law affects the lives of many and advice to act in a particular way is likely to have been given based on existing law. If no proper point of distinction can be made from a binding precedent after critical analysis of it, any change in the law is likely to result in a hard case making bad law. The criminal law is another area in which predictability will be prized.

On the other hand, where Parliament leaves quasi-political decisions to the Courts (eg s 5 of the Bill of Rights) or has enacted legislation in an ambiguous manner (requiring interpretation by text, in light of purpose: s 5 Interpretation Act), judicial development is unavoidable. The Judges have always had responsibility for developing the common law. In addition, the inherent jurisdiction is often invoked to deal with novel situations when they arise.

It follows that, in general terms, I adhere to the 'hard cases make bad law' maxim, while acknowledging that there are times when a Court can develop the law judicially. I suppose my approach to judging is closer to Sir Ivor Richardson's than Lord Cooke's, mainly because I do not have the same confidence in Lord Cooke's belief that 'fairness', as a criterion, may deliver 'more certainty'.⁶³ In saying that I am attracted to a simple expression of legal principle: I am a firm believer that if one cannot explain a proposition of law in simple terms to an intelligent lay person, the proposition is probably bad law.

Simplicity of expression was something Lord Cooke prized,⁶⁴ but it is easier to achieve in a 'fairness' based approach to judging. In my view, a synthesis of the Cooke/Richardson approaches is the ideal. Lord Cooke spoke of 'the struggle for simplicity'.⁶⁵ I suggest the real quest is for *both* simplicity *and* predictability.

VIII. TWO PRACTICAL EXAMPLES: HARD CASES OR BAD LAW?

There are two decisions in which I have been involved that demonstrate the difficulties in dealing with issues of this type. The first was *P v K*,⁶⁶ in which Priestley J and I sat as a Full Court. The second is my recent judgment in *Body Corporate 188529 v North Shore City Council*,⁶⁷ in which I considered the applicability of the principle derived from *Invercargill City Council v Hamlin*, in the context of a multi-unit development.

63 Sir Robin Cooke, 'Fairness' above n 8, 423; set out at para [17] above.

64 Spiller, above n 10, 123.

65 Sir Robin Cooke 'The Struggle for Simplicity in Administrative Law' in M Taggart (ed), *Judicial Review of Administrative Action in the 1980's* (1986).

66 [2003] 2 NZLR 787.

67 [2008] 3 NZLR 479.

P v K involved the interpretation of s 5 of the Status of Children Amendment Act 1987. Section 5(2) provided:

- (2) Where a woman becomes pregnant as a result of artificial insemination and that woman is either a woman who is not a married woman or a married woman who has undergone the procedure without the consent of her husband,—
- (a) Any child of the pregnancy, whether born or unborn, shall not have, in relation to the man who produced the semen used in the procedure, the rights and liabilities of a child of that man unless at any time that man becomes the husband of the woman; and
- (b) *The man who produced the semen used in the procedure shall not have the rights and liabilities of a father of any child of the pregnancy*, whether born or unborn, unless at any time that man becomes the husband of the woman. (Emphasis added).

P v K was an appeal from the Family Court. It involved a child whose mother was in a stable lesbian relationship. The mother had been inseminated artificially from semen donated by a man whom she knew. He was living in a stable gay relationship.

The women had approached the donor, seeking his sperm to conceive a child. An agreement was drawn up in an endeavour to define the role that each of the four would play in the child's life. Sadly, the two couples fell out and the 'father' brought proceedings seeking access to the child. His application was dismissed by the Family Court on the basis that he had no parental rights because of s 5(2).

The High Court was asked to interpret the statute in a manner that would permit the 'father' to make application to the Family Court in that capacity. We held that the statutory provision was clear and there was no warrant for the Court to invoke a strained interpretation in an endeavour to do justice in the particular case. We were able, however, to point to the possibility of the 'father' applying for leave to apply for access under a provision of the Guardianship Act 1968 that enabled people, other than parents, to seek such benefits.

Priestley J and I concluded that there was an urgent need for review of this area of the law. I made a number of comments on the reasons why such a review was best left to Parliament. As it happens, the provision in issue has now been repealed and rights would now be determined under the Care of Children Act 2004.

I prefaced my general comments on the desirability of Parliamentary reform by referring to a number of issues that had arisen. Priestley J endorsed the observations I made.⁶⁸

I started my judgment by expressing the view that when Parliament enacted the Guardianship Act in 1968, I was sure that all Members of Parliament would have regarded the terms 'father' and 'parent' as two of the words least likely to give rise to problems of interpretation. I expressed surprise that in my first year on the Bench, I had been faced with the challenge of interpreting the terms 'parent' and 'father', as well as the word 'child'.⁶⁹

I noted that New Zealand society had changed significantly since 1968. Traditional concepts of a 'nuclear' family and 'legitimate' children had been challenged by the prevalence of *de facto* relationships, same sex relationships, reconstituted families after relationship breakdowns, 'single' parenthood and the rapid advancement of artificial reproductive technologies. I also noted that in 1987, Parliament was hardly likely to have had in mind the type of situation that arose in

68 *P v K* [2003] 2 NZLR 787 (HC) at [176].

69 *Ibid.*, [182]. As to the need to interpret the term 'child' see *Re an unborn child* [2003] 1 NZLR 115.

P v K; the Homosexual Law Reform Act was only passed in 1986; until then homosexual conduct between males was illegal in New Zealand.⁷⁰

I expressed my views on the need for legislative reform as follows:

[204]....When legislation is clearly out of step with contemporary societal trends the Court has two choices. First, the Court can choose to interpret legislation on the basis indicated in s 6 of the Interpretation Act 1999 which provides:

. . . an enactment applies to circumstances as they arise.

Secondly, if the Court is concerned that any decision which it may make in an endeavour to apply old legislation to contemporary circumstances may have unintended consequences, the Court can leave the societal problem for Parliament to resolve (after appropriate consultation) by legislation.

[205].... Policy is properly made by elected governments. Elected governments are responsible to the electors who, every three years, vote on the composition of Parliament. It is that direct constitutional responsibility which parliamentarians, and the Cabinet Ministers appointed from the ranks of Members of Parliament, have to the electorate which renders it more appropriate for Parliament to make policy choices for difficult societal problems. The Courts are not equipped with evidence of the extent of particular problems and must, where appropriate, limit their consideration of issues to the particular facts put before the Court on any particular case.

P v K raised issues involving contemporary society which, in my view, were so stark that the Court could not respond to the problem in the manner sought by the ‘father’. Policy issues were too difficult to assess in a vacuum. That was the type of case which, in my view, the need for the statute to be given clear meaning, despite the obvious problems that were caused to the four individuals whose collaborative efforts had brought the child into the world.

The second example is *Body Corporate 188529 v North Shore City Council*. This case is an interesting study in whether to adapt the law to meet modern conditions, primarily because the law that the plaintiffs were seeking to adapt to new circumstances was set out in *Invercargill City Council v Hamlin*⁷¹ a case much criticised by Professor Watts on the basis that the ‘community consensus’ on which the Court relied had not been established.⁷²

Some background is necessary. *Invercargill City Council v Hamlin* followed earlier New Zealand authority in holding that a territorial authority owed a duty of care to an actual or potential homeowner to take reasonable care in issuing a building permit. The cases up to and including *Hamlin* had dealt with inadequate foundations. Declining to follow a judgment of the House of Lords to the contrary, the Court of Appeal decided that the duty continued to exist and was sustainable on the grounds that New Zealand conditions were different from those in England. The relevance of local conditions is something on which Professor Watts takes a different view.

The Court of Appeal’s decision was, in fact, upheld by the Privy Council.⁷³ In the course of its decision, the Privy Council acknowledged the right of the New Zealand Court to develop this area of law in a manner different from that prevailing in England, due to local conditions. Notwithstanding Professor Watt’s observations that one does not know whether English conditions

70 Ibid, [183] and [195].

71 [1994] 3 NZLR 513 (CA).

72 Bigwood, above n 31, 210.

73 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); the decision of the House of Lords which was not followed was *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL), an appeal heard by a Bench of seven Law Lords.

differed from New Zealand, it is highly likely that those Law Lords who sat on appeal would have been able to discern relevant differences.

The fact that the Privy Council was prepared to allow New Zealand to develop its own rules in this area confirmed the decision of the Court of Appeal to retain the duty. My task, in *Body Corporate 188529* was to determine whether the duty to homeowners identified in *Hamlin* was applicable to a dwelling for which a stratum title was held by an owner, within a development under the Unit Titles Act 1972.

I held that the duty did exist but needed to be adapted to meet the needs of the Building Act 1991 and the Unit Titles Act 1972. The real difficulty was in expressing the scope of any duty with sufficient definition or particularity. I took the view, consistent with my primary view that the law should be predictable, that:⁷⁴

- a) The nature and scope of the duty of care imposed on a territorial authority must be principled, capable of being expressed simply, predictable in its future application and result in a just and reasonable allocation of risk between parties who are not in any contractual relationship.
- b) ‘Vulnerability’ was not an appropriate touchstone for liability to attach. ‘Vulnerability’ (while a factor to be taken into account in determining whether a duty exists or ought to be created) is too uncertain a concept to be the ultimate test.
- c) There is a need for predictability. I use the word ‘predictability’ (in preference to ‘certainty’) deliberately because, however the test is articulated, there will remain grey areas which will need to be determined on a case by case basis. Certainty is too much to expect. Predictability provides a level of assurance that is needed by the Council to determine the extent of its potential liability and to take steps to guard against risks. As any Judge knows, even with legal principles that are well settled, the difficulty lies in applying them to the facts of particular cases.
- d) It is equally important that both advisers for those who are buying a home and Council officers understand clearly the category of persons to whom the duty is owed. A relatively simple articulation of the extent of the duty in a predictable manner should discourage claims by those who fall outside its ambit, particularly where it is possible for an adviser to make inquiries, yet provide an incentive for the Council to ensure its functions are performed to an acceptable standard.

I concluded that there was a need to develop the law cautiously and, unusually, I took the view that the duty of care should be articulated in a fairly rigid way. I said:

[217] I am conscious of the many appellate warnings against articulating a duty of care in too rigid a fashion. However, in this case I see the need to retain the integrity of the original basis of the *Hamlin* duty, coupled with an emphasis on simplicity of expression and predictability in outcome, as justifying my approach. From a policy perspective, in this very narrow part of the law of negligence, a greater degree of precision is required. That approach is consistent with the way in which *Hamlin* limited the Council’s duty to homeowners.

[218] I do not exclude the possibility that there may be some circumstances in which a territorial authority assumes a duty of care to a particular purchaser as a result of proved conduct. My approach is not intended to limit the ability of the Court to find an assumption of a duty of care of a type akin to that discussed by the Privy Council in *Brown v Heathcote County Council*.⁷⁵ Nor do I intend to exclude circumstances in which, despite what is disclosed on an application for a building consent or in the plans, it is so obvious that units are being constructed for residential purposes that a duty must attach. In both types of cases, however, there would need to be a clear focus on the facts said to give rise to the alleged duty. (Footnotes omitted).

⁷⁴ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479.

⁷⁵ [1987] 2 NZLR 720 (PC).

I left open expressly whether a duty would attach to a mixed use development and did not exclude the possibility of an assumption of a duty of care independent of the type of duty to which I had referred.

I was dealing in *Body Corporate 188529* with a novel situation which required an exhaustive analysis of the Unit Titles Act 1972 (particularly the respective rights and obligations of bodies corporate and individual owners) as well as the applicability of *Hamlin*. But I was dealing with development of a tortious remedy, something that has always been regarded as within the powers of the Judges.

It seemed to me to be necessary to extend the duty, not because I wanted to make law but, rather, it was, in principle, right to apply the *Hamlin* duty to what, in my view, was plainly an analogous fact situation. The difficulty arose out of the need to differentiate the commercial from residential, a difference on which the Court of Appeal had acted in *Hamlin*.

My answer, rightly or wrongly, was to focus on intended end use rather than actual end use. Whether I was right or wrong may be for the Court of Appeal or the Supreme Court to determine ultimately.

Are *P v K* and *Body Corporate 188529* hard cases that make bad law? Or, was the law bad to begin with? You be the Judge.

THE DYNAMICS OF PROFESSIONALISM: THE MORAL ECONOMY OF ENGLISH LEGAL PRACTICE – AND SOME LESSONS FOR NEW ZEALAND?

JULIAN WEBB*¹

In the sociology of the professions, the emergence of the modern legal profession is often told as a story of political economy; a reflection on the capacity of the profession, by political means, to mobilise the state, structure its market and legitimate certain productive relations by techniques of professional governance and self-regulation.² In the language of political economy professionalism itself thus exists as part of that process of legitimation, as a ‘peculiar type of occupational control rather than an expression of the inherent nature of a particular occupation’.³

In this paper, however, I want to turn our attention away from professionalism as an expression of political economy, to consider it more as a matter of *moral economy*. This particular notion has been much less explicit in the professions literature, though early sociological work in the field tended to take at face value professional claims about the moral and ethical dimensions of professionalism,⁴ and much later scholarship on professional ethics has also tended to use professionalism as a way of capturing certain key features of the role morality.⁵ But this is not my concern. Rather, I want to focus on the nexus between the economic and the moral.⁶ For the pur-

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1 This paper draws in part on a number of presentations reflecting on the reform of the English legal services market and given at the First International Conference on Legal Ethics at the University of Exeter, UK, in July 2004, the Socio-Legal Studies Association Annual Conference, Liverpool, UK, 2005, and at a seminar organised by Duncan Webb at the University of Canterbury in June 2006. I am grateful to participants at each of these events for their observations. My considerable thanks also go to John Flood for sharing wisdom and references. The usual disclaimers apply.

2 Richard L Abel, ‘The Political Economy of Lawyers’ (1981) *Wisconsin Law Review* 1117, 1121; see also Abel, *The Legal Profession in England and Wales* (1988), chapter 1.

3 Terence Johnson, *Professions and Power* (1972), 45.

4 A Carr-Saunders and P Wilson, *The Professions* (1933), 497.

5 The literature on professionalism as a moral value or set of values is vast, particularly in the US. Useful examples include Colin Croft, ‘Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community’, (1992) 67 *New York University Law Review* 1256; Steven Lubet, ‘Professionalism Revisited’ (1993) 42 *Emory Law Journal* 197; Burnele V Powell, ‘Lawyer Professionalism as Ordinary Morality’ (1994) 35 *South Texas Law Review* 275; W Bradley Wendel, ‘Morality, Motivation and the Professionalism Movement’ (2001) 52 *South Carolina Law Review* 557.

6 The relationship between the moral and political is also significant. As Halliday observes, the ‘normative professions’ like law have been able to blur the boundaries between moral and technical authority, and have used this to exploit opportunities for (political) influence – Terence C Halliday, ‘Knowledge Mandates: Collective Influence by Scientific, Normative and Syncretic Professions’ (1985) 36 *British Journal of Sociology* 421, 429-31.

poses of this paper, I therefore adopt the definition of moral economy used by Sayer,⁷ as the study of how economic movements and pressures may shape and influence, and in turn be shaped by, moral norms.⁸

While the focus on political economy has told us much about the ‘professional project’⁹ of lawyers, like all master discourses, it has its limits. The moral discourses of the profession will undoubtedly provide legitimation for certain moves within the professional project, but to treat all moral discourses as such threatens both to underplay the extent to which such discourses may have a wider social rationale, and to blur distinctions that may be of genuine moral importance to the actors involved. The language of moral economy, needs to be understood as part of what Bourdieu would call the *habitus*, or ‘feel for the game’ of being a lawyer.¹⁰ Much of this modern moral economy is therefore embedded not just in the political discourse of the profession *qua* profession, which tends still to reflect traditional values, such as professional autonomy and independence, collegiality, and social service, but in the day to day work and organisation of law firms. ‘Professionalism’ in this context, I suggest, needs to be explored in political and cultural terms, as a dynamic, contingent and contested *practice*, responsive to a range of ideological, economic and situational factors.¹¹

In the following pages I set out to discuss a number of current developments within the world of English legal practice which are, I suggest, indicators of a continuing and fundamental transformation of the professional project and cultural practices of lawyering. English lawyers have, until relatively recently, been extremely successful at maintaining the *status quo*. But, over the past twenty to thirty years the profession has also experienced considerable challenges. It has ceded control over the supply of new lawyers to independent universities and colleges. In the face of political opposition from both Conservative and Labour governments, it has lost many of its traditional market controls and monopolies. It has faced a rising tide of apparent consumer dissatisfaction; its leadership has, at times, displayed breathtaking levels of political incompetence and an exceptional ability to shoot itself in the collective foot.¹² In the latest chapter of the story, it has been obliged to divest itself of much of its regulatory autonomy, and prepare for further deregulation of an already highly deregulated legal services market.

7 Andrew Sayer, ‘Moral Economy and Political Economy’ (2000) 61 *Studies in Political Economy* 79. It should be noted that the concept of moral economy as used by Sayer and in this article has both a descriptive and normative dimension.

8 For these purposes the notion of moral norms should be construed as all those outward-facing values and dispositions that imply a conception of the good. That is, we are not here concerned with the internal (self)perception of what it is to lead a good life, but with values, etc, manifesting in behaviour affecting others.

9 The term professional project was coined by Magali Larson to characterise the deliberate political action of professions, converting their technical and cultural capital into an institutionalised system of financial and social rewards – *The Rise of Professionalism: A Sociological Analysis* (1977), xvii.

10 Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805, 811.

11 Donald Nicolson and Julian Webb, ‘Editorial: Public Rules and Private Values: Fractured Profession(alism)s and Institutional Ethics’ (2005) 12 *International Journal of the Legal Profession* 166, at 166; Herbert Kritzer, ‘The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World’ (1999) 33 *Law and Society Review* 713, 749; Robert Nelson and David Trubek, ‘Arenas of Professionalism: the Professional Ideologies of Lawyers in Context’ in Robert Nelson, David Trubek and Raymond Salomon (eds), *Lawyers Ideals/Lawyers’ Practices* (1992), 176.

12 The story of the turbulent decade from 1989-99 is recounted in depth and with some relish in Richard Abel’s monumental work, *English Lawyers Between Market and State: The Politics of Professionalism* (2003).

By way of a *caveat* I should say that, in a number of ways, this paper is only a preliminary foray into a much larger field. It does not purport to present a complete ‘model’ of a moral economy approach to the study of the legal profession; that would be a paper in its own right. Nor can it pretend that its perspective on some of the trends discussed in the following pages goes much beyond informed speculation. While a number of these developments are already well-established within the legal services market of England and Wales, others are only just beginning, and, many of the regulatory changes have yet to be implemented. It will take time for the real market effects of these to become apparent. Nevertheless, I think one can say with a high degree of confidence that the changes discussed in these pages are significant, not just in the UK context, but more widely. As I will demonstrate in this paper, many of the challenges confronting the English legal profession today reflect the logic of the new, global, political and moral economy. What is happening in the UK therefore has implications not just for the UK legal profession, but for the future of legal professions internationally, perhaps even for professions in general as a distinctive kind of occupational system and culture.

I. THE CONTEXT: THE ‘NEW ECONOMY’ AS A MORAL ECONOMY

The term ‘new economy’ was coined by the media in the mid 1990s to describe the sense of deep economic transformation that was starting to be experienced at that time.¹³ Looking beyond much of the early hype associated with the term, it still serves usefully to describe the convergence of five broad and interrelated trends that have been under way for some years, and together were said to herald an ‘age of social transformation’.¹⁴ These trends are now too well known to require lengthy discussion here. The first is the internationalisation of trade, particularly the rise of the big multi-national enterprises, and with it the increasing dominance of certain global brands for both goods and services (globalisation is as much about the spread of McKinsey as McDonalds). The second trend is the revolution in information technology, particularly in the way it has enabled the digitization of information, and the creation of ‘24/7’ transnational information flows. Thirdly, the rise of the new economy has been built on new modes of economic production and new ways of working, that are largely characterised in terms of both a shift from an industrial economy to a knowledge economy, and also as a shift from conventional ‘Fordist’ (standardised mass-production) systems, to more flexible ‘post-’ or ‘neo-Fordist’ modes of production, involving trends such as flexible working, outsourcing, and ‘Just in Time’ production processes. Fourthly, there has also been a significant ideological shift, reflected in the widespread commitment to free market discourses, of competitiveness, market liberalisation, rationalisation, and de-regulation. This has been driven not just by national governments, but by international institutions such as the World Trade Organisation and the large regional trading blocs, such as NAFTA and the European Union. This has meant, lastly, that the new economy has come also to signify a very different form of political economy, one which has fundamentally changed the relationship between state and

13 See, eg, John Huey, ‘Waking Up to the New Economy’ *Fortune Magazine*, 27 June 1994, <http://money.cnn.com/magazines/fortune/fortune_archive/1994/06/27/79465/index.htm>; Stephen Shepard, ‘The New Economy: What it Really Means’ in *Business Week*, 17 November 1997, <<http://www.businessweek.com/1997/46/b3553084.htm>> at 14 August 2008. For a major analysis of the legal implications of the new economy, see Harry W Arthurs and Robert Kreklewich, ‘Law, Legal Institutions and the Legal Profession in the New Economy’ (1996) 34 *Osgoode Hall Law Journal* 1-60.

14 Peter F Drucker, ‘The Age of Social Transformation’ *The Atlantic Monthly*, November 1994, 53.

civil society, and with it the distribution of wealth and power in society, creating an environment in which states have moved away from using Keynesian strategies to manage the economy, and have, to a degree, rejected welfarist notions of social justice, and many of the interventionist/redistributive strategies of the classical welfare state era.

The implications of these trends for law and the legal profession have been, and continue to be, substantial. The point I want to make here, however, is to highlight, briefly, the ways in which the new economy has also come to imply a new moral economy. The new economy brings with it a strongly value-laden rhetoric. It expresses aims of liberating and democratising social relations, largely through market mechanisms. It stresses the importance of choice and individual freedom, and seeks to enhance access to both material goods, and, indeed, to non-material goods, such as justice, through competition.¹⁵ At the same time, even if we take these virtues at face value, we must also acknowledge that they seem to come with certain other moral costs. The new economy model has certainly intensified the extent to which the market itself has become disembedded from the traditional moral economy of social life. The market has taken on a life of its own, with a consequent commodification of many aspects of our culture and society. Ideals of civic culture have given way, increasingly perhaps, to consumer culture, and consumer sovereignty¹⁶ itself has become reframed as a moral imperative.¹⁷ Paradoxically, almost, the new economy seems also to have both contributed to and sought to prevent the decline in trust in social institutions that has been a feature of late modernity.¹⁸ Numerous commentators have written of the loss of trust in government, the professions and corporations.¹⁹ Even the law itself has been regarded as part of the problem, as it has increasingly become the means by which the state seeks to guarantee trust, or even replaces trust, as the foundation for social relationships.²⁰ At the same time new economy thinking has sought to respond to the crisis by using state power to create increasingly marketised systems of accountability and regulation in an attempt to construct new forms of institutionalised trust.²¹

15 See, eg, Christine Parker's argument, developing a metaphor constructed by Mauro Capelletti, that competition policy constitutes the 'fourth wave' of the access to justice movement – *Just Lawyers: Regulation and Access to Justice* (1999), 38-41.

16 Consumer sovereignty means that individual consumers are free to choose as they wish, subject to constraints imposed by the price system, and according to their current wants and needs. In addition to its descriptive function in free market economics, it has a strongly normative dimension as a theory about who should exercise power and for what purposes.

17 See Paul Du Gay, *Consumption and Identity at Work* (1996), 76-80.

18 Anthony Giddens, *The Consequences of Modernity* (1990), 29-30; Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

19 Under conditions of complexity the state becomes the central guarantor of trust in expert systems - Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd ed, 2002) 76-7. Logically it would seem to follow that any loss of trust in the state is likely to have a knock-on effect on other social institutions where trust in those institutions is premised, at least in part, on the capacity and availability of the state to monitor their activities and manage risks associated with their operation.

20 Cf Santos, *ibid*, and Frank B Cross, 'Law and Trust' (2005) 93 *Georgetown Law Journal* 1457, 1459.

21 Techniques of audit and, despite the early deregulatory rhetoric, regulation have become an increasing feature of the new economy, though with a greater emphasis on principles of co-regulation (or 'regulated self-regulation') and public participation: see Trevor Purvis, 'Regulation, Governance, and the State: Reflections on the Transformation of Regulatory Practices in Late-Modern Liberal Democracies' in Michael Mac Neil, Neil Sargent and Peter Swan (eds), *Law, Regulation and Governance* (2002); Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103.

The legal profession, I suggest, is both a beneficiary and victim of the new economy. And in this it has only a limited amount of choice. As Heinz and Laumann have argued, the legal profession is an 'overdetermined social system'.²² It cannot escape from the larger transformations that make up the new economy, and the profession's need to be responsive to those often competing economic, political and cultural changes can sometimes make it difficult for firms to be other than reactive. But if it is to be more than a victim of the process of change, it needs to understand what is actually involved in that transformation, and much of the (anecdotal) evidence is that it still does not – or at least not fully enough.²³ With the current pace of change, particularly in the UK, this of itself should be a matter of some concern.

II. THE LEGAL SERVICES ACT 2007: BACKGROUND AND IMPLEMENTATION

Any discussion of changes to the English legal profession must now be understood in the context of the Legal Services Act 2007, which received the Royal Assent on 30th October 2007. Although very little of the Act relevant to this discussion is currently in force, the Act is the culmination of a process that began six years earlier, and the profession has been maneuvering to position itself in readiness for the reforms for at least the last two years.

The 2007 Act reflects three converging forces. First, there was the competition agenda driven, at a national level, by the Office of Fair Trading (OFT), the UK's consumer and competition authority.²⁴ The OFT's agenda, however, was itself much influenced by the European Competition Commission's concerns at the extent of anti-competitive practices in European professions, and its conviction that European professional services markets had to be made more competitive.²⁵ The OFT agenda in England and Wales was focussed on two areas of potentially restrictive practice: restrictions on the supply of services (including advertising, constraints on price competition, and restrictions on forms of business organisation), and restrictions on conduct, notably legal professional privilege, though ultimately changes to lawyer-client privilege were not pursued.

22 John Heinz and Edward Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982), 213.

23 I can only justify this conclusion on the basis of conversations with practitioners, and with other observers of the legal profession. A number of other scholars have come to a similar conclusion: see, eg, Richard Susskind, *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (2000), 55; Richard Devlin, 'Breach of Contract? The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession' (2002) 25 *Dalhousie Law Journal* 335, 338.

24 Notably in the Office of Fair Trading's report, *Competition in the Professions - A Report by the Director General of Fair Trading* (2001).

25 The European Commission Competition Directorate has issued two reports on the subject: 'Report on Competition in Professional Services', COM(2004) 83 of 9 February 2004, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0083:EN:NOT>>, and 'Professional Services - Scope for more reform', COM (2005) 405, of 5 September 2005, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0405:EN:NOT>>, both at 14 August 2008. By 2005 competition-led reform was established on the agenda in a number of other European jurisdictions, notably in Ireland, where proposals very similar to Clementi had been published. National reviews were also ongoing in Germany, Denmark and Poland (as regards ownership and structure of law firms), Italy and Hungary (advertising restrictions), and the Netherlands (rights of audience; legal professional privilege and Bar Association structure) – see Richard Parnham, 'The Clementi Reforms in a European Context – Are the Proposals Really That Radical?' (2005) 8 *Legal Ethics* 195. The Scottish Government had commenced its own review of complaints against the legal profession in 2002, and subsequently commissioned a detailed research review of the Scottish legal services market in 2006 (see Scottish Executive, *Report by the Research Working Group on the Legal Services Market in Scotland*, April 2006, <www.scotland.gov.uk/Resource/Doc/111789/0027239.pdf> at 14 August 2008). A new Legal Profession Bill is likely to be on the Scottish Government's legislative programme for 2008-09.

Secondly, there was genuine recognition that, even if it was not wildly anti-competitive, regulation of the legal services market was, at best, unwieldy and unduly complex, and that such complexity could create unintended market distortions.

The market for legal services in England and Wales has involved a mix of regulated and unregulated groups, and regulated and 'unregulated' activities. The result is a complicated matrix of rights to conduct work and corresponding regulatory responsibilities. Added to that, legal professional bodies themselves have also been answerable to an additional layer of 'second tier' or 'supervisory regulators' for some areas of work.²⁶ The effects of this require some explanation.

Professional occupations are, as is well known, traditionally characterised by their practice of self-regulation *via* a formal association. Solicitors and barristers, and members of the Institute of Legal Executives (ILEX) are the key occupational groups in the legal services market, and all broadly fit that pattern. In respect of some services, they are joined also by patent agents, trade mark attorneys, and licensed conveyancers – all of whom have their own independent professional bodies, with representative and self-regulatory functions. Other paralegals and clerks employed by solicitors and barristers are regulated only indirectly, insofar as the employing lawyer is answerable to his/her professional body for their conduct. Other legal occupational groups such as will writers and certain trust managers are, at present, essentially unregulated in this sense.²⁷

The main regulated activities are conveyancing, probate, immigration advice, the right to conduct litigation, and the right of audience, where any of these are to be undertaken for a fee. The notion of regulated or unregulated activity however requires unpacking. A number of the regulated activities constitute reserved areas of practice, which may only be conducted by a qualified professional. Who counts as a qualified professional may vary between areas. Thus conveyancing is an activity reserved, essentially, to solicitors and licensed conveyancers. Immigration advice is unusual, as it is regulated but not 'reserved' in the classical sense, since a wide range of persons can provide the service, including those trained specifically as non-admitted immigration advisers. Moreover, the extent of professional jurisdiction in these areas can vary between professional groups, as with rights of audience, where, for example, barristers automatically have full rights of audience before all courts; solicitors have limited rights of audience, unless they are solicitor-advocates who have obtained a higher court qualification, and patent agents/trade mark attorneys have a limited jurisdiction, reflecting their specialist competence. These variations obviously have potentially different effects on consumer access and competition, and may create significant coordination problems for the regulators.

As we have seen there are also areas of practice, like will writing, which are entirely unregulated in the sense that anyone can draft a will for another, even for a fee, regardless of their training to do so. However, in a broader sense, the idea of an unregulated activity is a misnomer, since solicitors, barristers, and legal executives are all regulated as regards standards of work and conduct by their professional bodies in respect of *any* work they undertake in that capacity. Consequently 'unregulated' work is best understood as work that is not regulated *except* where the service is provided by a regulated professional. One of the regulatory issues in the context of the legal services market is thus where one draws the line. For example, the will writing market has seen a growing number of non-lawyer practitioners entering the market, who are not subject to

26 For example, the Financial Services Authority which authorises the Law Society to regulate solicitors' firms in the conduct of investment business.

27 Though such service providers do owe the same duty of care at common law as a solicitor would in respect of the quality of work: *Esterhuizen v Allied Dunbar Assurance plc* [1998] 2 FLR 668.

the training, conduct standards and indemnity insurance requirements required of, say, solicitors. This may not just raise issues of consumer protection, it can also be seen as a competition issue, since, regulated providers, such as solicitors, may be placed at a competitive disadvantage by their regulatory burden, and may ultimately either be priced out of the market, unless they can either persuade consumers that they provide sufficient added value to warrant a premium price, or, if they want to stay in the market, are prepared to join an unregulated race to the bottom.

Thirdly, the continued failure of the solicitors' profession in particular to address the problem of consumer complaints had left it a sitting target for reform. The complaints problem is of long standing. As long ago as 1995, solicitors were warned that they were 'drinking in the last chance saloon'.²⁸ The profession responded, at first, by blaming everyone but themselves.²⁹ The government fired a significant warning shot in the Access to Justice Act 1999, ss 51 and 52, which introduced reserved powers to directly supervise complaints handling from a 'failing' legal professional body. This forced the Law Society, finally, to throw large amounts of money at its historically underfunded and, by now, dysfunctional complaints arm, the Office for the Supervision of Solicitors. It was, however, still too little, too late. In the face of continuing coruscating criticism of solicitors' complaints handling by the Legal Services Ombudsman, the government finally moved into action.

In July 2003, the then Department for Constitutional Affairs (now the Ministry of Justice) announced a major review of the regulatory regime governing the legal services market, to be led by Sir David Clementi, a former deputy governor of the Bank of England and current chairman of Prudential, one of the UK's largest insurance companies. In the interim, the Lord Chancellor also exercised his reserve powers to supervise the Law Society's complaints handling, and in February 2004, appointed the Legal Services Ombudsman, Zahida Manzoor, also to the role of Legal Services Complaints Commissioner, a supervisory responsibility that is still in place.

The Clementi Review itself moved with some pace. A Consultation Paper was published in March 2004 and, following opportunities for consultation, a final Report appeared in December of the same year.³⁰ The Clementi terms of reference were broad, and clearly reflected the new competition-based and consumer-focused ideology;³¹

To consider what regulatory framework would *best promote competition*, innovation and the public and consumer interest in an *efficient*, effective and independent legal sector....

To recommend a framework which will be *independent in representing the public and consumer interests*, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified. (Emphasis added)

Turning to the details, the Clementi Review made a range of key recommendations. First and foremost the report called for the separation of the professional bodies' regulatory and representative functions and for the establishment of a single regulatory body, the 'Legal Services Board' (LSB) to licence and oversee those professional regulatory bodies. This option was favoured by the ma-

28 Stephen Ward, 'Solicitors drinking in the last chance saloon over client bills', *The Independent (London)* 21 May 1995, http://findarticles.com/p/articles/mi_qn4158/is_19950621/ai_n13989905 at 15 August 2008 (reporting criticisms of the profession by Michael Barnes, the then Legal Services Ombudsman in his fourth Annual Report).

29 See Abel, above n 12, 398-400; the potential scale of the problem was illustrated in a study commissioned by the Law Society in 1999 from Ernst & Young indicating that 50% of law firms generated 80% of complaints, *id.* at 400.

30 Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report*, December 2004, <www.legal-services-review.org.uk> at 14 August 2008.

31 *Ibid.*, 1.

majority of respondents, and ultimately by Clementi himself, over the creation of a single regulatory body ('model A' in Clementi's terms) that would take over the direct regulatory functions of the legal professional bodies.

Secondly, the report also called for the creation of a single complaints body, to be known as the Office for Legal Complaints (OLC), and overseen by the LSB. This was intended to replace the existing in-house complaints systems of the professional bodies, and to extend the range of matters for which consumers could complain (including potential negligence). The OLC was not mooted to take over the disciplinary functions of the professional disciplinary tribunals.

Thirdly, Clementi also addressed a number of governance and accountability issues that flow from these other proposals. It concluded that the LSB should be governed by a Board with a lay majority and lay Chair and Chief Executive. It created a set of regulatory objectives and stressed the importance of creating consultation and accountability mechanisms which would ensure the responsiveness of the LSB to government, consumers and representatives of the legal services sector. The details of this it left largely to be determined at a later stage. It also proposed that the regulator should have a role to play in determining what services should fall within the 'regulatory net', but that it would ultimately be for the government to determine changes to that net.

Lastly, the report also made important recommendations as regards 'alternative business structures' (now widely referred to as ABSs). In particular it called for a relaxation of present constraints over joint partnerships between solicitors, barristers and other regulated legal professionals – so-called 'Legal Disciplinary Practices' (LDPs) – and also anticipated a potential relaxation of rules governing non-lawyer ownership of and investment in law firms. Interestingly, post-Enron, the report stopped short of a wholesale endorsement of multi-disciplinary practices (MDPs), seeing these proposals as perhaps a good way to 'test the water' first, and assess the issues involved in licensing such businesses.

Most of the Clementi proposals have found their way largely unaltered into the Legal Services Act (LSA) 2007.³² This is a very substantial and complex piece of legislation, containing 214 sections and 24 schedules. It is also primarily framework legislation. Much of the regulatory detail will need to be put in place by the LSB, and also by the frontline regulators and licensing authorities. Inevitably quite a lot of the devil will lie in that detail.

The Act implements the Clementi recommendations for a lay-dominated Legal Services Board, and an independent, unified, Office for Legal Complaints. These new institutions will take some time to put into place. The first members of the Legal Services Board have recently been appointed, but it still has to construct its operational teams and internal processes from scratch, and will have to go through a detailed drafting and consultation phase before it can come up with a new set of rules and monitoring procedures in respect of its oversight and licensing functions. It is anticipated that it will be spring 2010 before the Board is actually operating as a regulator. In developing and exercising its powers it must keep in mind a set of regulatory objectives laid down by the Act. These are broad and for the most part reflect a consensus of views derived from the

32 <http://www.opsi.gov.uk/acts/acts2007/ukpga_20070029_en_1> at 14 August 2008.

Clementi Review process.³³ The Board also has duties to consult and seek advice from a number of bodies, eg, in respect of decisions to authorise new regulatory bodies, or to allow regulatory bodies to license ABSs. The LSB is statutorily required to take account of consumer and competition interests in these processes, which are represented in the Act by the LSB's own specially constituted 'Consumer Panel' and by the OFT.

The Office for Legal Complaints will, in manpower terms, be much the larger operation of the two. The chair and Board members for the OLC are due to be appointed early in 2009, with the intention that it will become operational in late 2010. The costs of this whole process are not insubstantial. In June 2007 the forecast for implementation costs was revised upwards to £32.1 million (at then current prices) of which £19.9 million would be recovered through a direct levy of the frontline regulators, a further £9.8 million falling directly on the Law Society, and £2.4 million borne by the Ministry of Justice. Annual Running costs were also reviewed to £4.0 million for the LSB and £19.9 million for the OLC.³⁴

Although individual regulation and disciplinary arrangements are to be retained, the Act moves professional regulation substantially towards a firm- and market-based system. In order to do this the Act, first, defines what constitutes a reserved legal activity,³⁵ and then, by s 13, requires both individuals and firms who wish to undertake reserved legal work to be authorized to do so by either an approved regulator or, in the case of an ABS, a licensing authority.³⁶ Eight existing regulators are recognised in the Act as approved bodies, including the Law Society and Bar Council. The LSB will have powers to authorise new regulators of a reserved legal activity under procedures laid down in Schedule 4 of the Act, and its own rules, and this of course reflects part of the Act's market liberalisation strategy.

It is worth noting that there is nothing in the Act which expressly obliges an approved regulator to physically separate its regulatory from its representative arm, though it is clear from s 29(2), that the Board must ensure that the regulatory and representative functions are organised in a way that is not prejudicial to the former, and that there is sufficient independence in regulatory decision-making. Nevertheless, both the Law Society and Bar have wholly delegated their regulatory functions to operationally independent bodies, known respectively as the Solicitors Regulation

33 Under s 1(1) LSA, the objectives are: (a) protecting and promoting the public interest; (b) supporting the principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles'. The 'professional principles' are a set of broadly ethical principles defined in s 1(3), which require authorised persons to act with independence and integrity; to maintain a proper standard of work; to act in the best interests of their clients; in the conduct of litigation or advocacy to comply with their duty to the court to act with independence in the interests of justice, and to maintain client confidentiality.

34 Ministry of Justice, *Supplement to the regulatory impact assessment: June 2007* <<http://www.justice.gov.uk/docs/RIA-Supplement-v021.pdf>> at 14 August 2008.

35 Section 12(1) LSA identifies these as (a) the exercise of a right of audience; (b) the conduct of litigation; (c) reserved instrument activities; (d) probate activities; (e) notarial activities, and (f) the administration of oaths. The scope of these terms is explained more fully in Schedule 2, though the Act does not change the range of reserved activities from that which existed before the Act. Under s 24, the Lord Chancellor may, by order, amend s 12 and Schedule 2 so as to add any legal activity to the list of reserved legal activities.

36 Companies and firms that have in-house legal departments that are not providing legal services to the public do not need to be authorised, though in-house counsel who undertake reserved legal activities for their employer are required to have individual authorisation – ss 15(4) and (5) LSA.

Authority (SRA)³⁷ and the Bar Standards Board (BSB).³⁸ These have taken over full responsibility for regulation, discipline and, until the OLC is operational, consumer complaints. Under proposed SRA rules,³⁹ all solicitors' firms will be required, from March 2009, to become 'recognised bodies' (in case of partnerships or incorporated practices) or, from July 2009, 'recognised sole practitioners'. It is intended that this will be achieved by a relatively simple 'passporting' process for existing firms, provided that the structure of the practice complies with the rules in force. New firms created after March 2009 will have to apply for recognition, and, once the new regulatory structure is in place, there will be an annual renewal process for all recognised bodies.

The most innovative parts of the Act, and those most likely to have significant market effects relate to the implementation of new business structures. The most radical of these provisions, concerning alternative business structures under Part 5 of the Act will not come into operation until the LSB itself is operational. Consequently the liberalisation of the legal services sector is taking place in a number of stages.

Firstly, some liberalisation of the formerly highly restrictive rules on fee-sharing with non-lawyers was introduced in 2004. This permits fee-sharing as a means of facilitating, subject to public interest constraints, the introduction of capital or the provision of services to the law firm involved. This means that law firms can already attract external investment by offering a form of profit-sharing to investors, based on fee income; rather than being restricted to raising capital through loans or from their own resources.⁴⁰

Secondly the LSA permits⁴¹ the creation of what Clementi called 'legal disciplinary practices' (LDPs - though note that the term is not used anywhere in the Act itself). These are practices in which different types of lawyer are appointed as 'managers' (ie partners, or directors of the business), but where there is no external (ie non-lawyer) ownership. The SRA anticipates bringing in new regulations in March 2009 to permit LDPs in which at least 75 per cent of managers are solicitors, European lawyers or registered foreign lawyers, and thereby allowing up to 25 per cent of the management to be drawn from other approved occupations, ie, barristers, licensed conveyancers, notaries public, legal executives, patent and trademark agents, and law costs draftsmen.

Thirdly, the Act will permit the LSB, through designated licensing authorities (which are likely to include some of the frontline professional regulators), to authorise practice through ABSs. Here the Act potentially goes further than Clementi in permitting lawyers to form multi-disciplinary practices offering both legal and non-legal services under one roof, as well as permitting individual non-lawyers and corporations to own law firms. The ABS regime may not be in place until 2012, but it is already being heralded as a very significant development in the legal services market, that could herald in new investment, as banks, insurance houses, private equity firms, and perhaps even supermarket chains (the so-called 'Tesco Law' model) start to take minority and majority stakes in law firms. If – or rather when – this happens it is also likely to see the introduction of some very different business models from those that dominate at present, especially around

37 <www.sra.org.uk>.

38 <www.barstandardsboard.org.uk>.

39 See Solicitors Regulation Authority, 'Legal Services Act FAQs' <www.sra.org.uk/legal-services-act/lisa-questions-faqs.page> at 15 August 2008.

40 See now Rule 8.02 of the Solicitors' Code of Conduct 2007, <www.sra.org.uk/documents/code/rule-8-fee-sharing.pdf> at 15 August 2008.

41 In effect by excluding them, by virtue of ss 71 and 111(2), from the definition of businesses subject to the ABS licensing regime.

mid-market, which is the sector most likely to be most receptive to external investment. But what will all this mean at the interface of the moral economy?

III. THE NEW (MORAL) ECONOMY AND ENGLISH LEGAL PRACTICE POST-CLEMENTI

The Clementi-inspired reforms cannot be considered in isolation. They are, after all, coming into play in an environment that is already being substantially re-shaped by the new economy. In order to understand the potential impact of the LSA, we need to look at what is already happening in legal practice. I will do so here by focusing on three related trends: changes to the market for legal services, and with that, changes to the way law firms operate – what we will refer to as the labour process - and, finally, changes to regulation.

A. *The market and labour processes*

The LSA is likely to hasten a number of market processes that are already clearly developing, and in this context it constitutes both an opportunity and a threat to law firms. The idea that there is not so much a single legal services market as a multiplicity of differentiated markets is hardly new, but it does mean that the effects of market liberalization are also likely to be complex and differentiated according to different sectors.⁴²

Globalisation has particularly supported the largest firms to grow larger – those doing the big capital markets work, international trade, mergers and acquisitions, commercial property, trade and tax. The growing dominance of the large commercial law firms in Anglo-American practice has been a theme of the professional literature for much of the last twenty years. These play a very significant role in globalization itself – legitimating (indeed in John Flood's terms 'sanctifying'⁴³) major international transactions with the imprimatur of Anglo-American law, managing uncertainty and stabilizing not just the parties' but the global markets' expectations. The largest law firms have grown very rich in the process. The UK big four – Allen & Overy, Clifford Chance, Freshfields, and Linklaters – have seen their collective revenue increase by 198 per cent since 2000, from £1.68bn to £4.82bn, with most of that growth coming from international and emerging, rather than domestic, markets.⁴⁴ The signs are that the biggest firms – the so-called 'magic circle' giants and their US counterparts – are pulling even further away not just from the domestic but the international competition.⁴⁵ Certainly the LSA is unlikely to have much impact at this very sharp end of the market, at least in the short term. Particularly in the US, but in the UK too, these high profile lawyers play, and will continue to play an important intermediary role in the political economy. They communicate business needs to government, they lobby, they move through

42 I have suggested elsewhere that market differentiation and fragmentation is in fact more fundamental to understanding the operation of the legal services market than competition per se – see Julian Webb, 'Turf Wars and Market Control: Competition and Complexity in the Market for Legal Services' (2004) 11 *International Journal of the Legal Profession* 81.

43 John Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' (2007) 14 *Indiana Journal of Global Legal Studies* 35.

44 Data derived from 'The Transatlantic Elite' *The Lawyer*, 10 May 2008, <www.thelawyer.com/cgi-bin/item.cgi?id=132912> at 14 August 2008.

45 *Ibid.* See also, in the US context, Peter D Sherer, 'The Sky's the Limit', *American Lawyer*, May 2008, 155 (showing how compounding profits will widen the gap even among the ultra-elite firms).

the revolving door between the law firms and government or regulatory agencies, and sometimes cross the floor into the corporate environment. But more than that, in the new economy they are the key facilitators and 'moral entrepreneurs'⁴⁶ behind the emergence of new forms of private ordering and 'global law'.⁴⁷ Without them, the globalization process itself would not succeed.⁴⁸ This role is unlikely simply to disappear.

Below this level, many law firms in middle tiers have already done quite well from the new economy. A number of these have internationalised their offerings, or benefitted from the creation of new markets, eg, where governments have contracted out or privatised legal services. There is a strong feeling among commentators that the inward investment, and listing opportunities afforded by the LSA may well be exploited, particularly by larger mid-size and volume market firms.⁴⁹ And it is perhaps the volume market that remains most open to serious transformation. The potential to commoditise volume legal services remains enormous and is still relatively untapped. If external investment is permitted on an international scale, as seems consistent with the GATS ideology, then this will have significant consequences for domestic markets. Commoditisation is likely to involve two related processes: the delivery of relatively standard legal products through technologically rich environments, and the outsourcing of much routine transactional work to legal process outsourcing (LPO) businesses. The potential for such processes is already being explored in a relatively fragmented fashion. A number of English firms are already using technology to deliver services to the volume market. Examples include firms such as Lovetts plc, a five solicitor firm which incorporated in 1994, and has since become a recognised market leader⁵⁰ in delivering highly automated, low cost, pre-legal debt recovery, and successful volume conveyancers like Barnetts.⁵¹ A number of law firms in the UK – and more in the US - are experimenting with different approaches to outsourcing, as are a growing number of in-house legal departments, using offshore entities to deliver both legal process outsourcing, and back-office functions like IT and accounts support. LPOs are growing rapidly in size and sophistication, delivering a wide range of services. The Indian LPO market is predicted to grow massively from US\$146m in 2006 to US\$640m by the end of 2010.⁵² While most vendors have built business by concentrating on low value-high volume services, such as document review, e-discovery and legal publishing, the key players have consolidated by moving up the value chain into more high-end services, or specialist niches, such as contract services and intellectual property. It cannot be too long before someone starts to pull it all together, and when they do, the impact could be dramatic. Combine the two and we can begin to see an opening for high volume multi-national products to be serviced entirely offshore. In

46 Yves Dezalay and Bryant Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes' (1995) 29 *Law and Society Review* 27.

47 Arthurs and Kreklewich, above n 13, 22.

48 Flood, above n 43, 41.

49 See for example, Tony Williams, 'Ten Trends That Will Shape the Legal Market' *The Times* (London), 22 October 2007, <<http://business.timesonline.co.uk/tol/business/law/article2718339.ece>> at 20 August 2008. Charlotte Edmond, 'Private Equity Firm First to Openly Target Legal Services in the UK' *Legal Week*, 6 March 2008; E Leigh Dance, 'The UK Legal Services Act: What Impacts Loom for Global Law Firm Competition?' *Law Practice*, July/August 2008, p 35.

50 Rated in the top band for debt recovery by the *Chambers UK Guide 2008* – see <<http://www.chambersandpartners.co.uk/uk/rankings36.aspx?fid=1928&solbar=1>>.

51 <<http://www.barnetts-solicitors.co.uk>> at 20 August 2008.

52 *Offshoring Legal Services to India – An Update* July 2007, <www.researchandmarkets.com/reports/c62163> at 20 August 2008

short, in twenty years time it may not be Clifford Chance and Baker and McKenzie vying for the title of the world's largest law firm, but 'Google Law International' and 'MSN Legal'.⁵³

Even in the shorter term, the cold winds of marketisation will certainly add to the chill at what, in English terms, we call the 'high street' end of the market. The English legal profession has grown geometrically over the last twenty years,⁵⁴ and while much of that growth has been absorbed by the large commercial firms, the pressures on the lower end have increased. This is not just a consequence of a more crowded marketplace, but of long term structural changes to the market itself, affected by factors such as the opening up of the conveyancing monopoly, the introduction of conditional fees, and the consistent downward pressure on legal aid fees.⁵⁵

The loss of the conveyancing monopoly and the introduction of conditional fees are both instructive in what they tell us about how the legal services market may behave in a deregulated market. The Administration of Justice Act 1985 permitted a new para-professional group of licensed conveyancers to enter the market. But this was not, on the whole, the 'big bang' the profession feared, though this may in part be because the effects of price competition were initially cushioned by the property boom of the mid-1980s. The reforms did undoubtedly increase competition among solicitors, though some research indicates that the effects on price were in fact locally very varied.⁵⁶ Fixed price conveyancing became commonplace, and it has generated greater transparency over costs. However, the introduction of licensed conveyancers did not of itself add a substantial element of inter-professional competition; rather licensed conveyancers were as likely to become collaborators as much as competitors, with many licensed conveyancers being employed by law firms.

The early history of conditional fees agreements (CFAs) is also instructive. The fundamental problem was that the initial system was under-regulated. It created a kind of market system that was largely costless to the consumer at the point of access, but one that was controlled and, to some degree, manipulated by the commercial interests of the insurance companies who underwrote the litigation, and law firms and claims managers who now had a direct financial interest in the outcomes of the litigation they took on. Claims management companies sprang up, scenting an opportunity for profit by tapping into what appeared to be a deep pool of minor personal injury litigation. There was a real lack of regulation over the setting of fee uplifts and insurance premiums, fees which consumers themselves had no real incentive to control. The insurance companies saw that they were potentially exposed to a far greater risk than they had anticipated and generated a high volume of satellite litigation about costs, which then created significant cash flow problems for claimant solicitors. The mess was finally sorted out by a mix of guidelines from the courts

53 I am particularly grateful to John Flood for pointing out the potential for a major online information provider like Google to diversify into legal services.

54 In the past ten years the number of solicitors on the Law Society's Roll has increased by 46%, from 91,000 to 134,000 – Derek Bedlow, 'Brave New World' *Legal Week Student*, Spring 2008, pp 24-28 at 24.

55 Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11 *International Journal of the Legal Profession* 159-190. See also Lord Carter's Review of Legal Aid Procurement, 'Procurement of Criminal Defence Services: Market-based Reform', February 2006, p 4-5. It argues that '[t]o be sustainable in the long term the supply of independent quality legal services must come from an efficient market structure that provides the right quality of service at minimum cost' and sees criminal legal aid contracts becoming concentrated in 'fewer, larger, more efficient firms'. <www.legalaidprocurementreview.gov.uk/docs/carter_review.pdf> at 20 August 2008.

56 See Frank H Stephen, James H Love and Alan A Patterson, 'Deregulation of Conveyancing Markets in England and Wales' (1994) 15 *Fiscal Studies* 102.

and new regulations, but not before two of the largest players in the market had collapsed, and a number of finance houses had withdrawn from CFA schemes. For our purposes, the point is that the CFA *debacle* demonstrates not just the risks of deregulation, but the fact that here the lack of proper regulation actually contributed to creating a system that clients could not understand (ie it actually created problems of information asymmetry⁵⁷), and which actually disincentivised solicitors from acting in the public interest.⁵⁸

Overall these various changes have now bedded-in, and successful firms at this end of the market have responded by adapting to the new economy; they have merged to generate economies of scale, routinised their work, and made use of information technology to deliver high volume, low cost services, often to a particular niche market. The growing interest of the new 'infomediaries', like price comparison website Moneysupermarket.com, in the most commoditised areas of legal work (conveyancing, personal injury and wills) is likely also to increase price competition in the future.⁵⁹ In this market, the LSA will almost certainly boost these trends, opening up new investment strands to the larger players, enabling further mergers and acquisitions, and potentially greater investment in new technology. Assuming that the world has started to move out of the current downturn by 2012, the new rules on ABSs could be introduced in time to ride the crest of a new investment wave, with the capacity to transform this end of the market, and leading, one suspects, to the domination of the marketplace by a smaller number of leading 'brands'.

To exploit these market trends law firms will need to develop business models and labour processes that will fit with the new economy.⁶⁰ The 'problem' (from a commercial perspective) is that many law firms are wedded both to ways of working, and to ideals and values which, though they still form an important feature of professional identity, may no longer sustain them economically. This is not to deny that firms have already changed significantly over the last twenty years or so. For many solicitors work has become increasingly specialized; outside of the smallest firms, the old image of solicitor as general practitioner is virtually dead. The 'Lone Ranger' image of the lawyer has also been replaced in larger firms by a conception of the lawyer as team player. These sorts of changes are significant, but do not necessarily tell the whole story. Despite such changes, firms may still be constitutionally inclined to a predominantly old economy worldview, which Muzio and Ackroyd term 'defensive professionalism'.⁶¹ This, I suggest, is not so much old-fashioned professionalism, as a shift towards a managerialist ethos that still does not wholly fit with the logic of the new economy. What follows of course is a generalization, though one supported by quite a lot of empirical data, and industry comment.

57 The problem of information asymmetry is seen as a cause of market failure, particularly in professional service markets where the consumers may have little information on which to judge the quality of service offered. This problem is more acute where the client is a relatively unsophisticated 'one shot' or very occasional 'repeat' player. In an unregulated market, therefore, information asymmetry increases the risk of 'adverse selection' – that without sufficient information, consumers will select poor quality services, often on the basis of price alone.

58 See generally Stella Yarrow and Pamela Abrams, 'Conditional Fees: The Challenge to Ethics' (1999) 2 *Legal Ethics* 192.

59 Rupert White, 'Retail Shift in Legal Services' *The Law Gazette*, 9 March 2008, <www.lawgazette.co.uk/in-business/retail-shift-legal-services> at 20 August 2008.

60 See for example, Williams, above n 49; Richard Susskind, *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (2000), chapter 2.

61 Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32 *Journal of Law and Society*, 615.

The key feature of defensive professionalism is that it is a strategy that seeks first and foremost to protect the status and profits of equity partners.⁶² It is characterised by an industrial model of growth in which big is beautiful. The long term focus is thus on growing both the overall size of the firm, and the ratio of salaried fee earners to partners (referred to as ‘leveraging’), as a route to increased profitability for the latter.⁶³ As clients become more price conscious, increased profitability is also generated by higher productivity demands. There is ample evidence of the long hours’ culture and increasing workloads borne by associates and even trainees.⁶⁴ Associates in English magic circle firms are now expected to bill in the region of 1,700 to 1,800 hours per year. In mid-tier firms, the expectation is closer to 1,400-1,500 chargeable hours. These figures equate to somewhere between 6.4 and 7.6 billable hours per working day.⁶⁵ Buy-in to deteriorating working conditions is achieved by the ‘tournament’ for partnership, fuelling both a culture of compliance and processes of internal competition and (gender and ethnic) stratification.⁶⁶

The logic of defensive professionalism is fundamentally conservative. It offers little incentive to change the business model, other than responsively to overt market threats. It involves a mindset that is often risk-averse and intolerant of failure; anything that is not fee earning may be ‘rejected and discouraged as fee spending’.⁶⁷ Firms may be unwilling to invest in (risky) research and development. So far, many have struggled to find effective ways of addressing retention problems at associate level, despite the fact that high attrition rates involve not just a significant loss of investment in staff, but, research suggests, in a highly leveraged firm, can result in lower profitability.⁶⁸ Support functions, and their associated staff, may be under-resourced and under-valued: the first to go when profitability is threatened.⁶⁹ Where it does engage with the post-Fordist ethos of the new economy, defensive professionalism does so primarily because of the bottom line. It seeks competitiveness through managerial efficiency, a strong customer focus, routinisation of work where possible, and commoditisation of low value work, whether through technology or outsourcing.

In terms of moral economy, many of these developments are worrying, and not least because they remind us that professionalism has always been Janus-faced about its values. Capitalisms old and new have always used labour in pursuit of the accumulation of capital, and to that extent both use people primarily as a means to an end. However, there are qualitative changes that we probably should not ignore, and which represent a significant degrading of the old moral economy in a number of ways.

62 Cf Susskind’s observation that ‘with very few exceptions... the top hundred law firms in the world are committed to squeezing as much profit as possible out of traditional legal service... [T]hey will cling dearly to the old economy until there are overwhelming reasons to do otherwise’. above n 60, 55.

63 Muzio and Ackroyd, above n 61.

64 Ibid, 638.

65 Bedlow, above n 54, 26.

66 See Robert G. Lee ‘Up or Out’ – Means or Ends? Retention in Large Law Firms’ in Philip Thomas (ed) *Discriminating Lawyers* (2000); Hilary Sommerlad and Peter J. Sanderson, *Gender Choice and Commitment: Women Solicitors in England and Wales* (1998).

67 Susskind, above n 60, 64-65.

68 Yasemin Y Kor and Huseyin Leblebici, ‘How Do Interdependencies Among Human-Capital Deployment, Development and Diversification Strategies Affect Firms’ Financial Performance?’ (2005) 26 *Strategic Management Journal* 967.

69 Muzio and Ackroyd, above n 61, 636-7; See also ‘Employee survey reveals support staff dissatisfied’ *The Lawyer*, 1 September 2008.

First, growth and internationalisation within a firm may weaken the social and collegial ties within that firm, creating a vicious circle whereby still greater emphasis is placed on bureaucratic and managerialist structures in an attempt to replace the lost sense of identity and cohesion.⁷⁰ Secondly, the increasing segmentation and fragmentation of the profession as a whole is also of considerable significance. Fragmentation significantly undermines the unity of the profession.⁷¹ As a matter of regulation, it raises questions about the capacity of a single regulatory body (such as the SRA) to maintain both its legitimacy, and its capacity to regulate through what is fundamentally a single professional code. Fragmentation may equally reduce the sense of collegiality within the wider profession; making the representation of the profession *qua* profession more difficult, and potentially weakening the influence of the collective profession in the political economy. Thirdly, the industrialisation of much transactional work, so that tasks are distributed between teams of workers, may create greater functional dependence between workers, but it also generates new ethical problems of its own,⁷² and its routinisation and commoditisation may also contribute to a loss of the experience of law as ‘meaningful work’⁷³ or ‘craftsmanship’. For some, the growing emphasis on business imperatives threatens to undermine the ethos of universal service,⁷⁴ or perhaps, the outright rejection of traditional notions of professionalism as so much ‘sherry talk’.⁷⁵

B. Regulation

As the first independent review of the legal services market since Sir Henry Benson’s Royal Commission reported in 1979, and the first ever, to my knowledge, to focus specifically on the issue of regulation, Clementi represented a highly significant development in the UK regulatory debate, and a victory for the new moral economy.

It was also a clear reflection of changing perceptions about the function of the regulatory state. Although influenced by the deregulation debate of the 1980s and the move to models of ‘New

70 Cf. Anthony Ferner, Paul Edwards and Keith Sisson, ‘Coming Unstuck? In Search of the ‘Corporate Glue’ in an International Professional Service Firm’ (2006) 34 *Human Resource Management* 343.

71 These arguments are developed more fully by Andrew Francis, ‘Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism’ (2005) 12 *International Journal of the Legal Profession* 173, 183-9.

72 The need to operate increasingly complex systems for checking conflicts of interest is one obvious consequence, but, more generally, in the move to team working, decisions traditionally made by a single professional must now either be negotiated among a team of people, or delegated to a team leader with responsibility for such decisions. Neither scenario sits entirely comfortably within an ethical model of decision-making that assumes individual professional autonomy. See Mary Twitchell, ‘The Ethical Dilemmas of Lawyers in Teams’ (1988) 72 *Minnesota Law Review* 697, 716, 726; Edwin H Greenebaum ‘Law Firms and Clients as Groups: Loyalty, Rationality and Representation’ (1988) 13 *Journal of the Legal Profession* 205.

73 Bill Simon defines ‘meaningful work’ as work that is a means both of self-expression and of connection with others – see William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (1998), 112.

74 See, for example, Anthony Kronman’s *The Lost Lawyer* (1993). These concerns, however, are hardly new, and many of them were already being expressed in the early twentieth century – when the large law firm first started to emerge as an entity in the United States: see Champ S Andrews, ‘The Law. A Business or a Profession?’ (1908) 17 *Yale Law Journal* 602; Julius Henry Cohen, *The Law: Business or Profession?* (1924).

75 A phrase used by a solicitor quoted by Christa Christensen, Suzanne Day and Jane Worthington, ‘“Learned Profession? – the Stuff of Sherry Talk’. The Response to Practice Rule 15’ (1999) 6 *International Journal of the Legal Profession* 27.

Public Management',⁷⁶ the debate has moved beyond a crude deregulation agenda, to stress the need for systems of regulation that are themselves fit for the new moral and political economy: efficient, systematic, transparent and accountable, whilst remaining – or perhaps becoming even more – skeptical of the (conventional) role of the state in regulation.⁷⁷

It is tempting to suggest that the imprint of the new moral economy ran through the Clementi Review rather like the lettering through a stick of rock. The Review was shaped by a very different perception of professional services from that which had informed most debate until the 1980s. Now the language of competition had largely overridden the traditional discourses of professional service and autonomy. An instructive comparison can be drawn with the Benson Commission. Benson was very much the final act of a gentler age. It was dominated by the traditional values of professionalism, and to an extent that was surprising even then, gave the professions a clean bill of health. While ten years later, in 1989, Lord Benson (as he had become) could round on the Lord Chancellor Lord Mackay's Green Papers on legal services for their attachment to 'the political dogma of competition',⁷⁸ the rules of the game had changed sufficiently by 2004 for Sir David Clementi's review to be framed precisely by that same 'dogma', as his terms of reference proclaimed.

Clementi's objective was also to create a regulatory framework that was sufficiently independent *from* lawyers. Again, this constitutes an obvious but nonetheless significant shift in the balance of the moral and political economy. Lawyers' themselves have traditionally sought regulatory regimes which guarantee *their* independence, both from the state and, in some respects, from client interests. Whilst that traditional sense of independence was certainly acknowledged as important in the review, this framing of the issues reinforces a key assumption of the first term of reference: that consumers need protection from the legal profession; that left to their own devices, the majority of lawyers will resist competition. It assumes that the interests of lawyers and clients are generally not aligned, and that, given the opportunity, lawyers will use their power and knowledge, and, indeed, their moral claims to independence and self-regulation, to create monopoly rents for themselves.⁷⁹

In this context, it is tempting to see the Legal Services Act, at the level of political economy, as the state's strategic response to a process of transition whereby, in Abel's pithy phrase, 'the traditional profession mobilized state power to resist the market, [and] the modern profession mobilizes market forces to resist the state',⁸⁰ and as indicative of the profession's failure to capture the moral high ground.

This is not to say that there are no potential benefits to be had for the profession, as well as consumers, out of this process. The proposal of a broadly co-regulatory model has been generally favourably received – and rightly so. If the LSB can position itself effectively as an intermediary

76 Christopher Hood, 'A Public Management for All Seasons' (1991) 69 *Public Administration* 3-19; Hilary Sommerlad, 'The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance' (1999) 6 *International Journal of the Legal Profession* 311.

77 Julia Black, 'Proceduralizing Regulation: Part 1' (2000) 20 *Oxford Journal of Legal Studies* 597, 600-601.

78 Hansard (HL) vol. 505, col.1317, 7 April 1989.

79 See Gillian K Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' (2000) 98 *Michigan Law Review* 953; Anthony Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22 *Oxford Journal of Legal Studies* 419.

80 Above n 12, 484.

between lawyers, the state and consumers, it may help to depoliticise some of the debates about the provision and quality of legal services. Moreover, if the OLC can also make a real difference to the efficiency of complaints handling, then these processes together could provide an important foundation for (re)constructing institutional trust in the profession.

But, on the other hand, there are genuine concerns that the broadly deregulatory thrust of the Act could have unintended consequences for access to justice. Clearly a ‘Tesco law’ approach does create opportunities to increase access to legal services, but there are threats too. The greatest risks to access may arise if ‘Tesco Law’ cherry-picks the most profitable services, to the detriment of established local providers. A particular risk here is of increasing geographical inequalities in meeting legal need, particularly in rural areas. We need to look very carefully at whether hastening the disappearance of the high street solicitor, in the wake of the independent butcher and baker, is really increasing consumer choice. This may be particularly critical if cherry-picking knocks out full service legal practices, without providing available alternatives, especially given the growing evidence of the extent to which people often experience clusters of ‘multiple justiciable problems’⁸¹ which may require a range of expert support.

Clementi rejected these as arguments against opening up the market on three grounds:⁸² (i) that access problems are more about cost than proximity (and here Clementi rightly encouraged providers to be more inventive in finding ways of meeting legal need other than face-to-face); (ii) that costs of ‘uneconomic’ services such as legal aid should be transparent; ‘there is no reason why they should be subsidised by the users of other services’,⁸³ and (iii) that if there is a particular issue about rural access this should be addressed as a separate policy/regulatory issue aside from the question of who provides the capital. Most of these arguments have some merit, but do not necessarily address the underlying risks. Baldwin *et al* have rightly raised the question whether the market should be managed in some respects to ensure a minimum geographical distribution of suppliers.⁸⁴ This has never been properly answered. There are also grounds for concern that transparency of cost and cross-subsidisation might become significant regulatory issues. Clearly, there are good reasons for increasing the transparency of *pricing*, but I am not sure it follows that providers of legal services should have to stop or somehow be more transparent about cross-subsidisation. I do not think the critique of cross-subsidisation is particularly well thought-out. There are counter arguments, notably in relation to the moral economy of lawyering, and the view of law as a social as much as an economic good, which militate against a narrowly economic view of cross-subsidisation, and which Clementi seemed to ignore. For example, if we reject the legitimacy of cross-subsidisation then we would surely risk precluding on purely economic grounds any ethical commitment by lawyers to provide *pro bono* services.

This brings me to my second point: the relationship between competition and quality. This is an issue that needs to be considered in respect of both regulated and unregulated services. As we saw in England in the early 1990s, with a number of scandals around immigration advice,⁸⁵

81 Pascoe Pleasence, et al, ‘Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators’ (2004) 1 *Journal of Empirical Legal Studies* 301.

82 Above n 30, 119-21.

83 *Ibid*, 120.

84 Robert Baldwin, Martin Cave and Kate Malleon, ‘Regulating Legal Services: Time for the Big Bang?’ (2004) 67 *Modern Law Review* 787, 791.

85 See, Lord Chancellor’s Advisory Committee on Legal Education and Conduct, Standards and Regulation of Immigration Advice (1997).

the risks to consumers may be particularly high in respect of unregulated legal services. I am not assuming here that regulation necessarily provides a strong guarantee of quality, but at the same time the degree and transparency of the risks in using a less-regulated entrant need to be carefully factored into the regulatory mix, and that information made available to consumers. The LSB could require service providers to be more explicit not just on price, but also quality measures and risk. This is not simply a matter of reducing informational asymmetry. Regulation of both risk *and* quality, it is submitted, are important. Risk assessment (and ultimately risk-based regulation) provides a potentially useful mechanism for encouraging best practice and higher levels of compliance by dangling the carrot of a reduced regulatory burden in front of lower-risk providers. Quality regulation is important in preventing adverse selection, and the problems of market capture and an unregulated 'race to the bottom', which might not just reduce choice, but also create potential externalities in the market (such as higher insurance or regulatory costs). Effective quality regulation, not just consumer access to information, I suggest is, paradoxical though it may seem, an important guarantor not just of quality, but also of competition.

IV. CONCLUSIONS – AND SOME LESSONS FOR NEW ZEALAND?

Without doubt the English professional project is entering a new phase; one in which the status and rewards of traditional professionalism are increasingly for the few, rather than the many, and in which many of the old certainties about what it means to be a 'professional' are a lot less certain. But in reality this is, I suggest, part of the logic of classical professionalism, which, as a last resort, seeks always to defend its own privileges, if not now from the state, then from the inexorable pull of the market. If it has to adapt radically to do so, it almost certainly will.

Whether the opportunities created by market-based developments such as the LSA are likely to add to rather than reduce the tensions within professionalism is a moot point. Developments in England and Wales over the past decade do not suggest that the professional associations can necessarily be relied on to provide political leadership or to be a driver for radical change. In the words of the legendary Frank Zappa, 'It isn't necessary to imagine the world ending in fire or ice – there are two other possibilities: one is paperwork, and the other is nostalgia'.⁸⁶ The professional associations' nostalgic turn to their claims of independence and professional disinterest as a means of defending their turf through the 1990s, did little other than to expose such claims as at best morally ambiguous, and at worst 'as a dying bourgeois ideal'.⁸⁷ The profession doubtless hopes that the LSA does not presage a future that threatens to kill it by weight of regulation. As the past decade shows, however, whatever way the future goes will depend in part on the profession itself. The LSA in this context offers some opportunity to draw a line under the past. The separation of regulatory and representative functions, and in particular, the transfer of complaints to the independent OLC finally removes from the profession the debilitating task of defending the indefensible, of being judge in its own cause. The possibility of a positive co-regulatory regime developing between the LSB, the professional regulators and representative bodies holds out the possibility that value compromises can be produced that will be capable of maintaining public trust in the profession. But, if professionalism is to have a meaningful future, I suggest, it needs to be embedded first and foremost within the ideology and practices of law firms.

⁸⁶ See <http://en.wikiquote.org/wiki/Frank_Zappa> at 3 September 2008.

⁸⁷ Abel, above n 12, 497.

The move to more firm-based regulation could play an important part in this. It will mean that law firms, not just individual lawyers, have to take greater responsibility for regulatory and ethical compliance. This creates important opportunities to develop and enhance internal compliance systems and cultures.⁸⁸ While these can be used in a way that is narrowly managerialist, or as an exercise in creative compliance, research in large law firms has also highlighted the potential of such systems to sustain and reinforce professional values and practices, within a culture of professionals organising professionals.⁸⁹ Ethics partners and ethics committees exist in a growing number of law firms already in the UK, USA and Australia, though it is often questionable how much power they have – at least outside of technical calls on matters such as potential conflicts of interest. More could be done to support such persons, for example, by the SRA promoting ethics advisors as a form of good practice,⁹⁰ or even moving to a stronger, mandated, compliance culture, perhaps with the promise of light touch regulation for those who adopt high quality internal processes. These kinds of changes could give such persons greater authority within their organisations.

We should also not overlook the possibility that the move to more corporatised business models could support law firms to break out of the mode of defensive professionalism just described. External investors may not only be less risk-averse than inside managers, but will almost certainly require new business models to be developed as a condition of their investment. This is both an opportunity and a threat. While there are significant ethical risks,⁹¹ the idea that, in this process, these corporate law firms could become the locus of a new moral economy of legal practice also should not be dismissed out of hand. The premise of the LSA, in requiring ABSs to appoint a Head of Legal Practice to oversee professional compliance,⁹² appears to push such practices further down the path of compliance-based regulation than their unincorporated competitors. This could potentially enable such firms to try and create some market advantage in setting themselves up as ethical leaders of the profession. At the very least it limits the risk of ‘floating responsibility’ (that is ethical and regulatory responsibility that attaches to the organisation, but rests with no specific individual) that is often attributed to corporations and large bureaucracies.⁹³ The introduction of fully incorporated firms also holds out some interesting possibilities. Incorporation itself is an opportunity to create a public statement about the type of law firm you intend to be. While investors will be interested in the bottom line, in the current climate, increasing numbers are also likely to want to know about the business’s sense of its place in the community, or its version of ‘corporate

88 See for example, Christine Parker, ‘Lawyer Deregulation via Business Deregulation: Compliance Professionalism and Legal Professionalism’ (1999) 6 *International Journal of the Legal Profession* 175; Julian Webb and Donald Nicolson, ‘Institutionalising Trust: Ethics and the Responsive Regulation of the Legal Profession’ (1999) 2 *Legal Ethics* 148.

89 James Faulconbridge and Daniel Muzio, ‘Organizational Professionalism in Globalizing Law Firms’ (2008) 22 *Work, Employment and Society* 7, 14.

90 Elizabeth Chambliss, ‘MDPs: Toward an Institutional Strategy for Entity Regulation’ (2001) 4 *Legal Ethics* 45, 61.

91 For example, Christine Parker cites the risks of greater managerialism (though, as I have sought to show, this is happening without incorporation); over-commercialisation of legal practice, and increased conflicts of interest between lawyer and non-lawyer participants in the incorporated firm – ‘Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible’ (2004) 23 *University of Queensland Law Journal* 347, 355-6.

92 See s 91 LSA 2007.

93 David Luban, Alan Strudler and David Wasserman, ‘Moral Responsibility in the Age of Bureaucracy’ (1992) 90 *Michigan Law Review* 2348.

social responsibility' (CSR).⁹⁴ Just as many large firm clients now require firms to demonstrate a commitment to *pro bono* activity, or support for community initiatives, so it is entirely plausible that investors will expect the same. It is notable in this context that the listed Australian firm of Slater and Gordon Limited emphasised their values and ethical obligations in their prospectus, including their overriding obligations to the law and their clients, to an extent beyond that which would seem required on a purely compliance basis.⁹⁵

So, what are the lessons and challenges for New Zealand in all this? New Zealand is in some respects a very different jurisdiction from England. Its largest firms are primarily national rather than global in reach, and in terms of size, would sit well in the mid-rank of English law firms.⁹⁶ In other regards, however, there appear to be some significant similarities, though accurate, detailed, comparison is hindered by a relative lack of published statistics and research on the New Zealand profession. In a very brief overview of the practice context it can be said that the profession in both jurisdictions has grown rapidly over the last twenty years. Work practices appear to be changing in New Zealand in ways that are not dissimilar to the UK. As in the UK, and most other Common Law jurisdictions, there is evidence of a wide earnings gap between corporate lawyers and the rest, and of a growing long hours' culture.⁹⁷ There is also evidence of continuing gender stratification.⁹⁸ Private client work has been impacted by even tighter budgetary control over legal aid than in the UK. Until this year remuneration rates had not been increased for 12 years, leading many firms to argue that legal aid had become wholly uneconomic.⁹⁹ Complaints against lawyers have been on the rise.¹⁰⁰

In terms of regulatory reform, of course, the New Zealand profession is also facing changes under the Lawyers and Conveyancers Act 2006 (LCA). The changes will be largely familiar to a New Zealand readership. Like the English Administration of Justice Act 1985, the LCA creates a separate conveyancing profession,¹⁰¹ permits conditional fees,¹⁰² and allows law firms to incorporate, though like earlier legislation in England and Australia, it restricts ownership and control essentially to lawyers.¹⁰³ It puts the 'fundamental obligation' of independence and the duties owed by lawyers to the court and to their clients on a statutory footing.¹⁰⁴ It does the same with the obli-

94 A growing number of large UK law firms have already developed CSR policies and programmes, including Clyde & Co, CMS Cameron McKenna, Freshfields, S J Berwin, and Simmons and Simmons. See also Halina Ward, 'Corporate Responsibility and the Business of Law' (International Institute for Environment and Development, London, 2005) (on file with the author).

95 <www.slatergordon.com.au/pages/reports_presentations.aspx> at 8 May 2008.

96 In fact, in terms of the size of firms, number of practitioners and population served it is probably much more comparable to the Scottish profession – see, eg, data from the Law Society of Scotland's Annual Report 2005, <http://www.lawscot.org.uk/AnnualReport2005/membership_society.htm>.

97 John H. Farrar, 'The Winds of Change Hit the Legal Profession' (2007) 15 *Waikato Law Review* 23.

98 Georgina Murray, 'New Zealand Women Lawyers at the End of the Twentieth Century' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (2003) 131-3.

99 See, eg, TV3 'Budget boost for legal aid lawyers not enough' 22 May 2008, <<http://www.tv3.co.nz/News/Story/tabid/209/articleID/56810/cat/41/Default.aspx>> at 15 August 2008.

100 Farrar, above n 97.

101 Section 3 LCA.

102 See Part 11, LCA.

103 Section 6. Curiously this definition section has been used as the mechanism for introducing two quite substantial changes to legal practice, the possibility of incorporation, and the definition of reserved activities.

104 Section 4. The duties are not enumerated in the Act and s 4 is best seen therefore as merely declaratory of existing Common Law obligations.

gation (imposed on the New Zealand Law Society – NZLS) to maintain rules of professional conduct and a code of conduct,¹⁰⁵ The Act also identifies a number of reserved areas of practice, but this does involve some erosion from the position under the Law Practitioners Act 1982, insofar as the giving of general legal advice is not a reserved activity. As in England and Wales will writing and tax advice are also not reserved.

The LCA introduces a number of other key regulatory changes to professional organisation and discipline. It leaves first-tier complaints-handling with the NZLS, but then creates both the post of Legal Complaints Review Officer¹⁰⁶ as an independent, but second tier complaints service, and an independent Lawyers and Conveyancers Disciplinary Tribunal¹⁰⁷ for more serious misconduct. Moreover, it has been anticipated that the New Zealand Law Society will take over the regulatory functions of the district law societies, and undertake representative functions for its members. Given that membership of the NZLS is voluntary, the extent of its representative role could be moot. The Society has sought to establish itself as the sole representative body for lawyers in New Zealand, though at the time of writing this is not yet a foregone conclusion.¹⁰⁸

In sum, then, it is apparent that the general direction of travel is not dissimilar to the UK, though New Zealand has yet to progress as far down the path predicted by the new economy. The Lawyers and Conveyancers Act has relatively limited deregulatory effects. It looks, by comparison to the LSA, a relatively play safe measure for both state and profession. It is unsurprising that, in 2006, the President of the NZLS greeted its arrival with ‘a sense of relief’.¹⁰⁹ The opening up of conveyancing may well increase price competition between solicitors, but does not necessarily presage substantial competition from conveyancing practitioners. The introduction of conditional fees to New Zealand, if the lessons from England are learned, may have significant economic benefits for law firms squeezed by cutbacks in civil legal aid, but both this and the opening up of the conveyancing market have increased the pressure to commoditise legal services in England, and could do the same in New Zealand. Commoditisation itself is not without ethical and moral risk (for example, it depersonalises the lawyer-client relationship, and can increase the risk of failure to distinguish those cases that require a more bespoke service). The English experience also suggests that conditional fees only enhance access to justice where the interests of lawyer, client and insurer are all aligned. Moreover the English experience suggests it is unlikely that the LCA will be the last word, even in the medium term. As we have seen in England, once the market genie is out of the bottle, it is very hard to put it back in and not least because, in an increasingly fragmented legal services market, it is not in the interests of the economically powerful to do so.

The LCA, then, may hasten the fragmentation of the profession, but in a number of respects it seeks also to reinforce the old moral economy and underpin it by a modicum of ‘modernisation’ as regards client care and complaints handling. The economic impact of the regulatory reforms on

105 Sections 94-95.

106 Sections 190-205.

107 Sections 226-235.

108 Section 65 LCA. At the time of writing it appears uncertain that the NZLS will establish the preferred ‘One Society’ model, as the Auckland District Law Society has rejected that approach following uncertainties whether it would be able to retain control over the representative functions in respect of its members, and is seeking incorporation in its own right – Sarah McDonald, ‘Auckland lawyers shun One Society’, *National Business Review*, 22 August 2008, <www.nbr.co.nz/article/auckland-lawyers-shun-one-society-34289> at 2 September 2008.

109 Letter from Chris Darlow to practitioners, 26 April 2006, <www.lawyers.org.nz/PDFs/LCA/letterweb.pdf> at 2 September 2008.

small firms will almost certainly not be as great as in the UK. The benefits of incorporation to mid-size and large firms are also likely to be less than if greater liberalisation of business structures had been allowed, though the risks may be less too. It will be interesting to see how the profession in England or Australia responds to the first attempt at a hostile takeover of a listed incorporated practice! On the other hand, the relative value of external investment, even in a smaller jurisdiction should not be overlooked. Large Australian law firms are working strategically to establish a strong, trans-national, competitive presence in markets in the Asia Pacific region,¹¹⁰ and there is a possibility that the large New Zealand firms will be left further behind in terms of that market. Whether that leaves them more exposed to predatory actions from across the Tasman, or from further afield is a moot question. So far there are relatively few genuinely trans-Tasman law firms, and the only truly global firm with a presence in New Zealand – Minter Ellison¹¹¹ – is also the only major global player to have an Australasian ‘home’ jurisdiction. Whether significantly more, and larger, Australian firms will follow Slater and Gordon, and whether New Zealand firms will begin to press for a level playing field with their Australian counterparts also remains to be seen.

The failure of the LCA to formally separate representative and regulatory functions appears surprising, in the context of international comparisons with both England and Australia, and particularly as the LSA in England operationalises reforms similar to those actually proposed in New Zealand by the 1997 E-DEC Report, commissioned by the New Zealand Law Society itself.¹¹² This, it will be recalled, had proposed the establishment of a New Zealand Law Council with responsibility for regulating professional conduct and promoting client protection in the public interest, leaving the Law Society free to develop its representative functions. How and whom the NZLS will represent is presently unclear. The precedents are not entirely encouraging. The English Law Society has increasingly struggled with the contradictions of its representative and regulatory roles; it has been hobbled by periods of poor and fractious leadership. It has been caught up in the contradictory needs of a fragmenting profession. It has thus too often found itself between the rock of small firms seeking a level of economic protectionism that, in reality, they would never be granted by a skeptical state, and the hard place of corporate firms who, increasingly, see themselves as having little in common with the ‘high street’ solicitor, and with little to gain from Law Society representation.

The lawyer’s ‘fundamental obligation’ of independence may itself prove to be a double edged sword. While I do not deny the importance of independence as an ethical principle, the collective professional claim to independence becomes in a number of respects incoherent. Clementi, as we have seen, called the English profession’s bluff, and won. If lawyers prize independence so much, then why should they not be obliged to behave independently, and be accountable to an independent body as such? The English profession has struggled with the ways in which its claims to independence have often served to privilege the interests of the few, over the many: notably the interests of equity partners over the growing army of associates, trainees, and paralegals; client

110 See Ashley H Pinnington and John T Gray, ‘The Global Restructuring of Legal Services Work? A Study of the Internationalisation of Australian Law Firms’ (2007) 14 *International Journal of the Legal Profession* 147.

111 Trading in New Zealand as Minter Ellison Rudd Watts; another ‘global’ trans-Tasman firm, DLA Phillips Fox is part of the DLA Piper Group, that grew out of three UK and US legacy firms. However that operates as a close alliance of independent practices rather than a true global partnership.

112 E-DEC Ltd, ‘Purposes, Functions and Structure of Law Societies in New Zealand: Final Report to the New Zealand Law Society’ (1997).

interests over the rights of third parties, minority groups and the environment,¹¹³ and the interests of lawyers collectively, in their exploitation of monopoly rents and restrictive practices, over consumers. The irony is, of course, that market liberalisation also threatens to kill as much as it cures, notably by increasing the gap between the class of what we might call ‘complete professionals’ (the traditional equity partners) and the rest of an increasingly de-professionalised service class. Whether New Zealand will be any more successful at negotiating these dynamics and contradictions of professionalism in the new moral and political economy is for you to decide.

Finally, we should also recognize that the new political and moral economy could also have significant implications for legal education and training. One very likely outcome of the changes in England and Wales is that the numbers of fully qualified lawyers required will decline, as paralegals and LPOs take over more work. This creates a challenge for universities, who are under their own pressures to maintain recruitment levels, and for whom law courses have been a strong source of student numbers since the expansion of the early 1990s. Growing numbers of graduates are already working as paralegals, and, outside of the research-led universities, bodies like ILEX and a new Institute of Paralegals are already engaged in developing linkages with universities to assist graduates in obtaining paralegal qualifications, in part through their degree studies. Changes proposed by the Law Society/SRA at the vocational stage of training are also beginning to mirror the trends of practice for more bespoke and specialized courses, reflecting the fragmentation of the field of practice.¹¹⁴ These trends, although capable of binding the professional bodies more closely into the reproduction of the profession, in turn may add to upward pressures on the already weakening ideal of unified legal profession, and downward pressure on the generic law degree, large parts of which are arguably redundant from the perspective of their professional utility, and increasingly unpopular with students chasing highly competitive training contracts and pupillages.

The link to education also brings our discussion of professionalism closer to one of the other themes of this issue: the law in context. Another common feature of the English and New Zealand systems has been their relative failure to take the study of the legal profession seriously within the law school curriculum. If it is taught at all, it is likely to appear either as just one element of a generic ‘legal system’ course, or, perhaps, as part of the context in teaching lawyers’ ethics,¹¹⁵ or legal skills.¹¹⁶ Whilst this is understandable in the context of an increasingly crowded curriculum, it does mean that we, in the academic profession, are missing important opportunities to turn a critical spotlight onto a world that most of our students still wish to inhabit, but in fact have little critical appreciation of. But more than that, like it or not, understanding what lawyers are and what they do is fundamental to a fuller appreciation of the relationship between law and society. Legal practice continues to play a significant role in state formation and reconstruction; it is deeply imbricated in the creation of global capital, and, on a good day, the profession still has the power and the privilege to act as a bulwark against oppression of many kinds. In short, as Rick Abel observes, ‘lawyers are a pivotal institution of civil society’.¹¹⁷ A proper study of the legal profession not only adds to our appreciation of the law in action, but serves to emphasise both the

113 Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (1999), notably at 282.

114 Andrew Boon, John Flood and Julian Webb, ‘Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession’ (2005) 32 *Journal of Law & Society* 473.

115 See, eg. Duncan Webb, *Ethics: Professional Responsibility and the Lawyer* (2000), chapter 1.

116 See, eg. Caroline Maughan and Julian Webb, *Lawyering Skills and the Legal Process* (2nd ed, 2005) chapter 6.

117 Above n 12, xiii.

changing, and deeply contested character of (legal) professionalism in the twenty-first century, and the moral ambiguity of law and legal institutions.

SOME THOUGHTS ON JUDICIAL DIVERSITY IN THE NEW SUPREME COURT ERA

MORNÉ OLIVIER*

[W]e have a keen appreciation of the task ahead; a consciousness of the solemn trust we undertake; and a willingness to respond to the expectation with which this reform has been undertaken. (Speech by the Rt Hon Dame Sian Elias, Chief Justice of New Zealand, on the occasion of the first sitting of the New Zealand Supreme Court, 1 July 2004).

I. INTRODUCTION

The past couple of decades have seen many significant legal and constitutional developments in New Zealand. Some of these developments have directly impacted on the New Zealand court system and judiciary. Arguably, the most significant judicial reform development has been the abolishment of appeals to the Judicial Committee of the Privy Council¹ and the concomitant establishment of the Supreme Court of New Zealand.² The abolishment of appeals to the Privy Council was mooted as far back as 1904 by the then Chief Justice, Sir Robert Stout. It has taken nearly a century to accomplish, but New Zealand now has a court of final appeal based on its own shores.³

In this article, I submit that the establishment of this new apex court requires a rethink of who our judges are, what they do and how they do it. Essentially, it requires a rethink of what it means to be a judge, particularly in light of the changing 'face' of New Zealand.⁴ This raises the important issues of judicial selection and appointment, which, in a diverse society like New Zealand with both bicultural and multicultural dimensions, is inextricably coupled with judicial diversity.

II. THE ROLE OF THE JUDICIARY

The question of what role judges in a democracy fulfil – or should fulfil – has become important in the modern world. It is increasingly a question that both governments and citizens ask because of the increasing powers of judges to review laws and conduct that affect public institutions and citizens. In jurisdictions where judges have the power to declare laws or conduct invalid, the thin line between the functions of the legislative and judicial branches of government – and the limits

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1 Hereinafter 'the Privy Council'.

2 Supreme Court Act 2003. The Act came into force on 1 January 2004 with the new Supreme Court empowered to hear appeals from 1 July 2004. For a short history of the Supreme Court, <<http://www.courtsofz.govt.nz/about/supreme/history>> at 16 October 2008.

3 For an overview of the historical development of the abolition process, see Terence Arnold, 'Update on the Supreme Court' (speech to the Legal Research Foundation Annual General Meeting, 7 August 2003) <<http://www.crownlaw.govt.nz/uploads/UpdateSC.PDF>> at 16 October 2008.

4 My focus in this paper is on the superior court judiciary.

imposed on each branch by the other – are particularly important and controversial issues. In jurisdictions where the legislature is supreme, the boundaries between the branches of government are also becoming progressively blurred as judges test the limits of the doctrine of separation of powers. This is also true in New Zealand.

There is no doubt that the establishment of the Supreme Court heralds a new age for New Zealand. It allows New Zealand to stand on its own feet – judicially speaking. Section 3(1) of the Supreme Court Act 2003 sets out the purpose of the Act:

- (1) The purpose of this Act is—
 - (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—
 - (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
 - (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
 - (iii) to improve access to justice ...

The purpose of the Act is helpful in determining the purpose of the Supreme Court. As I read it, the main function of the new court is to serve as a court of final instance setting binding precedent for lower courts. Additionally, the court – and its judges – has a symbolic role. In the words of the Chief Justice, ‘we know that we serve an idea much bigger than all of us’.⁵ This role includes bringing a distinctive New Zealand approach to the administration of justice and the resolution of disputes, including legal matters relating to the Treaty of Waitangi. It places a heavy burden on the court as an institution, and the individual judges who constitute it. New Zealand now has a final appellate court staffed by New Zealand judges with a knowledge and understanding of New Zealand law, society and the context within which the law operates. It is a further step in cutting the umbilical cord with its former ruler and contributes to the developing sense of a distinct New Zealand identity.

The Chief Justice links the creation of the new court with the aspirations for justice that existed at the time of the signing of the Treaty of Waitangi:⁶

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.

There is an expectation that the Supreme Court will be conscious of these aspirations in the performance of its obligations. The establishment of the Supreme Court provides an opportunity for the judiciary as a whole to reflect on its role in responding to these aspirations. The Supreme Court, staffed by New Zealand judges, has a general and a statutory obligation to ensure that justice is done with an understanding of New Zealand history and conditions. The aspirations referred to by the Chief Justice should not be ignored. This requires the discharge of the judicial

5 Dame Sian Elias, Speech on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 <<http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting>> at 16 October 2008.

6 *Ibid.*

function in a particular, distinctive New Zealand context. It appears that the role players are aware of this. In the words of Richard Dobson QC, speaking at the first sitting of the Supreme Court:⁷

Your Honours are of this society, and are exposed to and at all times aware of all that is going on, from the aspirations of many groups of New Zealanders for the best conditions to foster social and economic well-being, and mutual respect for the differences between us, to politicians and commentators fulminating on the elusive line between development and creation of the law, and also to the desirable business conditions for a small relatively affluent country where most economic activity is done in small businesses, as components of a country particularly dependent for our standard of living on matters beyond our shores and therefore largely beyond our control. We are in an era of heightened awareness of human rights and expectations that the Courts will recognise and enforce them. In this, we reflect aspirations in many countries, but they are tempered perhaps, by the beginnings of acknowledgments that the law cannot provide a complete remedy for every recognised wrong. The law must reflect the society it regulates and this Court will foster confidence as its judgments demonstrate and understanding of all those tensions and aspirations.

In dealing with the cases before them, the Supreme Court should respond appropriately to the aspirations underlying the creation of the new court. The vexing question is how the court should go about doing this. The primary role of the judge has always been and will remain the same: to resolve disputes through the interpretation and application of the law. It is not what the judge does that is changing, but the way in which it is done. Hodder's description of the judge as 'a philosopher-king in the democracy' no longer has a place in the Supreme Court era.⁸ Judges are more than mere positivist functionaries and mechanical interpreters of the law. Underlying everything a judge does, is a principled commitment to justice, and the rendering of justice in a comprehensible and accessible way. The Supreme Court has to provide the leadership in this regard. Daily, judges consider competing interests and values which require the exercise of discretion. They have a duty to pursue and advance the values that underlie a democratic legal system and its basis of the rule of law and right to equality. As expressed by Justice Baragwanath recently:⁹

Confidence in the judges is a component of confidence in the rule of law. Unless Māori (and other minorities) feel that the legal system is *their* legal system the estrangement of many from the law will continue and perhaps accentuate.

It is legitimately within the domain of judges to choose interpretations of law that will advance this cause. Legislation such as the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and also the Treaty of Waitangi, invite the courts to provide more specific content to generally framed provisions. It is also hoped that the court will contribute to the further development of a bicultural jurisprudence, including that '[t]he evolving common law of New Zealand should respond to the distinctiveness and dignity of Māori.'¹⁰

I am not proposing that the judiciary usurps the power reserved for the legislature by legislating from the bench. New Zealand is a democracy, not a judocracy or dikastocracy.¹¹ It is not

7 Robert Dobson QC, on behalf of the New Zealand Bar Association, on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 <<http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting>> at 16 October 2008.

8 Jack Hodder, 'Judicial Appointments in New Zealand' (1974) *New Zealand Law Journal* 80, 81.

9 The Hon Justice Baragwanath, 'The Evolution of Treaty Jurisprudence' (2007) *Waikato Law Review* 1, 10.

10 *Ibid* 4.

11 *Du Plessis v De Klerk* 1996 3 SA 850 (CC), para 181. The term dikastocracy is used to describe a government by judges. It is derived from the Greek word 'dikastos', meaning judge.

my belief that ‘nothing matters beyond politically desirable results, however achieved’.¹² Justice Albie Sachs, of the Constitutional Court of South Africa, made the following appropriate observation in *Du Plessis v De Klerk*:¹³

The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods of reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure.

The judiciary cannot – and should not – have the same functions as the legislature. The separation of powers should be maintained. However, the separation of powers does not mean that each branch should perform their functions in isolation, and with disregard of the other branches. The three branches of government are partners in the *trias politica*. They are also partners in the law-making process. Political realities dictate that the lawmaking process is a collaborative effort. I am not proposing that the Supreme Court should take centre stage as the lead actor on the political stage; rather, I am pleading for it to have equal billing with the other two main players. They have separate but complementary powers. It is only in this way that the Supreme Court will be able to fulfil its purpose and deliver on the promises that underlie its establishment. Through the performance of its functions, the judiciary should engage in dialogue with the other branches, particularly the legislature. Dialogue is part and parcel of the democratic process.

Decisions should however always be solidly grounded in law. The court is a court of law, not a court of justice. In the words of Dennis Davis, a former professor of law and now judge in South Africa, ‘judges must themselves be careful not to allow their conceptions of the substantive good to intrude into decisions so that they overreach themselves and encroach upon a political terrain where they can subvert rather than promote the democratic enterprise’.¹⁴ In a parliamentary supremacy like New Zealand, the court can only go as far as the laws made by Parliament allow it to go. The Chief Justice herself addressed this issue at the first sitting of the Supreme Court:¹⁵

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.

Respect for legal precedent needs to be maintained, but the courts should have the courage to deviate if and when required to do so. As so eloquently put by Justice Albie Sachs:¹⁶

There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic

12 Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 1.

13 *Du Plessis v De Klerk* above n 11, para 178.

14 Dennis Davis, ‘John Mowbray Didcott: The Jurisprudence of Justification’ (1999) 116 *South African Law Journal* 416, 421.

15 Elias, above n 5.

16 Justice Albie Sachs, ‘Book review’ (2001) *University of Toronto Law Journal* 87, 90.

to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question becomes not one of whether but when; I would love to see of theory of when...

In time, some issues relating to judicial precedent may arise: for example, would the court change its treatment of judicial authority as it develops a bank of its own case law, including progressively moving away from past Privy Council decisions and English case law generally, like the Supreme Court of Canada did? I think that in New Zealand expectations are high that the Supreme Court will set the tone for the rest of the judiciary. They are the guardians of New Zealand and the protectors against potential abuse by the two other branches of the *trias politica*. Like I stated before, the judiciary represents an essential component of the machine that is New Zealand democracy. Judges are quite literally the edge that cuts the law. They represent the face and the force of the law. This carries with it an onerous responsibility: a responsibility to carry the law through to those whom it affects in a way that will command their respect and acceptance. In order for them to maintain legitimacy, there is a dire need for the judiciaries of the world to evolve to meet the needs of the communities they serve and within which they operate.

The reality is that as the world changes, the world's judiciaries need to change to keep pace. The new world culture of human rights and substantive justice require this. This is also true for New Zealand and particularly the Supreme Court. The judiciary is widely regarded as a conservative institution; change is slow. However, I submit that the establishment of the Supreme Court is a catalyst for such change. To my mind, a diverse judiciary that is more reflective of New Zealand will assist in realising the aspirations and ideals articulated earlier in this article.

III. JUDICIAL DIVERSITY

It is a fact that our culture, religion, values, life experiences and a range of other factors colour the way that we see – and judge – the world. New Zealanders are not all alike, nor are our values. We do not all look the same, and we do not all think the same. Judges are no different. They are human beings, first and foremost. New Zealand has a diverse, pluralist society. It is not only composed of Pakeha and Māori people, but also people from other ethnic and cultural backgrounds. The latest statistics show that although the overwhelming majority of the population is still persons of European descent, ethnic diversity continues to increase.¹⁷ The ‘face’ of New Zealand has changed over the past decades, and it is continuing to change. The judiciary needs to keep up with this changing ‘face’. There is a need to acknowledge diversity, and to understand it.

The New Zealand judiciary has been criticised as not being sufficiently representative of the cultures and communities whom it serves. In the words of Spiller:¹⁸

There has been considerable criticism of the so-called ‘unhealthy uniformity’ of the judiciary. It has been claimed by some that the ‘judicial club’ was ‘almost exclusively composed of ageing Pakeha men, drawn from the legal and social elite’, who ‘cannot be expected to identify with, or even understand, the demands of Māori as tangata whenua, minority cultures, women or the poor.

17 Ministry of Social Development, *The Social Report 2008*. <<http://www.socialreport.msd.govt.nz/people/ethnic-composition-population.html>> at 16 October 2008. In 2006, Māori made up 14.6% of the total New Zealand population compared with 13% in 1991. The Asian ethnic group is now the third largest group, at 9.2%, ahead of Pacific peoples, at 6.9%. According to 2001-based medium population projections, by 2021 the Māori population is projected to be 17%, the Pacific people 9% and the Asian population 15%. In 2006, Europeans made up 77.6% of the population.

18 P Spiller, J Finn and R Boast, *A New Zealand Legal History* (2nd ed, 2001) 222.

It is a fact that until recently the members of the High Court and Court of Appeal were overwhelmingly male and European. Spiller provides an analysis of the backgrounds and professional experiences of the New Zealand judiciary up to 2001 prior to their elevation to the Bench,¹⁹ while Hodder did a study of judicial appointments in New Zealand for the period 1946-1972.²⁰ The research reveals, unsurprisingly, that the superior courts judiciary was at the time overwhelmingly staffed with European males with very similar backgrounds and professional experience.

Much has been written on the issue of diversity, particularly gender diversity.²¹ Diversity is a complex and multi-faceted concept. There is sometimes a tendency to oversimplify the concept by reducing it only to elements of race and gender. The reality is that people identify with somebody with whom they have something in common; race, culture and gender are very basic but fundamental identifiers. It engenders trust and confidence, which ultimately impacts on the legitimacy of the judiciary, and the legitimacy of the justice system as a whole. The reasons in favour of judicial diversity range from the symbolic to the substantive, and are often intertwined. A fundamental tenet underlying the arguments is that the judicial function, including judicial thinking, is not the exclusive domain of a single, privileged group with a single, privileged perspective of life and law.

With regard to gender diversity, the Chief Justice contends that although being a woman is not a sufficient qualification for being a judge, it is an important additional qualification.²² She cites three reasons:²³

- The exclusion of women from the judiciary is contrary to the equality of men and women under international law and also the law of equality which underlies the rule of law in domestic jurisdictions.
- Women judges are necessary for the legitimacy of the judiciary in a democracy which values all individuals as equals.
- Women bring a 'distinct' perspective and experience to judging, which are essential for judging in a modern perspective.

It is the last two reasons that I should like to focus on. They are equally applicable to persons from other non-traditional minority pools from which the judiciary is usually drawn, including people from different ethnicities and sexual orientation. Women judges or judges from a particular ethnic group do not necessarily vote or rule differently from their other colleagues on the Bench. As Baroness Hale, the first and only female member of the Judicial Committee of the House of Lords states, '[o]ur loyalty is to the law and not to our race and gender'.²⁴ Rather, the benefit of a diverse judiciary is that it allows judges to interact and work with other judges who are different from themselves in some or other distinct way who are likely to have a different life experience

19 Ibid 187-247.

20 Hodder, above n 8, 82-85.

21 See for example Kate Malleson, 'Justifying gender equality on the bench: why difference won't do' (2003) 11 *Feminist Legal Studies* 1; Hamilton, 'The Law Council of Australia Policy 2001 on the process of judicial appointments: Any good news for future female judicial appointees?' (2001) *QUT Law and Justice Journal* 17.

22 Dame Sian Elias, 'Changing our world' (Address given to the International Association of Women Judges' Conference, Sydney, 4 May 2006) <<http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting>> at 16 October 2008.

23 Ibid.

24 Baroness Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges' (2001) *Public Law* 489, 499.

to their own. It allows judges from more traditional backgrounds to confront diverse perspectives and opinions which will ultimately improve the likelihood that the outcome of the case will be just and fair. It is these different experiences of women and persons from minority groups that add value to the judicial function. The diverse life experiences of judges add to a more comprehensive understanding of the broader context within which the law operates. It is particularly beneficial at appellate level, where judges jointly deliberate the outcome of cases. The focus should be on the court as an institution, and not the individual members who constitute the court. However, the interaction between the individual members, including how they deliberate, is important as it influences the group of individuals that makes up the institution itself. Diversity therefore appears to improve the legitimacy of the deliberation process and the resulting judgments.

Many in New Zealand seem sceptical about the idea of a diverse judiciary. Cox writes, '[w]hether a judge is seen as representative or not should have little, if any, bearing upon selection. Litigants, and defendants in criminal cases, expect and are entitled to the highest standards of judicial performance'.²⁵

He calls the belief for the need of a more representative judiciary 'misguided': '[t]he bench, and the legal profession, are, or should be, committed to maintaining the highest standards of public service and not pandering to the notion that the bench should be "more representative." The bench cannot, and should not, be truly representative'.²⁶

The former Solicitor-General and now Court of Appeal judge, Terence Arnold, supports judicial diversity, but cites a word of caution:²⁷

As in other comparable jurisdictions, there remains pressure to ensure that the Bench reflects the diversity of New Zealand society. Diversity does not, of course, mean sectional representation or quotas. It simply means that the picture of the judiciary that Jack Hodder revealed in his 1974 study is no longer acceptable – upper-middle class, middle-aged pakeha males from a relatively narrow educational background. But while diversity is a goal, no one argues seriously that merit should be sacrificed to achieve it. Diversity can be achieved within a merit-based appointments system – it simply requires some flexibility of approach.

As Spiller explains:²⁸

It has rightly been pointed out that it is important not to put human beings into watertight compartments, and that to be a good judge one cannot be all things to all people. At the same time a wider range of people on the bench would provide a breadth of views and different insights into the claims, personalities and situations of the range of litigants appearing before the court.

A New Zealand that acknowledges its bicultural and multicultural character requires a diverse judiciary. One of the greatest challenges facing the current Supreme Court bench is to break free from a possible perception that it is a case of the same old outfit merely repackaged with a new brand name.

The aim of a more diverse judiciary should be a consideration in judicial selection and appointment. It should not be the primary consideration, but as either an additional requirement, or as part of an extended understanding of the merit requirement, it has an important role to play. In the guidelines for judicial appointments to the office of High Court judge, it is made clear that al-

25 Noel Cox, 'Merit should be the principal criterion for judicial appointment' (2004) 637 *Law Talk* 37, 38.

26 Ibid 38.

27 Terence Arnold, 'Judicial Appointments' (Address to the New Zealand Bar Association Conference, 21 August 2003) <<http://www.crownlaw.govt.nz/uploads/JudicialAppointments.PDF>> at 16 October 2008.

28 Spiller, above n 18, 234-5.

though there is a commitment to actively promoting diversity in the judiciary, taking in to account all appropriate attributes, appointments are still made on the basis of merit.²⁹

Merit should therefore remain the primary criterion for selection. Judicial legitimacy demands it. The question of what constitutes merit is vexing. It has traditionally been understood to relate to legal knowledge and experience, including professional qualities and ability. Is it time to look beyond merit? I submit that it is not, but that the merit concept should be given a broader meaning. The requirements of excellence, experience and ability that are inherent in the merit requirement should never be compromised. However, merit should be defined sufficiently broadly to include achievements in legal activities that are wider than the traditional mould of litigation practice as a senior barrister or solicitor. The New Zealand criterion of 'demonstrated overall excellence in a legal occupation' appears to be in theory sufficiently wide to allow for candidates from non-traditional backgrounds to be considered.³⁰ There is precedent for the appointment of academics, government lawyers and judges from lower courts – all non-traditional feeding grounds – to the superior courts. The precise determination of what merit is, and whether somebody meets the merit requirement, is not a wholly objective exercise. This determination is not value-neutral, and this is why the questions of who selects the judges, and how they are selected, become crucial. In the words of the Chief Justice, '[p]ositive law is value laden. Who decides, matters'.³¹ And because who decides matters, care needs to be taken to ensure that the best persons are selected for the role.

In recent years the selection and appointment of judges in New Zealand has been the subject of scrupulous debate. The debate intensified at the time of the selection and appointment of the judges of the new Supreme Court. At the time, a question of particular significance was whether a commission to select and/or appoint judges would be a solution to the problems raised by detractors of the selection and appointment processes that applied at the time. This prompted the publication of a public consultation paper entitled *Appointing Judges: a judicial appointments commission for New Zealand*?³² Ultimately, a commission model was not adopted. The current model remains whereby appointments are made by the Governor-General on the recommendation of the Attorney-General.³³

I favour a judicial selection commission with specifically proscribed functions and powers, as opposed to a judicial appointments commission. I agree with those who say that a judicial commission with unbridled power should be avoided. There is no question that the responsibility for appointment should remain with executive government. This is in line with the separation of powers. Rather, the issue, I suggest, is the selection of judges. Should the executive select the judges? In particular, who is consulted by the executive, the type and extent of consultation, and ultimately the force or binding power of such consultations? I favour a hybrid system, where the ultimate selection lies with the executive, but the choice is limited to a closed list of candidates recommended by a judicial selection commission. The current system has according to most reports not been abused because of scrupulous adherence to the constitutional conventions by the political

29 <<http://www.justice.govt.nz/pubs/other/pamphlets/2003/judicial-appointments/high-court-judge.html>> at 16 October 2008.

30 Ibid.

31 Elias, n 22 above.

32 Department of Justice (2003) <<http://www.justice.govt.nz/pubs/reports/2004/judicial-appointment/index.html>> at 16 October 2008.

33 For an overview of the appointments process, see 'Judicial Appointments: Office of High Court Judge' above n 29.

actors involved. However, there is no absolute guarantee that this will always be so. An independent judicial selection commission could act as a potential safeguard against abuse, and also ensure consistency and continuity in a judicial selection that recognizes diversity as an objective.

The membership of such a commission is open to debate, but its independence should not be compromised. Independence is an absolute prerequisite. As a bare minimum, all stakeholders should be represented; to my mind, no stakeholder is more important than the community, whose acceptance and support are essential to the legitimacy of the judiciary. I therefore support the idea of lay membership. The extent of the lay representation is debatable, but it would probably have legitimacy issues if there is majority lay representation. The advantage of lay members is that they have the ability to look beyond the candidates' legal ability, to the other qualities that would make a good judge. It is crucially important though that the selection process is not over-politicized by the inclusion of a majority of politicians, either from the legislature or the executive. This is arguably the greatest shortcoming and criticism of the South African Judicial Service Commission, where there is an over-representation of politicians.³⁴

How does one go about ensuring a diverse judiciary? Is the present system adequate, or should the aim of judicial diversity be formalised through the introduction of specific measures calculated to promote diversity? In other words, do we need a more aggressive policy of parity that essentially borders on affirmative action and a quota system, or will a more evolutionary approach achieve the desired results? In respect of the present system, the results are mixed. Justice Edward Durie was the first person of Māori descent to serve as a High Court judge until his retirement in 2006.³⁵ In September 2008, the appointment of Judge Joe Williams, Chief Māori Land Court judge and chairperson of the Waitangi Tribunal, to the High Court was announced. Justice Williams is currently the only person of Māori descent on the superior court bench. The Chief Justice is the sole female on the Supreme Court; two members of the Court of Appeal are female;³⁶ and eight judges on the High Court are female.³⁷ Justice Susan Glazebrook is currently the longest serving justice on the Court of Appeal, and is the most senior justice next to the President of the Court, William Young. According to the New Zealand Census on Women's Participation,³⁸ at 31 December 2007 there were 198 judges across all levels of the judiciary, of whom 51 were women. Reduced to a percentage, it means that 25.76 per cent of judges are women. Women are best represented on the Family Court, which is at District Court level, where 17 of the 45 judges are women. The report comments that '[t]he judiciary is another area where progress has all but stalled in terms of women's appointments'.³⁹ Elizabeth McDonald writes that there seemed to be a popular perception during the tenure of Margaret Wilson as Attorney-General that she favoured appointments on

34 See in general J Baloro and M Olivier 'Towards a legitimate South African judiciary: Transformation, independence and the promotion of democracy and human rights' (2001) 26 *Journal for Juridical Science* 31.

35 Justice Durie was appointed to the High Court in 2003 after serving as Chief Judge of the Māori Land Court for many years. He retired in 2006.

36 Justice Susan Glazebrook (appointed to the High Court in 2000; elevated to the Court of Appeal in 2002) and Justice Ellen France (appointed to the High Court in 2002; elevated to the Court of Appeal in 2006), both elevated from the High Court.

37 They are (year of appointment in brackets): Goddard (1995); Potter (1997); Winkelmann (2004); Courtney (2004); Andrews (2006); Mallon (2006); Duffy (2007); and French (2008).

38 Human Rights Commission, *New Zealand Census on Women's Participation* (2008) 69.

39 *Ibid.*

gender and ethnicity rather than merit.⁴⁰ McDonald cites interesting statistics: in the years 2000, 2001 and 2003, women were appointed in higher proportions to the Bench than men.⁴¹ Writing in 2001, Spiller opines that 'there have been tangible moves towards making the judiciary more accountable to and reflective of broader society'.⁴² He believes that the New Zealand judiciary is in a healthy overall state because of the preparedness of modern judges and Attorneys-General to address these issues, and that this hopefully points to the judiciary's continued adaptability to future change.⁴³

It is important that any measure designed to further diversity has the support of the legal profession and the judiciary. In simple words, the insiders need to buy into it. In all probability, the idea of quotas and affirmative action to ensure diversity would not meet with the approval of the legal profession or the judiciary. In my opinion, a diverse judiciary can be achieved naturally without the need for drastic measures such as affirmative action or quotas.⁴⁴ The proviso is that the criteria for selection and appointment should be supplemented to incorporate criteria that broaden the pool of candidates to persons from backgrounds that have traditionally not been the main feeding area for the judiciary, and whose appointment will contribute to a more diverse judiciary with an understanding of law in the 21st century. Regarding affirmative action, there is also the likelihood that appointment of persons under such a policy may be perceived not to have been on merit, irrespective of whether they may otherwise have qualified on the merit requirement alone.

A very positive aspect of the current system is that it lists the criteria for appointment, and acknowledges the importance of diversity. The four general criteria are: legal ability; quality of character; personal technical skills; and reflection of society. The last mentioned criterion means that those appointed must be:⁴⁵

[A] person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness. The Report of the Royal Commission on the Courts in 1978 put the point as the need for 'a good knowledge, acquired by experience, of New Zealand life, customs and values'.

As stated before, the guidelines for appointment explicitly state a commitment to actively promoting diversity in the judiciary.

IV. CONCLUSION

It is still early days, but as it evolves, the Supreme Court will no doubt continue to develop an identity and voice of its own which is uniquely New Zealand and distinct from that of the Privy Council. The Supreme Court has not reached the stage where news of its decisions is the major news story of the day. I am doubtful that it ever will and perhaps it is better that it should remain

40 Elizabeth McDonald, 'Diversity in judicial appointments: the extent to which gender is a factor' (2005) 642 *Law Talk* 16.

41 *Ibid* 17. This is the percentage of actual number of female appointments made compared with the number of females eligible for appointment in a particular year.

42 Spiller, above n 18, 224.

43 *Ibid* 225.

44 South Africa has opted for a more aggressive approach. S 174(2) of the Constitution of the Republic of South Africa 1996 provides: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

45 Above n 29.

so. However, I would caution against the notion of the Supreme Court as a quiet court in a quiet country, a phrase previously used to describe the Supreme Court of Canada.⁴⁶

It is essential that the general population is aware of what judges do and how they do it. One way of achieving this is to ensure that judgments are clear to everybody affected by them. I think it is particularly important that the background and context, especially the social context within which decisions are made, especially in cases with substantial public interest, should be made clear. It is very encouraging that the website of the Supreme Court has a separate page dedicated to decisions of public interest, and that summaries of cases written in plain, understandable language are available.⁴⁷

It is almost a decade since the elevation of Dame Sian Elias to the office of Chief Justice. Has progress been made in that time to improve the diversity of the judiciary? I think that any observer cannot deny that in the past ten years much more has been done to improve judicial diversity than at any previous time in New Zealand judicial history. Despite the inroads that have been made, it seems that the judicial world is still very much regarded as a man's world. In the words of Elias CJ, '[i]t is not surprising that women who exercise judicial authority continue to be outsiders who are watched more critically and who need constantly to justify their appointments and their work'.⁴⁸ The appointment of the most senior members of the Court of Appeal as the first judges of the Supreme Court represented 'continuity and progression, rather than radical change'.⁴⁹ This was sound policy at the time, but I think that the time has come to give some serious consideration to making an appointment that would contribute to diversifying the composition of the bench when next a vacancy arrives. More can still be done. The groundwork has been laid. Strategies should be put in place to identify candidates with judicial potential whose appointment would diversify the Bench's composition. It is not enough to call for expressions of interest, as persons from non-traditional backgrounds may not necessarily express such interest. Some proactive scouting may be required. If the pool of candidates from which these selections are made, is made sufficiently wide to incorporate all possible feeding grounds, including those from non-traditional backgrounds, there should be no reason why New Zealand should not achieve a more diverse judiciary.

46 P McCormick, *Supreme At Last* (2000) 1.

47 <<http://www.courtsofnz.govt.nz/from/decisions/judgments>> at 16 October 2008.

48 Elias, above n 22.

49 Margaret Wilson, Address of the Attorney-General on the occasion of the first sitting of the Supreme Court, Wellington, 1 July 2004 <<http://www.courtsofnz.govt.nz/from/speeches-and-papers/#speechpaper-list-first-sitting>> at 16 October 2008.

SOLICITORS' COMMON LAW LIABILITY: THE DUTY TO GIVE ADVICE BEYOND THE SCOPE OF THE EXPRESS RETAINER IN TRANSACTIONAL CASES AND THE APPLICATION OF THE 'LOSS OF CHANCE' APPROACH TO BREACH OF THE DUTY

LES ARTHUR*

I. THE TRANSFORMATION OF THE LEGAL PROFESSION

Many lawyers, legal commentators¹ and Judges² would agree that the legal profession has undergone radical change since the end of the 1970s. Important features of such change include the end of barristerial immunity in England and Wales³ and New Zealand⁴ but not Australia,⁵ the 'erosion of insulation of the legal profession from market forces'⁶ and the emergence of mega firms. The removal of limited common law immunity for legal practitioners relating to court representation and work 'intimately connected' to it flows from public policy considerations.

In *Chamberlains v Lai* the New Zealand Court of Appeal opined that it is anomalous for one group of professionals to be shielded from the general principle that all who undertake to give professional advice are under a duty to use reasonable care and skill.⁷

Having cleared away the shaky policy reasons for immunity identified in *Rondel v Worsley*⁸ the challenge now confronting the Courts relates to problems concerning the scope of the duty of care owed to clients by advocates and possibly the even more daunting issue of causation. It would seem a little curious, however, if a public policy driven decision to give litigants access to the courts in relation to the negligent conduct of proceedings by advocates, were to be defeated by formidable causation problems.

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1 David Weisbrot, 'Competition, Cooperation and Legal Change' (1993) 4 Legal Education Review 1.

2 *Russell McVeagh McKenzie Bartleet & Co v Tower Corp* [1988] 3 NZLR 641, 659-660 (Thomas J) commenting on the competitive environment in which law firms operate and the trend toward mega firms offering specialist services to the commercial community.

3 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

4 *Chamberlains v Lai* [2006] NZSC 70.

5 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92.

6 See the discussion in Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (2006) 23.

7 *Chamberlains v Lai*, above n 4, para 75.

8 [1969] 1 AC 191. Where barristerial immunity was grounded on the public interest in the administration of justice: The rule was thought to serve the public interest by:

- Preventing the fear of subsequent litigation from eroding the barrister's independent duties to the court.
- The risk of recrimination would undermine the application of the 'cab rank obligation' and therefore undermine access to representation for difficult or distasteful clients.
- The effect of re-litigation, particularly in criminal matters, on public confidence in the administration of justice.

In common law jurisdictions the policy driven loss of chance approach to the causation issue in litigation⁹ and transactional cases¹⁰ provides a remedy for breach of duty in circumstances where the balance of probabilities approach to causation otherwise would render the claimant unable to prove damage.¹¹ The scope of duty and causation issues is obviously quite recent in the context of a practitioner's negligence associated with Court proceedings. A reasonable amount of case law has emerged concerning the scope of a solicitor's duty to give unsought advice, particularly of a commercial nature, in transactional matters.¹² A feature of the jurisprudence in this area is the moulding of the scope of the duty of care by reference to the commercial expertise of the client.¹³

There are two fundamental problems which underpin the moulding of the duty of care to the commercial acumen of the client. First, the conventional competent practitioner test established in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*¹⁴ seems a little unrefined given the rationale behind the emergence of mega firms to provide corporate clients with comprehensive and expert legal services.¹⁵ Even so, in most circumstances the rebuttable presumption against a duty to give commercial advice to commercially experienced clients seems justified. The basis is that solicitors ought not to be liable for commercial decisions which go awry in circumstances where it is reasonable for the client to appreciate the nature of the risk. As a matter of principled risk allocation, it is not clear why professional indemnity insurers should underwrite the unfortunate commercial judgment of commercially experienced parties who are, or should be, fully competent to assess the risks associated with a transaction.

The second fundamental problem in using the commercial expertise of the client, as a touchstone for determining the duty of a solicitor to give unsought advice, is the vagueness of the duty in relation to commercially naïve clients. Clearly the rationale underlying principles which determine the scope of a solicitor's duty to give unsought advice to commercially astute parties is inappropriate in the context of clients unversed in business affairs. In these circumstances the law is rather abstract in so far as:

A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman.¹⁶

In these situations questions arise concerning the scope of the explanation required and the relationship between the retainer and the obligation to offer advice concerning the wisdom of the transaction. In *Clark Boyce v Mouat*¹⁷ a case involving an aged client apparently unversed in business affairs, the Privy Council held that the scope of the express retainer constrained the nature of the explanation given to the client concerning the viability of a proposed loan transaction. In the

9 *Mount v Baker Austin* [1998] PNLR 493, where the solicitors negligently allowed the claim to get struck out, the claimant was required to show that it had lost something of value, not merely a negligible chance.

10 *Allied Maples Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA); *Gilbert v Shanahan Partners* [1998] 2 NZLR 528 CA.

11 *Bristol & West Building Society v Mothew* [1997] 2 WLR 436. See below Part VIII (B).

12 See *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC). in relation to commercially naïve clients; *Pickersgill v Riley* [2004] UKPC 14; *Football League Ltd v Edge Ellison* [2006] EWHC 1462 with regard to commercially sophisticated clients.

13 *Pickersgill v Riley*, above n 12.

14 [1978] 3 All ER 582.

15 See *Russell McVeagh v Tower Corp*, above n 2, 659-660 (Thomas J).

16 *Pickersgill v Riley*, above n 12, para 7.

17 *Clark Boyce v Mouat*, above n 12.

Privy Council decision, the policy consideration of not imposing intolerable burdens on solicitors appears to have outweighed any duty on the solicitor to advise on the problematic aspect of the transaction and financial circumstances of the debtor. Interestingly the New Zealand Court of Appeal considered that Mrs Mouat was unable to fully understand the degree of risk involved in the absence of such advice and held the solicitors were negligent.¹⁸

The critical question which arises out of *Clark Boyce v Mouat* is should the duty of care, in relation to commercially naïve parties, extend to advice that it is necessary to investigate the financial position of the other party? The argument presented in this paper is that a duty to raise this issue is justified. Such a question ought not to impose an intolerable burden on commercial lawyers. It is however accepted that such a duty is not justified in the context of commercially astute clients who are fully conscious of the risk.¹⁹

The relevance of the commercial competence of the client to moulding the scope of the duty of care is a less useful touchstone where the advice, although beyond the express instructions of the retainer, involves issues of a legal nature. The problem here relates to the proximity of the unsought advice in relation to the express retainer. In *Gilbert v Shanahan*²⁰ the court held that the solicitor was negligent for failing to advise the commercially experienced client that he was under no real obligation to sign a guarantee. However, the competence of a client in understanding the importance of disclosing material information to its professional indemnity insurer was the critical factor against a finding of negligence in *John Mowlem Construction plc v Neil F Jones & Co (Mowlem v Jones)*.²¹ Arguably this is an example where the expertise of the solicitor is a relevant factor and the competence of the client is a matter which goes to contributory negligence rather than a scope of duty issue. A finding of negligence then raises the hypothetical question of how the client would have responded had competent advice been given, would the transaction have proceeded in any event, and if so, on what terms? These questions directly raise complex causation issues.

While, arguably, jurisprudence imposing liability on a solicitor is characterised by judicial restraint, the emergence of the loss of chance approach to the causation problem, is a radical, policy driven departure, from well established principles. As observed by Baroness Hale in *Gregg v Scott*, 'damage is the gist of negligence. So it can never be enough to show that the defendant has been negligent. The question is still whether his negligence has caused actionable damage'.²²

There is precedent in England and Wales,²³ and in New Zealand²⁴ for treating the loss of a substantial chance of achieving the intended result, as actionable damage in transactional cases involving solicitors. By treating the loss of a chance of avoiding the claimant's loss as actionable damage the claimant's prospects of a successful damages claim are considerably enhanced. This approach sidesteps the need for the clients to prove, on the balance of probabilities that they would not have entered the transaction if they had been correctly advised.

Clearly the loss of a chance approach to causation raises fundamental issues concerning the law of civil liability and, to some extent, heightens the importance of the scope of duty question.

18 Ibid, Sir Gordon Bisson, 647.

19 *Football League Ltd v Edge Ellison*, above n 12.

20 *Gilbert v Shanahan*, above n 10.

21 [2004] EWCA Civ 768.

22 [2005] UK HL 2, para 217.

23 *Allied Maples v Simmons & Simmons*, above n 10.

24 *Gilbert v Shanahan*, above n 10.

This is so, to the extent that the loss of chance approach to causation ‘provides a proportionate strict liability’ based remedy. In other words, once a duty of care has been established, the stringency of the causal link between the wrong and damage departs from the conventional civil standard. Whether this is an appropriate response to a duty of care which is fault based rather than strict liability based is an important question which does not appear to have been fully addressed in any of the above jurisdictions. What has been addressed is the broad policy question of whether or not ‘[a] robust test which produces rough justice may be preferable to a test that on occasion will be difficult, if not impossible, to apply with confidence in practice’.²⁵

In *Gregg v Scott* the majority preferred rough justice and rejected the proposition that the loss of chance approach should be used in the law of clinical negligence, but in *Phillips & Co v. Whatley (Gibraltar)*,²⁶ a lost litigation case, Lord Mance noted that ‘[t]here are also obvious differences between the medical context of *Gregg v Scott* and the present’.²⁷

The purpose of this paper is to evaluate the principles which determine the variable duty of a solicitor to give advice beyond the confines of the express retainer and to argue that the loss of a chance approach to causation is a reasonable remedial response to breach. A convenient starting point is to describe how the duty of care arises in contract and the impact of concurrent liability on the solicitor’s obligation to give unsought advice

However, as already mentioned, determining the scope of a solicitor’s duty of care is not a straight forward exercise. A useful starting point is to discuss how the duty arises in contract and tort. Then it is necessary to analyse how the scope of the duty is moulded according to the express provisions of the contract of retainer and more interestingly the extent to which the scope of implied duties turns on the commercial attributes of the parties.

II. JURIDICAL BASIS OF THE DUTY OF CARE

As stated by Mummery LJ in *Swindle v Harrison*,²⁸ a case which involved a solicitor who breached his fiduciary duty of loyalty through non disclosure, the correct starting point to examine the scope of a solicitor’s duty of care is to understand how the obligation arises and the rationale for the rules imposing the duty. One reason why this approach is not straight forward is the emergence of concurrent liability in contract and tort²⁹ and to a lesser extent the relationship between fiduciary duties and duties of care.³⁰ Most of the case law emphasises that the contract of retainer,³¹ together with the implied promise to exercise reasonable care (and skill) in the performance of the relevant services,³² governs the scope of a solicitor’s duty of care. While the identification of the source of the duty does not define the scope of the duty it will be suggested that a contractual analysis offers a principled approach to the scope of duty question, and that arguments which seek to widen the

25 *Gregg v Scott*, above n 22, para 170 (Lord Phillips).

26 [2007] UKPC 28.

27 *Ibid*, para 2.

28 [1997] 4 All ER 705.

29 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Astley v Austrust* (1999) 161 ALR 155 *Riddell v Porteous* [1999] CA 1 NZLR 1.

30 See *Bristol & West Building Society v Mothew*, above n 11.

31 *Midland Bank v Hett Stubbs & Kemp*, above n 14.

32 In *Lanphier v Phipos* (1838) 8 CAR, 479 Tindal CJ said ‘Every person who enters into a learned profession undertakes to bring to it the exercise of it a reasonable degree of care and skill’.

scope of the contractual duty, by reference to duties in tort, are contrary to principle,³³ and in any event in most circumstances superfluous.

The conceptual justification for this primacy of contract approach is that contractual duties are fixed by the parties themselves and contract law is concerned with obligations which arise voluntarily, rather than those imposed by law. An obvious problem with this approach, in the solicitor client relationship, is the potential imbalance in knowledge between the parties. After all, a common justification for the monopoly, albeit diminishing, of lawyers over legal services is the professional expertise and skills of the legal profession.³⁴ Arguably, however, this imbalance can be addressed in most circumstances by a principled adjustment of the implied promise to exercise reasonable care, depending on the sophistication and circumstances of the client. A brief discussion of the principles underpinning concurrent liability in contract and tort illustrate the conceptual difficulties associated with allowing the 'imperial march of modern negligence law'³⁵ to outflank the contract of retainer.

In *Frost & Sutcliffe v Tuiara*³⁶ Justice Baragwanath relied on English³⁷ and Australian³⁸ authorities in support of the proposition that a solicitor's tortious duty is or may be wider than in contract. His Honour held that the reasonably competent practitioner test which was governed by the retainer:³⁹

[M]ust become in Tort what the practitioner would be expected by the standards of his profession to do having regard to all the circumstances, including:

- The lack of experience and limited education of the clients; and
- Significance of the transaction; neither of which is of direct moment when construing the written contract of retainer; as well as
- Consequences of its failure.

In support of this approach Baragwanath J cited the following passage from Dean J's judgement in *Hawkins v Clayton*:⁴⁰

The clear trend of modern authority is to support the approach that the duty of care owed by a solicitor to a client in respect of professional work prima facie transcends that contained in the express or implied terms of the contract between them and includes the ordinary duty of care arising under the common law of negligence ...

The New Zealand Court of Appeal stated that there were 'major difficulties with this analysis'.⁴¹ First, the court observed 'the scope of the retainer was equally apt to influence what a competent practitioner should have done whether the obligation is analysed as contractual or tortious'.⁴²

This observation fits neatly with the idea that the scope of implied duties can be adapted to take into account the reasonableness of the solicitor's advice given the circumstances of the client.

33 *Henderson v Merrett Syndicates Ltd*, above n 29.

34 Webb, above n 6, 26.

35 *Astley v Austrust*, above n 29, para 170 (Gleeson CJ).

36 [2003] NZCA 277.

37 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, above n 29.

38 *Hawkins v Clayton* (1988) 164 CLR 539, 574; *Waimond P/L v Byrne* (1989) 18 NSWLR 642, 650-2.

39 *Frost & Sutcliffe v Tuiara*, above n 36, para 10 quoting the High Court case.

40 *Hawkins v Clayton*, above n 38, para 22.

41 *Frost & Sutcliffe v Tuiara*, above n 36, para 11.

42 *Ibid.*

For this reason, it is simply unnecessary, in most circumstances, to invoke tortious principles that broaden the scope of the contractual retainer.

In *Frost & Sutcliffe v Tuiara* the solicitor had advised his commercially unsophisticated clients not to enter into a buy back transaction involving the sale and repurchase of their residential property transaction but had not given reasons for this advice. It seems entirely artificial to argue that the duty in tort required a greater explanation than in contract as to why not to proceed with the transaction. This does leave open the appropriate scope of the duty to warn and the distinction between advising clients not to proceed with a transaction and giving reasons for that advice is consistent with dicta in *Pickersgill v Riley* concerning the need to give more detailed explanations to commercially naïve clients.

The Court of Appeal held that the plaintiffs had been given sufficient reasons to satisfy the duty of care. The more controversial issue is the extent to which the solicitor should have explained the need for the client to investigate the financial position of the company which went into liquidation and could not therefore transfer the property back to the plaintiffs. For present purposes it is sufficient to note that, in most situations, it is unnecessary to rely on tortious principles to enlarge the scope of the contractual retainer.

This reasoning is consistent with the ratio of *Henderson v Merrett Syndicates Ltd* that there is no material difference between the relevant contractual duty and the duty owed in tort⁴³ the substance of the obligation is the same; to take reasonable care. Indeed, Lord Goff, who gave the leading speech, indicated more than once that, at least as a general rule he did not envisage the concurrent duty of care in tort as being wider in its scope than the duty in contract. The ambit of tort is wider only to the extent that the limitation period in contract does not apply and claims for contributory negligence are not stifled by the existence of a contract. In *Frost & Sutcliffe v Tuiara* the New Zealand Court of Appeal agreed with the dissenting judgment of Mason CJ and Wilson J in *Hawkins v Clayton*, who recognised that:⁴⁴

[I]t is not appropriate to foreclose entirely on the possibility that in some circumstances it may be necessary, for example to avoid professional impropriety, to hold that the duty in tort is wider than that in contract. The means to achieve that end would be to hold on policy grounds that the law will not in some cases allow the general duty in tort to be cut back by the terms or the scope of the contractual retainer.

III. FIDUCIARY DUTY AND DUTIES OF CARE

Unlike a solicitor's duty in contract which, in most circumstances, is concurrent and co-extensive with the tortious duty of care, the substance of the fiduciary duty is loyalty rather than a duty to exercise reasonable care.⁴⁵ For this reason, arguments which would turn negligent acts by solicitors unconnected to their duty of loyalty into fiduciary breaches, have met with widespread judicial disapproval. In *Bristol and West Building Society v Mothew* the court addressed this issue in the following way:⁴⁶

The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon to the breach of other duties. Unless the expression is so limited it is lacking in practical utility.

43 *Frost & Sutcliffe v Tuiara*, above n 36, para 11.

44 *Ibid* para 20.

45 *Bristol & West Building Society v Mothew*, above n 11, 449 (Millett LJ).

46 *Ibid* 448.

This reasoning emphasises the important point made by Mummery LJ in *Swindle v Harrison* that the correct starting point to establish civil liability, is to identify the relevant wrong which involves identifying the scope of the duty breached. Thus, while fiduciary duties of fidelity and loyalty often exist in conjunction with a duty of care⁴⁷ the detailed rules relating to causation and the remedial consequences of breach, vary as a result of the purpose of the duty.⁴⁸ In light of the separate duties imposed by equity and the common law, it would be curious if the fiduciary duty enlarged the scope of the contractual duty. This is the point forcibly made by Lord Jauncey in *Clark Boyce v Mouat*, where His Lordship stated that a '[fiduciary duty] ... cannot be prayed in aid to enlarge the scope of contractual duties'.⁴⁹ This view is entirely consistent with the principle but, of course, raises the issue of the appropriate scope of the contractual duty of care.

For the reasons discussed, the fiduciary duty does not enlarge the contractual duty, the purpose of the equitable obligation being to ensure loyalty in asymmetrical knowledge relationships. It is nevertheless a make-weight argument which reinforces the broad proposition evident in the case law that there is a greater duty of care when advising commercially unaware clients.

A. Overview

So far it has been suggested that the correct starting place to answer the scope of duty question is to focus on the express or implied terms of the contract between the solicitor and the client. Arguments which seek to transcend contractual obligations by reference to tortious or fiduciary duties are inconsistent with principle and precedent. In any event, such arguments are largely redundant given the potential ambit of the contractual duty created by an implied term. The daunting question then becomes what are the relevant principles in determining the appropriate scope and content of the contractual duty of care arising from an implied term. Before turning to this problem in the context of the duty to give legal advice and commercial advice beyond the express confines of the retainer it is necessary to consider refinements to the 'reasonably competent practitioner test'.

IV. THE EXTENT OF A SOLICITOR'S DUTY OF CARE

The often cited authority on the extent of a solicitor's duty is the following passage from *Midland Bank v Hett Stubbs & Kemp* in which it was held that:⁵⁰

the court must beware of imposing upon solicitors, or upon professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. ... The test is what the reasonably competent practitioner would do, having regard to the standards normally adopted in his profession ... the duty is directly related to the confines of the retainer.

The rationale for this approach is referred to by Laddie J in *Credit Lyonnais v Russell Jones & Walker* '[a] solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer ...'⁵¹

47 See *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, which involved a breach of fiduciary duty as well as undisputed negligence on the part of the solicitors.

48 *Target Holdings Ltd v Redfern (a firm)* [1995] 3 All ER 785 792, (Lord Browne-Wilkinson). *Everist v McEvedy* [1996] 3 NZLR 348, 355 (Tipping J).

49 *Clark Boyce v Mouat*, above n 12, 649.

50 *Midland Bank v Hett Stubbs & Kemp*, above n 14, 583.

51 [2002] EWHC 1310, para 51.

As an important principle of risk allocation the scope of the retainer is clearly important but as the Court observed in *Gilbert v Shanahan*:⁵²

Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

Unfortunately the vagueness of this statement raises more questions than are resolved. The fundamental idea is, however, clear the scope of duty question cannot always be answered by reference to the express retainer.

These statements of the basic law are subject to a number of refinements. First, a critical aspect of the scope of the duty to give unsought commercial advice turns on the commercial expertise of the client. In the light of the decisions in the important case of *Pickersgill v Riley*, it is probably more accurate to state the test as what the reasonably competent practitioner would do given the relevant commercial expertise of the particular client. This test is conceptually analogous to the approach of the High Court of Australia in *Rogers v Whitaker*,⁵³ which involved the duty of care owed to a patient by a medical practitioner. The Court reasoned that the duty to warn the patient of a material risk inherent in a proposed treatment must take into consideration the circumstances of the particular patient. This approach was adopted as applicable to legal practitioners by Malcolm J in *Heydon v NRMA Ltd*.⁵⁴

The second proposed refinement is not explicitly recognised in case law but it also seems reasonable and practicable to expect a higher degree of competence from a 'mega firm', given that the fundamental reason for the emergence of mega firms is to provide specialist and expert commercial advice to corporate clients.⁵⁵ The short point is that the utility of the standard competent practitioner test appears compromised by the transformation of the legal profession. Even so, the scope of the implied duty to give unsought 'commercial advice' to commercial clients must be balanced with an assessment of the legitimate expectations of the client. In this regard it seems unlikely, in circumstances where the client has the expertise to make a commercial judgment, that the solicitor will be considered negligent if the transaction goes awry. This reasoning is exemplified by the decision in *Football League Ltd v Edge Ellison*.

Perhaps the strongest impact of the emergence of the mega firms is in relation to specialist areas of law such as insurance law.⁵⁶ As might be expected however, the reasonably competent solicitor test is sufficient to support a finding of negligence in areas involving a basic transactional legal issue, such as the failure to advise a client that there was no legal requirement to sign a guarantee.

V. THE DUTY TO GIVE LEGAL ADVICE BEYOND THE SCOPE OF THE RETAINER

In *Gilbert v Shanahan* the issue concerned the solicitor's duty to advise a shareholder client that he was not legally obliged to sign a guarantee which related to the obligations of a company in which the client was a director and shareholder. Before seeking legal advice the claimant had

52 *Gilbert v Shanahan*, above n 10, 537.

53 (1992) 175 CLR 479.

54 (2000) 51 NSWLR 1, 53.

55 *Russell McVeagh McKenzie Bartleet & Co v Tower Corp*, above n 2.

56 See *Mowlem v Jones*, above n 21.

signed a preliminary agreement which specified the terms of the lease but which contained no reference to any guarantee from the shareholders.

The High Court found that the shareholders were 'experienced businessmen'⁵⁷ and 'considerably more experienced in property transactions than most members of society'.⁵⁸ The judge also found the plaintiff to be 'by no means without experience with regard to guarantees'.⁵⁹ Expert evidence from experienced commercial solicitors confirmed that as a matter of law the shareholders could not be required to sign the guarantee and the company was not obliged to procure it. Given that the omitted advice was characterised as 'legal' the argument that such advice was not within the scope of the retainer was easily rejected by both the High Court⁶⁰ and the Court of Appeal. More problematic for the appellate Court was the problem of causation, because it did not follow from the evidence that if the solicitor had told the plaintiff that he was not legally obliged to sign the guarantee the transaction would have proceeded without a guarantee. The issues which arise from this loss of a chance approach, to overcome the problems associated conventional balance of probabilities approach to causation are discussed later in the paper. For present purposes it is sufficient to emphasise that the expertise of the client was considered irrelevant in determining the scope of the retainer, once the omitted advice was classified as legal.

VI. THE ISSUE OF SPECIALIST LEGAL ADVICE

The argument for the adequacy of the reasonably competent solicitor test seems less than compelling in cases involving 'specialist' legal knowledge, particularly where the solicitors do in fact have specialist legal knowledge. In *Mowlem v Jones* at issue was the solicitor's duty to advise the client to notify its professional indemnity insurers of a threatened claim. The solicitors had been instructed to act in arbitration proceedings for a subcontractor, alleging non payment of monies due from the main contractor. During the proceedings the main contractor intimated a counterclaim based on the alleged negligence of the subcontractor in carrying out the work under the contract. The subcontractor's insurer subsequently declined to meet the claim due to non-disclosure/misrepresentation in the renewal form. Relying on *Midland Bank v Hett Stubbs and Kent*, *Credit Lyonnais SA v Russell Jones & Walker* and *Carradine Properties Ltd v DJ Freeman & Co*⁶¹ the Court of Appeal upheld the decision of the trial court, in deciding that the solicitor was not negligent.

The court reasoned that the solicitors were not retained to advise about insurance by their client, who in any event was perfectly competent to deal with such matters. In answer to the question, would a reasonably competent solicitor have contemplated the need to ask about insurance and the importance of notification, the Court of Appeal affirmed the trial judge's view that he would no, 'supported as it is by the fact that such questions did not occur at the time to other experienced solicitors'.⁶²

This view is open to challenge in so far as the insurance question is clearly a legal issue and it would be reasonable to speculate that most undergraduate insurance law papers would refer to

57 *Gilbert v Shanahan*, above n 10, 535.

58 *Ibid.*

59 *Ibid.*

60 *Gilbert v Shanahan* 12 PRNZ 185 (Gallen J, 12 September 1997, High Court, Wellington (CP503/93)).

61 [1999] Lloyds Law Rep. P N 483.

62 *Mowlem v Jones*, above n 21, para 20.

the insured's duty to disclose material facts. In this respect *Mowlem v Jones* can easily be distinguished from *Football League Ltd v Edge Ellison* and *Pickersgill v Riley* which concerned commercial rather than legal advice. Indeed it is arguable that in *Mowlem v Jones* insurance advice could be classified as a potential risk or legal pitfall which arose during the course of the retainer. In this respect the competent solicitor test sets too low a threshold, particularly where a mega law firm offers specialist insurance advice in addition to more general legal services.

While an obvious difference between *Gilbert v Shanahan* and *Mowlem v Jones* is the proximity of the advice to the client's express instructions, it is arguable that the legal issue in *Mowlem v Jones* was a legal pitfall which was clearly related to the retainer. Certainly a law firm advertising specialist insurance knowledge should not escape liability. Extending this standard of care to general law firms would increase the level of professional service in line with the professional status of law firms. In cases involving legal issues, the competency of the client to deal with the matter is usually a factor which ought to be addressed under the head of contributory negligence.

VII. SCOPE OF THE DUTY TO GIVE UNSOUGHT LEGAL ADVICE: COMMERCIALY EXPERIENCED CLIENTS

Unlike the obligation to give unsought legal advice, where such advice is material and proximate to the transaction, it is not ordinarily part of a solicitor's function to advise clients on the commercial prudence of a transaction. The law and basic rationale for this distinction is articulated by Lord Jauncey in *Clark Boyce v Mouat*:⁶³

When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

The rationale for limiting the duty on solicitors to give commercial advice together with guidance on the meaning of 'commercial advice' is provided by the Privy Council decision in *Pickersgill v Riley* and the decision in *Football League Ltd v Edge Ellison*. In *Pickersgill v Riley* the solicitor had given commercial advice to the claimant, correctly warning of the risk associated with taking a contractual indemnity from a limited liability company. Having given this advice, the Privy Council held that there was no duty to warn the claimant about the commercial wisdom of accepting the undertaking from the purchasing company or to advise the claimant to investigate the financial substance of the purchasing company. Of critical importance to the reasoning of the court was that the claimant was an experienced businessman, who had a wide experience of guarantees and who must have known from his own experience that the company's future profitability was speculative.

Unlike *Gilbert v Shanahan*, the failure to give advice concerning the financial viability of the purchasing company was unrelated to any legal complexity and, importantly there were no 'hidden commercial pitfalls' for this particular claimant, whose loss could be fairly attributed to the claimant's imprudent commercial judgment. This was really a case about the plaintiff's commercial misjudgement and on the facts of the case there appears to be little justification for extending the role of the solicitor from legal adviser to insurer against unsound commercial judgment.

63 *Clark Boyce v Mouat*, above n 12, 649.

The judgment in *Football League Ltd v Edge Ellison* decides no novel point of law, but does neatly illustrate the fact sensitive nature of the distinction between commercial and legal advice. The case arose from the solicitor's alleged failure to advise on the desirability of seeking parent company guarantees for the Football League Ltd's contract with ONdigital p/c for television rights, with claimed losses of £142 million. Drawing on the principles outlined in *Pickersgill v Riley*, Justice Rimmer had little difficulty in rejecting the contention that the solicitors owed the client a general duty of care: 'There is no duty upon a solicitor to point out to the client things which the client can reasonably be expected to appreciate for himself, being matters in respect of which the solicitor has no special skills of appreciation'.⁶⁴

Such is the force of this 'reasonable expectation' approach to the duty of care issue that it eclipsed the duty of the solicitor to ask a very simple question, concerning the solvency of the bidder ONdigital and the need for parent company guarantees. A meticulous and conscientious practitioner may have ventured beyond the scope of the express retainer, but that is not the test.⁶⁵ As to the normative question; is the test appropriate? On the facts of *Football League Ltd v Edge Ellison* it would have been an oddity if the solicitors had been made liable, setting aside causation issues, for a consciously made commercial decision made by a committee handpicked for its relevant experience which admitted that it needed no advice from solicitors. Potentially the weakest aspect of the test applied in *Football League Ltd v Edge Ellison* relates to the level of commercial competence attributed by the court to the solicitor.

The negligence issue may not have been quite so straight forward if the plaintiff had been advised by a 'mega firm', which sought to enhance its competitive edge by offering on websites and in brochures 'sensible and commercial advice' or 'responsive, pragmatic and commercial advice'. Such representations would seem to give rise to an assumption of responsibility to give commercial advice which may well outflank the express terms of the retainer. In these circumstances the focus may shift from the scope of the duty of care to causation and contributing negligence issues. Although on the facts of *Football League Ltd v Edge Ellison* the claimant's admission that it did not rely on the commercial skill of the solicitor would appear to be conclusive.

VIII. COMMERCIAL AND LEGAL ISSUES

In *Football League Ltd v Edge Ellison*, while the court held that there was no general duty on the solicitors to give advice concerning the wisdom of accepting a bid without guarantees, a duty to advise did arise during the course of the transaction. The duty was triggered by the financial arrangement paragraph in the bid document. The financial arrangements paragraph was ambiguous as it could be interpreted as either an offer of parent company guarantees or merely parent company commercial support for ONdigital's financial commitment.

In these circumstances the court held that a reasonable solicitor had a duty to seek instructions from the client concerning the improbable notion that guarantees were on offer. In this respect the solicitor was fortunate, Rimmer J held, that on the balance of probabilities that Football League Ltd would in any event not have pressed for guarantees, given its perception that it was on the cusp of an exceptional deal.⁶⁶ As the company was unable to meet the burden of proof on

64 *Pickersgill v Riley*, above n 12, para 261.

65 *Midland Bank v Hett Stubbs & Kemp*, above n 14, 583.

66 *Football League Ltd v Edge Ellison*, above n 12, para 321.

this point, it was unnecessary, on the *Allied Maples v Simmons* test, for the court to calculate the claimant's lost chance of obtaining guarantees.

A. *Scope of Duty: Commercially Naïve Clients*

The law in relation to the scope of a solicitor's duty to give unsought advice concerning the financial wisdom of a transaction to commercially unsophisticated clients is far from clear. In part this is because judicial pronouncements concerning the ambit of the duty of care have largely been articulated in cases involving commercially competent clients who did not rely on their solicitors for guidance in relation to commercial issues. In *Pickersgill v Riley* and *Football League Ltd v Edge Ellison* the common theme is that the solicitor's duty of care was abrogated by the commercial competence of the client. It was therefore unnecessary for the court to consider precisely how the duty of care might vary in circumstances where the client was unable to appreciate and evaluate the commercial risks for himself. That said, the Privy Council decision in *Clark Boyce v Mouat* is clear authority for the proposition that there is no duty for a solicitor to go beyond the express provisions of the retainer and give unsought advice on the wisdom of the transaction when a client, who was not a business person, and who is apparently aware of what she was doing. Mrs Mouat had mortgaged her house to secure a loan to her son, who joined in the mortgage as guarantor. He became bankrupt, leaving his mother facing a liability for over \$110,000 secured on her house. Mrs Mouat sued the solicitors who had acted in the transaction for both her and her son for breach of duty of care and fiduciary duty. The claim for breach of fiduciary duty was unlikely to succeed given that she rejected the suggestion to seek independent advice. As a matter of principle it seems entirely correct that the fiduciary duty 'cannot be prayed in aid to enlarge the scope of contractual duties'.⁶⁷ Rather, what was at issue was the appropriate scope of the implied contractual duty of care. A crucial finding of fact was that Mrs Mouat understood the legal consequences of the transaction and to this extent had received a clear and careful explanation from the solicitor.

The issues not canvassed by the solicitor and regarded, inter alia, by the New Zealand Court of Appeal as negligent was the failure of the solicitor to disclose that he knew nothing of her son's ability to service the mortgage.⁶⁸ To this extent it is arguable that although Mrs Mouat understood that her home would be at risk, if her son defaulted in making the repayments due under the mortgage, in not knowing her son's financial position, she did not know the degree of that risk. In these circumstances it seems unlikely that Mrs Mouat was sufficiently aware of the risk posed by the transaction.

As a matter of principled risk allocation, involving a practical commercial, not entrepreneurial, consideration there appears to be some merit in the view that the risk should probably lie with a reasonably competent practitioner rather than a commercially naïve client. It seems most unlikely that a reasonably competent commercial solicitor would not have turned his mind, given the grave consequences of the son's default, to the son's parlous financial position.

Unlike the commercial cases discussed above it seems unrealistic to contend that Mrs Mouat appreciated the degree of risk and to this extent, simply made an unsound decision. In these cir-

67 Ibid, 649 (Lord Jauncey).

68 Ibid.

cumstances it would not appear to place an intolerable burden on solicitors to ask a simple question and to seek instructions concerning the financial viability of the 'other' party.⁶⁹

On the facts of *Clark Boyce v Mouat*, this strict approach appears to strike at the core of the purpose of the general proposition that it would be unreasonable and artificial to define the scope of the retainer by reference only to the client's express instructions.⁷⁰ If this reasoning is accepted, it follows that there would have been a duty in *Frost & Sutcliffe v Tuiara* for the solicitor to have explained the intricacies of how the transactions could go wrong, including a duty to seek instructions and give advice concerning the importance of investigating the financial viability of the 'other' party. This information is directly material to the client's understanding of the degree of risk inherent in the proposed transaction. Quite unlike the cases involving commercial parties, it seems entirely reasonable for a client to rely on his solicitor to raise this issue. It would also seem unreasonable for solicitors to contractually to exclude this duty. Such an exclusion might not avoid the application of a duty in tort.⁷¹

If this analysis is applied to *Clark Boyce v Mouat*, with the result that the solicitor breached his contractual duty of care, the court would then be confronted with conflicting approaches to the causation issue. Is it necessary for the claimant to establish on the balance of probability⁷² that the transaction would not have proceeded if the solicitor's duty had not been breached? Or is it sufficient for the plaintiff to show that as a result of the solicitor's breach, it has lost a chance of avoiding a lost chance of avoiding the loss resulting from the solicitor's breach?⁷³ If so, on what basis is the percentage value of the lost chance calculated? These questions focus on the conceptual basis and practical problems associated with the loss of a chance approach to the imposition of civil liability.

B. Causation and Damage; the Approach of the Civil Law

At common law and equity the fundamental principle relating to the awarding of damages is that the defendant's wrongful act must cause the damage complained of. In *Target Holdings Ltd v Redfern* the court expressly referred to the rules relating to the award of damages:⁷⁴

Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such a wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.

The reason for the different causation rules in equity and the common law is related to the scope and purpose of the relevant duty. Thus, the gravity of a solicitor's breach of the duty of single minded loyalty is evidenced by a less stringent approach to causation than for breach of the duty of care. In *Everist v McEvedy* Tipping J opined, after considering the leading English authorities, that to succeed in a claim for breach of fiduciary duty the plaintiff must show 'that [they] have

69 Ibid. While the transaction in *Clark Boyce v Mouat* was complicated by the conflict of interest issue the reasoning of the Privy Council emphasised that the solicitor's duty of care was governed by the narrow terms of the retainer.

70 *Gilbert v Shanahan*, above n 10, 537.

71 See above Part II.

72 *Bristol & West Building Society v Mothew*, above n 11.

73 *Gilbert v Shanahan*, above n 10.

74 Ibid, cited in *Swindle v Harrison*, above n 28, 727.

suffered a loss arising out of a transaction to which the breach was material.⁷⁵ If the plaintiff is able to establish this legal burden the evidential burden is then transferred to the defendant:⁷⁶

To establish this in a case involving a solicitor, it is necessary for the solicitor to show that even with appropriate independent advice or full information the plaintiff client would nevertheless have entered into the impugned transaction upon materially the same terms. If that can be shown equity should not attribute the loss to the errant fiduciary; for it cannot fairly be said that without the breach the loss would not have occurred. The breach cannot be regarded as causing the loss. To establish the point the errant fiduciary cannot invite speculation. There must be a proper evidentiary foundation for the conclusion which the Court is asked to draw. Usually the point will be one of inference rather than direct evidence.

Of particular interest in relation to the loss of chance approach is the idea that the link between causation and loss can be established by inference rather than evidence. The rules linking breach to damage are not therefore immutable although the rule that there must be damage remains a fundamental requirement of civil liability. In contrast to the rules of causation applicable for breach of a fiduciary duty the common law rules are more stringent. This difference is discussed by Millett LJ in *Bristol*:⁷⁷

Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice would have been given and (on a balance of probabilities) that if such advice had been given he would not have entered into the relevant transaction or would not have entered into it on the terms he did.

What is highlighted by these differing approaches is that ultimately the stringency of the causation test turns on the policy and purpose of the particular duty. As illustrated by the decisions in *Arthur JS Hall* and *Chamberlain* public policy is not static. However, it does seem essential expressly to articulate why changes to the rules relating to causation for a particular group of claimants are justified and to consider as noted by Lord Phillips in *Gregg v Scott*⁷⁸ the practical problems associated with such changes. Unsurprisingly, the most difficult practical problem relates to the calculation of the percentage value of the lost chance. These problems are confronted by the English Court of Appeal in *Allied Maples v Simmons*.

In *Allied Maples v Simmons* the defendant solicitors conceded that their advice had been negligent in not warning the client company that it could acquire certain liabilities in purchasing a business belonging to the vendor. The defendants argued that the complaint had failed to establish causation. Even had the complainant been advised of the risk of liability it was not proved on the balance of probabilities that the vendor would have granted the warranty excluding liability. The Court of Appeal applied a two stage test to the causation issue.

First it was necessary for the claimant to prove on the balance of probabilities that it would, if correctly advised, have taken action to avoid the risk (on the facts to seek the warranty). This step is simply an application of the law as outlined in *Bristol*. The second step involves a further hypothetical question, the response of the third party to the claimant's request. At this step the Court

75 *Everist v McEvedy*, above n 48, 355.

76 *Ibid.* This test is a move away from the absoluteness of the *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, 469 (Lord Thankerton), which held that once the duty had been breached, speculation as to what course of action the plaintiff would have taken but for the breach, is not relevant.

77 *Bristol & West Building Society v Mothew*, above n 11, 443.

78 *Gregg v Scott*, above n 22, para 190.

unanimously accepted that the claimant can succeed provided it shows that it 'had a substantial chance rather than a speculative one'⁷⁹ of receiving the benefit (in this case the warranty).

The Court did not agree on the assessment of the lost chance, Millett LJ curiously proposed an evidential assessment of the lost chance, and considered that:⁸⁰

[T]he evidence was not even sufficient to justify the inference that there was any real or substantial chance that [the vendor] would have acceded to the Plaintiff's request. Whether they would or would not have done is, on the evidence so far adduced, a matter of pure speculation.

This approach appears to confuse the evidential approach to causation with the possibility of drawing inferences from the facts to establish quantification. To this extent the utility of the loss of a chance approach is significantly reduced. The majority judges did not consider the assessment of the lost chance speculative:⁸¹

Those with experience of commercial negotiation are able, with a reasonable degree of accuracy, to form a view of what can be achieved by such negotiation. ... It is possible to make an informed judgment of what the chances were of achieving certain results.

This approach is based on reasonable inferences drawn from the facts, rather than on precise quantification based on evidential burdens that would appear just about impossible to meet.

In *Gilbert v Shanahan* the New Zealand Court of Appeal dispensed with the two step process applied in *Allied Maples v Simmons*. In *Gilbert v Shanahan* it did not follow on the evidence that if the claimant had been correctly advised that he was not legally obliged to sign the guarantee that the transaction would not have proceeded without a guarantee. Indeed the Court held that it was highly likely that if correctly advised the claimant 'would have agreed to sign, perhaps with some amelioration by way of limit ...'⁸² As in *Allied Maples v Simmons*, the Court found it possible to assess the likely result of the negotiations in the event that the claimant refused to sign the guarantee. On this basis the Court held that the solicitor's negligence lost 'Mr Gilbert a 20 per cent chance of avoiding entry into a guarantee of a kind which caught the liability which he ultimately had to assume'.⁸³

The rationale of the English Court of Appeal in *Allied Maples v Simmons* for relaxing the stringency of the causation test at the second step of the inquiry was because of the hypothetical nature of the inquiry. It is difficult to see why the balance of probabilities test should apply at the first step as that too is a hypothetical inquiry.

IX. CONCLUSION

This paper has attempted to argue that solicitors ought to have a contractual duty to offer specialist legal advice beyond the scope of the retainer. This argument is strengthened in the context of mega law firms which purport to give expert legal advice in specific areas. Arguments based on advertised expertise do not and should not easily shift the strong presumption that solicitors should not be responsible for the commercial misjudgement of commercially competent clients who consciously decide to take a commercial risk.

79 *Allied Maples Ltd v Simmons*, above n 10, 914.

80 *Ibid*, 924.

81 *Ibid*, 922.

82 *Gilbert v Shanahan*, above n 10, 538.

83 *Ibid*, above n 10, 530 (emphasis added).

This principle of risk allocation, based on the reasonable expectation of the parties, is not applicable to commercially naïve clients. In these circumstances the commercial experience of a competent commercial solicitor is likely to be superior to that of the client. It would not place an intolerable burden on solicitors, in this situation, to inquire into the commercial viability of the transaction or to recommend that the client seek the advice of other professionals. There is little point in suggesting an increased ambit of the duty of care if claimants are then confronted by onerous causation hurdles. The loss of a chance approach is an attempt to ameliorate the stringency of the common law balance of probabilities test. To a proportional degree this approach results in strict rather than fault based liability. It is arguable that such an approach is justified on policy grounds although it will never be sufficient to impose damages without a careful analysis, usually as a matter of inference rather than direct evidence, regarding quantification of the chance lost.

PROPERTY LAW IN THE SOUTH ISLAND HIGH COUNTRY – PART II

JOHN PAGE* AND ANN BROWER♣

I. INTRODUCTION

In *Property Law in the South Island High Country – Statutory Not Common Law Leases*, we contended that Crown pastoral leases confer exclusive rights of pasturage, but no rights to exclusive possession. This challenged an entrenched orthodoxy in the high country that run-holders enjoy powerful property rights analogous to freehold title, including rights of exclusive occupation.¹ Our argument is premised on the analysis that pastoral leases are a unique statutory tenure, not a common law lease. Thus the ambit of the tenure must be read within the four corners of the statutory remit, not by implication of the common law. The absence of any explicit grant of exclusive possession in either the Land Act 1948 or the Crown Pastoral Land Act 1998 (CPLA) suggests there is no grant. In this case, absence of evidence is indeed evidence of absence. At best, any right to exclusive possession can only be inferred by staring hard at the space between the lines of statute.

In December 2007, we predicted that the pastoral tenure journey was far from over. This paper continues that temporal journey by analysing the legal and political reactions to, and since, the publication of our paper. In part II we analyse the advice of the Crown Law Office which rejects our conclusions, not by the resolute clarity expected of settled doctrine, but by the long bow of inference. The implications for recreational access to Crown pastoral lands are canvassed in part III in light of imminent High Court litigation challenging exclusive occupation. Part IV traces the political twists and turns in the high country in the past year. In part V we look to the background of the Land Act 1948 and conclude that history is equally equivocal in substantiating exclusive occupation rights.

Notwithstanding the journey further travelled, our original findings remain unchanged. Rather, as part IV details, reactions to and legal developments from Page and Brower 2007 have only affirmed our original thesis that the myth of exclusive possession in the South Island high country

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1 In this article we succumb to the practice of using the terms 'exclusive possession' and 'exclusive occupation' interchangeably. For a more technical explanation of the difference between the two, see John Page & Ann Brower, 'Views, property rights and New Zealand land reform' (2008) 2(4) *International Journal Business and Globalisation* 468, 484.

rests not on the firm ground of black letter law, but on rhetoric inspired by 17th century English philosopher John Locke and the ideal of efficiency envisaged by Adam Smith. The nature and extent of pastoral tenure is far from certain. Assertions of exclusivity of possession continue to be conflated by self-serving rhetoric detached from historical and legal foundation. Ultimately, clarity will be attained only through judicial determination and definition.

II. THE CROWN LAW OPINION

On 14 March 2008, Crown Counsel issued an advice to Land Information New Zealand (LINZ) in response to the question, do pastoral leases confer rights of exclusive occupation. The advice was sought by LINZ as a direct consequence of the publication of *Property Law in the South Island High Country – Statutory Not Common Law Leases*. In mid-June 2008, LINZ posted the Crown Law opinion on the Internet² some time after it pre-released it to high country run-holders.³

Crown counsel found Page and Brower's thesis unconvincing, and concluded that pastoral leases do confer exclusive possession, noting that 'it would be impossible for the holder to undertake...farming operations without exclusive possession of the land'. In reaching this conclusion, several aspects of the advice stand out.

Firstly the Crown Law Office advice failed to identify the precise legislative source of the exclusive possession grant. Instead of the definitive authority that run-holder advocates had consistently foreshadowed,⁴ the advice fell back on an amalgam of 'lease' covenants and statutory inference cumulatively suggestive of intended exclusive possession. The advice identified some clauses that supported exclusivity,⁵ others cited were equally supportive of a pasturage use right,⁶ most were equivocal.⁷ A significant number of the clauses relied upon were introduced into the

2 Letter from Malcolm Parker, Crown Counsel, to Simon Espie, Land Information New Zealand, 14 March 2008 (the 'Crown Law Opinion'), <<http://www.linz.govt.nz/docs/crownproperty/crown-law-opinion.pdf>> 11 September 2008.

3 For possible insight into the pre-release to run-holders, see: Neal Wallace, 'Linz Working to Rebuild Relationships with Pastoral Lessees', *Otago Daily Times* (Dunedin), 13 June 2008.

4 See Ann Brower, *Who owns the high country?* (2008), chapter 5.

5 For example *Land Act* 1948, Section 68A(3).

6 For example covenants 4, 8 & 10 in the Crown Law Opinion's '1st' item numbered 11, and the '2nd' item 11. Covenants requiring diligent farming or the maintenance of Crown improvements are consistent with a pasturage use right, or conforming to Crown soil conservation policy in the high country. The restrictions on use in the '2nd' item 11 are explicable on the basis that the Crown had an overriding policy objective to minimise land degradation in the high country. That a run-holder must seek consent before carrying out such non-grazing agricultural activities is suggestive of the grant of a limited pasturage use right, rather than a common law lease.

7 For example covenants 2 & 3 in the '1st' item 11 Crown Law Opinion are equivocal. Covenant 3 affirms use rights but suggests that there is an interest (that may include a use right) capable of transfer. Covenant 2 requires residence. High country history suggests that residence requirements furthered government policy of established settlement, as a counter to unfettered land speculation. In other words, such a clause may be explicable on historical grounds unrelated to exclusive possession.

principal Land Act by amendment, including as recently as 1998.⁸ That a fundamental premise such as exclusive possession requires circumstantial validation from amending legislation 50 years later speaks loudly of its inherent uncertainty. Indeed the only sections from the original Act cited in support of exclusive possession were section 26 and a repealed version of section 62. Section 26 is capable of multiple interpretations, including one that is the antithesis of exclusivity,⁹ whilst former section 62 highlighted the special nature¹⁰ of the statutory tenure applicable to 'pastoral land'.

In relation to the Crown Pastoral Land Act 1998 the opinion did not enumerate corroborative provisions, preferring a blanket statement that the Act 'has a number of provisions¹¹ ... consistent with the grant of exclusive possession although some require the consent of the Commissioner'.¹² Suffice it to say that the legislative patchwork presented in the Crown Law Opinion failed to deliver a statutory 'silver bullet' that definitively refutes our argument that the run-holders' claim of exclusive possession is shaky at best. The reliance on inference of Crown counsel re-affirms rather than diminishes the uncertainty of exclusive possession in the high country.

Secondly the stated assumption that farming operations require exclusive possession is questionable. Many primary production activities are carried out on public or private lands pursuant to licences, concessions, permits, or analogous instruments that do not stipulate exclusive possession.¹³ Historically the common law utilised non-possessory proprietary interests¹⁴ to permit agricultural use rights on the lands of another. That 'farming operations' require exclusive possession, an important plank of Crown Counsel's argument, is a notion supported by neither history nor practice. Indeed the wider concept of 'farming' articulated in the Crown Law advice is inaccurate, as the statutory use rights at question here are pastoral, and all wider non-pastoral farming or exploitation requires consent of the Commissioner of Crown Lands.¹⁵

Importantly the conflation of exclusive pasturage rights into a practical 'exclusive possession' appears a 'back door' means to achieve the latter. It is also a tacit concession that there is no 'front door' route. Thus Crown Counsel argues exclusive pasturage rights infer that 'other people are

8 *Land Act* 1948, Sections 66A, 67A & 68A. Crown Counsel's interpretation of these amendments is open to alternative construction. Section 66A may suggest that use right (such as pasturage and recreation) can co-exist contemporaneously in Crown land as separate 'bundles of rights' or 'sticks'. If the run-holder had exclusive possession, there would be no scope for feasible co-existence in the manner envisaged by the 'bundle of sticks' metaphor. In considering section 67A, a Parliamentary Select Committee received advice from Parliamentary Counsel's Office: '[I]t is perfectly possible to give lessees rights that amount to something less than exclusive occupation, while still leaving lessees with some rights against trespassers.' Letter from PCO to The Chairman Primary Production Select Committee, 15 April 1997. The lessee may thus have a variant of statutory 'trespass rights' but no exclusive possession. Section 68A(3) may relate to grazing permits in their own right (as a new form of statutory tenure).

9 See further discussion on section 26 in part III.

10 In the case of 'pastoral land' neither freehold nor leasehold tenures are available, unlike 'land other than pastoral land' where either tenure is available.

11 Assuming the advice refers to sections 15 or 16 of *Crown Pastoral Lands Act* 1998, it could be argued with equal force that these provisions are consistent with long standing policy retaining Crown control in the high country to further soil conservation objectives.

12 Crown Law Opinion, above n 2, 3, clause 18.

13 Examples include some pastoral runs in Australia, cattle ranches in the Western US, and most farming operations in the UK and much of Scandinavia.

14 Such as *profits a prendre* or communal pasturage rights.

15 *Crown Pastoral Lands Act* 1998 Section 4(b) (formerly section 66(2) *Land Act* 1948) coupled with consent provisions in *Crown Pastoral Lands Act* including ss 15, 16.

excluded for other purposes'.¹⁶ This adds an unnecessary gloss to the Section 4 CPLA grant of exclusive pasturage rights, which has 'restricted characteristics' and a 'confined scope'.¹⁷ Pasturage is the right to graze animals on the vegetative cover of land owned by another.¹⁸ The exclusivity of this grant means that competing grazing activities are precluded on the same land. It does not logically follow however that other people are automatically excluded where their activity does not impede the right of pasturage. The word 'exclusive' is an adjective that describes the extent of the run-holder's pasturage rights; it is not a noun in its own right. The 'farming equals exclusivity' analysis also relies for its intellectual force on the fact that run-holders own their improvements. Though this point is incontrovertible at law,¹⁹ it submits this investment requires the security of exclusive possession. There is an historic irony in this argument, given that run-holders in the first half of the 20th century sought security for improvements through fixity of tenure and Crown reimbursement, not exclusive possession.²⁰ Undoubtedly pastoral improvements are a necessary incident of pasturage rights. But an 'interference' with a fence is an unauthorised interference with the run-holder's pasturage rights, because it adversely affects grazing operations. It need not be an interference with any notional exclusive possession.

Thirdly the advice criticises *Property Law in the South Island High Country – Statutory Not Common Law Leases* as being overly reliant on Australian authority, and lacking New Zealand relevance. In a contextual respect this is conceded. It is not surprising that Crown pastoral tenure has been rigorously scrutinised in Australian courts, chiefly because of native title. In New Zealand it is equally unsurprising that the tenure has not been as rigorously scrutinised given the small numbers of run-holders and the absence of any compelling thematic rationale for its close examination, at least until now. Crown counsel also suggests that different geographical conditions may explain different interpretations of antipodean pastoral tenures. However to the extent that a common denominator exists (non-intensive grazing activities over broad acre parcels), there may be greater degrees of similarity than points of difference. In any event the Australian High Court decisions²¹ represent highly persuasive authority to a New Zealand court.

In answer to the allegation of New Zealand relevance, we submit three additional cases for consideration. The first is *Commissioner of Crown Lands v Bennie*²² in 1909. The Court of Appeal was required to consider the extent of the grant of a lease in perpetuity (999 years). In so doing it used exclusive pasturage rights in both small grazing runs and pasturage leases as points of comparison. In a unanimous judgment, the court observed:²³

Section 176 (lease of small grazing runs) provides that such a lease entitles the lessee to the exclusive right of pasturage over all the lands included in the lease, section 198 (relating to pasturage leases) provides that such a lease entitles the holder to the exclusive right of pasturage over the lands specified therein but shall give no right to the soil, timber or minerals. In each of these cases the lease of the surface of the land gives strictly limited rights to the surface, and in the case of a pasturage lease gives a right to

16 Crown Law Opinion, above n 2, 4, clause 19.

17 *The Attorney-General for and on behalf of the Minister of Lands v Feary* CP 89/97 (12 November 1997).

18 *Commissioner of Crown Lands v Bennie* (1909) 28 NZLR 955.

19 See definition of 'Improvement' in section 2 *Crown Pastoral Lands Act* 1998. See footnote 49.

20 See generally part V of this paper.

21 The Crown Law advice relied solely on *Western Australia v Ward* [2002] HCA 28 It overlooked the earlier landmark decision of *The Wik Peoples v State of Queensland* (1996) 187 CLR 1.

22 *Commissioner of Crown Lands v Bennie* (1909) 28 NZLR 955.

23 *Ibid* 960 (Williams ACJ, Denniston and Edwards JJ).

the vesture only. In the case however of a lease under Part III [a lease in perpetuity] there is no limitation of the right of the lessee to use the land as he pleases.

Though the Land Act 1948 superseded the aforementioned Act, it did not substantively change the basic rights mentioned by the Court in 1909. It merely changed the length of tenure of the rights, not the rights themselves.

The second and third cases involve the Feary family. In *The Attorney-General for and on behalf of the Minister of Lands v Feary*²⁴ the court held that a run-holder must apply for consent to make a track across pastoral lease land. Its rationale was that the disturbance of soil inherent in this activity was 'incompatible with the statutory concept of a pastoral lease'.²⁵

This further affirms the pastoral lease is for grazing, not farming, as Crown counsel implied. In talking of (then) section 66(2) the court observed:

Reference to the right of *pasturage* over the land indicates that the primary right conferred by the lease is a right to depasture livestock on the land. This concept is emphasised by the indication that the rights conferred do not include a right to the soil. Mr Moran argued that this reference to the soil was intended to spell out that a lessee could not use the soil for commercial purposes... In my view the restrictive interpretation is not supported by the wording of the section. If that had been the statutory intention the section would have specified that there was no right to *remove* soil. The statutory reference to soil is wider and is intended to emphasise the restricted characteristics of a pastoral lease.... Paragraph a) of the lease broadly matches section 66(2)... the result [is] that the confined scope of the pastoral lease is reinforced.

In 2001 in *Feary v Commissioner of Crown Lands*²⁶ the court observed that where a pastoral lessee sought equitable relief from forfeiture, a court acting in a statutory regime (under the Land Act 1948) in principle did not have the wide discretion that it would have otherwise enjoyed in an analogous equitable claim.

Collectively these cases suggest that pastoral leases are statutory interests with restricted characteristics and confined scope. Pasturage is the primary and sole right. The inherent message of the New Zealand cases is hence similar to that from the highest Australian authorities.

The final feature of the Crown Law opinion is its most quixotic. In its concluding paragraphs, the advice concedes that pastoral leases do indeed have a statutory basis, but this merely ensures uniformity of content and equality of terms. The implication is that statute only provides a framework for conformity and equity; it does not lay the legal foundation for exclusive possession. This critical role is left to the common law. The 'lease itself brings into play any common law or equitable principles and that includes the provision that it grants exclusive possession'.²⁷ Hence despite the prior painstaking identification of legislative clauses implying – but never explicitly stating – a grant of exclusive occupation, in the final analysis, the Crown ultimately relies on the common law which does not apply to a statutory pastoral lease.

We have no disagreement with Crown counsel as to the common law of leases.²⁸ But we do depart on one fundamental issue: that pastoral tenure is a creature of statute detached from the com-

24 *The Attorney-General for and on behalf of the Minister of Lands v Feary* CP 89/97 (12 November 1997).

25 *Ibid.*, 6.

26 *Feary v Commissioner of Crown Lands* [2001] 1 NZLR 704.

27 Crown Law Opinion above n 2, 5, clause 27.

28 *Fatac Ltd (in liq.) v Commissioner of Inland Revenue* [2003] 3 NZLR 648.

mon law, legislatively moulded to suit exigencies.²⁹ The Crown Law advice was framed within a common law prism in its quest for intention. In this regard it omitted to substantively address the fundamental issue of divergence. It admitted the statutory nature of pastoral leases up to a point, yet retained a ‘romantically impracticable’ view of the common law’s role. The common law did not and does not operate in an inflexible, irrational void. It implied lease terms for pragmatic reasons, historically related to original grants presumed lost from ‘time immemorial’. In a modern tenure system where the original grant is readily accessible, and its legislative source is only ten years old,³⁰ the rationale for the common law to play a determinative role is reduced. The rationale for a statutory regime to supplant it is commensurately enhanced.

III. THE IMPLICATIONS FOR ACCESS AND THE DECLARATORY JUDGMENT

The status of access rights over Crown pastoral lands to reach conservation areas, lakes, or streams, is increasingly contested ground between recreationalists and pastoralists.³¹ The former cite customary open access as a traditional New Zealand value,³² the latter rely on ‘trespass rights’, offset by a professed yet discretionary willingness to permit access. The notion that run-holders may not have exclusive possession of their runs injects a volatile new dynamic into this debate.

Should one accept the thesis that pastoral tenure is but a statutory use right to graze animals on the public lands of the Crown,³³ it is a logical corollary that activities that do not interfere with the run-holder’s quiet enjoyment³⁴ of exclusive pasturage, nor derogate from the grant, should not in principle be excluded. Hence a recreational trampler who closes gates, does not graze on the high country ‘vesture’³⁵ and does not interfere with improvements or stock, should be allowed to exercise his or her co-existing, non-exclusive public entitlement to access public resources.³⁶ Where there is potential conflict between uses, voluntary or mandatory codes of conduct³⁷ are viable points of resolution.

29 This interpretation is not a recent invention of the Australian High Court. In the mid 19th century Counsel’s opinion in colonial Victoria was sought as to the nature of pastoral tenure: ‘With regard to the right to these lands, the point is not so difficult. It depends solely on the Statute and Order in Council, and though we cannot look at history or official despatches for their interpretation (and if we could Lord Grey has put it beyond a doubt in his despatch of 29 November 1846), yet the state of the law at the time the Statute and the Orders came into force, may be regarded as an exponent of their provisions.’ T H Fellows, *Opinions of Counsel as to the Rights of the Pastoral Tenants of the Crown* (1856), 25.

30 *Crown Pastoral Land Act* 1998; see also generally A R Buck, *The Making of Australian Property Law* (2006).

31 Mike White, ‘High Country Hijack’, *North & South* (Auckland), November 2006; see also Matt Philp, ‘The No-Go Zones’, *North & South*, (Auckland) August 2008, 40.

32 In a government-commissioned report on public access to roads and waterways, the former Registrar General of Lands wrote: ‘The intention of the Crown and the Colonial Office was to provide a new open country where the outdoors should be the preserve of the people rather than the privilege of the land owners.’ Brian Hayes, *Roads, water margins and riverbeds: the law of public access* (2008) 1.

33 Run-holders selectively accept this thesis when it comes to justifying low valuations and concessional rents based on pasturage rights only, and no right to the soil. A case against the Crown is set down for hearing before the Land Valuation Tribunal, (due to commence 13 October 2008) where restrictive pasturage rights are expected to be central to run-holder arguments.

34 *Property Law Act* (2007), S 218 (1).

35 A term used in *Commissioner of Crown Lands v Bennie* (1909) 28 NZLR 955, 960.

36 The notion of ‘public resources’ is legislatively recognised, see s 23 *Wildlife Act* 1953, s 26ZN *Conservation Act* 1987, clause 3 *Walking Access Act* 2008.

37 A voluntary code of conduct is proposed by part 2, subpart 2 *Walking Access Act* 2008.

But the incursion of private rights into public property complicates the relative logic of the preceding proposition. Public land subject to a strong private right may become sufficiently 'private' that its underlying status becomes moot. In the case of the Crown pastoral estate, the legislature has sought to alchemise public land into 'private' land for isolated purposes. This 'reverse deeming' is demonstrated by the Trespass Act 1980.³⁸ This legislation transforms public lands into private land to capture statutory trespass, a remedy shorn of its common law requirement of exclusive possession.³⁹ Statutory trespass purports to criminalise a recreationist's accessing of public land solely on the basis that what is at law public land owned by the Crown, is for the purposes of the Trespass Act, private land. The intended effect of the Trespass Act is ironic given that the CPLA expressly stipulates that, prior to a land tenure review negotiated agreement, run-holders have no right to freehold any part of the land.⁴⁰ When it comes to asserting 'trespass rights' (a misnomer⁴¹), there is a right to freehold.

This perverse and unsatisfactory incursion of private rights into the public domain exemplifies the difficulties that arise when a property rights regime fails to clarify the specifics of a right-holder's title, and makes the boundary between public and private land ambulatory.⁴² The inefficiencies that arise from confusion over property right were first theorised by the renowned economist Ronald Coase.⁴³ Hence run-holder advocates make the seemingly irreconcilable argument that

38 'NZ has among the harshest trespass laws in the world. ...The FMC's view is that the *Trespass Act* 1980 tilts the balance too far in favour of the land owner at the expense of the recreational user' Janet Girvan, 'Access to Private Land and the Trespass Act' (Paper presented at the Federated Mountain Clubs Backcountry Recreation 2000 Conference, St Arnaud, 27-29 September 1991), 80. See also the parliamentary debates surrounding the passage of the Trespass Bill in 1980:

'If those station owners can prevent New Zealanders from getting access to Crown land, in effect they will be the owners of the land. They will be able to say to wealthy Americans, "Sure you can come and shoot on my property, and I will give you the right of access to go and shoot on a whole mountain owned by New Zealanders"; and they will be able to charge thousands of dollars for that privilege....By this legislation New Zealanders will be wrongly prevented from going on to Crown property, which in effect they own.' New Zealand Parliamentary Debates, 5 June 1980, 514 (Mr. Geoffrey Palmer, MP Christchurch Central).

39 Common law trespass is concerned with 'conflicts with the right of a landowner to the exclusive use of property', see Rowan-Robinson & Ross, 'The freedom to roam and implied permission' (1998) 2 *Edinburgh Law Review* 226.

40 *Crown Pastoral Lands Act* 1998, S 4(d).

41 It is a misnomer because at common law trespass is a remedy, not a right. It is a remedy concerned with unauthorised interferences to one's possession of land.

42 Regrettably the trend continues, see clause 4 *Walking Access Act* 2008 which defines 'public land' as land that is not private land, and where 'private land' includes 'any land that is held under a lease or licence granted to the person by the Crown'.

43 Ronald Coase, 'The Problem of Social Cost' (1960) *Journal of Law and Economics* 1, 3, 5.

Crown land is not public land.⁴⁴ Accordingly there is no right to access ‘private land’.⁴⁵ However, away from the ‘white noise’ of so-called trespass rights, Crown pastoral leasehold is undeniably public land. The doctrine of tenure confirms the Crown as the ultimate legal owner of the land.⁴⁶ In 1948 the Crown introduced limited pasturage use rights that did not impair its ability to control activities adverse to the national interest of soil conservation.⁴⁷ The Crown retained overriding control of these lands for the public benefit and against the general freeholding tenor of the Act. It remains the allodial landowner not in any private capacity (for example as a corporatised Crown entity), but in a public capacity.

Thus if run-holders do not have exclusive possession, and if the Crown pastoral estate is ‘public’ land, why should the public be excluded? Do overriding policy objectives preclude public access rights? The historic policy preoccupations in the high country have been soil conservation and measures to avoid land degradation. It is difficult to envisage circumstances where recreational trampers, anglers or foot hunters ‘disturb the soil’ in ways that interfere with these policy goals. Contrast such passive uses with intrusive recreational activities like off-road 4WD use, where policy objectives are more likely to be compromised. It would appear a sliding scale in which the greater the intensity of access use, the more likely it is to be objectionable. Intensity of use also has access implications when considering the issue of run-holder owned ‘improvements’.⁴⁸ As previously traversed, interferences with improvements would constitute an interference with the quiet enjoyment of pasturage rights. Thus the greater the ‘access footprint’, the more likely will be the impact on improvements. Correspondingly the wider the definition of ‘improvements,’ the

44 For example, in November 2006, the High Country Accord (an advocacy group for run-holders) hosted a media field day for which it flew journalists from all over the country to the high country (see: Staff, ‘Red Rag to a Brower’, *National Business Review* (Auckland), 1 December 2006). At the media conference, a professor of economics commissioned by a by the High Country Accord opined that Crown land is indeed private land:

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.

Prof. Neil Quigley quoted in ‘High Country Lessees Vindicated by Report,’ *Otago Daily Times* (Dunedin) November 27, 2006.

For other examples of run-holders equating leasehold with freehold, see: Fencepost, ‘High Country Accord Defends Position,’ September 22, 2006. Leanne Scott, ‘Station Farmers Worried,’ *The Press* (Christchurch), June 2, 2004. David Bruce, ‘Farmer Threatens Legal Action on Road,’ *Otago Daily Times* (Dunedin), March 9, 2005. ‘this land is in private hands’.

45 The US Supreme Court described the right to exclude as ‘one of the most essential sticks in the bundle of rights’ of private property, *Kaiser Aetna v United States* 444 U.S. 164, 176 (1979).

46 See for example David Grinlinton, ‘Private Property Rights versus Public Access: the Foreshore and Seabed Debate’ (2003) 7 *NZ Journal of Environmental Law* 313, 321.

47 See the first reading speech of Lands Minister Hon C F Skinner who said ‘If there is any doubt as to the suitability of the land for permanent alienation, obviously the Crown must retain some control over it. That is why there is no right of purchase in these hill country leases called pastoral licences’. New Zealand Parliamentary Debates, 24 November 1948, vol. 284, 3999, (Hon. C F Skinner, Minister of Lands).

48 Improvements were originally defined in the *Land Act* 1948 section 2 as ‘substantial improvements of a permanent character, and includes reclamation from swamps; clearing of bush, gorse, broom, sweetbrier, or scrub; cultivation; planting with trees or live hedges; the laying-out and cultivating of gardens; fencing (including rabbit proof fencing); draining; roading; bridging; sinking wells or bores; or constructing water tanks, water supplies; water-races; irrigation works; head-races; bore dykes, or sheep dips; making embankments or protective works of any kind; in any way improving the character or fertility of the soil; the erection of any building; and the installation of any telephone or of any electric-light or electric-power plant’.

more likely that access is precluded. A definition of the term 'improvements' should not be so elastic that it would stretch reasonable and objective interpretations of what is 'substantial or lasting' beyond all credulity.

Lastly is there a legislative negation of a public right to access? Section 26 of the Land Act gives to the Crown unrestricted rights of ingress and egress. This could read as an implied preclusion of non-Crown ingress and egress, or it could read as an affirmation of a fully-fledged public right to access. The interpretation of section 26 raises important questions. Can an implication be drawn that because the Crown has unlimited access, somebody else does not? Who or what is the entity apart from the Crown denied ingress or egress? Having deliberately reserved to itself unrestricted access rights to the lands (the subject of the grazing use right), has the Crown retained an unfettered discretion to decide to whom and upon what terms access is granted to its public lands?⁴⁹

It is open for members of the public (or representative groups) to make a persuasive case that a non-exclusive right to access Crown pastoral lands should be recognised. This is particularly so where no adverse public policy implications are evident, and pasturage can feasibly co-exist with access in a mosaic of *less than fee simple* use rights.⁵⁰ Moreover this approach does less damage to the private/public divide in property law, than purporting to criminalise a person's otherwise legitimate public right to access public lands. The Minister of Land Information, Hon. David Parker, deemed it unlikely that anyone would raise the exclusive possession thesis in court 'because both the Crown and the lessees agree that they've got exclusive possession'.⁵¹ However, such a case is to come before the High Court in the first half of 2009, when the Fish and Game Councils of New Zealand seek a declaratory judgment that pastoral leases do not confer exclusive possession or exclusive occupation. Fish and Game's statutory mandate is to advocate the interests of recreational fishers and hunters, and to preserve public property rights in resources such as freshwater fish and game birds.⁵² In seeking this declaratory judgment, Fish and Game is pursuing the interests of its constituents,⁵³ and asserting a public right that does not preclude the existence or functioning of the vested private right. The potential implications this declaratory action⁵⁴ may have on access to public resources are profound, and present an opportunity to re-establish a measure of balance to the public/private divide in the Crown pastoral estate.

49 The reservation of 'free rights of ingress, egress and regress at all reasonable times' in section 26 *Land Act* 1948 should be contrasted with section 400 *Land Act* 1994 (Qld) where Crown access requires prior agreement of the runholder, or failing agreement 14 days notice. The High Court of Australia in *Wik* found that Queensland runholders do not necessarily have exclusive possession notwithstanding the conditional access rights of the Queensland Crown.

50 See generally Sally K Fairfax et al, *Buying Nature The Limits of land Acquisition as a Conservation Strategy, 1780-2004* (2005).

51 Chris Laidlaw, Interview with Hon David Parker, Donald Aubrey, Ann Brower and Kevin Hackwell, Radio New Zealand. 'Sunday Morning with Chris Laidlaw.' 7 July 2008, 10-11 am.

52 *Wildlife Act* 1953, S 23; *Conservation Act* 1987, s 26 ZN.

53 Fish and Game represents recreational anglers and game bird hunters. The New Zealand Deerstalkers Association represents hunters of game species, such as deer and tahr, larger than fowl.

54 The sole respondent to the action will be the Crown. Though the High Country Accord was invited to join, they declined, Fish & Game Councils of NZ, 'Fish and Game Application to the High Court on High Country Land' (Press Release, 19 September 2008).

IV. LEGAL VS. RHETORICAL FOUNDATIONS OF EXCLUSIVE POSSESSION

In Page and Brower 2007, we posited that exclusive possession was a myth based, not in statute, but in rhetoric grounded in the Lockean ‘work-to-own’ view of land ownership and classical economic views of efficiency. Both the Crown Law opinion and farmers’ responses in the media support this two-pronged thesis.

First, much of the Crown Law opinion and the farmers’ rhetoric rest on the farmers’ ownership of land improvements. The Crown argues that ‘it would be impossible for the holder to undertake the farming operations without the exclusive possession of the land’.⁵⁵ In other words, Crown Law argues that because the economically viable pastoralism permitted by the Land Act requires improvements to the land and soil, and exclusive possession is a necessary pre-condition to improving land and soil, the Land Act drafters must have intended to grant the run-holders exclusive possession, even if they failed to do so explicitly. Further, ‘bearing in mind that the lessee owns both structural improvements such as buildings and fences and improvements to the state of the land, exclusive possession ensures that the lessee will have their sole use. That is confirmed by the terms to the lease which grants the lessee the exclusive right to the pasturage. The reference to the “pasturage” is a restriction on the use to which the land can be put. But because the land is a pastoral lease granted for pasturage purposes, the use of land for other purposes (by other people) is excluded’.⁵⁶

In his *Second Treatise of Government*, John Locke argued that because a man owns his labour, mixing individually owned labour with apparently un-owned land transferred ownership from the commons to the individual. This transfer of ownership is good for both the individual and the collective whole, because improving land adds value (by ten-fold in Locke’s estimation). Some value owned by an individual is better than no value owned by the collective. Thus the Lockean ‘rent-to-own’⁵⁷ view of land ownership is both legally equitable and economically efficient. The Lockean labour theory of property was very much *au courant* during the 19th century, when fledgling nations and colonies such as New Zealand, Australia, and the US were busily encouraging its citizens and subjects to settle the hinterlands and when pastoral leases were first established in New Zealand. Rewarding work on the frontier with land on the frontier seemed an equitable and efficient means of achieving Manifest Destiny.

The labour theory of property was very much a nation-building idea that promoted land settlement in a time when unoccupied land was very much a liability as it represented a hole, or a weak point in the new colony or nation.⁵⁸ As such, unoccupied land carried a negative value to the Crown or federal government, so giving it away to those who would strengthen the nation geographically and economically made sense. In that sense, the Lockean view of ownership intersects with the classical economic view of efficient use of resources. In order to promote investment in land or resource development, one must guarantee security of tenure over the resource. Without that security, the tenant will have little incentive to invest in the necessary agricultural and nation-building improvements.

55 Crown Law Opinion, above n 2, 1.

56 Crown Law Opinion, above n 2, 3-4.

57 Brower above n 4, 74.

58 See generally, Daniel Bromley, ‘Private Property and the Public Interest: Land in the American Idea.’ in William G Robbins and James C Foster (eds), *Land in the American West: Private Claims and the Common Good* (2000).

Whether knowingly or not, runholders have used the synergy between Locke and classical economic efficiency to blur the boundary between a legal grant of security of tenure and a legal grant of exclusive possession. Effectively they have implied that since land improvements are good for the nation and secure and exclusive tenancy is a necessary for improvement, secure and exclusive tenancy are good for the nation as well.⁵⁹ This is similar to their consistent and repeated conflation of leasehold occupation with privately owned land under freehold title.⁶⁰ The runholders summarized this argument in a media release chastising conservation groups for calling for a moratorium on the high country tenure review. Tenure review and relations in the high country would be much smoother and friendlier, they argued, if ‘everyone recognized that ... the land [runholders’] farm is theirs’.⁶¹

Again, even if the drafters failed to grant exclusive possession at black letter law, absence of evidence is not, they argue, evidence of absence. In a live debate on National Radio’s Sunday Morning with Chris Laidlaw an advocate for runholders makes this case effectively:

Aubrey: ‘These pastoral leases have been provided on an exclusive basis. Without that security of tenure, I don’t believe that we would have achieved the sorts of outcomes that we have for the South Island tussock grasslands. ... security of tenure does deliver good results’.

But the Minister of Land Information, Hon David Parker distinguished between exclusivity and security:

Parker: ‘There are two issues here that have been conflated. One is whether pastoral lessees have long-term rights of renewal, which pastoral lessees do and absolutely need. ... in respect of whether the leases confer exclusive possession, that’s a separate issue. And actually I agree with Mr Aubrey on that one too. The advice to me from Crown Law is that they do confer exclusive possession’.

Several notable statutes governing the disposition, retention, and management of publicly-owned natural resources contained a method of disposition reminiscent of both Locke and classical economics. These statutes conferred exclusive possession and indeed freehold title to the men and women who had made productive use of frontier land – whether by ‘proving up’ on a mining claim⁶² or satisfactorily staking a homestead claim.⁶³ But, with notable exceptions, the days of public land and resource disposition by Lockean logic came to a close soon after the turn of the 20th century.⁶⁴ Though there is nothing wrong with disposing of public land in this manner if the primary statute says so, the Land Act 1948 does not so say.

Given this hole in the black letter law, it is not surprising that recreation access advocates such as Fish and Game might seek clarification but run-holders might want no such thing. As has been observed in other property disputes, lack of statutory clarity usually serves the interest of the purported right-holder rather than the public.⁶⁵ Ambiguity allows cultural definitions of a property entitlement to supersede statutory definitions to such a degree that the ‘most striking incongruity

59 Brower, above n 4, chapter 9 ‘Strategic hypocrisy’.

60 Brower, above n 4, chapter 5 ‘The land they farm is theirs: The Lockean view of land ownership’.

61 High Country Accord ‘Tenure review can provide win-win outcomes.’ (Press release, 15 August 2006) <[http:// www.highcountryaccord.co.nz/index.php?page=21](http://www.highcountryaccord.co.nz/index.php?page=21)>.

62 *Mining Law of 1872* (US).

63 *Homestead Act of 1862* (US).

64 Leigh Raymond and Sally K Fairfax. ‘Fragmentation of Public Domain Law and Policy: An Alternative to The “Shift-to-Retention” Thesis’ (1999) 39(4) *Natural Resources Journal* 649-753.

65 Ann Brower, John Page, et al (in review), ‘The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Ownership in the US, New Zealand, and Australia.’

between law and custom is how often custom wins'.⁶⁶ It makes possible a situation in which it is reasonable for Fish and Game chief executive to 'suspect that over the years the high country community has talked up the extent of their rights that go into the leases when the statute seems to state it is purely for pasturage'.⁶⁷

Indeed the ambiguous legal landscape of high country tenure has served the runholders' interests well over the decades – contributing to Crown payouts in tenure review that are more generous than a strict interpretation of property law would have predicted.⁶⁸ As is often the case in disputes over private rights in public resources, custom favours the private interest while statute favours the public interest.⁶⁹ So the private interest often chooses to fight its battles in the media rather than in the Court room. Indeed when Fish and Game issued proceedings for a declaratory judgment, Federated Farmers immediately issued a media release likening Fish and Game to terrorists. In it, the Federated Farmers' high country chairman called Crown pastoral land 'privately held land,' and likened a pastoral lease to a residential flat tenancy.⁷⁰ He also issued a thinly-veiled threat to would-be high country anglers:⁷¹

High country farming families have strong relationships with fishermen, hunters and other recreational users. This action by Fish and Game is likely to destroy this goodwill ... Having firearms discharged at any time of the day or night will only serve to terrorise both livestock and families in remote areas. This would be similar to the Wild West of old.

V. BACKGROUND TO THE LAND ACT 1948

We conclude this 12 month journey by stepping back 60 years to identify the dominant high country issues preceding the enactment of the Land Act 1948. This may seem a strange chronological diversion, but it is critical to grasp the problems of the 1940s.⁷² These issues influenced the legislative solutions crafted for the high country in former section 66.⁷³ In particular we consider the 1946 Sheep Industry Royal Commission and the parliamentary debates surrounding the passage of the Land Act. These emphasised the importance of fixity of tenure and security for improvements in creating a sustainable pastoral industry. Exclusivity of possession was prominent by its absence.

66 Joseph Sax quoted in Leigh Raymond, 'Viewpoint: Are grazing rights on public lands a form of private property?' (1997) 50(4) *Journal of Range Management*, 437.

67 Fish and Game Councils of NZ chief executive Bryce Johnson quoted in Chris Hutching, 'Declaratory Judgment Sought on High Country Leases: Are the Leases Just for Pasturage?' *The National Business Review* (Auckland), 18 July 2008.

68 Brower, above n 4.

69 Brower, Page, et al (in review), above n 65.

70 This awkward analogy also touches on runholder's claims to 'quiet enjoyment rights'. Quiet enjoyment is a covenant (owed by the grantor) not to interfere directly or indirectly with the grantee's rights, here exclusive pasturage rights. Interferences with exclusive possession are easier to conceptualise in the case of a residential flat. It is more difficult to conceptualise exclusive occupational control over expansive areas of high country, but it is easier to conceptualise interferences with pasturage rights in such wild, isolated settings.

71 Federated Farmers, 'High Country No Wild West' (Press release, 27 August 2008).

72 Indeed the same issues were identified 28 years earlier in the 1920 Sadd Royal Commission inquiring into the condition of the southern pastoral lands; see also L W McCaskill, 'Rural Land Use', in J. Bruce Brown (ed), *Rural Land Administration in New Zealand* (1966) 70.

73 The former section 66 was transplanted into the *Crown Pastoral Lands Act* without qualification.

A Royal Commission into the Sheep Industry was set up in 1946. Its report was not handed down until 1949, shortly after the Land Act took effect. But along with the Soil Conservation and Rivers Act 1941, this commission heavily influenced thinking behind the Act as it related to high country runs.⁷⁴ The Report listed the concerns of high country sheep farmers as: the regrouping of uneconomic units created by faulty subdivisions; the safeguarding of the value of pastoral improvements; a working plan to encourage good husbandry; and the setting up of a tribunal to protect the rights of the farmer.⁷⁵

The commission took evidence from high country run-holders in the South Island in 1946. The following exchange between Chair J M Macdonald and run-holder R C Todhunter at sittings in Lake Tekapo typifies the concerns at the time:⁷⁶

R C Todhunter: We must get security... before good husbandry can be practiced and confidence restored to high-country farming.

Chair: Do you think a permanent right of renewal in lieu of these pastoral leases would be satisfactory?

Todhunter: Unless we can have some security for our improvements, by a valuation by arbitration on termination, then no-one at present is going to put any improvements on the back country. You can't get a bank...or any financial body... – even the State Advances Corporation – to lend one penny-piece on improvements...

Other witnesses raised problems such as the lack of labour, drought, indiscriminate burning, erosion, and 'pests' including rabbits and keas. The commission was sympathetic to the run-holders. It was convinced of the need for a secure tenure but it did not recommend freeholding. Fixity was evidenced in the Chair's thinking of a 'permanent right of renewal'.⁷⁷

As a response, the Land Act 1948 created a distinct tenure applicable to high country pastoral lands.⁷⁸ This 'new form of tenure [was] ...for land classified as suitable or adaptable only for pastoral purposes'.⁷⁹ In using the term 'pastoral purposes' there was 'convincing evidence that the framers of the Act understood "pastoral purposes" [to mean] the extensive pastoralism for which such land was used in a largely undeveloped state'.⁸⁰

74 Other influences included the writings of Kenneth Cumberland (for example K B Cumberland, 'High Country "Run" the Geography of Extensive Pastoralism in New Zealand' (1944) 20(3) *Economic Geography* 204); and Horace Belshaw, (for example H Belshaw, *Land Tenure and the Problem of Tenurial Reform in New Zealand* (1948)).

75 New Zealand, Royal Commission on the Sheep Industry, Final Report (1949) 74.

76 Royal Commission on the Sheep Industry, Transcripts, Evidence Vol. IX – Ashburton to Mackenzie Country, March 9-15, 1948 DAAK 9421 D450, Lake Tekapo sittings, 12 March 1948, 10T3.

77 Ibid, evidence of C A Parker, Rollesby Station, 12 March 1948, Lake Tekapo, 10W1.

78 Section 66(1) A pastoral lease or pastoral occupation licence shall entitle the holder thereof to the exclusive right of pasturage over the land comprised in his lease or licence, but shall give him no right to the soil.

(2) Every pastoral lease or pastoral occupation licence may be subject to such restrictions as to the numbers of stock which may be carried on the land comprised therein as the Board in each case determines

(3) A pastoral lease under this Act shall be a lease for a term of 33 years with a perpetual right of renewal for the same term, but with no right of acquiring the fee simple. Section 2 defined a "Lease" as a lease granted under this Act, (emphasis added) or any former Land Act. A "Licence" had an equivalent definition, suggesting that the terms have a statutory basis.

79 Lincoln Papers in Resource Management, *Pastoral High Country Proposed Tenure Changes and the Public Interest: A Case Study*, No 11 (1983) 45.

80 The Committee of Inquiry into Crown Pastoral Leases and Leases in perpetuity, Final Report (1982) 6.

It established the 33 year renewable lease as the standard tenure...Because of the land's susceptibility to erosion, the Act provided for Crown land in the South Island high country to be leased on special pastoral tenures with perpetual right to renewal but no right to freehold.⁸¹

This removal of the right to freehold went against the general tenor of the 1948 Act,⁸² and was explained by Lands Minister Hon C F Skinner because of doubts as to the suitability of pastoral leases for permanent alienation, arising from public concern for soil conservation. 'The new tenure retained restrictions as to burning and cultivation without the consent of the Commissioner of Crown Lands and as previously, gave a right to pasturage only.'⁸³

It was also believed that a national failure to take care of the high country would result in danger to the more fertile lowlands. 'The Soil Conservation and Rivers Control Act 1941 [was] a recognition that the hill country is also of concern to the riparian landholders dependent on river flow.'⁸⁴ Government backbencher Mr Parry, during debates on the final reading of the Bill said:⁸⁵

It is only in recent years... that we have come to realize the dangers in this country of soil erosion, and the danger of what good land we have being devastated because of our failure to take proper care of all the back country...the only exception that occurs in this Bill to the right of freeholding...is land which belongs to that hill country,...which is important in itself, but also for the sake of the areas of front land and good land from which the greater part of our production comes.

The Land Bill was introduced into the House on 21 October and was passed on 29 November 1948. It was not referred to the committee process after its first reading. Debates in the House stressed the interest of the Crown in these lands, and the creation of a secure tenure that encouraged investment in farm improvements, facilitated financial security, and as a consequence avoided scenarios of overstocking and land degradation. 'The changes in tenure introduced in 1948, particularly the perpetual right of renewal, created a climate of confidence which encouraged run holders to undertake development programmes.'⁸⁶

VI. CONCLUSION

The pending High Court litigation brought by Fish and Game will permit the issues identified in *Property Law in the South Island High Country – Statutory Not Common Law Leases*, and especially their implications for access to Crown pastoral leases, to be clarified. It will also test the arguments of the Crown Law Office.

These proceedings are desirable because they will deliver transparency and certainty to pastoral tenure through the rule of law, rather than hyperbole, distortion or obfuscation of law or history. We repeat our conclusions of December 2007 that 'the journey ahead would be better served

81 R J Maclachlan, 'Land Administration in New Zealand', in J Bruce Brown (ed), *Rural Land Administration in New Zealand* (1966).

82 The opposition National party praised the Labour Government for its commitment to private freehold title, and teased it for its apparent conversion from socialist principles, such as state leasehold.

83 Lincoln Papers in Resource Management, above 79, 46.

84 Royal Commission on the Sheep Industry, Transcripts, Evidence Vol. IX – Ashburton to Mackenzie Country, March 9-15, 1948, DAAK 9421 D450, Lake Tekapo sittings, 12 March 1948, evidence of Dr P R Woodhouse from the Soil Conservation Board, testifying as to the problems occasioned by insecurity of compensation for permanent improvements, 10YZ.

85 New Zealand Parliamentary Debates, 25 November 1948, vol. 284, 4071 (Hon. Mr. Parry).

86 Lincoln Papers in Resource Management, above n 79, 48.

by taxonomic coherence of the rights of Part 1 CPLA holders'.⁸⁷ It is now apparent that coherence of the 'rights' of the public to access these lands, would likewise serve the public good.

⁸⁷ John Page & Ann Brower, 'Property Law in the South Island High Country – Statutory Not Common Law Leases' (2007) 15 *Waikato Law Review* 48, 63.

THE PRICE OF FISH: PROBATIVE VALUE, PREJUDICE AND POLICY

BRENDA MIDSON*

I. INTRODUCTION

For almost a hundred years, the admissibility of evidence in New Zealand courts was determined by a mishmash of statutory rules, regulations, and case law. This unsatisfactory state of affairs was finally remedied on 1 August 2007, close to 20 years since reform was put on the agenda, by the commencement of the Evidence Act 2006.¹ Not only did the Act repeal the Evidence Act that had been in force since 1908, but also proposed to form a comprehensive scheme relating to evidence and to replace most, if not all, of the common law in the area.

The Act affirms the fundamental common law principle that evidence must be relevant to be admissible. Further, evidence will be excluded² if (a) its probative value is outweighed by any unfairly prejudicial effect on the proceeding³ or (b) it would needlessly prolong the proceeding. Along with various procedural requirements, the Act also sets out a number of more specific admissibility rules, which primarily correspond with what have been known at common law as exclusionary rules, such as the rule against hearsay and the rule against propensity (or conduct evidence⁴).

Recently New Zealand's criminal trial system has faced criticism following acquittals in several high profile cases. In May of this year alone, Chris Kahui was acquitted of murdering his twin sons, George Gwaze was acquitted of the rape and murder of his niece, and Murray Foreman was acquitted of the 2004 killing of farmer Jack Nicholas. The acquittals of former police officers in the Louise Nicholas case have also raised questions, not simply about police prosecutions, but about the efficacy of the justice system as a whole. In at least two of these cases, those of George Gwaze and Messrs Shipton, Schollum and Rickards, the admissibility of certain pieces of evidence were in dispute. Indeed, disquiet about the outcomes in the latter case impelled Justice Randerson, Chief High Court Judge, to explain, via an article in the *New Zealand Herald*, how the jury trial system works. In doing so, he made the following salient point:⁵

An accused is entitled to be judged solely on the basis of the evidence. Gossip and innuendo are not evidence. Evidence is information that is admissible if it is deemed to be relevant and if the assistance it can provide in determining an issue outweighs any unfairly prejudicial effect.

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1 Hereafter referred to as 'the Act'.

2 Pursuant to section 8.

3 This aspect requires a Judge to take into account the right of the defendant to offer an effective defence.

4 At common law, evidence of conduct has also been referred to as similar fact evidence.

5 Justice Tony Randerson, 'Fair trial recognises competing interests' *New Zealand Herald Online* <http://www.nzherald.co.nz>. 16 March 2007.

In any litigation, facts must be proved, and facts require evidence to prove them. In turn, this depends upon the operation of the rules of evidence.⁶ In light of questions about the ability of our criminal trial system to dispense justice, this article argues that the specific admissibility rules the Act contains do not provide for the admission of all relevant evidence, and accordingly are unlikely to achieve justice in criminal cases. An alternative determinant of admissibility is proposed – that evidence that is relevant is admissible unless its probative value is outweighed by illegitimate prejudice, or there is a policy reason to exclude it.⁷ It will be argued that this test could be applied to any piece of evidence, regardless of its nature, without reference to any other condition for admissibility. Significantly, given further criticisms about our ‘slow, costly’⁸ justice system, the prejudice-policy test has the added advantage of being far less resource intensive than other approaches to admissibility and yet will still allow for the admissibility of, if not *all* truly cogent evidence, at least more than has been the position under the common law and arguably more than provided for by the Act. Hence the title of this paper reflects its central thesis – if the evidence is relevant to proving the price of fish, it should be admitted, subject only to exclusion based on illegitimate prejudice or policy.

To illustrate how the prejudice-policy test could work in practice, this paper will focus its attention on evidence that might otherwise be excluded by the operation of the rules against hearsay and evidence of conduct. But firstly any quest for justice must begin by exploring precisely what is sought.

II. JUSTICE IN CRIMINAL LITIGATION?

What do we mean by ‘justice’ in criminal litigation? Do we seek the truth, in the sense of guilt or innocence, liability or none, of the defendant? The truth seems as good a place as any to start, and at least from the public perspective, justice does appear to be measured by a finding of either guilty or not guilty – depending of course upon whether those verdicts reflect what is perceived to be the truth. As noted in the introduction to this article, more recently it has been acquittals that have given rise to concern about the way in which cases are prosecuted. But there has also been unease, albeit not unanimous, about some guilty verdicts, notably those of Scott Watson for the murders of Ben Smart and Olivia Hope, and David Bain, who has recently been granted a retrial.

In discussing the relationship between truth and justice, Paciocco argues that ‘[t]he intuitively irresistible connection between truth and justice arises only because our system of criminal justice is “guilt-based”.’⁹ When Chief Justice Freedman of the Manitoba Court of Appeal questioned whether the quest for justice was synonymous with the truth, his answer was qualified:¹⁰

In most cases, yes. Truth and justice will emerge in a happy coincidence. But not always. Nor should it be thought that the judicial process has necessarily failed if justice and truth do not end up in perfect harmony. Such a result may follow from the law’s deliberate policy.

6 D M Paciocco, ‘“Truth and Proof”: The Basics of the Law of Evidence in a “Guilt-Based” System’ (2001) 6 *Canadian Criminal Law Review* 71.

7 This will hereafter be referred to as the prejudice-policy test.

8 ‘Ex-judge slates slow, costly justice system’ *Waikato Times* 4 June 2008, 5.

9 Paciocco, above n 6.

10 S Freedman, ‘Admissions and Confessions’ in *RE Salhany & RJ Carter, Studies in Canadian Criminal Evidence* (1974) 99, cited in SA Cohen, ‘Controlling the Trial Process: The Judge and the Conduct of Trial’ (1977) 36 *Criminal Reports (Articles)* 15.

In referring himself to Justice Freedman's answer, Paciocco adds, 'In our system, just convictions remain tethered to truth. By contrast, just acquittals are not bound to the truth in the same way.'¹¹

But what of 'unjust acquittals'? Paciocco notes with interest that the 'intuitive link between truth and justice' is now being used to support calls to reduce the degree to which exclusionary rules *benefit an accused*.¹² But comments made by New Zealand's Chief Coroner, Judge Neil MacLean, suggest that there is no such thing as an 'unjust acquittal'. In an article referring to the Kahui, Foreman, and Gwaze cases, Judge MacLean is quoted as stating, 'It's about the Crown proving an allegation about someone beyond reasonable doubt. If it can't, that's the end of the matter: "That's an acquittal".'¹³

So justice cannot simply be measured by verdicts that reflect guilt or innocence, or even by an error-free trial process. Sir Thomas Thorp also points out that a conviction that is justified by the relevant criminal code may still be a miscarriage of justice where there is credible evidence exonerating an accused that was inadmissible at trial.¹⁴ Likewise, sometimes the truth will emerge, but for all the wrong reasons. Furthermore, a just verdict is not only one involving fairness to the accused but that also promotes the public interest in securing the convictions of those who pose a threat to society.

So truth alone is insufficient. What else determines a just outcome? Clearly, a fair process is also crucial, for of what good is a factually correct outcome obtained in breach of fundamental rights and principles of fairness? And thus, for centuries rigorous rules relating to the admissibility of evidence and the format of trial process have been applied in order that does not occur. But in many jurisdictions, rules of evidence have developed too far in favour of exclusion of evidence that might be highly relevant.

While in the English Court of Appeal case *Air Canada v Secretary of State for Trade*, Lord Wilberforce observed that if decisions are made 'in accordance with the available evidence and with the law, justice will have been fairly done,'¹⁵ the problem is that rules of evidence do not allow for the admission of *all* available evidence. Thus, while justice may be done, as Jolowicz notes, the justice Lord Wilberforce refers to is procedural rather than substantive.¹⁶ Is procedural fairness sufficient to support a claim that an outcome is just? I would suggest that just as the truth alone cannot be equated with justice, neither can procedural fairness.

Leane argues that any body of law is of little use if it simply provides for procedural justice. Outcomes, he writes, must be ones that:¹⁷

...we, as parties and observers, can accept as believable, legitimate and justifiable according to some felt sense of 'fairness' and justice within some common web of understanding. It should not, for example, be an outcome pre-determined by the unthinking application of rigid, inflexible rules fashioned in an alien context and mechanically applied to a concrete case, regardless of the equity and reasonableness of the outcome.

11 Paciocco, above n 6.

12 Ibid.

13 C Masters, 'Reasonable doubt, and beyond' *New Zealand Herald Online* <http://www.nzherald.co.nz>. 31 May 2008.

14 Sir Thomas Thorp *Miscarriages of Justice* (2005) Legal Research Foundation 3.

15 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 411 per Wilberforce LJ, in JA Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International and Comparative Law Quarterly* 281.

16 Jolowicz, *ibid* 286.

17 GWG Leane, 'Testing Some Theories About Law: Can We Find Substantive Justice Within Law's Rules?' (1994) 19 *Melbourne University Law Review* 924.

While it is not necessarily so that the law of evidence is made up of 'rigid, inflexible rules', many of them were developed in an alien context inasmuch as they evolved when what was *known* about crime and human behaviour (such as the ability of jurors to rationally assess evidence; or the fact that certain crimes have a high rate of recidivism, for instance) was more limited. Leane continues; 'We do not want procedural equality through formalism only to suffer substantive inequality through the thoughtless application of formal rules divorced from social reality.'¹⁸

In referring to Bentham's thesis that 'rectitude of outcome' is best achieved by natural rather than technical systems of proof,¹⁹ Jackson notes that:²⁰

In recent years there has increasingly been a move away from the rules of evidence in favour of the principle of free proof under which triers of fact should be permitted to evaluate all evidence that is sufficiently relevant without the need for rigid exclusionary rules mandating the exclusion of entire categories of evidence.

It is true that modern Courts do tend towards a more flexible approach in determining admissibility, but it is fair to say that the 'exclusion of entire categories of evidence' is still possible. The potential for injustice that arises is convincingly demonstrated, in the context of the hearsay category, by the English case of *R v Blastland*.²¹ A young boy had gone missing one evening and his body discovered the following morning. He had been sexually assaulted and strangled. Blastland was eventually charged with the sexual assault and murder. He pleaded not guilty to the murder, but admitted he had attempted buggery with the boy, stopping when the boy complained of pain. Blastland said that shortly afterwards he saw a third party, Mark, nearby. Afraid that he had been seen attempting buggery, Blastland ran away. The defence's contention was that Mark had murdered the boy and sought to call witnesses to give evidence that before the boy's body was discovered, Mark had made statements that demonstrated a knowledge of the killing. The Judge ruled the evidence inadmissible as hearsay and Blastland was convicted. He appealed against conviction on the basis that the Judge's exclusion of the evidence was in error. The Court of Appeal dismissed his appeal and Blastland appealed to the House of Lords. The House of Lords held the evidence was not wrongly excluded because Mark's knowledge, or state of mind, was not an issue, nor relevant to an issue, at Blastland's trial.

Lord Bridge of Harwich noted that statements made by a third party are not excluded by the hearsay rule when tendered to prove the state of mind of the maker or the person to whom the statement was made, but he added that this only applies where; '...the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial'.²²

On one level, the Court's reasoning is sound, in that statements made by a third party are not excluded by the hearsay rule when they are tendered to prove the state of mind either of the maker of the statement or of the person to whom they were made. Allan argues that:²³

18 Ibid.

19 J Jackson, 'Evidence: Legal Perspective' in R Bull, & D Carson, (eds) *Handbook of Psychology in Legal Contexts* (1999) 170.

20 Ibid.

21 *R v Blastland* [1986] 1 AC 41; [1985] 2 All ER 1095 (HL).

22 Ibid, per Lord Bridge of Harwich at 54; 1099.

23 TRS Allan, Case and Comment 'Hearsay exception subject to relevance – relevance subject to hearsay' (1985) *Cambridge Law Journal* 345.

[i]t is difficult to fault the logic of the decision. The rule admitting evidence of knowledge or state of mind could not sanction the reception of irrelevant facts. However, the decision starkly illustrates the rigid nature of the hearsay rule and the artificiality of its results.

While I would argue that the Court's finding on the question of relevance is suspect, what is more concerning, in the present context, is that the decision was justified on the basis of the hearsay rule. Lord Bridge of Harwich continued:²⁴

...to allow this evidence of what Mark said to be put before the jury as supporting the conclusion that he, rather than the appellant, may have been the murderer seems to me, *in the light of the principles on which the exclusion of hearsay depends*, to be open to still graver objection than allowing evidence that he had directly admitted the crime. [emphasis added]

My complaint here is that the 'principles on which the exclusion of hearsay depends' only arise if the statements are tendered to prove the truth of their contents:²⁵

Hearsay evidence is not excluded because it has no logically probative value. Given that the subject matter of the hearsay is relevant to some issue in the trial, it may clearly be potentially probative. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination.

The dangers that the hearsay rule is designed to avoid were clearly not present in the case at all. If the evidence was tendered to establish Mark's state of mind, his truthfulness and accuracy would not have required testing in cross-examination. If the statements were tendered to prove that a boy had been murdered, the position would clearly be different. But in *Blastland* there was no point in proving the truth of the statements because whether or not the boy had been murdered was not a fact-in-issue. So the disputed statements were not hearsay at all, despite the Court's acceptance of the trial Judge's reasoning that the evidence was an implied admission of guilt and therefore hearsay. The problem that this case clearly demonstrates, in the writer's opinion, is that the hearsay rule has diverted attention away from what should have been, and should always be, the fundamental question in any case – is the evidence relevant to a fact-in-issue?

A similar issue arose in *R v Bain*.²⁶ As it was in *Blastland*, the defence's theory was that another person was responsible for the killings and to support this theory, the defence wished to call evidence from a witness that would establish a motive for this other person. The evidence consisted of statements allegedly made by a third party to the witness. The trial Judge excluded the evidence. David Bain was convicted and appealed on the basis that the witness's evidence should have been admitted. The Court of Appeal approached the issue on the basis of whether it was admissible as an exception to the rule against hearsay. Thomas J stated:²⁷

It is preferable to have regard to the substance of the proposed evidence, who made the statement, the manner in which it was made, and all other relevant circumstances, including whether the original or direct evidence is available, and then to make an overall assessment whether the evidence is sufficiently relevant and reliable to be admitted, notwithstanding that it is hearsay evidence.

The Court of Appeal upheld the trial Judge's decision not to admit the evidence, noting that the trial Judge's decision that the evidence would not be reasonably safe or reliable was made having

24 *R v Blastland*, above n 21, per Lord Bridge of Harwich at 54; 1100.

25 *Ibid*, per Lord Bridge of Harwich at 53-54; 1099.

26 *R v Bain* [1996] 1 NZLR 129; (1995) 13 CRNZ 684 (CA).

27 *Ibid* 133; 692.

regard to the witness's appearance, his demeanour, his background and his general conduct. When compared with *Blastland*, this decision is sensible. While a motive for the third party was logically relevant to the primary issue, certain factors pertaining to the witness suggested the evidence might be less than reliable. And if the evidence is not reliable, it has a low probative value, and is therefore not sufficiently relevant.

Not surprisingly, the *Blastland* case has excited considerable sympathy for the accused in that case, who arguably was convicted in the absence of *all available evidence*.

Similar problems, albeit with varying results, arise in relation to evidence of prior conduct, or propensity evidence, as it is referred to in the Act. In *Noor Mohamed v R*,²⁸ the accused was charged with the murder of his second wife by poisoning her with cyanide. At his trial, the trial Judge admitted evidence that suggested that Noor Mohamed had murdered his first wife by the administration of cyanide. He had not been charged in relation to his first wife's death. On appeal, the Privy Council was of the view that if the evidence was of no substance other than to show that the accused was a person likely from his character or conduct to have committed the offence charged, it was not admissible. In other words, if the evidence was not relevant for some other purpose it was not admissible, because it breached the rule against evidence of conduct. The Privy Council held that the evidence was wrongly admitted. However, the evidence points to remarkable similarities in the circumstances of both deaths and possible explanation given by the accused for both deaths (suicide in respect of the second and it would appear accident or suicide in respect of the first). In other words, the evidence was relevant to rebut the defence of coincidence.

Yet in *R v Smythe*²⁹ evidence of a prior 'accident' was admissible. The accused was charged with burning down his house with intent to defraud his insurers. The house had recently been acquired and insured. Some weeks earlier, the accused was alleged to have allowed his recently acquired and recently insured lorry to fall over a cliff. The evidence tended to negative the possible defence that the fire had been unintentional. In the light of *Noor Mohamed*, Salmond J's obiter comments are illuminating:³⁰

When a similar accident happens to the same person too frequently to be reasonably and naturally accounted for by the law of chances, there is ground for the inference or suspicion that it is not an accident at all but an intentional result...So [a man] may lose one wife by the accidental administration of arsenic, but if he marries three successive wives and loses them all in the same way an inference of wilful murder may be justly drawn.

Following this reasoning, one could reasonably expect that Noor Mohamed was entitled to lose two more wives to cyanide poisoning before any adverse inferences could be drawn from such facts.

All levity aside, what these cases, and there are countless others, demonstrate is that while the ultimate question should be one of the relevance of the evidence, the operation of technical rules has led to inconsistent outcomes, which make the application of the doctrine of precedent a somewhat problematic exercise. Indeed, the Explanatory Note to the Evidence Bill stated that:³¹

[E]vidence law is largely Judge-made, comprising decisions that are made in response to the circumstances of particular cases. The statutory provisions dealing with evidence are contained in a number of statutes, and have been reformed on a piecemeal basis, responding to issues as they arise. The resulting

28 *Noor Mohamed v R* [1949] AC 182; [1949] 1 All ER 365 (PC).

29 *R v Smythe* [1923] NZLR 314.

30 *R v Smythe*, *ibid*, per Salmond J at 323.

31 Explanatory Note, p 1.

complexity and inconsistency of the law of evidence results in undue legal argument, expense, and delays in proceedings to accommodate arguments over issues of admissibility.

The question is, does the Evidence Act 2006 ameliorate these problems?

III. EVIDENCE ACT 2006

In 1999, some ten years after receiving its terms of reference from the Minister of Justice, the Law Commission published the Evidence Code and accompanying report.³² The Code contains the Law Commission's recommendations in respect of reform of the law of evidence, and the Evidence Act 2006 is based largely, but not entirely, upon these recommendations.

In order to overcome the problems of the existing law of evidence, noted above, the purpose of the Act, as set out in section 6, is to:³³

...help secure the just determination of proceedings by—

- (a) providing for facts to be established by the application of logical rules; and
- (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
- (c) promoting fairness to parties and witnesses; and
- (d) protecting rights of confidentiality and other important public interests; and
- (e) avoiding unjustifiable expense and delay; and
- (f) enhancing access to the law of evidence.

Interestingly, the commentary to the Law Commission's Evidence Code notes that one of the objectives of clause 6 was to 'help promote procedural fairness'.³⁴ There is no reference to the promotion of substantive fairness.

Sections 7 and 8 form the overriding inclusionary and exclusionary rules, namely that all relevant evidence is admissible,³⁵ but a Judge *must* exclude evidence if its probative value is outweighed by a risk that the evidence will have an unfairly prejudicial effect on the outcome, or would needlessly prolong the proceeding.³⁶ Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.³⁷

As noted above, the Act also sets out a number of other rules regarding admissibility as well as matters of trial process. The following sections of this article will canvass the provisions of the Act as they relate firstly to hearsay and secondly to propensity evidence.

32 New Zealand Law Commission, *Evidence: Reform of the Law* NZLC R55 – Volume 1, Wellington, 1999; New Zealand Law Commission, *Evidence: Evidence Code and Commentary* NZLC R55 – Volume 2, Wellington, 1999.

33 *Evidence Act* 2006, s 6.

34 New Zealand Law Commission, *Evidence: Evidence Code and Commentary* NZLC R55 – Volume 2, Wellington, 1999, C50.

35 *Evidence Act* 2006, s 7. All relevant evidence is admissible except evidence that is (a) inadmissible under this Act or any other Act; or (b) excluded under this Act or any other Act.

36 *Evidence Act* 2006, s 8.

37 *Evidence Act* 2006, s 7(3).

A. Hearsay

Prior to the Act's commencement, the admissibility of hearsay evidence depended upon locating the evidence within one of a number of common law or statutory exceptions to the general rule of exclusion. Most recently, Courts admitted evidence under a 'general residual exception' that took account of three factors: the relevance of the evidence, the inability of the maker of the statement to give evidence, and the reliability of the evidence. Documentary hearsay was admissible provided it met certain statutory requirements; confessions and admissions were admitted as common law exceptions to the rule, as was evidence that fell within the *res gestae*.

Traditionally when a potential hearsay issue arose, the starting point was to question the purpose for which the evidence was sought to be admitted. The Act does not alter this position, since the definition of hearsay statement in s 4 is a statement that 'is offered in evidence at the proceeding to *prove the truth of its contents*' (emphasis added). Thus under s 7 when establishing the relevance of the statement, it is necessary to determine whether it is relevant for the fact that it was made, or whether its relevance depends upon the truth of what is asserted in the statement. If the answer is that the evidence falls within the former category, it is original evidence, and the hearsay rule does not apply.³⁸ If it falls into the latter category, then the second question to be asked is whether it is a 'statement' as defined in s 4:

(a) A spoken or written assertion by a person of any matter; or

(b) Non-verbal conduct of a person that is intended by that person as an assertion of any matter.

The third step is then to consider whether the statement is a *hearsay* statement. We have already established that it is to be offered in evidence at the proceeding to prove the truth of its contents, but it also must be made by a person who is not a witness. A witness is a person who gives evidence and is able to be cross-examined in a proceeding. This definition must necessarily be limited to a person *actually giving evidence* at the material time, since otherwise the new rules would make it possible to argue that a statement made by witness Y (who is yet to give evidence) would be admissible if witness X gives evidence of it. This has never been the general rule under common law and that position is doubtlessly unchanged by the Act.

In summary, if the evidence is an assertion of any matter, made by someone other than the witness giving evidence at the material time, tendered to prove the truth of the matter asserted, then it is hearsay.

In its 1999 report on reform of evidence law, the Law Commission referred to its earlier report specifically dealing with hearsay, noting that the Law Commission 'considered that the rule should operate to exclude evidence only if there are sound policy reasons for so doing'.³⁹

While this comment could be seen as suggesting a reversal in approach to the general inadmissibility of hearsay evidence, the Act itself subjects all hearsay statements to the rule in s 17 and thus hearsay statements are *prima facie* inadmissible.⁴⁰

38 See for example *R v Rajamani*, unreported, High Court, Auckland (CRI 2005-004-001002). 5 June 2008. Heath J. In that case, decided under the Evidence Act 2006, statements made by a deceased to witnesses were offered as proof of her state of mind, and thus not subject to the hearsay rules in the Act.

39 New Zealand Law Commission, *Evidence – Reform of the Law* NZLC R55 – Volume 1, Wellington, 1999, 13.

40 Hearsay statements may also be inadmissible if tendered as opinion or propensity evidence, for instance, and they do not comply with the provisions of the Act dealing with those areas. They might also be excluded or inadmissible under any other Act: s 7. On the other hand, hearsay statements might be admissible, under other provisions of the Act or indeed if the hearsay provisions of the Act are inconsistent with another Act: s 5(1) and 17(b).

B. Exceptions – circumstances where hearsay evidence may be admitted

Notwithstanding that hearsay is prima facie inadmissible, the Act does provide for certain exceptions. Section 18 of the Evidence Act 2006 provides for a ‘general exception’ to the rule set out in s 17. Namely, a hearsay statement is admissible if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is unavailable as a witness⁴¹ or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness. ‘Circumstances’ are defined in s 16 to include the nature of the statement; the contents of the statement; the circumstances that relate to the making of the statement; any circumstances that relate to the veracity of the person (that is, the person who is *not* the witness); and any circumstances that relate to the accuracy of the observation of that same person.

It is immediately apparent that the parameters of the exception provided for by s 18 draw largely on those provided by the general residual exception. This exception would see evidence admitted if in the circumstances the evidence was relevant and reliable and unavailable in a form other than hearsay. The development of this exception began as early as 1989 in *R v Baker*⁴² in Cooke P’s eminent dicta:⁴³

At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards.

The exception was ultimately set out in *R v Manase*⁴⁴ to require that to be admitted, hearsay evidence must be relevant and reliable, and the primary witness be ‘unable’ to give evidence. While section 18 of the Act does not expressly provide for relevance as a requirement, as *Manase* does, s 7 explicitly applies to evidence offered under the Act. Thus s 18 can be read as requiring relevance, reliability (a reasonable assurance that the statement is reliable) and inability (unavailability).

In terms of ‘circumstances relating to the statement’, it is important to note that these, as defined under s 16, do not include the veracity, or truthfulness, of the witness who is giving the evidence in Court. As noted in *R v Shortland & Hughes*,⁴⁵ this is because the veracity of that witness can be tested by the fact-finder on cross-examination. While *Shortland* was decided before the commencement of the Act, the Court of Appeal in that case expressed doubt that it would prove practicable to exclude from an assessment of the ‘circumstances’, the accuracy and truthfulness of the witness who gives evidence of it. In that case, defence counsel for the two appellants charged with murder, wished to tender evidence of admissions by a third party, Piripi Shortland, who had since died. The evidence was to be given by a Ms Shelford, an ex-girlfriend of Piripi Shortland. She had given five different accounts of what she said she was told by the deceased and claimed

41 For the purposes of this part of the Act a person is ‘unavailable as a witness’, as defined in s 16, if that person
Is dead; or
Is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
Is unfit to be a witness because of age or physical or mental condition; or
Cannot with reasonable diligence be identified or found; or
Is not compellable to give evidence.

42 *R v Baker* [1989] 1 NZLR 738; (1989) 4 CRNZ 282.

43 *Ibid.*, per Cooke P at 741; 285.

44 *R v Manase* [2001] 2 NZLR 197.

45 *R v Shortland & Hughes* [2007] NZCA 37.

that any difference in her accounts was due to the improprieties of the police. She did not disclose any information at all until 12 days after the appellants had been arrested. She was illiterate and had a history of mental illness. As noted, the case was not decided under the Act but the decision of the Court identifies some of the considerations that may arise under the Act. The Court pointed out that:⁴⁶

[i]f the evidence is led, it will result in the jury being required to hear evidence about the various statements which Ms Shelford has made. This could be a lengthy process given her illiteracy and complaints of police misconduct and it may well be that all police officers who interviewed her and the private investigator would have to give evidence. There may well be an inquiry into Mr Piripi Shortland's character (including an alleged propensity for violence). All of this would undoubtedly be distracting for the jury. Further, there is necessarily some subtlety to an assessment of the overall reliability of the evidence. Critical to that assessment is how Mr Piripi Shortland's alleged role in the relevant events fits in with the evidence as a whole. As well, the reliability of Ms Shelford's evidence is distinctly in issue and, in the background, so too is the reliability of Mr Piripi Shortland. The layered nature of the exercise will not be easy for a jury to grasp and this itself carries the risk of further distraction.

Earlier, in *R v Bain*⁴⁷ there was also some discussion concerning the fact that questions of reliability can arise at different stages of the inquiry. The Court ultimately approved of the trial Judge's exclusion of the evidence, noting that:⁴⁸

[i]n deciding whether the evidence would be reasonably safe or reliable in the circumstances, the Judge concluded that he must exercise his judgment having regard to [the witness's] appearance, his demeanour, his background and his general conduct. After making an allowance for the way in which the hearing had taken place and his then circumstances, the Judge nevertheless decided that [the witness's] evidence would not be reasonably safe or reliable.

Thus, the Court in *Bain* focused on the reliability of the witness who was to give evidence of the statement, not the reliability of the maker of the statement and the circumstances relating to the making of the statement. In light of this, and the comments of the Court of Appeal in *R v Shortland and Hughes*, it remains to be seen whether, in applying the Act, the question of reliability of the witness is considered as part of the preliminary assessment of relevance or whether it is factored in to the reliability requirement in s 18, notwithstanding that it is not a 'circumstance relating to the statement'.

The Act also provides for hearsay statements contained in business records to be admitted under s 19, which is not subject to a reliability test, and for the admissibility in civil proceedings of hearsay statements in certain documents under s 20.⁴⁹ In criminal proceedings only, section 22 requires the giving of notice if a party wishes to offer a hearsay statement. Such notice includes seven different pieces of information, and further requirements must be complied with if the state-

46 *R v Shortland & Hughes*, *ibid*, para 39.

47 *R v Bain*, above n 26.

48 *Ibid*, per Thomas J at 132; 691.

49 Prior to the Act's commencement there were three main common law exceptions to the hearsay rule, namely confessions and admissions, general residual exception, and *res gestae*. Under the Act, section 18 provides largely for the general residual exception, and s 27 provides for the admission of defendant's statements, but *res gestae* is not explicitly provided for by the Act. It is implicitly provided for, if it comes within s 18, and clearly if the statement was made in circumstances of such spontaneity and contemporaneity that the risk of concoction or distortion can be disregarded, then there is a 'reasonable assurance as to its reliability'. But as s 18 is subject to the notice requirements of s 22 thus a party who tenders such evidence faces a hurdle that did not exist at common law.

ment is in writing. One of the main criticisms levelled at the hearsay provisions in the Act is that the notice requirements may have the effect of increasing the length and cost of trials.

It is clear that while the Act aims to avoid undue expense and delay, the provisions relating to hearsay do not lend themselves well to achieving this objective.

To date there have been only a few cases in which admissibility decisions have turned upon the hearsay provisions in the Act. In *R v Rajamani*⁵⁰ some of the tendered statements were not hearsay since they went to the victim's state of mind. Other statements contained a double hearsay element which the Judge did not consider fell within the meaning of 'hearsay statement' in the Act. For these reasons, there was no application of the reliability test in s 18. In *R v Kereopa*⁵¹ a statement by a witness who died before trial was not admitted because it did not meet the reasonable assurance of reliability hurdle in s 18. In that case, the Court accepted defence counsel's arguments that there was no reasonable assurance of reliability because the statement would be relied upon for identification purposes; there were inconsistencies between the statement in question and those of other witnesses; the witness had previous convictions for dishonesty offences; she had made a statement that she did not drink and yet had a conviction for drink driving; and there were issues about lighting conditions that threw the level of detail of her observations into doubt. The defence argued that on those grounds it would be inherently unfair to admit the statement, in the absence of the opportunity to cross-examine.⁵² *Kereopa* thus gives some guidance about the interpretation and application of s 18, and in particular, the 'circumstances relating to the statement' as they are defined in s 16.

It is appropriate at this point to return to the case of George Gwaze, referred to in the introduction to this article. In May 2008, George Gwaze stood trial and was acquitted of the rape and murder of his niece, Charlene Makaza. Charlene lived with the accused and his family, her parents both having died from the AIDS virus in Zimbabwe. Charlene herself was HIV positive, and it was the defence's position that there was neither a crime of rape nor murder and that Charlene had become suddenly overwhelmed by the HIV infection. Relatively late in the trial, the defence became aware of the opinion of a South African paediatric surgeon, Dr Heinz Rode, to the effect that there were similarities between Charlene's symptoms and those of children in South Africa who had died of AIDS.⁵³ Justice Chisholm admitted the surgeon's evidence as hearsay. Following the acquittal it was reported that the Solicitor-General was considering seeking a retrial on that point, although to date there appears to have been no decision on this.⁵⁴

In the absence of a written record of the Judge's ruling, we can only speculate as to his reasoning, but some conclusions are self-evident. In terms of 'unavailability', clearly the maker of the statement, Dr Rode, was outside New Zealand, and presumably Justice Chisholm decided it was not reasonably practicable for him to be a witness. We have little information on the circumstances relating to the making of the statement that provided a reasonable assurance that it is reliable. In terms of the nature of the statement, it could have been written or oral. At least one newspaper ar-

50 *R v Rajamani*, above n 38.

51 *R v Kereopa*, unreported, High Court, Tauranga (CRI 2007-087-000411). 11 February 2008. Cooper J.

52 *Ibid.*, para 31.

53 'Gwaze lawyer urges quick decision on possible retrial' *New Zealand Herald* online <http://www.nzherald.co.nz>. 30 May 2008.

54 *Ibid.*

ticle suggests the evidence was given via a statement Rode made to police.⁵⁵ Arguably the maker of the statement, a paediatric surgeon in another country, has little motive to give false evidence. Also, the evidence would have been in the form of an expert opinion and not a statement of fact as such. Thus the maker of the statement, Dr Rode, arguably can be compared favourably with the maker of the statement in the *Shortland* case, at least in terms of circumstances that relate to the veracity and accuracy of the observation of the person.

On the other hand, the content of the statement was crucial to the case – in the absence of the evidence, the jury could well have concluded not only that a crime had been committed, but also that George Gwaze committed it. The evidence is critical in that it tends to prove that there was no crime at all. Thus, given the centrality of the evidence to the issues in the trial, the inability of the prosecution to cross-examine the witness may have been sufficiently prejudicial to the prosecution case so as to outweigh its probative value, as was argued and accepted in *R v Kereopa*.⁵⁶ But section 8(2) also requires a Judge to take into account the right of the defendant to offer an effective defence. And again, the fact that the disputed evidence was crucial to the defence case is of vital importance when considering this point.

C. Propensity

In general terms, the exclusion of previous convictions has been justified in many cases on the basis that their relevance has been insufficient to outweigh the prejudice that might accrue to the accused's right to a fair trial. As was noted by Justice Randerson, above, an accused should be judged only on the evidence relating to the current charge. Admitting previous convictions can result in a jury erroneously reasoning that, despite any other evidence in the case, because the accused has committed a related crime in the past, they therefore did so on the occasion giving rise to the current charge. Notwithstanding this risk, in many cases evidence of the earlier conduct of an accused person can be of a compelling nature, depending upon what is sought to be proved.

In New Zealand the test for the admissibility of previous convictions at common law was that the probative value of the evidence outweighed its prejudicial effect.⁵⁷ In assessing probative value the Judge looked to any particular similarities between the earlier offending and the current charge. For example, in a burglary case, if there were particular features of the earlier offending such as that they took place late at night while occupiers were asleep, only cash was taken, entry was effected in the same way each time, for example, and the circumstances of the current charge involved those features, then the earlier burglaries might have a *tendency to prove* that the same offender was responsible for the current charge. That is, the earlier offending establishes a *modus operandi* that is probative of the fact that the person with that *modus operandi* committed the current charge. The more previous convictions the accused has for those types of burglaries, the stronger the probative value. On the other hand, the length of time between the earlier offending and the current charge tends to decrease the probative value, since there is a chance that the accused may have reformed. But even if the evidence was highly probative, the Judge was required to balance that against the prejudicial effect of the evidence, which derives from the fact that an

55 D Chisolm, 'Crown looks to appeal Gwaze verdict' *Sunday Star Times*, 25 May 2008. <http://www.stuff.co.nz/4560073a11.html>.

56 *R v Kereopa*, unreported, High Court, Tauranga (CRI 2007-087-000411). 11 February 2008. Cooper J.

57 In this context, New Zealand courts adopted the approach taken in the House of Lords decision in *DPP v P* [1991] 2 AC 447; [1991] 3 All ER 337 (HL).

accused's right to a fair trial may be threatened by the risk that a jury will use the evidence improperly and convict the accused on suspicion rather than proof beyond reasonable doubt.

Unsurprisingly, post-acquittal revelations about an accused's previous convictions, held inadmissible before the jury, usually give rise to increased public criticism of the justice system. In early 2007, prior to the Act's commencement, Clint Rickards, Bob Schollum and Brad Shipton faced trial on charges of sexual offending against two women in Rotorua during the 1980s. The identity of one of the complainants (B) is statutorily protected. The other woman was Louise Nicholas, who waived her entitlement to the same protection. All three accused were acquitted on all charges at both trials. Following the disposition of the second trial, involving complainant B, it was revealed that Messrs Schollum and Shipton were currently in prison, having been convicted with two other men of the pack rape of another woman in 1989. While there have been allegations that the jurors in the Rotorua trial actually knew about these convictions, they were not entitled to employ that knowledge in their deliberations. There is nothing to suggest that juries are incapable of separating these issues. Indeed, given the verdict there is little room for an argument that the jury afforded any consideration at all to the previous convictions.

Under the Act, evidence of propensity covers what at common law was often referred to (not always accurately) as similar fact evidence. Section 40 of the Act defines propensity evidence as evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved.⁵⁸

Section 41 allows defendants in criminal cases to offer propensity evidence about themselves, but under s 41(2) the Judge may then permit the prosecution or another party to offer propensity evidence about the defendant. Section 43 (to which s 41(2) is not subject) allows for the prosecution to tender propensity evidence about a defendant (even if the defendant does not put it in issue) only if the probative value of the evidence outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant. In assessing the probative value of such evidence, the Judge can take into account the frequency of the acts; connection in time between acts; extent of similarity between the acts; number of persons making allegations; whether allegations might be the result of collusion or suggestibility; the extent to which the acts are unusual.⁵⁹ When assessing the prejudicial effect of the evidence the Judge must consider whether it is likely to unfairly predispose the jury against the defendant and whether the jury will give it disproportionate weight. Despite comments made in the Court of Appeal in *R v Taea*,⁶⁰ to the effect that s 43 itself gives adequate guidance, it would seem that the Judge's exercise under the new Act will be much as the same as is currently applied in these types of cases, in that probative value is to be weighed against prejudicial effect. But in identifying the factors that are relevant to the assessment of probative value, the Evidence Act expressly recognises what the House of Lords did in *DPP v P*, that the factors from which probative force is derived:⁶¹

may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed consisting of unusual characteristics in its execution the necessary relationship is by

58 It does not include evidence of an act or omission that is one of the elements of the offence for which the person is being tried or the cause of action in the proceeding.

59 *Evidence Act* 2006, s 43(3)(a)-(f).

60 *R v Taea* (CA442/07) [2007] NZCA 472, at para 20.

61 *DPP v P*, above n 57, 462; 348.

no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection.

Thus under the Act what may be used as propensity evidence includes evidence which may not constitute similar fact evidence at all. Evidence that falls within the *res gestae* is an example, and as cases such as *R v Shortland*⁶² and *R v Karetai*⁶³ demonstrate, there is no requirement that conduct that forms the *res gestae* bears any relation to the acts charged, save that they were contemporaneous. But the term ‘propensity’ itself, especially the way it is defined in the Act, is one that seems to be more concerned with evidence that shows a ‘constant or continual attitude’,⁶⁴ or ‘system or underlying unity’⁶⁵ (that is, similar fact evidence) than evidence of *res gestae* or other types of conduct evidence. It is difficult to see how a disposition to act in a particular way can be proved *other* than by showing that the defendant has acted in the same (or similar) way on previous occasions. In other words, while *res gestae* evidence arguably falls within the propensity rules in the Act, I am not convinced that the evidence necessarily shows a *disposition* to act in a particular way or have a particular state of mind. The evidence might suggest the accused had a particular state of mind, but a disposition for it, not necessarily.

The Court of Appeal in *R v Wyatt*,⁶⁶ relying in particular upon s 43(3)(c) (extent of similarity) and s 43(3)(f) (extent to which the acts are unusual) admitted evidence of ‘high risk, almost voyeuristic’⁶⁷ sexual offending which demonstrated the respondent’s degree of interest in the physical and sexual development of the complainants. In *R v S*,⁶⁸ the Court of Appeal allowed a Crown appeal against a High Court decision to exclude propensity evidence. The respondent was to be tried on a number of charges of sexual offending, against one complainant, alleged to have occurred between 1967 and 1978. The High Court ruling excluded evidence from two witnesses other than the complainant that the respondent had touched them inappropriately during the same period. The Court of Appeal was of the view that the High Court Judge had understated the extent of similarity between the incidents relating to the complainant and one witness, and the evidence would not unfairly predispose the jury against the respondent. The Court of Appeal held the evidence of the other witness could not be tendered as propensity evidence since it described a ‘one-off incident of minor touching’⁶⁹ but it was admitted as being directly relevant to the charges since the incident involved the witness, the complainant, and the respondent.

IV. PROBATIVE VALUE & ILLEGITIMATE PREJUDICE

It scarcely needs repeating that the first and utmost consideration in determining admissibility of evidence is whether or not the evidence is relevant, and this is affirmed by section 7 of the Act. As noted earlier in this article, evidence is relevant if it has a tendency to prove or disprove a fact-in-issue in the case.⁷⁰ If the evidence does not tend to prove or disprove the proposition for which it

62 *R v Shortland* [1991] NZLR 428.

63 *R v Karetai* (1988) 3 CRNZ 564.

64 *R v Huijser* [1988] 1 NZLR 577, 579.

65 *Hsi En Feng* [1985] 1 NZLR 222, 225.

66 *R v Wyatt (CA311/07)* [2007] NZCA 436.

67 *Ibid*, para 29.

68 *R v S (CA514/07)* [2007] NZCA 497.

69 *Ibid*, para 30.

70 *Evidence Act 2006*, s 7(3).

is tendered, it is not admissible as it has no bearing on the case. In determining whether or not a particular item of evidence is relevant, Courts will look to its probative value – in other words the *degree* to which the evidence tends to prove or disprove a fact-in-issue. Because individual items of evidence have differing degrees of strength in their tendency to prove, assessing the probative value of the evidence is essential to a determination of admissibility, since if the probative value of the evidence is low, the evidence is not particularly relevant.

Reliability is also critical to an assessment of relevance. Probative value and reliability are distinct concepts in that probative value is derived from the reliability of evidence, but even reliable evidence may not necessarily be probative of a fact-in-issue.

However, even if the evidence is probative, it may be excluded when it is displaced by substantial prejudice to a party. The prejudicial effect of the evidence does not alter the degree of probative value of the evidence; rather the evidence is not probative *enough* to justify incurring prejudice to one party. In this sense, it is preferable to refer to such prejudice as illegitimate prejudice because, as noted by Tipping J in *R v Calder*,⁷¹ all evidence that constitutes a logical step in the evidence against a party is prejudicial to that party. Tipping J noted:⁷²

It is only where prejudice of an illegitimate kind is involved that the question arises. Illegitimate prejudice can exist where the impugned evidence has little probative force but may lead the jury into an erroneous process of reasoning or may lead the jury to conclude that the accused is guilty on an insecure or improper basis.

Most evidential exclusionary rules are underpinned by either concerns about the probative value or prejudicial impact of certain types of evidence. With regard to probative value, one of the justifications for excluding hearsay statements is that they can be unreliable. The extent to which a piece of evidence might be unreliable reduces its probative value. Thus the relevance of an out-of-court statement made by an intoxicated witness, who was standing too far away from the incident to see anything, is limited since it is unlikely to be reliable. In terms of prejudice, prior convictions are generally inadmissible because of the risk that the jury will convict an accused solely on the basis of antecedent bad acts than the evidence relating to the present charge, therefore prejudicing the accused's right to a fair hearing.

Similar reasoning illustrates that some common law *inclusionary* rules have admitted particular types of evidence because the probative value of those types of evidence is so high. The doctrine of *res gestae* is an example. The contemporaneity requirement of that rule provides for a degree of reliability that is not necessarily present in evidence that falls outside the application of the rule. In *R v Andrews*, a case in which the *res gestae* rule was applied in a hearsay context, Lord Ackner held that:⁷³

[T]he judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

It is difficult to conceive of cases where *res gestae* evidence will be excluded, at least when considering hearsay evidence. If the possibility of concoction or distortion can be disregarded, the

⁷¹ *R v Calder*, unreported, High Court, Christchurch, T154/94, 12 April 1995, Tipping J.

⁷² *Ibid.*, 13.

⁷³ *R v Andrews* [1987] 1 AC 281, 301.

probative value of the evidence is high (and therefore relevant, assuming that the statement is material to a fact-in-issue). Illegitimate prejudice only really arises in this context from the inability to cross-examine the maker of the statement – and the need to do so is diminished precisely because the statement is likely to be reliable. In the context of conduct, the probative value of *res gestae* evidence is derived from the contemporaneity of the evidence and its ability to explain why a person acted in a particular way, or that it was more likely that he or she acted in that particular way. However, the risk of illegitimate prejudice is higher in the case of conduct evidence because it relies upon a circumstantial inference. The prejudice that might ensue is borne of the risk that the jury could draw the wrong (or improper) inference.

V. POLICY CONSIDERATIONS

While many exclusionary rules are derived from considerations of probative value and prejudice, other exclusionary rules originate from broader policy considerations and exclude evidence that might be relevant and highly probative, and yet not illegitimately prejudicial. Evidential privileges provide examples. As noted by Cooke J in *R v Uljee*,⁷⁴ '[T]here are occasions when the public interest in the truth and in obtaining the conviction of guilty persons is recognised to be outweighed by some other public interest'.⁷⁵

This point was affirmed, in somewhat stronger terms, by Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court ex parte B*:⁷⁶

The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

In a similar way, the general prohibition on admitting involuntarily obtained confessional statements is based upon the policy that no person shall be compelled to confess guilt, as well as upon concerns about the reliability of an induced confession. As mentioned by the Court of Appeal in *R v Cameron*⁷⁷ the Law Commission noted as much when it published its discussion paper on police questioning: 'The values emphasised by the Commission were reliability (evidence which was unsafe to put before a jury should be excluded) and the protection against oppression'.⁷⁸

Also, concerns about the way in which the criminal justice system has re-victimised complainants in sexual cases, as much as relevance, are at the heart of legislative bans on questioning such complainants about their sexual history with anyone other than the accused.

Under the prejudice-policy test, when a policy ground operates, evidence should be conclusively excluded. In this sense, policy considerations extend beyond the rationales for existing exclusionary rules. Policy considerations should be limited to cases where the justification for excluding the evidence is paramount to any other consideration. As an example, defendants' statements obtained by oppression should never be admitted. On the other hand, it would not be

⁷⁴ *R v Uljee* [1982] 1 NZLR 561 (CA).

⁷⁵ *Ibid*, 567.

⁷⁶ *R v Derby Magistrates Court ex parte B* [1996] 1 AC 486, 507-508.

⁷⁷ *R v Cameron* (CA430/07) [2007] NZCA 564.

⁷⁸ *Ibid*, para 61.

sufficient to argue that hearsay statements should be excluded because there is a policy against admitting out of court statements where there is no opportunity to cross-examine the maker of the statement. While certainly the inability to cross-examine the maker of a hearsay statement is a central justification for the rule against hearsay, it is not the only, or even most significant, consideration. In *R v L*⁷⁹ the Court of Appeal noted that:⁸⁰

Cross-examination is aptly described as the greatest legal engine ever invented for the discovery of truth where credibility is in issue. The right to cross-examine an accuser is regarded in our system of justice as an important element of criminal process...But neither the specific legislation nor the Bill of Rights guarantee elevates the opportunity to cross-examine into an absolute right to confront and question the witness at the trial itself.

The statement at issue in *R v L* was a sworn statement of a complainant who had since died. Thus the Court of Appeal found that the circumstances of the statement gave an assurance of reliability since it was made under oath. Richardson J continued 'It is because of the indications of reliability that the public interest in the receipt of relevant evidence justifies its introduction where the witness is dead or otherwise unavailable'.⁸¹

Applying this reasoning it is clear that even statements not made on oath may be admissible where there are assurances as to reliability, and thus as to probative value. On this basis, there is no policy ground that excludes statements simply because the opportunity to cross-examine the maker of the statement is absent.

VI. THE PREJUDICE-POLICY TEST – APPLICATION

I return now to my original thesis – that exclusionary evidential rules do not assist in achieving justice since they operate to exclude much evidence that is relevant. Would the prejudice-policy test achieve a 'more just' result in the sense that Leane identifies – ones that we can 'accept as believable, legitimate and justifiable'?⁸² In order to measure the efficacy of the prejudice-policy test in this way, I will now apply the test to the facts of some of the cases already mentioned.

In *R v Blastland*,⁸³ the disputed evidence was clearly relevant. The statements said to have been made by Mark demonstrated his knowledge, prior to the victim's body being discovered, of a killing. That Mark had such knowledge was consistent with the defence's theory of the case that Mark was the perpetrator of the crime and not Blastland. As Lord Bridge of Harwich noted, Mark could have come by that knowledge in other ways,⁸⁴ by seeing Blastland commit the offence, for instance. But the fact that he made statements to several witnesses that a boy had been killed, that he was also dishevelled and shaking during one such conversation, that he made and retracted admissions to the police, all provide a sufficient basis for the jury to infer that he came by that knowledge by participating in the offence rather than by being a bystander. It is noteworthy, in the context of Mark's admissions to police, that there is no evidence that Mark's statements to other witnesses that a boy had been killed included identifying Blastland, or indeed any other person, as the perpetrator. That is, it seems reasonable to suggest that Mark did not offer any explanation for

79 [1994] 2 NZLR 54.

80 *Ibid.*, per Richardson J at 61.

81 *Ibid.*

82 Leane, above n 17.

83 *R v Blastland*, above n 21.

84 *Ibid.*, per Lord Bridge of Harwich at 54; 1099.

how he came by his knowledge. On the whole then, the evidence tends to prove that Mark could have committed the offences with which Blastland was charged. There would have been no prejudice to Blastland in admitting the evidence, but unfair prejudice can be occasioned to parties other than an accused in criminal cases. Obviously, the evidence was prejudicial to Mark. But Mark was not on trial. If the admission of the evidence resulted in an acquittal for Blastland, and Mark were to be charged, then the statements would have been admissible against him (subject to any question of involuntariness being raised by the defence). The only real prejudice to Mark arises in the fact that the police could have charged him with the offence, but the police already had the relevant information and could have charged him at any time. It is difficult to find any real grounds on which it could be argued that the admission of the evidence at Blastland's trial was unfairly prejudicial. There also appears to be no policy grounds for excluding the evidence in the absence of any arguments that Mark's statements were covered by a privilege of any type. Thus, according to the test proposed in this paper, the evidence would have been admitted.

In *Noor Mohamed*,⁸⁵ evidence that suggested that Noor Mohamed had murdered his first wife with cyanide is relevant to whether he murdered his second wife in the same way. That he had not been charged in relation to the first death is, in my view, irrelevant. The fact that he was not charged does not mean he had nothing to do with Gooriah's death. To say so is not the same as stating he did have something to do with her death. As the decision in *R v Smythe*⁸⁶ establishes, evidence of this nature is entirely relevant to establishing an absence of coincidence, without it necessarily amounting to a conclusion that the accused was guilty in relation to the earlier events. Lord du Parq himself thought that a hypothetical conclusion in this regard was appropriate:⁸⁷

Even if the appellant deliberately caused Gooriah to take poison (an assumption not lightly to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide.

I would add that even if the appellant deliberately caused Gooriah to take poison, it would not necessarily have resulted in a conviction. Thus, as I have already stated, whether Noor Mohamed was held responsible for Gooriah's death is irrelevant. What is relevant is that the evidence shows a connection between the deaths of two women with whom the accused was living at the material times, and as such casts doubt on any suggestion that both women's deaths were the result of accident or suicide.

The evidence was prejudicial to the accused but, I would argue, not *unfairly* so when weighed against its probative value. It has always been the case that the jury must be satisfied beyond a reasonable doubt that the accused committed all elements of the offence *for which he or she is charged*. What the disputed evidence does is to add weight to all other evidence in the case – it does not by itself equate to a conclusion that the accused was responsible for either of the two deaths. There do not appear to be any relevant policy grounds for excluding the evidence. Again, applying the test proposed in this paper, I would have admitted the disputed evidence in *R v Noor Mohamed*.⁸⁸

85 *Noor Mohamed v R*, above n 28.

86 *R v Smythe*, above n 29.

87 *Noor Mohamed v R*, above n 28, per Lord du Parq at 193; 371.

88 *Ibid.*

In the case of George Gwaze, the prejudice-policy test would also lead to admission of the hearsay evidence. I have already referred to factors in favour of its admission.⁸⁹ It is relevant to whether or not there was any crime at all. That Charlene's symptoms were consistent with other children who had died from the HIV infection is probative of the fact that she may indeed have died from that infection and not at the hand of any other person. The probative value of the evidence is not decreased by concerns about the reliability of the evidence. There is no *illegitimate* prejudice to the prosecution by an inability to cross-examine the witness.

Finally, the trials of Messrs Rickards, Shipton and Schollum for offending in relation to Louise Nicholas and complainant B (the Rotorua case) gave rise to numerous issues about the admissibility of propensity evidence. For present purposes the most significant issue, it would appear from the post-acquittal fallout, was whether the jury were entitled to hear about the previous convictions of Bradley Shipton and Robert Schollum for the rape of another woman at Mount Maunganui in the late 1980s. At the time of the trial for the Rotorua case, there were extensive suppression orders surrounding the Mount Maunganui case, including the names and identities of Shipton and Schollum, along with evidence of allegations about the use of a police baton. Interestingly, in relation to the Rotorua trial, it was conceded by the Crown that 'at least some members of the jury would be likely to be aware of [Shipton's and Schollum's] previous convictions for rape'.⁹⁰ Perhaps even more interesting is that the admissibility of Shipton's and Schollum's convictions for the Mount Maunganui rape does not appear ever to have been contested by the Crown. The ruling of Justice Randerson on pre-trial admissibility applications contains the following reference:⁹¹

In view of suppression orders made in respect of Messrs Shipton and Schollum and the orders made prohibiting the publication of references to the police baton, I do not accept there is any material risk of a jury concluding that at least two of the accused were involved in allegations that a baton was used in the Mt Maunganui incident.

While there are similar references scattered among the many judgments engendered by the Rotorua case, my research has failed to locate any decision turning on the admissibility of the convictions themselves. That the Crown may not have sought their admission is unsurprising. It is more than likely that any Judge would have determined that any probative value in relation to the previous convictions would have been vastly outweighed by illegitimate prejudice. This is because the previous convictions related to sexual offending occurring in Mount Maunganui in 1989, some years after the Rotorua offending, involving two other accused who had nothing to do with the Rotorua offending. Significantly, the accused in the Mount Maunganui case were acquitted of allegations that a baton was used,⁹² which is the only real connection between the allegations in both cases. I will return to this point shortly.

Also for consideration in the Rotorua case was whether there be joint or separate trials in relation to the two complainants. Justice Randerson declined the application for severance on the grounds that there were striking similarities between the offending alleged by each complainant in respect of the use of objects by the accused, namely that both complainants were teenagers at

89 See text following fn 54.

90 *R v Rickards, Shipton & Schollum*, unreported, High Court, Auckland (CRI 2005-063-1122). 13 September 2006. Randerson J. para 37(b).

91 *R v Rickards, Shipton & Schollum*, unreported, High Court, Auckland (CRI 2005-063-1122). 28 November 2005. Randerson J, para 112.

92 *Ibid* para 47.

the time of the alleged offences, and the allegations involved ‘group sexual activity’.⁹³ Somewhat ironically, given that Shipton and Schollum denied the use of a police baton in the way alleged in the indictments,⁹⁴ in arguing that the evidence of the two complainants was not sufficiently similar, defence counsel submitted that ‘violating a woman with an object was not an uncommon practice in Rotorua at the time’.⁹⁵

The accused appealed against Justice Randerson’s decision on the severance issue. The Court of Appeal did not disagree with Justice Randerson’s finding of probative value:⁹⁶

The common features of the two incidents are, in our view, remarkable. They share the use of a foreign object as, to use Mr Stanaway’s words, an instrument of abuse and degradation. All three accused are alleged to have been present and to have taken an active role. The incidents are closely related in time and circumstances. The similarities are striking. Their force is undiminished by the dissimilarities relied on.

Where the Court of Appeal and Justice Randerson were at variance, however, was the risk of illegitimate prejudice. The Court of Appeal thought there were two sources of prejudice in this case. The first source of prejudice was derived from the fact that the evidence of each complainant was admissible as similar fact or propensity evidence in relation to only some of the charges in relation to the other complainant. Secondly, there was evidence of four witnesses as to the use by Shipton and Schollum of police batons in the course of sexual activities. The latter evidence was only admissible in relation to some of the charges alleged by Louise Nicholas. The Court of Appeal held:⁹⁷

The risk of prejudice from both sources would conventionally be met by appropriate directions. However, these directions would be additional to the similar fact directions required in relation to the complainant’s evidence and that of the four witnesses. We have a real concern at the potential for confusion which would arise from such a bewildering array of directions.

Thus, notwithstanding that the Court of Appeal was of the opinion that the evidence of each complainant was ‘likely to provide powerful support for the account of the other’, it overturned Randerson J’s ruling and ordered that the trials be severed. Louise Nicholas’s evidence would have been admissible on a similar fact basis at the trial of the other complainant’s evidence, and vice versa. But a result of severance could well have been ‘a weakening in the cogency of the probative force’ of the evidence.⁹⁸ In any event, following the acquittals at the trial involving Louise Nicholas’ complaints, the Crown did not seek to call her as a witness in the case involving B.⁹⁹

Applying the test proposed in this paper, the evidence of Shipton and Schollum’s previous convictions for rape would not, by themselves, have been admissible. What was relevant was evidence relating to the use of a baton. Indeed, in the Rotorua case there was evidence from other witnesses as to the use by Shipton and Schollum of police batons in the course of sexual activities. As to the admissibility of that evidence, Justice Randerson was satisfied that:¹⁰⁰

93 Ibid para 110.

94 Ibid para 134.

95 *R v Rickards, Shipton & Schollum*, *ibid*, para 110.

96 *R v Rickards & Schollum*, unreported, Court of Appeal (CA491/05; CA 503/05). 2 March 2006. William Young P, Potter & Rodney Hansen JJ, para 41.

97 *R v Rickards, Shipton & Schollum*, *ibid*, para 44.

98 D Mathias, ‘Similar fact evidence and severance of counts’ [1986] *New Zealand Law Journal* 42.

99 *R v Rickards, Shipton & Schollum*, above n 90, para 21.

100 *R v Rickards, Shipton & Schollum*, above n 91, para 133.

...the evidence goes beyond establishing mere propensity or bad character. The key to its probative value is that it demonstrates the accused had on other occasions during the relevant period engaged in sexual activity of a sufficiently unusual or distinctive character as to give it probative force which outweighs any legitimate prejudice. The distinctive characteristics of the behaviour of which these witnesses depose is that it involves joint sexual activity by two serving police officers featuring the use of a police baton.

The principal stumbling block to the admissibility of the baton evidence in relation to the Mount Maunganui case is that Shipton and Schollum were acquitted of the charges involving the use of a baton. However, previous acquittals are not presumptively inadmissible – in some cases they can be admitted as ‘similar fact’ or propensity evidence. In New Zealand, earlier cases on point held that acquittals might be admitted if admission does not amount to allegation that accused had committed the offence for which he or she was acquitted.¹⁰¹ In *R v Degnan*¹⁰² the Court of Appeal held that evidence of acquittals is admissible subject to the discretion of the Court to exclude if admission would be unfair to the accused or would result in an abuse of process.¹⁰³ In talking about striking a balance between the rights of those previously acquitted and the interests of society in having all relevant evidence before the court, the Court of Appeal made the following salient point:¹⁰⁴

The accused has the benefit of the earlier acquittal or acquittals in that he can never again be tried for the offences involved. But he should not have the further benefit of being immunised from the relevant evidence when facing a similar charge in the future.

Taking those views into account, the evidence relating to the allegations about the use of a baton by Shipton and Schollum in relation to the Mount Maunganui complainant should have been admitted against Shipton and Schollum in the Rotorua cases. There may have been a number of reasons why they were acquitted on those charges without necessarily equating to a conclusion that Shipton and Schollum did not use a baton, or have a baton present, in relation to the Mount Maunganui incident. The evidence is prejudicial, but again, not illegitimately so, in the light of its probative value. There are no policy arguments in favour of exclusion.

Thus it would seem that the prejudice-policy test would tend to admit a wider range of relevant evidence than would have been the case at common law. Given that the Evidence Act 2006 is still in its infancy, it is difficult to draw any inferences as to outcomes from the relatively few cases that have been decided to date. However, given that under the Act both hearsay and propensity evidence is *prima facie* inadmissible, it seems reasonable to infer more hurdles to admissibility than the prejudice-policy test. These hurdles, at least in relation to hearsay, are compounded by the notice requirements.

VII. CONCLUSION

In applying the prejudice-policy test, the factors that originally justified the exclusionary rules simply become factors to be taken into account to the extent that they affect the probative value of the evidence or create illegitimate prejudice to one party. For example, concerns about the unreliability of hearsay evidence can be taken into account in assessing the probative value of that evidence. Similarly, in terms of conduct evidence, a twenty-year-old conviction is more likely to

101 *R v H (T20/93)* (1994) 11 CRNZ 342, 346.

102 *R v Degnan* [2001] 1 NZLR 280.

103 *Ibid.*, 292.

104 *R v Degnan*, above n 102, 291.

be more prejudicial than probative, when compared with a recent conviction. But these factors do not need to be statutorily defined or limited since there may be a range of other considerations that bear upon both probative value and prejudice that cannot readily be foreseen.

Critics of this approach would no doubt argue that the discretion it affords to judges is too wide and gives no guidance as to how the discretion should be exercised in the individual case. As Sankoff writes:¹⁰⁵

The notion that judges have the flexibility to 'choose' how to resolve a legal question, or even that they may legitimately reach different results when confronted by similar fact patterns, still acts as a red flag to many.

But the doctrine of precedent and its reliance upon material facts should give sufficient guidance. Further, despite the current existence of *prima facie* exclusionary rules, Judges have long been required to exercise discretion in determining whether evidence should be admitted (as falling within an exception, for instance). This has usually involved weighing prejudice against probative value.

The prejudice-policy test has meaning and Judges will need to apply that meaning to the facts of the individual case. When considering probative value the questions to be asked are: what fact-in-issue does the evidence tend to prove and how strongly does it tend to prove it? In terms of prejudice the questions are how significant is the risk that this information will be used *improperly* by the jury, or that the jury will give the evidence more weight than it deserves? It is not within the scope of this paper to canvas the capacity of juries to follow judicial directions that explain to them the uses to which evidence can be put, but this may be a factor for consideration. We also must bear the criminal standard of proof in mind – if there is a reasonable doubt then the jury must acquit. The recent acquittals referred to at the beginning of this chapter may simply be a reflection that juries do understand that much and this is as it should be. An acquittal may not reflect the reality of an accused's guilt or innocence, but it reflects at least that a case has not been proved to the requisite standard.

Even before the Act's commencement, in respect of many of the exclusionary rules, Courts had tended away from strict application towards a more flexible approach. In terms of propensity evidence, since the House of Lords decision in *DPP v P*¹⁰⁶ the test applied in New Zealand courts was expressed in terms of a probative value versus prejudicial effect balancing exercise that recognised that probative value can be derived from a variety of factors. In terms of hearsay, the case of *R v Baker*¹⁰⁷ opened the door for the development of a common law rule that took indicia of reliability into account in determining admissibility. Similarly, when considering the admissibility of novel scientific evidence in *R v Calder*,¹⁰⁸ Tipping J set out the test as being one of relevance and helpfulness:¹⁰⁹

To be relevant the evidence must logically tend to show that a fact in issue is more or less likely. To be helpful the evidence must pass a threshold test which can conveniently be called the minimum threshold of reliability. This means the proponent of the evidence must show that it has a sufficient claim to reli-

105 P Sankoff, 'The Search for a Better Understanding of Discretionary Power in Evidence Law' (2007) 32 *Queen's Law Journal* 487.

106 *DPP v P*, above n 57.

107 *R v Baker*, above n 42.

108 *R v Calder*, above n 71, 13.

109 *Ibid.*, 7.

ability to be admitted. If this threshold is crossed the weight of the evidence and its probative force can be tested by cross-examination and counter evidence and is ultimately a matter for the jury.

Thus, as already noted, Judges are no strangers to the type of balancing exercise proposed in the prejudice-policy test. While some regulation of trial process, questioning of witnesses, and modes of giving evidence may be necessary, all questions of admissibility can be dealt with by ascertaining that there is no illegitimate prejudice outweighing probative value and that there is no policy consideration excluding the evidence. As noted, previous statute and case law provides numerous examples of what policy considerations might include. While the overall goal of the prejudice-policy test is to support the admission of 'all relevant evidence', it is arguably less time-intensive because there is no requirement to refer to presumptive rules. The test represents a trend away from procedural box-ticking, and is also in line with the policy underlying the new Criminal Procedure Act, namely the promotion of efficiency and fairness in the criminal justice system. It is to be hoped that overall the concept of fairness is broad enough to encompass substantive justice.

INTERPRETATIONS OF THE HAGUE CHILD ABDUCTION CONVENTION 1980 IN NEW ZEALAND SINCE COCA: CAUSE FOR CONCERN?

REBECCA ROSE*

I. INTRODUCTION

Child abduction is not an act of love. It has never been and never will be. It is the ultimate revenge on the other partner – and the pain never leaves.¹

International child abduction² is a significant global problem.³ The *Hague Convention on the Civil Aspects of International Child Abduction 1980*⁴ attempts to ameliorate this problem by facilitating prompt return of abducted children to their state of ‘habitual residence’.⁵

As a signatory state, New Zealand initially implemented its *Hague Convention* obligations by way of the *Guardianship Amendment Act 1991* (‘GAA’). However, on 1 July 2005, the *Care of Children Act 2004* (‘COCA’) replaced the GAA as New Zealand’s implementing statute.⁶ Whilst COCA clearly changes New Zealand’s approach to child law in some areas, subpart 4 of Part 2 of COCA replicates New Zealand’s *Hague Convention* implementing provisions as contained in the GAA. Likewise, s 23(3) of the *Guardianship Act 1968* has been retained under COCA in the form of s 4(7). However, notwithstanding these fundamental similarities between the two Acts, COCA

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1 T Ooi, ‘Kidnapped Children: Parents’ Pain Never Dies’ *Straits Times* (Singapore), 24 November 1994 at 9 as cited in L Cardin, ‘The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One’ (1997) 20 *Houston Journal of International Law* 141 at 142.

2 Within this paper ‘child abduction’ refers to a wrongful removal from or retention outside the child’s state of ‘habitual residence’ which has been unilaterally decided by the abductor and which infringes any ‘rights of custody’ another person may have: *Hague Convention*, Arts 3 and 5. Consistent with private international law usage, the term has no relation to third party abductions/‘stranger kidnappings’, which are recognised as having very different motivations: E Perez-Vera, *Explanatory Report of the Convention on the Civil Aspects of International Child Abduction*, *Actes et Documents of the XIVth Session, Vol III* (1980) 426 at 451 (‘Perez-Vera Report’).

3 See generally <<http://www.incadat.com>> and <<http://www.un.org>> each viewed 14 July 2007. Note also S Barone, ‘International Parental Child Abduction: A Global Dilemma with Limited Relief – Can Something More be Done?’ (1995) 8 *New York International Law Review* 95 at 96.

4 Hereafter ‘*Hague Convention*’ or ‘*Convention*’.

5 *Hague Convention*, Preamble. Discussion of issues surrounding interpretations of ‘habitual residence’ and ‘rights of custody’ is outside the scope of this paper. However, *Punter v Secretary for Justice* [2007] 1 NZLR 40 (CA) and *Murrow v Hunter* [2006] NZFLR 623 (HC) – criticised as ‘wrong’ for not recognising ‘the sharp distinction between rights of custody and rights of access’ in *Hunter v Murrow* [2005] EWCA Civ 976 (CA), respectively provide important statements of recent New Zealand authority.

6 COCA, ss 2 and 3(2)(g).

has recently occasioned significant *Hague Convention*-related debate in New Zealand's appellate Courts.

Secretary for Justice v HJ marks the Supreme Court's first *Hague Convention* decision under *COCA*. Critically, *HJ* departs from a strong line of authority under the *GAA* regarding the scope and application of some of the Convention's exceptions and the proper approach to the exercise of discretion once an exception is found established.⁸

The Convention's success relies heavily on mutual trust, respectful reciprocity and markedly close judicial/administrative authority cooperation.⁹ Accordingly, the purpose of this paper is to analyse whether *HJ* and the conclusions of selected other post-*COCA* appeal cases regarding 'grave risk' and the general exercise of discretion¹⁰ are consistent with key comparative interpretations and what the implications of any differences in approach might be. Therefore, Parts II and III of this paper respectively discuss the Convention's background and the relevance of *COCA*. Part IV explores the conclusions of six appeal cases under *COCA*. Part V examines Canada, the United States, the United Kingdom and Australia's approach to 'grave risk' and discretionary exercises. Part VI focuses on the implications of significant similarities and differences identified. Part VII offers some concluding remarks regarding the future direction of New Zealand's Convention jurisprudence.¹¹

II. UNDERSTANDING THE HAGUE CONVENTION: BACKGROUND AND CONTEXT

In this paper, I do not rehearse all of the arguments put forward in judgments regarding the specific requirements for successful establishment of Convention exceptions, as others have done elsewhere at length. Nevertheless, particularly given this paper's focus on discretionary exercises under the Convention, some discussion of Convention policy issues and an overview of the exceptions invoked in cases discussed in Parts IV and V is necessary in order to distil whether New Zealand approaches are congruent with international authority. Accordingly, relevant background issues providing the framework for analysis in Parts III-VII are discussed below.

7 *Secretary for Justice (as the New Zealand Central Authority on behalf of TJ) v HJ* [2007] 2 NZLR 289 (NZSC) (hereafter also 'HJ'); *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) – the 'grave risk' issue (*COCA*, s 106(1)(c)) was not raised in the Supreme Court appeal.

8 Compare for example, *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA); *S v S* [1999] NZFLR 625 (HC & CA); *KS v LS* [2003] NZFLR 817 (HC, Full Court); *KMH v The Chief Executive of the Department for Courts* [2001] NZFLR 825 (HC); *Adams v Wigfield* [1994] NZFLR 132 (HC); *Clarke v Carson* [1995] NZFLR 926 (HC); *Damiano v Damiano* [1993] NZFLR 548 (FC).

9 *S v S*, *ibid*; *DP v Commonwealth Central Authority*; *JLM v Department of Community Services* (2000) 180 ALR 402 at para [155] per Kirby J (dissenting) (HCA) ('DP/JLM'); Hague Convention, Art 7; Perez-Vera Report, above n 2 at para [9]: 'the applicability of Convention's benefits will itself depend upon the concept of reciprocity'. Note also M Weiner, 'Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction' (2002) 33 Columbia Human Rights Law Review 275 at 285. As to comity as a canon of construction lying at the heart of international Convention jurisprudence, see generally L Silberman, 'Interpreting the Hague Convention: In Search of a Global Jurisprudence' (2005) 38 U.C. Davis L. Rev. 1049; S Nelson, 'Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction' (2001) University of Illinois Law Review 669 at 671.

10 *COCA*, s 106(1)/Hague Convention, Arts 12, 13, 18 and 20.

11 The law stated within this article is current as at December 2007.

A. History of the Hague Convention

Prior to the Hague Convention's inception, the lack of enforcement of foreign custody orders created perverse incentives for parents to engage in 'forum shopping', ie the seeking of a more favourable jurisdiction to adjudicate or escape from custody disputes.¹² When taken together with social, legal and technological factors¹³ such as increasing globalisation, heightened personal mobility, sky-rocketing divorce rates, escalating numbers of marriages between residents of different countries¹⁴ and the vulnerability of children possessing dual citizenship and multiple passports,¹⁵ securing an abducted child's return was particularly difficult.¹⁶ Additionally, resolution of custody disputes by way of the imprecise 'best interests of the child' standard created difficulties.¹⁷ Indeed, as international commentators have observed, 'It is more difficult to define children's interests than those of an adult, who can express what he or she takes to be his or her best interests'.¹⁸

By the mid 1970s, the growing incidence of international child abduction came to be described by Commonwealth Law Ministers as an issue of 'immense social importance and requiring early concrete action'.¹⁹ Although, as Anton²⁰ emphasises, reported cases of child abduction appear relatively small during this period, recognition of the risk of harm to abducted children and the

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- 12 L Herring, 'Taking Away the Pawns: International Parental Abduction & the Hague Convention' (1994) 20 *N.C. J. Int'l L. & Com. Reg.* 137 at 142-143: 'The non-deferential treatment of foreign custody orders created a conducive environment for child snatching'. See generally D Rivers, 'The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parental Abductor' (1989) 2 *Transnational Law* 589 at 616 for discussion of relevant international conventions prior to the Hague Convention.
 - 13 A Dyer, Report on International Child Abduction By One Parent, Preliminary Document No. 1 of August 1978, III Hague Conference on Private International Law, Actes et Documents of the XIVth Session: Child Abduction 12 at 18 ('Legal Kidnapping Report').
 - 14 P Beaumont and P McEleavy, The Hague Convention on International Child Abduction (1999) 2; L Stotter, 'The Light at the End of the Tunnel: The Hague Convention on the Civil Aspects of International Child Abduction Has Reached Capitol Hill' (1986) 9 *Hastings International & Company Law Review* 285 at 300.
 - 15 D Zawadzki 'The Role of Courts in Preventing International Child Abduction' (2005) 13 *Cardozo Journal of International & Company Law* 353 at 354; J Kay 'The Hague Convention – Order or Chaos?' (2005) 19 *AJFL* 245; *Thomson v Thomson* (1994) 119 DLR (4th) 253 at 296 (SCC).
 - 16 See generally, J Todd, 'The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?' (1995) 2 *Ind. J. Global Stud.* 553; T Harper, 'The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-abduction' (1995) *Emory International Law Review* 257.
 - 17 Application of the 'best interests' standard includes consideration of both a child's physical and psychological well-being': J Goldstein et al., *The Best Interests of the Child: The Least Detrimental Alternative* (1996) 5; P Beaumont and P McEleavy, above n 14 at 2.
 - 18 J Rubellin-Devichi, 'The Best Interests Principle in French Law & Practice' (1994) 8 *Int'l J.L. & Fam.* 259, 263. See generally, M Freeman, 'In the Best Interests of Internationally Abducted Children? – Plural, Singular, Neither or Both?' (2002) *IFLJ* 77.
 - 19 Hague Conference on Private International Law, Actes et Documents de la Quatorzième Session, III, Child Abduction at 15, n. 6. See generally also J Eekelaar, 'International Child Abduction by Parents' (1982) 33 *University of Toronto Law Journal* 281 regarding suggestion that the Commonwealth Secretariat ought to follow the discussions on child abduction at The Hague.
 - 20 A Anton, 'The Hague Convention on International Child Abduction' (1981) 30 *ICLQ* 537 referring to the 1978 A Dyer, Legal Kidnapping Report, above n 13. See also P Dallmann – citing US State Department Reports, 'The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by the US Courts' (1994) 5 *Ind. Int'l & Comp. L. Rev.* 171 at 177.

‘certainty of distress’ for left-behind parents generated ‘overwhelming support’²¹ for increased coordination and cooperation between Governments to prevent this ‘social evil’.²²

The November 1979 meeting of the Special Committee adopted a draft Convention.²³ This document served as the basis for discussions by the Fourteenth Session of the Hague Conference held in October 1980, which agreed upon the final version of the Convention that was formally adopted by the unanimous vote of States that were present²⁴ and the Fourteenth Session in Plenary Session.²⁵ Somewhat unusually, following the Closing Session, the Convention was made available for immediate formal signature.²⁶ Canada, Portugal and France were the first three States to ratify the Convention. These States’ ratifications took effect on 1 December 1983.²⁷ New Zealand’s accession²⁸ to the Convention came into force on 1 August 1991.²⁹

B.Purposes, Policy & Structure of the Convention

Premised upon recognition that the ‘true victims’ of child abduction are the children who suffer the trauma of being uprooted from their milieu of habitual residence, the anguish of a loss of contact with a parent previously involved in their care, and the insecurity associated with adjusting to a strange culture and language,³⁰ among contracting states,³¹ the Hague Convention is the principal legal remedy for parents of internationally abducted children. As Torrez J emphasises, the Hague Convention is neither an extradition treaty nor a mechanism for adjudicating the merits of any

21 See Replies to Questionnaires circulated to Governments in 1978 together with A Dyer, *Legal Kidnapping Report*, above n 13; N Lowe et al., *International Movement of Children: Law, Practice and Procedure* (2004) 197.

22 *Thomson v Thomson* (1994) 119 DLR (4th) 253 at 271 (SCC).

23 Working Document No. 11 of the November 1979 Special Commission.

24 Specifically: Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States, Venezuela and Yugoslavia. Member States Argentina, Turkey and Surinam did not attend the meetings. Notwithstanding their active role in the First Commission’s proceedings, Israel, Egypt and Italy did not participate in the vote: N Lowe, above n 21; Perez-Vera Report, above n 2.

25 Perez-Vera Report, *ibid* at para [1]. See generally N Lowe et al., *ibid*, at 196-198.

26 Canada, France, Switzerland and Greece immediately signed, which is why the Convention bears the date 25 October 1980: Perez-Vera Report, *ibid*, at 426, para [1].

27 HccH, ‘Spreadsheet Showing Acceptance of Ratifications & Accessions’: <http://www.hcch.net/index_en.php?act=publications.details&pid=3282&dtid=36> viewed 14 July 2007.

28 Only States which were present at the Convention’s inception were eligible to ratify; other countries interested in abiding by the Convention have only the option of acceding. Practically, the difference is, however, minimal in terms of the Convention’s interpretation: N Lowe et al., above n 21.

29 GAA 1991; *ibid*.

30 Perez-Vera Report, above n 2 at 431; Hague Convention, Preamble; A Dyer, *Kidnapping Report*, above n 13 at 19-20. Currently, 79 countries are party to the Convention: HccH, ‘Spreadsheet Showing Acceptance of Accessions’ (July 2007) <http://www.hcch.net/index_en.php?act=publications.details&pid=3282&dtid=36> viewed 14 July 2007 (‘HccH Spreadsheet’).

31 As J Starr, ‘The Global Battlefield: Culture and International Custody Disputes at Century’s End’ (1998) 15 *Arizona Journal of International & Company Law* 791 at 794 notes, there is a stark contrast ‘in life and law’ between signatory and non-signatory states. Other than to note that the Convention’s success depends on broad ratification/accession by the international community: Perez-Vera Report, above n 2, discussion of issues associated with ‘safe-haven’ non-signatory states such as those throughout the Middle East where Israel is the only signatory nation, is outside the scope of this paper.

specific custody issue.³² Rather, the Convention is simply a civil³³ law remedy designed to restore the pre-abduction status quo by mandating, in the absence of an established exception,³⁴ return of abducted children under the age of 16 years 'forthwith' to the state of their habitual residence.³⁵

The general rule that a child's best interests are to be determined by Courts in the child's state of habitual residence is a 'fundamental and animating' principle of the Convention.³⁶ This principle is supported by an underlying assumption as to the capacity of the Courts in contracting states to protect children's best safety and welfare interests. On this point, the conclusions of the New Zealand Court of Appeal in *A v Central Authority for New Zealand* are germane:³⁷

Where the system of law of the country of habitual residence makes the best interest of the child paramount and provides mechanisms by which the best interests of the child can be protected and properly dealt with, it is for the Courts of that country and not the country to which the child has been abducted to determine the best interests of the child.

Flowing from the Convention's underlying principle and supporting assumption,³⁸ the express objects of the Convention are thus:³⁹

- (a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) To ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States.

Consistent with the Convention's procedural character pertaining to a summary choice between competing forums,⁴⁰ upon filing of an application for return, the Convention stipulates immediate suspension of all ongoing substantive proceedings pending resolution of the *Hague Convention*

32 Torrez J, 'The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction' (2005) 5 *Whittier Journal of Child & Family Advocacy*, 7 at 8. As explained in *Meredith v Meredith* 759 F. Supp. 1432 at 1434 (D. Ariz, 1991), the Hague Convention 'merely empowers a court to determine the merits of an abduction, and not the merits of any custody claim'.

33 As opposed to a criminal remedy. As Passanante, 'International Parental Kidnapping: The Call for an Increased Federal Response' (1996) 34 *Columbia Journal of Transnational Law* 677, 690 explains, the Convention's drafters elected to address only the civil aspects of abduction predominantly because criminal sanctions generally prove inefficient in deterring international abductions.

34 As contained in the Hague Convention, Arts 12, 13, 18 and 20; COCA, s 106. As the Perez-Vera Report, above n 2 at 432 and 461, makes clear, the inclusion of the Convention's limited exceptions represented a 'fragile compromise' aimed at accommodating differences in legal systems and tenets of family law in effect in the various States that negotiated the Treaty.

35 Hague Convention, Art 4:

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

As to other objective temporal qualifications that must be established, see Arts 3, 5, 12 and 35/COCA, s 105 respectively regarding 'wrongful removal/retention', 'custody/access rights', requirement for proceedings to be commenced within one year of the wrongful removal/retention, and precluding any retroactive effect between relevant Contracting States. See generally, Perez-Vera Report, above n 2.

36 *Aulwes v Mai* (2002) 220 DLR (4th) 577 at 587 (CA).

37 *A v Central Authority for New Zealand* [1996] 2 NZLR 517 at 523 (CA). Compare also conclusions of the English Court of Appeal in *C v C* [1989] 1 WLR 654 at 664.

38 *Aulwes v Mai*, above n 36 at 587.

39 Hague Convention, Art 1.

40 *S v S*, above n 8; *Adams v Wigfield*, above n 8.

claim.⁴¹ In this sense, the Convention demonstrates its ‘overriding commitment’ to deterring international parental abduction.⁴² Indeed, in the words of Perez-Vera:⁴³

[T]he Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child’s habitual residence – are in principle best placed to decide upon questions of custody and access.

Because the *Hague Convention* is not self-executing, its enforceability depends on signatory countries enacting implementing legislation, ie domestic law adopting the Convention.⁴⁴ In New Zealand, *COCA* – to which the *Hague Convention* is completely Scheduled – is the current implementing legislation giving effect to New Zealand’s 1991 accession.⁴⁵ Critically, although it is possible for State parties’ implementing legislation not to directly incorporate the Convention into domestic law,⁴⁶ in all jurisdictions, implementing legislation is not an alternative to the *Hague Convention*. Rather, it is the legal means of utilising the remedies contained in the treaty.⁴⁷

The *Hague Convention* is comprised of six chapters and 45 Articles, including six discretionary exceptions to an abducted child’s mandatory return. Currently, 80 countries are party to the *Hague Convention*. However, the Convention is in effect between New Zealand and only 44 sister nations.⁴⁸

C. *The Relevance of Welfare*

The principle that decisions relating to children ought to be based on the child’s ‘best interests’ is arguably one of the most extensively accepted principles in the Western world.⁴⁹ Reflecting its drafting in an atmosphere of emerging recognition of children’s rights and the ‘best interests’ principle,⁵⁰ the Preamble of the *Hague Convention* declares that ‘the interests of children are of

41 Hague Convention, Arts 16 and 19.

42 B Bodenheimer, ‘The Hague Draft Convention on International Child Abduction’ (1980) 14 *Family Law Quarterly* 99 at 102.

43 Perez-Vera Report, above n 2 at 434, para [34]. Compare also *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at para [11] (HCA).

44 S Barone, ‘International Parental Child Abduction: A Global Dilemma with Limited Relief – Can Something More Be Done?’ (1995) 8 *New York International Law Review* 95, 101-102.

45 Acceding on 31 May 1991, New Zealand was the third contracting state to accede to the Convention, although 16 others had previously ratified. By way of implementation through the GAA, the Hague Convention came into force in New Zealand on 1 August 1991.

46 For example, in the United Kingdom, the Convention’s Preamble and Arts 1, 2, 20 and 35 are notably absent from the jurisdiction’s Child Abduction and Custody Act 1985. However, following *Re D (a child) (foreign rights of custody)*, below n 393, Art 20 appears recognised as indirectly incorporated.

47 W Rigler and H Wieder, *The Epidemic of Parental Child Snatching: Attempts to Prevent Parental Child Abduction, Applicable United States Laws and the Hague Convention* <http://www.travel.state.gov/family/abduction/resources/resources_545.html> viewed 14 July 2007.

48 Hcch Spreadsheet, above n 30 and Hcch ‘News and Events’, <http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=133> viewed 1 August 2007. Statistics as at 1 June 2007.

49 See generally J Eekelaar, above n 19; A Dyer *Kidnapping Report*, above n 13 at 22, and compare more traditional methods of custody allocation in other parts of the world.

50 G van Bueren, *The International Law on the Rights of the Child* (1995) 3 and 45.

paramount importance in matters relating to their custody'.⁵¹ However, the tension inherent between protecting an individual child's best safety and welfare interests and the Convention's overall interest in preventing abductions generally has not yet been categorically resolved.

In recent years, significant developments in children's rights⁵² and domestic violence treaties⁵³ have brought the individual rights vs collective interests tension under closer scrutiny with increased calls for greater consideration of children's particular rights and wishes in legal proceedings.⁵⁴ Where the 'child's objection' or 'grave risk' exceptions are invoked, the tension between the Convention's remedial and normative roles is particularly strong.⁵⁵ Certainly, in this context, the *Hague Convention's* relatively state-centred⁵⁶ approach has been criticised as doing 'little or nothing to promote the rights of children'.⁵⁷

Notwithstanding some fairly trenchant criticisms that the *Hague Convention* 'agrees badly' with the view that the 'best interests of the child' principle ought to provide a formula that enables 'open' assessments of the complete situation of the individual child,⁵⁸ Courts internationally have expressly approved the *Hague Convention's* compatibility with Art 3(1) of the *United Nations Convention on the Rights of the Child 1989 (UNCROC)*,⁵⁹ which provides, 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

51 As M Freeman (2002), above n 18 observes at 80, welfare considerations are also clearly evident in the jurisdictional requirements for a Convention application – welfare considerations being so fundamental to the Convention's ethos that it will not even begin to operate where there is conflict with these issues.

52 See for example United Nations Convention on the Rights of the Child ('UNCROC') which requires nations to recognise the human rights of children, including the right to have their views heard and considered in custody proceedings: Art 12. Perhaps importantly, the Hague Convention was adopted around two years after completion of the first UNCROC draft in 1978 and approximately 20 years after the Declaration on the Rights of the Child 1959: GA res 1386 (XIV) 14 UN GAOR Supp (No 16) 19, UN Doc A/4354, 1959.

53 Note for example, Convention on the Elimination of All forms of Discrimination against Women (1984) ('CEDAW'); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1989) ('CAT').

54 Note for example M Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593 at 662-663 – arguing that Courts should display greater willingness to consider a child's preference when he/she expresses a desire to remain with an abducting parent who is a victim of domestic violence, due to the child's possible fear of the left-behind parent; S Nelson, above n 9 at 672 – criticising Courts' narrow interpretation of exceptions to return and arguing that a broader interpretation of exceptions is necessary to better protect the best interests of abducted children.

55 See generally Perez-Vera Report, above n 2; *S v S* [1999] NZFLR 625 (HC & CA); P Beaumont and P McEleavy, above n 14 at 29. Compare conclusions of Australian Courts, holding that because UNCROC expressly approves of the Hague Convention, UNCROC considerations cannot override purposes/policy articulated by the Hague Convention: authorities: *McCall v State Central Authority* (1994) 18 Fam LR 307 (Fam CA, Full Court).

56 As opposed to a transnational approach. The Convention is said to adopt a state-centred approach as it allows the judicial system of each Contracting State to exercise substantial discretion when interpreting the Convention: A Scott, 'From a State-centred Approach to Transnational Openness: Adapting the Hague Convention with Contemporary Human Rights Standards as Codified in the Convention on the Rights of the Child' (2004) 11 *Ind. J. Global Leg. Stud.* 233 at 235.

57 J Starr, 'The Global Battlefield: Culture and International Custody Disputes at Century's End' (1998) 15 *Arizona Journal of International & Company Law* 791, 832.

58 See for example J Schiratzki, 'Habitual Residence in Sweden and the USA' (2001) 15 *International Journal of Law, Policy and the Family* 297 at 300-301; R Schulz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *ICLQ* 771 at 800 – suggesting the Hague Convention lacks sufficient flexibility to appropriately deal with non-standard cases and hence risks being incongruent with the forum conveniens principle.

59 20 November 1989, GA res 44/25, UN GAOR (44th Sess) 108. UN Doc A/RES/44/25, 1577 UNTS 44 28 ILM 1457 (entered into force 2 September 1990).

administrative authorities, or legislative bodies, the best interests of the child shall be a paramount consideration'.⁶⁰

In particular, the Australian Courts⁶¹ have grounded acceptance of the compatibility proposition in the fact that Art 11 of *UNCROC* implores States 'to take measures to combat the illicit transfer and non-return of children abroad'.⁶²

In a similar fashion, Courts in the United Kingdom have been quick to uphold the *Hague Convention's* primacy both with respect to *UNCROC* and the *European Convention on Human Rights* ('*ECHR*'). In relation to the *Hague Convention*, Balcombe LJ emphasised in *G v G*:⁶³

For my part, I am not prepared to assume that Parliament, in passing the Child Abduction and Custody Act 1984, accepted that it was substituting a test which did not put the child's welfare as the first and paramount consideration.

Likewise, the three landmark decisions in *Maire v Portugal*,⁶⁴ *Ignaccola-Zenide v Romania*⁶⁵ and *Sylvester v Austria*⁶⁶ have made clear that a failure by domestic authorities to take 'adequate measures' to enforce a return order under the Convention can constitute a State breach of Art 8 of the *ECHR*, which imposes a positive obligation on States to ensure effective reverence for the right to respect for family life.

Further support for the proposition that the tension between individual rights and collective interests is most properly resolved in favour of stability for children generally is also provided by the Canadian Supreme Court's *Thomson v Thomson*⁶⁷ decision, where the dichotomy distinguishes

60 For a brief history regarding the rights of children, see generally R Rios-Kohn, 'The Convention on the Rights of the Child: Progress and Challenges' (1998) 5 *Geo. J. on Fighting Poverty* 139 at 140-145. Whilst the term 'best interests' is not defined in *UNCROC*, as Rios-Kohn explains, the principle's intent is not to guarantee that a child's best interests will trump other competing interests. Rather, the principle aims to ensure that a child's interests are appropriately considered. Application of the 'best interests' principle recognises the child as an individual rights holder, which entitles him/her to proper consideration of any interests that may be affected.

61 See for example decisions of the Full Court in *McCall v State Central Authority*, above n 55 at 323; *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982 at 1000 (FCA). For similar statements of principle in the New Zealand context see *S v S*, above n 8 at 634:

On an application under the Hague Convention resort may be made to the United Nations Convention on the Rights of the Child where no inconsistent with the former.

and *KMH v The Chief Executive of the Department for Courts* [2001] NZFLR 825 at 836 (HC):

I am of the view that New Zealand's ratification of the Convention on the Rights of the Child in March 1993 cannot be taken as involving watering down of the earlier implementation (via the Guardianship Amendment Act 1991) of the Hague Convention.

62 N Lowe et al., above n 21 at 200, suggests that this proposition is 'further bolstered' by Art 35, which implores States 'to take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or in any form'. Note also *Sonderup v Tondelli* (2001) SA 1171 at 1198 (CCSA) where the Constitutional Court of South Africa considered the interplay between custody and jurisdictional matters and the interaction between a child's short and long-term best interests. The Court held that even if Art 12 of the Convention limited a child's s 28(2) Constitutional right that 'A child's best interests are of paramount importance in every matter concerning the child', by virtue of the Convention's important policy objectives of abduction deterrence, comity and forum determination, any such limitation is justifiable on a proportionality analysis.

63 *G v G (Minors) (Abduction)* [1991] 2 FLR 506 at 514.

64 *Maire v Portugal*, Application No 48206/99 (ECtHR).

65 *Ignaccola-Zenide v Romania* (2001) 31 EHRR 7 (ECtHR).

66 *Sylvester v Austria* [2003] 2 FLR 210 (ECtHR).

67 *Thomson v Thomson* (1994) 119 DLR (4th) 253 (SCC).

between the majority and minority judgments.⁶⁸ Writing for the minority, L'Heureux-Dube J accepts La Forest J's majority interpretation that the Preamble 'refers to the best interests of children generally and not to the best interests of any particular child', but states, 'I cannot believe that the intention was to ignore the best interests of individual children'. Subsequently Her Honour concludes that:⁶⁹

The emphasis placed upon prompt return in the Convention must be interpreted in light of the paramount objective of the best interests of children and in light of the express wording of the Child Custody Enforcement Act 1987 through which the Convention was enacted in Manitoba, and should not mean return without regard for the immediate needs or circumstances of the child.

Importantly, however, as the Preamble explains and the majority acknowledges, unlike custody determinations where legislatures generally devolve the task of determining a child's best interests to the Courts themselves,⁷⁰ the *Hague Convention* represents a policy decision as to what is in children's collective best interests, ie individual children's best interests were made a primary consideration and balanced against competing factors in the process of drafting and finalising the Convention.⁷¹ Consequently, the 'fragile compromise'⁷² represented by adoption of the narrow exceptions to the general rule of rapid mandatory return dictates that, on a policy level, the *Hague Convention* and its implementing regulations/legislation⁷³ is consistent with Art 3(1) of *UNCROC*.

With respect to the relevance of welfare in the Courts' exercise of discretion, the consistent view of the Courts internationally has been that, following establishment of a recognised exception, the 'gate is unlocked' and, provided that the purposes of the Convention are also weighed, the Court may engage in a best interests/welfare assessment when exercising discretion to order a child's return.⁷⁴ Indeed, in the New Zealand context, the internationally-cited High Court decision in *Clarke v Carson*⁷⁵ acknowledges that 'it is impossible to ignore welfare when exercising discretion':

[The] discretion must be exercised in the context of the Act under which it is conferred and the Convention which it implements in Schedules. (See *Re A (Minors) (Abduction: Custody rights)* [1992] 12 WLR 536 at 550 per Lord Donaldson of Lynton MR.) It therefore requires assessment of whether decisions affecting the child should be made in the Court from the country from which the child has been wrong-

68 Compare also *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211 at 220 where Waite J concludes that 'It is implicit in the whole operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases' and Perez-Vera Report, above n 2 at paras [24] – [25].

69 *Thomson v Thomson*, above n 15 at 303-305.

70 P Alston, 'The Best Interests Principle: Towards a reconciliation of culture and human rights' in P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 21.

71 R Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12 *Transnat'l L. & Contemp. Probs.* 393 at 397-399. Compare also comments of Courts in *De L* (1996) 187 CLR 640 at 684 (HCA); *S v S*, above n 8 at 514 and P Beaumont and P McElevay, above n 14 at 29.

72 Perez-Vera Report, above n 2 at 432 and 461.

73 Implementation of the Convention through Regulations or legislation is at the discretion of individual State parties.

74 *Re A (Minors) (Abduction: Acquiescence) (No. 2)* [1993] Fam 1 (CA); *TB v JB* [2001] 2 FLR 515 (CA); *Central Authority v Reissner* (1999) 25 Fam 330. Compare also comments of S Parker, 'The Best Interests of the Child – Principles and Problems' in P Alston (ed), above n 70 at 28 who argues that, particularly in terms of the exercise of the Court's discretion, juxtaposition of 'children' and 'child' in Art 3(1) *UNCROC* means that the Article's collective element must 'inevitably temper the way in which the individual right is exercised and interpreted.'

75 *Clarke v Carson* [1996] 1 NZLR 349 (HC). Note also similar comments of Full Court upheld by Court of Appeal in *KS v LS* [2003] NZFLR 817 at para [120] (HC Full Court).

fully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other.⁷⁶

D. Interpretative Aids & the Importance of Uniformity

The absence of a single tribunal/institution to resolve interpretative controversies creates a challenge of achieving a reasonable level of consistency in *Hague Convention* interpretations adopted by domestic Courts in the Convention's 80 contracting states.⁷⁷ However, the Convention's subject matter and the Treaty interpretation maxim of 'good faith' dictate that international interpretative uniformity is required if the *Hague Convention* is to continue to achieve its core objectives.⁷⁸ As Silberman explains, where the Convention becomes subject to 'varying national approaches and perspectives', potential abductors have a greater incentive to abduct in the belief that they will be able to avoid the Convention's application and sanction by exploiting divergent legal interpretations.⁷⁹ Additionally, malleable Convention interpretations compromise stability within family relationships – parents requiring predictability in the travel abroad of their children.⁸⁰

Acknowledging that rigid adherence to foreign precedent is undesirable in terms of ensuring that the Convention remains responsive to problems imperceptible at the time of its drafting, it is argued that application of the principles contained in the *Vienna Convention on the Law of Treaties*⁸¹ provides a useful starting point for achieving interpretation consistency within global Hague Convention jurisprudence.⁸² Article 31 of the *Vienna Convention* states:⁸³

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32 further directs that:

⁷⁶ *Clarke v Carson*, above n 8 at 351.

⁷⁷ W Duncan, 'The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau' (2000) 33 *N.Y.U. J. Int'l L. & Pol.* 103 at 105.

⁷⁸ See generally M Weiner, 'Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction' (2002) 33 *Colum. Human Rights L. Rev.* 275.

⁷⁹ L Silberman, above n 9 at 1057-1060.

⁸⁰ M Weiner, above n 9 at 291.

⁸¹ Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331 at 340 ('Vienna Convention'), entered into force 27 January 1980, <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> viewed 14 July 2007. See generally also I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, 1984) 141-147; E Criddle, 'The Vienna Convention on the Law of Treaties in US Treaty Interpretation' (2004) 44 *Va. J. Int'l L.* 431.

⁸² L Silberman, above n 9 at 1059. See generally D Bederman, 'Revivalist Canons and Treaty Interpretation' (1994) 41 *UCLA L. Rev.* 953, 972; I Johnson, 'Treaty Interpretation: The Authority of Interpretative Communities' (1991) 12 *Michigan Journal of International Law* 371 at 375. Compare *Air France v Saks* (1985) 470 US 392 at 397 emphasising that 'interpretation of a multilateral treaty is different than interpretation of pure domestic law'.

⁸³ Compare comments M Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 *U. Pa. L. Rev.* 687 at 688-689 and 693-694 arguing that a purposive analysis offers the 'best hope' for maintaining uniformity and recognising situations where a departure from the status quo is warranted.

Recourse may be had to supplementary means of interpretation,⁸⁴ including the preparatory work of the treaty and the circumstances of its inclusion, in order to confirm the meaning resulting from the application of Art 32, or to determine the meaning when the interpretation according to Art 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Consequently, given that ‘persistently forwarded unconventional construction of a treaty can be seen as implicit abrogation’,⁸⁵ as *Thomson v Thomson*⁸⁶ affirms, national Courts have an obligation to keep *Hague Convention* interpretations as uniform as possible and to ‘follow the consensus’.⁸⁷ Indeed, in its requirement that national Courts take account of ‘any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation’,⁸⁸ Art 31(3)(b) makes it ‘abundantly clear’⁸⁹ that international consensus achieved through the application of autonomous definitions⁹⁰ and the giving of credence to meanings ascribed by sister signatories is desirable.

E. Overview of the Exceptions to Mandatory Return

Recognising the inflexibility of a rule denying Judges any discretion and that, in some circumstances, restoration of the status quo ante can endanger a child, the *Hague Convention* contains six exceptions/defences⁹¹ to a wrongfully removed or retained child’s mandatory return.⁹² Most relevant to this paper’s comparative analysis, however, are the exceptions contained in Arts 12(2), 13(b) and 13(2).⁹³ A brief outline of these exceptions and the onus for their establishment thus follows below.

On the issue of onus, *Basingstoke v Groot*⁹⁴ provides New Zealand authority for the proposition that it is well-settled that the burden of proving a defence to the satisfaction of the Court rests

84 In the context of the Hague Convention, this direction to consult supplementary materials is particularly important given the Convention’s extensive drafting history, the travaux préparatoires and the Perez-Vera Report. Importantly, the Perez-Vera Report, above n 2 at 436 and para [85], emphasises the need to create ‘autonomous definitions and concepts’ in order to ensure the Hague Convention’s long-term success.

85 I Johnson, above n 82 at 384-385.

86 *Thomson v Thomson*, above n 15 at 272-273.

87 See also *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31 at 34 (CA) where Butler-Sloss LJ opines that ‘it is the duty of the Court to construe the Convention in a purposive way and make the Convention work’.

88 Vienna Convention, Art 31(3)(b).

89 *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192 at 197.

90 ‘Autonomous’ refers to the notion that the Hague Convention ought not to be interpreted merely by reference to domestic standards. See generally Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001) at paras 4.1 and 4.2.

91 These terms are used interchangeably within this paper.

92 Hague Convention, Arts 12, 13 and 20.

93 COCA, ss 106(1)(a), 106(1)(c) and 106(1)(d) respectively.

94 *Basingstoke v Groot* [2007] NZFLR 363 at paras [10] – [18] (CA).

with the abducting parent.⁹⁵ Similarly, that the onus is an ordinary onus has been confirmed by the Supreme Court in *HJ* where Tipping J refers to it thus,⁹⁶ ‘There was an ordinary onus on the mother to establish the existence of the s 106(1)(a) ground. But it was not appropriate to say that having established that ground the mother had an onus, let alone a heavy onus of persuading the Court not to order return.’

However, notwithstanding establishment of a defence, the decision to refuse a child’s return remains discretionary.⁹⁷ As Tipping J emphasises in *HJ*, a two-part enquiry is required when considering a defence to an application made under s 105 of *COCA*, ‘It is important in this respect to keep conceptually separate whether a ground for declining to order return has been established, on the one hand; and if so, whether return should or should not be ordered, on the other. The first is an issue of fact; the second involves an exercise of discretion’.⁹⁸

Significantly, whilst standards of proof differ between defences in some contracting states,⁹⁹ in New Zealand, *Basingstoke v Groot* affirms that the determinant in relation to the standard of proof for all defences is the balance of probabilities.¹⁰⁰

With respect to the nature of the defences, as Anton¹⁰¹ emphasises, all of the defences – deriving their justification from three different principles,¹⁰² represent a compromise among drafting nations which were divided in their opinions as to whether any justifications ought to be allowed for an abductor’s actions. The four defences contained in Arts 12(2), 13(a) and 20 relate to general conditions which may stop a Court from returning a child to its place of habitual residence. By contrast, the two defences contained in Arts 13(b) and 13(2) derive specifically from consideration of the child’s interests and wishes.¹⁰³

Importantly, the Convention’s defences are only grants of discretion.¹⁰⁴ A fear of abuse and judicial overreaching has consequently seen the proposition that all defences to the presumption of return are ‘narrowly drawn’ and ought to be ‘narrowly construed’ well-emphasised by the Courts

95 For international authority on this point see *Gsponer v Johnson* (1988) 12 Fam LR 753 at 766; *Friedrich v Friedrich* 78 F. 3d 1060 (6th Circ, 1996); *Sonderup v Tondelli* (2001) 1 SA 1171 (CCSA); *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (HL) – holding that the balance of probabilities is the sole standard of proof, but ‘the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.’

96 *Secretary for Justice v HJ*, above n 7.

97 See Hague Convention, Art 18. As recognised by the Supreme Court in *Secretary for Justice v HJ*, in New Zealand, debate as to the source of discretion is largely rendered academic due to s 106 of *COCA* deeming all defences discretionary.

98 *Secretary for Justice v HJ* above n 7.

99 See for example the United States where ‘grave risk’ and the ‘human rights’ defence require proof by way of ‘clear and convincing evidence’ whilst the other exceptions require simply proof by a ‘preponderance of evidence’: *Friedrich v Friedrich*, above n 95. Compare also comments English Court of Appeal in *In re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355 at para [48] (CA) and *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 at para [110] (CA).

100 *Basingstoke v Groot*, above n 94 at paras [10] – [18].

101 A Anton, ‘The Hague Convention on International Child Abduction’ (1981) 30 *ICLQ* 537, 550.

102 Perez Vera Report, above n 2 at paras [27] – [32].

103 *Ibid*, paras [27] – [32].

104 See Perez-Vera Report, *ibid*, para [113] – stating that the exceptions ‘do not apply automatically, in that they do not invariably result in the child’s retention; nevertheless, the very nature of these exceptions gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances.’

in New Zealand and internationally.¹⁰⁵ Undoubtedly, an overly broad interpretation of the defences would likely defeat the Convention's overall purpose of deterring international child abduction. As emphasised by the English Court of Appeal in *TB v JB*, 'systemic invoking' of the defences and substitution of the forum chosen by the abductor for that of the child's habitual residence 'would lead to the collapse of the whole structure' of the *Hague Convention* by 'depriving it of the spirit of mutual confidence which is its inspiration'.¹⁰⁶

1. *One Year & Settled: Art 12(2)/s 106(1)(a)*

Pursuant to Art 12(2), a Court may refuse a child's return where it is satisfied both that (1) more than one year has elapsed since the child's wrongful removal or retention; and (2) that the child is 'now settled in the new environment'. As Beaumont and McEleavy emphasise, the settled exception recognises that the Convention's objective of prompt return is severely undercut by the passage of time and that restoration of the status quo ante may be difficult or impossible and hence ought not to be ordered without an evaluation of the merits of doing so.¹⁰⁷ However, the exception does not mandate a custody determination under the *Hague Convention*. Rather, the exception requires an evaluation of which country has jurisdiction to determine the custody decision as the country most closely connected to the evidence regarding a child's care.

Whether a return application was filed within one year of a child's wrongful removal or retention is a strictly factual issue. By contrast, establishing settlement to the satisfaction of a Court leaves much room for discretion.¹⁰⁸ However, both aspects of the exception have recently attracted

105 See for example *Rydder v Rydder* 49 F. 3d 369 at 372 (8th Circ, 1995). Compare DP/JLM, above n 9 at 414 (HCA). See also A Anton, above n 101; L Silberman, 'Hague International Child Abduction Convention: A Progress Report' (1994) 57 *L. & Contemp. Probs.* 209 at 233 – 247 – stating that the Convention's success depends on application of the defences being limited. See also Perez-Vera Report, above n 2 at para [34].

106 *TB v JB*, above n 99 at 534 and 544. See also Perez-Vera Report, above n 2 at para [34].

107 P Beaumont and P McEleavy, above n 14 at 203. See also Perez-Vera Report, above n 2 at paras [106] – [107] and comments of Singer J in *Re C (Abduction: Settlement)* [2005] 1 FLR 127 (FD) as approved on appeal in *Cannon v Cannon* [2005] 1 WLR 32 (CA) explaining that Art 12(2) 'defines the point of transition':

Established settlement after more than one year since the wrongful removal or retention is the juncture in a child's life where the Hague Judge's legitimate policy objective shifts from predominant focus on the Convention's aims (for the benefit of the subject child in particular and of potentially abducted children generally) to a more individualised and emphasised recognition that the length and degree of interaction of the particular child with his or her new situation deserve qualitative evaluation, free of Hague Convention considerations and constraints.

108 Compare provisions Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility ('Brussels II Revised'), repealing Regulation (EC) No 1347/2000 (2003) OJ L 338/1 ('Brussels II'). Brussels II Revised has applied since 1 March 2005 and supersedes domestic law in all EU member states except Denmark. In situations of subterfuge, Brussels II Revised precludes an abducting parent from relying on a child's settlement: Art 10(b). Likewise, the Regulation provides that the one-year time period begins to run from the time the left-behind parent 'has had or should have had knowledge of the whereabouts of the child' rather than from the time of abduction: Art 10(b). For full text of Brussels II Revised document, <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_338/l_33820031223en00010029.pdf> viewed 14 July 2007.

controversy, most notably in terms of what qualifies as ‘settled’ and at what point the one-year time limit ought to begin to run.¹⁰⁹

2. Grave Risk: Art 13(b)/s 106(1)(c)

Perhaps unsurprisingly, as the exception involving the most judicial discretion, Art 13(b) is the *Hague Convention’s* most litigated and successfully invoked exception.¹¹⁰ Pursuant to Art 13(b), a Court may refuse a child’s return if, ‘there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’.¹¹¹

As the Perez-Vera Report explains, Art 13(b) focuses on the social situation¹¹² to which the child will be returned and represents a ‘fragile compromise’ between drafting nations in order to recognise the realities of returning a child, ie the fact that in some instances a particular child’s welfare requires more than his/her summary return.¹¹³

It is well-settled that the Art 13(b) defence imposes a stringent test whereby the present risk¹¹⁴ is ‘serious’,¹¹⁵ the harm ‘severe and substantial’¹¹⁶ and the situation ‘intolerable’^{117,118}. Indeed, the

109 See comments of P Beaumont and P McEleavy, above n 14 at 203-204 regarding background of the Art 12(2) provision and initial proposal for a dual system depending on whether the location of the child was known. See also R Schuz, ‘In search of a settled Interpretation of Article 12(2) of the Hague Child Abduction Convention’ (2008) 20 *CFLQ* 64. Note controversy surrounding proper treatment of cases where subterfuge/secreture of the child is involved. Compare United States’ practice of ‘equitable tolling’: *Furnes v Reeves* 362 F. 3d 702 (11th Circ., 2004); *Lops v Lops* 140 F. 3d 927 (11th Circ., 1998) and *Wojcik v Wojcik* 959 F. Supp. 413 at 421 (E. D. Mich., 1997). Contrast English position explicitly rejecting any imposition of tolling: *Cannon v Cannon*, above n 107. As to positions in Ireland, Scotland Australia and Canada, see respectively *P v B (No 2) (Child Abduction: Delay)* [1999] 4 IR 185 (SC); *J v K* (2002) SC 450 (Outer House); *D-G, Department of Community Services v M and C* (1999) 24 Fam LR 168 (Full Court, FCA) *Atwles v Mai* (2002) 220 DLR (4th) 577 (Nova Scotia, CA).

110 HecH, Statistical Analysis, above n 30 at 17 – stating that, although refusals generally remain rare, ‘the reason for refusal most frequently relied upon as a sole reason was Art 13(b)’. Nevertheless, attempts to invoke the defence fail in most cases.

111 Hague Convention, Art 13(b). Whilst some contracting states require the harm to also constitute an intolerable situation, in New Zealand, legislation and interpretations make plain that the defences are independent with the factual circumstances giving rise to a ‘grave risk’ of an ‘intolerable situation’ ostensibly being broader than the ‘grave risk’ of ‘physical or psychological harm’ defence. See generally COCA, s 106(1)(c); *Damiano v Damiano*, above n 8; *S v S*, above n 8.

112 Note paragraph 3 of Art 13 which requires judicial/administrative authorities to take into account ‘information relating to the social background of the child’. As the Perez-Vera Report, above n 2 explains at para [117], although procedural in nature, the provision attempts to contemporaneously ‘compensate for the burden of proof’ placed on the Respondent and to ‘increase the usefulness of information supplied by the authorities’ in the child’s State of habitual residence.

113 Perez-Vera Report, *ibid*, paras [116] and [29].

114 As distinct from a risk which previously existed: *TB v JB (Abduction: Grave Risk of Harm)*, above n 99 at 532.

115 See S Nelson, above n 9; Perez-Vera Report, above n 2 at para [29].

116 See for example *A v Central Authority for New Zealand*, above n 8; *Gsponer v Johnson* (1988) 12 Fam LR 753; *Armstrong v Evans* (2000) 19 FRNZ 609 (DC); *Mok v Cornelisson* [2000] NZFLR 582 (FC). The stringency of the test does not vary depending on whether a grave risk of ‘physical or psychological harm’ or an otherwise ‘intolerable situation’ is alleged: *H v H* (1995) FRNZ 498 at 504 (HC). Furthermore, ‘the harm must be caused by the return and not be the mere continuation of an existing state which would have continued in any event’: *TB v JB (Abduction: Grave Risk of Harm)*, above n 99 at 533.

117 *H v H*, *ibid*; *Clarke v Carson*, above n 8; *B v B (Abduction)* [1993] 1 FLR 238 at 247.

118 As to key authorities internationally on this point, see generally: *Re S (Abduction: Custody Rights)* [2002] EWCA Civ 908; *Re Q Petitioner* 2001 SLT 243; *AS v PS* [1998] 2 IR 244; *Thomson v Thomson*, above n 15; *Friedrich v Friedrich*, above n 95.

weight of international authority is that the ‘narrowly’ interpreted defence will only succeed ‘in the most exceptional cases’¹¹⁹ and must not be used as a vehicle to litigate/re-litigate the merits of a custody dispute.¹²⁰

That the policy of precluding parents from adducing evidence on the merits has potential to engender perverse results¹²¹ – invoking of the Art 13(b) exception creating a clear tension between the Convention’s approach and a conventional best interests analysis, is acknowledged. However, as Courts and commentators have repeatedly emphasised and the more aberrant cases¹²² make patently clear, a broad construction of Art 13(b) threatens to categorically undermine the Convention’s objectives and adversely impact on the reciprocity and cooperation enjoyed among contracting states.¹²³

3. *Child’s Objection: Art 13(2)/s 106(1)(d)*

Closely connected to Art 13(b) through its concern with advancing children’s particular interests, Art 13(2) allows a Court to refuse a sufficiently old and mature child’s return where the child objects¹²⁴ to being returned.¹²⁵

119 *S v S*, above n 8; *Re S (Abduction: Rights of Custody)*, *ibid*; *Friedrich v Friedrich*, above n 95 at 1069. Compare also *Vigreux v Michel* [2006] 2 FLR 1180 (CA) – see *Vigreux and Brussels II Revised* discussion Section V(C) below. In *Vigreux*, the Court held that a successful Art 13 defence requires something ‘exceptional’ in the facts and that compelling facts were required to persuade the Court not to exercise its discretion to return the child.

120 Hague Convention, Art 5. As M Weiner, above n 9 at 337 highlights, Hague Convention advocates have always feared that Art 13(b) would be the Convention’s ‘Achilles heel’. Note also P Beaumont and P McElevy, above n 14 at 140 – ‘Art 13(b) is without doubt the most strictly regulated of all the exceptions and has been upheld in only a handful of cases’; A Anton, above n 101 at 551 – ‘the exception is intended to be a narrow ground of refusal.’

121 See for example views of commentators writing on the subject of women abducting in the face of domestic violence: M Weiner, above n 9; S Nelson, above n 9 at 672 – arguing that a broader interpretation is necessary to safeguard the best interests of children; M Kaye, ‘The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four’ (1999) 13 *Journal of Law, Policy and the Family* 191, 198-205.

122 Compare *PF v MF* [1992] IR 390 (IRSC) – Irish Supreme Court holding father’s irresponsible management of money constituted an ‘intolerable situation’; perhaps to a lesser extent *DP/JLM*, above n 9, which both stand in stark contrast to the very narrow approach advocated by the 6th Circuit Court of Appeals in *Friedrich v Friedrich*, above n 95 at 1069.

123 L Silberman, above n 9; M Weiner, above n 9; *Tahan v Duquette* 613 A. 2d 486 at 489 (N.J. Sup. Ct. App. Div., 1992).

124 Whilst it is well-settled that the term ‘objects’ is to be interpreted literally, proper application of the exception requires that a child’s objection is to return to their country of habitual residence rather than merely to returning to their left-behind parent: *Re S (A Minor) (Abduction: Child’s Views)* [1993] Fam 242 at 250. However, it is important to recognise that, in some situations, the child’s objection to returning to their state of habitual residence becomes ‘so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated’: *Re T (Abduction: Child’s Objections to Return)* [2000] 2 FLR 192 at 203.

125 Hague Convention, Art 13(2). In New Zealand, COCA’s implementation of Art 13(2) differs from that in the GAA by replacing the phrase ‘take account of’ with that of ‘give weight to’. Whilst the *raison d’être* for this change in wording is unclear, in *White v Northumberland* [2006] NZFLR 1105 (CA), the Court of Appeal suggests that Parliament has signalled a preferred approach where the controversy associated with Balcombe LJ’s ‘shades of grey’ and Millet LJ’s ‘in or out’ approaches as articulated in *Re R (child abduction: acquiescence)* [1995] 1 FLR 716 at 731 and 735 (CA) require resolution in New Zealand. However, following the English Court of Appeal’s clear preference for Balcombe LJ’s ‘shades of grey approach’ in *Zaffino v Zaffino* [2006] 1 FLR 410 (CA) and *Vigreux v Michel* [2006] 2 FLR 1180 (CA) and *White v Northumberland’s* express approval and adoption of this, it appears unlikely that COCA’s changed wording will be particularly significant.

The Convention's drafting history confirms that all drafting nations agreed that the Convention's *ratione personae* application to all children under 16 years¹²⁶ meant inclusion of Art 13(2) was 'absolutely necessary'.¹²⁷ However, the Convention offers no definition of a 'threshold age' at which a child becomes sufficiently mature to interpret his/her own interests.¹²⁸ Accordingly, as the Perez-Vera Report suggests, Art 13(2) is best viewed as an attempt at balancing the two competing interests of ensuring broad scope and application of the Convention and accommodating those nations that allow children under the age of 16 to determine their own place of residence.¹²⁹

Analysis of reported decisions under Art 13(2) reveals increasing judicial sensitivity towards children's views, with the detrimental effects of forcibly returning children against their will being frequently acknowledged.¹³⁰ Importantly, however, recent international interpretations of Art 13(2) appear fairly consistent.¹³¹ Indeed, congruent with the Convention's other exceptions, Courts generally adopt a relatively strict interpretation – a factor particularly important given the exception's extensive jurisprudence and that approximately 78 per cent of abducted children are under the age of 10 years.¹³² Nevertheless, notwithstanding that the exception now requires consideration in the wider context of contemporary notions of children's rights,¹³³ Art 13(2) remains subject to the arguments which divided delegates over its inclusion in 1980. Most notable is that regarding Art 13(2)'s openness to judicial abuse through its granting of broad discretion that allows Judges to subjectively determine first whether a child is sufficiently mature to choose between their abducting and aggrieved parent and second, based on the Court's perception, the appropriate weight to give the child's objection when deciding whether to order return.¹³⁴

126 Children aged 16 years and older being assumed to have more of an independent existence and having 'a mind of [their] own which cannot easily be ignored either by one or both of [their] parents, or by a judicial or administrative authority': Perez-Vera Report, above n 2 at paras [30] and [77].

127 Perez-Vera Report, *ibid*, para [30]. Significantly, through its acknowledgment of children's right and ability to participate in matters affecting them, Art 13(2) broadly reflects UNCROC, Art 12. Note, however, that Art 13(2) applies only where a child 'objects' and that the Hague Convention contains no requirement to give weight to a child's wish to return. Nevertheless, as *S v S*, above n 8 at 521 suggests, it is likely that Art 12 of UNCROC requires a Court to listen to such views. Compare Brussels II Revised, which is acknowledged as placing much greater emphasis on listening to children's views where such views are appropriate having regard to the relevant child's age or degree of maturity: *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 (HL); Art 11(2). However, by way of earlier adoption of Strasbourg jurisprudence regarding obligations under Arts 6 and 8 of the ECHR, for some States, the Brussels II Revised Regulation is perceived as occasioning little practical change: A Schulz, 'The New Brussels II Regulation and the Hague Conventions of 1980 and 1996' (2004) *IFLJ* 22. Note also that under Brussels II Revised, a Court is unable to refuse a child's return unless the applicant has first been afforded an opportunity to be heard in the proceeding: Art 11(5).

128 Note and compare various proposals to restrict the exception, eg to children over 12 years, and to exclude the exception altogether. See generally summary provided by the Canadian delegation in Vol III Discussions of the 14th Session at p. 243. See also Perez-Vera Report, above n 2 at para [78].

129 Perez-Vera Reports, *ibid*. See also P Beaumont and P McElevay, above n 14 at 178-180. Note A Anton, above n 101 at 550.

130 Note, for example, *TB v JB*, above n 99.

131 See Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (October 2006), <http://www.hchc.net/upload/wop/abd_pd02efs2006.pdf> at 107-126 viewed 12 August 2007.

132 *Ibid*.

133 UNCROC, for example.

134 See generally P Beaumont and P McElevay, above n 14 at 178-180 discussing why introduction of Art 13(2) proved so contentious during the Convention's drafting.

In a similar fashion, Art 13(2) is criticised as placing an ‘inordinate burden of responsibility’ on young children to make vital decisions which they ‘are not psychologically equipped to handle’.¹³⁵ Indeed, as the Perez-Vera Report explains:¹³⁶

[Art 13(2)] could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think that they are being forced to choose between two parents.

Likewise, the strong potential for too broad an interpretation of Art 13(2) to erode the rights of left-behind parents and undermine the Convention’s objects by permitting a requested Court to adjudicate on custody issues and allowing children rather than Judges to ultimately decide whether they will be returned have been well-emphasised.¹³⁷

F. *The Changed Profile of Abductors*

All international parental child abductions are distinct both factually and in their effects on the particular child concerned.¹³⁸ Nevertheless, some common patterns in abductor profiles are discernible. Importantly in terms of the Hague Convention’s continued responsiveness to emerging trends, current patterns suggest a contemporary abductor profile quite different to the presumption on which the Convention was introduced in 1980.

Between the 1970s and early 1990s, the stereotype of a parental abductor constituted a non-custodial father – usually a foreign national, who was dissatisfied with an actual or anticipated custody decision and so desperate to have permanent contact with his children that he was willing to wrongfully remove them abroad.¹³⁹ Indeed, it is this notion which is implicitly reflected in the

135 See Vol III of the Discussions of the Fourteenth Session at p. 243 where the United States emphasises that, from its perspective, inclusion of Art 13(2) was ‘seriously objectionable’. Note also 1997 Report of the Special Commission whose review highlights feelings by some nations that the Convention ‘gives too much weight to the opinion of the child, considering what is involved is just a matter of determining the forum’, <http://www.hcch.net/index_en.php?act=publications.index> viewed 1 Aug 2007. Regarding potential imposition of an unacceptable psychological burden, see generally B Cantwell and S Scott, ‘Children’s Wishes, Children’s Burdens’ (1995) 17 *Journal of Social Welfare and Family Law* 337.

136 Perez-Vera Report, above n 2 at para [30].

137 Ibid, paras [77] – [78].

138 For a discussion of common and potential effects of international child abduction on children see generally, M Freeman, ‘International Abduction: The Effects’, Report funded by the Department for Constitutional Affairs and prepared for the Reunite Research Unit, Leicester, (2006) <http://207.58.181.246/pdf_files/library/freeman_2006.pdf> viewed 10 September 2007; Reunite International, ‘The Outcomes for Children Following an Abduction’ (September 2003), Report Funded by the Foreign and Commonwealth Office, <http://207.58.181.246/pdf_files/library/freeman_2003.pdf> viewed 10 September 2007; M Agopian, ‘The impact on children of abduction by parents’ (1984) 63(6) *Child Welfare* 511; G Greif, ‘Many years after the parental abduction: Some consequences of relevance to the court system’ (1998) 36(1) *Family and Conciliation Courts Review* 32; G Greif, ‘The long-term impact of parental abduction on children: Implications for treatment’ (1998) 26 *Journal of Psychiatry and Law* 45.

139 A Dyer Report, above n 13 at 19; P Beaumont and P McEleavy, above n 14 at 13-15; M Agopian, Parental Child-Stealing (1981), *ibid*, at 3-4 – claiming to be the first formal study of patterns characteristic of international child abduction; M Agopian and G Anderson, ‘Characteristics of parental child stealing’ (1981) 2(4) *Journal of Family Issues* 471.

Perez-Vera Report's explanation that in an abduction situation, 'the child is taken out of the family and social environment in which its life had developed'.¹⁴⁰

Since the mid 1990s, a pronounced change in the profile of abductors has occurred.¹⁴¹ Indeed, the most recent global survey indicates that approximately 68 per cent of contemporary abductors are mothers, most of whom are the primary or joint-primary caregiver returning 'home'. Furthermore, results also indicate that freedom from domestic violence is a recurrent motivator for abduction.¹⁴²

Freeman¹⁴³ has questioned whether it can still be stated with confidence that the 'best interests of children are generally being protected, when the face of abduction has changed so significantly that children are being returned from their primary carers'. However, as Lowe and Horosova¹⁴⁴ emphasise, the argument remains that it is 'basically wrong' for children to be unilaterally uprooted from their habitual residence. Certainly, the presence of domestic violence does temper the strength of best interests arguments. Nevertheless, where a child and his/her mother's safety can be afforded proper protection by the child's habitual residence, that country remains the best forum for adjudicating the merits of any custody dispute.¹⁴⁵ Accordingly, whilst it is argued that the Convention's policy and objects remain appropriate, it is accepted that the global problems created by drafters' omission¹⁴⁶ of domestic violence and other contemporary trends from the abduction paradigm will require Courts and other bodies to carefully consider how the instrument continues to evolve.¹⁴⁷

140 Perez-Vera Report, above n 2 at para [11]. Note that although A Dyer's 'Legal Kidnapping' Report, above n 13 was included in the Convention's preparatory documents and contains a section 'Typical elements of the situation which produces the abduction of a child by one of his parents', the Special Commission's Report comments at 174, 'We dare not advance ideas on the possible psychological motivations leading to "abduction"; this remains an obscure domain for the jurist'.

141 P Beaumont, and P McEleavy, above n 14; TB v JB, above n 99.

142 M Weiner, above n 9.

143 M Freeman, 'In the Best Interests of Internationally Abducted Children? – Plural, Singular, Neither or Both' (2002) *IFLQ* 77, 82. Compare C Bruch 'Sound Thinking or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law' (2006) 39 *Family Law Quarterly* 281.

144 N Lowe and K Horosova, 'The Operation of the 1980 Hague Abduction Convention – A Global View' (2007) 41 *Family Law Quarterly* 59 at 71.

145 See *A v Central Authority for New Zealand*, above n 8.

146 Note comments M Weiner, above n 9 that such omission means the Convention effectively functions as if drafters had explicitly assumed abductors were male non-custodial parents.

147 Note that one of the biggest problems at the time of the Convention's drafting was the lack of abductor profile statistics.

III. COCA 2004: A COMMENT ON POLICY AND NOTABLE CHANGES

In light of interpretations internationally and under the *GAA* both holding that discretion under the Convention is ‘not unfettered’ and instead ‘must be exercised in the context of the Convention and the Act in which it is incorporated’,¹⁴⁸ analysis of whether *COCA* does in fact represent a change in *Hague Convention* policy is warranted.

COCA represents an attempt to ‘modernise’ the law relating to guardianship and care of children in a manner that ‘more effectively promote[s] the interests of children and satisf[ies] the needs of all New Zealand families’.¹⁴⁹

Regarding *COCA*’s specific ‘public policy’ objectives, the Bill’s Explanatory Note identifies its main objectives as being to:¹⁵⁰

- Ensure a stronger focus on the rights of the child;
- Recognise the diversity of family arrangements that exist for the care of children;
- Improve New Zealand’s compliance with international obligations, for example, those under the United Nations Convention on the Rights of the Child (UNCROC);
- Support a child’s right to ongoing contact with both parents and mitigate the risk of unsafe contact arrangements.

A number of *COCA*’s provisions – eg ss 4-6, stand in ‘clear distinction’ from the law as it previously existed.¹⁵¹ However, despite affirmation that *COCA*’s changes encompass much more than mere codification,¹⁵² the Courts have consistently emphasised that *COCA* does not constitute a radical shift in the law.¹⁵³ Nevertheless, particularly with respect to *COCA*’s increased focus on

148 See for example, *S v S*, above n 8 at 635. The on-going international debate regarding the breadth of discretion exercised ‘under’ or ‘outside’ the Convention, ie discretion included within an exception and that exercised under Art 18, is acknowledged. Compare, for example, divergent judgments of Lord Roger and Baroness Hale in *Re M and another (children)* [2007] UKHL 55 (HL). Note that although *COCA* expressly renders the s 106(1) exceptions discretionary, the source of the relevant discretion may well be a proper factor when it comes to deciding the proper weight Convention policy considerations ought to attract.

149 ‘General Policy Statement’, Care of Children Bill, (2003, Bill No 54-1) at 1, introduced into Parliament 10 June 2003, <http://www.parliament.nz/NR/rdonlyres/1D86B4E3-0A1B-41A1-9338-58231519953C/59990/DBHOH_BILL_5507_117999994.pdf> viewed 12 August 2007. Third reading and Royal assent 9 November 2004 and 21 November 2004 respectively, <http://www.parliament.nz/NR/rdonlyres/1D86B4E3-0A1B-41A1-9338-58231519953C/59992/DBHOH_BILL_5507_118993.pdf> viewed 12 August 2007.

150 Care of Children Bill, above n 149 at 2 and 24-25. These objectives are explicitly reflected in s 3(1) of the *COCA* regarding the Act’s ‘purpose’. Compare also Government policy as expressed by the Ministry of Social Development in the Agenda for Children and the Vision for Children, <<http://www.msd.govt.nz/work-areas/children-and-young-people/agenda-for-children/>> viewed 1 August 2007 where a focus on ‘a new ‘whole child’ approach to child policy’ is recorded.

151 *White v Northumberland* [2006] NZFLR 1105 at para [50]; *Ding v Minister of Immigration* (2006) 25 FRNZ 568 at paras [137] – [188] (HC) – identifying relevant changes and holding, at para [183], that even where *COCA* is found to have no direct application, the Act provides important evidence of New Zealand’s current public policy regarding the status of children.

152 See generally *T v J* (unreported, High Court, Wellington, CIV-2005-485-559, MacKenzie J, 10 November 2005) at para [26] (HC). Note also *COCA*, s 13.

153 *White v Northumberland*, above n 125 at para [51]; *N v N* [2007] NZFLR 320 (FC). For pre-*COCA* judicial acknowledgment of changing family structures and recognition of children’s rights issues, see generally *Tavita v Ministry of Immigration* [1994] 2 NZLR 257 (CA); *P v K* [2003] 2 NZLR 787 (HC); *L v A* [2004] NZFLR 298 (HC) at paras [44] – [46] (HC).

children's rights and parental responsibility,¹⁵⁴ it is important to acknowledge that *COCA*'s reforms share similarities with the major child law reforms which have occurred in jurisdictions such as Australia and England and Wales.¹⁵⁵

Under *COCA*, the paramountcy principle remains at 'centre stage'.¹⁵⁶ However, in contrast to s 23 of the *Guardianship Act 1968*, s 4 has been 'substantially recast' to provide a much 'sharper focus' regarding the paramountcy principle's application.¹⁵⁷ In particular, s 4(1) now provides that 'the welfare and best interests'¹⁵⁸ of the child must be the first and paramount consideration' in the administration and application of *COCA*.¹⁵⁹

Significantly, with particular respect to the *Hague Convention*, the Explanatory Note to the Care of Children Bill makes no reference to the *Hague Convention* in its identification of the 'main changes to existing law'.¹⁶⁰ Similarly, *COCA* continues to utilise 'wording' drafting methodology

154 Note in particular *COCA*, ss 3(1), 3(2)(a)(i), 4(5)(a) and 5.

155 See Australian Family Law Reform Act 1995 and Children Act 1989 (Eng.) respectively. Compare also Brussels II Revised.

156 *ACCS v AVMB* [2006] NZFLR 986 at para [53] (HC).

157 *Ibid*, paras [53] and [55].

158 The phrase 'welfare and best interests' being derived from UNCROC. For discussion of the distinction between 'welfare' and 'best interests' see conclusions of O'Dwyer DCJ in *C v W [Custody]* [2005] NZFLR 953 (FC).

159 For a non-exhaustive list of principles relevant when assessing a child's best interests and welfare, see *COCA*, s 5.

160 Care of Children Bill, above n 149 at 2-4.

whereby the Convention is implemented through incorporation into statutory provisions.¹⁶¹ Importantly, whilst relevant provisions of the *COCA* are not framed in precisely identical terms to the *Guardianship Act 1968* and the *GAA*, as *HJ v Secretary for Justice*¹⁶² affirms, corresponding provisions are to the same effect. Critically on this point, through its provision that '[t]his section does not limit section 83 or subpart 4 of Part 2', s 4(7) of *COCA* retains what was accepted as the paramountcy principle qualification¹⁶³ contained in s 23(3) of the *Guardianship Act 1968*.¹⁶⁴

On the issue of the propriety of any legislative intent to displace *Hague Convention* jurisprudence under the *GAA* by introduction of *COCA*, Art 27 of the *Vienna Convention* makes clear that enactment of a conflicting domestic statute cannot change a country's international obligations

161 M Nixon, 'Legislation and the Hague Convention' (April, 2007) *New Zealand Law Journal* 91, 92. The Legislation Advisory Committee Guidelines on Process and Content of Legislation, para [6.2.2] explain the 'wording' method thus:

In many cases, the wording of a treaty is incorporated into the body of the Act. The Act may specify the treaty that it seeks to implement or it may not. In either case, the wording of the treaty is reflected in the Act's provisions. Sometimes the wording is repeated verbatim and sometimes it is translated to accommodate local conditions ... As most treaties tend to be expressed in general language, mainly to achieve agreement, the wording method is used often.

As to the rationale for utilising the 'wording' method in the context of *COCA*'s Hague Provisions, note comments of the Minister of Justice in his speech on the Bill's second reading, <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/c/a/1/00DBHOH_BILL5507_1-Care-of-Children-Bill.htm>:

One issue raised by the submissions related to the manner in which the Bill implements the Convention. The Bill implements the Convention in New Zealand by setting up a statutory regime that elaborates the provisions of the Convention itself. The select committee heard the view that all that was necessary was a shorter Bill that simply stated that the Convention was the law for New Zealand and provided judicial and administrative authorities with the necessary powers to fulfil their obligations under the Convention. It was argued in support that any difficulties in the interpretation of the Convention could be resolved by reference to cases decided in other countries rather than by provisions in the legislation.

The select committee gave careful consideration to that view. However, it decided that the Bill should remain in its present form. That was because it recognised the need to deal promptly with applications made under the Convention. The committee acknowledged that lawyers, judges, and officials would be helped to deal with applications expeditiously if the legislation were in a form which they were familiar; if interpretation questions apparent on the face of the Convention were resolved in the legislation; and if the provisions of the Convention were arranged in a manner that assisted understanding of them. I take the same approach.

Regarding the various drafting techniques employed in New Zealand, see M Gobbi, 'Drafting Techniques for Implementing Treaties in New Zealand' (2000) 21 *Statute Law Review* 71. Note that New Zealand's method of implementing the Hague Convention is somewhat unusual within the international community whereby the text of the Convention is usually incorporated into domestic law directly without variation: P Nygh, 'Review of the Hague Convention on the Civil Aspects of Child Abduction' (2000) 16 *AJFL* 67 at 70-71. Compare Australian methodology whereby the Convention is embodied in the Family Law Regulations (subordinate to the Family Law Reform Act) rather than being attached to ratifying legislation.

162 *HJ v Secretary for Justice* [2006] NZFLR 1005 at para [11] (CA).

163 See *Damiano v Damiano* [1993] NZFLR 548 at 551 (FC); *Adams v Wigfield* [1994] NZFLR 132 at 138 (HC) and *S v S* [1999] NZLR 513 at 523 (HC & CA).

164 Section 23 of the *Guardianship Act 1968* relevantly provides that:

23. Welfare of child paramount

(1) In any proceedings where any matter relating to the custody or guardianship of or access to a child ... is in question, the Court shall regard the welfare of the child as the first and paramount consideration.

...

(3) Nothing in this section shall limit the provisions of ... Part I of the *Guardianship Amendment Act 1991*.

under a Treaty.¹⁶⁵ Consequently, recognising Van Alstine's¹⁶⁶ argument that Treaties ought to be considered as being 'capable of maturing beyond drafters' contemplation' and that international amendment of the *Hague Convention* is difficult,¹⁶⁷ as a matter of international law, New Zealand remains precluded from invoking *COCA* as justification for any failure to perform its obligations under the *Hague Convention*. Accordingly, it is argued that the Court of Appeal's statement in *White v Northumberland*¹⁶⁸ that *Hague Convention* cases under *COCA* must 'continue to be determined according to past precedents and on a uniform international basis' is apposite – the potential for any strict application of statutory provisions over the Convention itself resulting in New Zealand failing to fulfil its *Hague Convention* obligations being acknowledged.¹⁶⁹

IV. RECENT HAGUE CONVENTION INTERPRETATIONS UNDER COCA

For its Convention interpretations under the *GAA*, New Zealand enjoyed an enviable reputation among signatories. Decisions such as *A v Central Authority for New Zealand*,¹⁷⁰ *S v S*¹⁷¹ and *KS v LS*¹⁷² demonstrate the strict/'narrow' approach – consistent with English decisions,¹⁷³ that New Zealand traditionally applied to the *Hague Convention's* exceptions. Undoubtedly, New Zealand's long-standing exceptional record of orders for return (see Lowe & Horosova table below)¹⁷⁴ is attributable to this strict approach, as well as New Zealand's articulated commitment to upholding the purposes and policy of the Convention.

165 Art 27 of the Vienna Convention 1969 provides that: 'A party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty'.

166 M Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 *U. PA. L. Rev.* 687 at 782-783. For further discussion of principles relevant to Treaty interpretation/construction, see generally A Glashauser, 'What We Must Never Forget When it is a Treaty We Are Expounding' (2005) 73 *U. Cin. L. Rev.* 1243.

167 L Silberman, above n 9.

168 *White v Northumberland* [2006] NZFLR 1105 at para [53]. See also *Punter v Secretary for Justice* [2007] 1 NZLR 40 at paras [10] – [12] (CA); *Dellabarca v Christie* [1999] 2 NZLR 548 at 551 (CA) and *Chief Executive of the Department for Courts v Phelps* [2000] 1 NZLR 168 at para [14] (CA).

169 Compare *MHP v Director-General, Department of Community Services* (2000) 26 Fam LR 607 – holding that Australia's method of implementation strengthens an argument that the Convention must be interpreted 'according to Australian legal standards.'

170 *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (CA).

171 *S v S* [1999] 3 NZLR 513 (HC & CA).

172 *KS v LS* [2003] 3 NZLR 837 (HC, Full Court).

173 *Ibid*, para [143].

174 N Lowe and K Horosova, above n 144 at 88-90. Whilst it cannot be stated that a high rate of refusals categorically equates to 'bad performance' (particularly where application numbers are small), a comparison of contracting state's individual return rates attracts at least some validity, particularly when assessed against global averages.

Table 1: Individual State's Return Rates¹⁷⁵

State	2003				1999			
	Overall Return Rate		Judicial Return Rate		Overall Return Rate		Judicial Return Rate	
	Number	%	Number	%	Number	%	Number	%
USA	131/284	47%	78/115	68%	109/210	52%	50/60	83%
England & Wales	86/141	61%	73/99	73%	84/149	56%	76/90	84%
Spain	37/87	42%	29	38%	18/36	50%	8/12	67%
Germany	31/80	39%	19/26	73%	24/70	35%	13/26	50%
Canada	24/56	42%	11/14	79%	21/35	60%	8/12	66%
Italy	23/46	50%	14/26	54%	24/41	59%	18/25	71%
Australia	18/43	42%	16/25	64%	33/64	52%	26/34	76%
France	28/42	66%	17/21	81%	21/42	50%	10/13	77%
Switzerland	25/39	64%	7/8	88%	5/11	45%	4/5	80%
Turkey	20/35	48%	5/12	42%	—	—	—	—
Ireland	22/33	66%	10/12	83%	23/38	60%	16/20	80%
Mexico	17/27	63%	7/8	88%	6/41	15%	6/6	100%
New Zealand	16/27	60%	12/14	86%	26/39	66%	22/26	85%
Netherlands	8/26	31%	6/8	75%	15/26	57%	10/12	83%
Belgium	12/25	48%	9/12	75%	7/8	88%	3/3	100%
Sweden	11/22	50%	4/7	57%	8/14	57%	6/10	60%
Portugal	12/19	63%	7/10	70%	4/11	36%	1/2	50%
Poland	6/18	33%	3/11	27%	—	—	—	—
Chile	6/17	36%	2/16	13%	2/7	29%	2/5	40%
Argentina	6/13	46%	6/6	100%	—	—	—	—
Hungary	9/13	69%	4/7	57%	4/8	50%	4/7	57%
Israel	6/13	46%	3/6	50%	8/19	43%	6/11	55%
Denmark	4/12	33%	3/8	38%	5/11	45%	3/4	75%
Austria	6/11	54%	3/6	50%	0/9	0%	0/7	0%
Scotland	10/11	90%	5/5	100%	9/10	90%	1/1	100%
Czech Republic	6/11	54%	3/4	75%	3/4	75%	0/1	0%
Global	628/1241	51%	361/544	66%	477/952	50%	304/411	74%

175 Reproduced directly from N Lowe and K Horosova, above n 144 at 88. Return rates indicated are calculated from results of the second and third Statistical Surveys, respectively conducted in 1999 and 2003 by Cardiff University Law School's Centre of International Family Law Studies and funded by the Nuffield Foundation. For confirmation of relevant statistics, see generally N Lowe et al., *A Statistical Analysis of Applications Made in 1999 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prel. Doc. No. 3 (revised version, November 2001), <http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2268&dtid=32> viewed 10 September 2007 and N Lowe et al. *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prel. Doc. No. 3 (October 2006), <http://www.hcch.net/index_en.php?act=publications.details&pid=3889&zoek=national%20report> viewed 10 September 2007.

In a similar fashion, it is also important to acknowledge New Zealand's good reputation as a contracting state which, within its general adherence to a strict approach, is often instrumental in ensuring that the *Hague Convention* remains responsive to contemporary trends.¹⁷⁶ Accordingly, building on Parts II and III, this section gives consideration to key doctrinal changes effected by six post-*COCA* Convention decisions.

A. *White v Northumberland* [2006] NZFLR 1105 (CA)

Although delivered approximately four months after the Court of Appeal's *HJ v Secretary for Justice*¹⁷⁷ decision, *White v Northumberland*¹⁷⁸ essentially begins the series of judgments serving to substantially alter the landscape of New Zealand's *Hague Convention* jurisprudence. Most notably, the decision attracts significance for its preferring of Balcombe LJ's 'shades of grey' approach to the child objects/s 106(1)(d) defence over that of Millet LJ's 'in or out' approach, which had previously been applied by the New Zealand High Court in *Collins v Lowndes*.¹⁷⁹ However, the decision also attracts attention for its conclusions as to whether the exercise of discretion in cases under s 106(1)(d) of *COCA* requires a Court to take into account 'general welfare' considerations.¹⁸⁰

The Court of Appeal rejected the submission that ss 4(1)-(3) of *COCA* required *Hague Convention* jurisprudence to give way to the fundamental guidelines contained in these sections. This conclusion was grounded in a view that the submission failed to 'accord proper weight to s 4(7)'. In support of that proposition, the Court approved continued application under *COCA* of the comments of Elias J in *Clarke v Carson*¹⁸¹ where Her Honour referred to s 23(3) of the *Guardianship Act 1968* as 'displacing' the general paramountcy principle contained in s 23(1) and emphasised that 'the function of a New Zealand Court hearing an application under the 1991 Act is circumscribed'.¹⁸²

On the issue of the propriety of recognising general welfare considerations acknowledged in the English *Zaffino v Zaffino (Abduction: Children's Views)*¹⁸³ decision as being relevant on a Balcombe analysis, the Court of Appeal held that such recognition was appropriate. However, consistent with *Zaffino*, the Court stressed that relevant welfare considerations were limited to, 'those relating to the period *up to* when the Court (be it a foreign court or the local court) could deal with the question of where the child should live'.¹⁸⁴

176 See for example *Mok v Cornelissson* [2000] NZFLR 582 (FC) and *Armstrong v Evans* [2000] NZFLR 984 (DC) – internationally recognised as being particularly pioneering: J Grey, 'Respecting human rights in the drafting and interpretive stages of the Hague Convention on the Civil Aspects of International Child Abduction' (2003) 17 *A.J.F.L.* 270; M Weiner, above n 9.

177 *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) – judgment delivered 11 April 2006.

178 *White v Northumberland* [2006] NZFLR 1105 (CA) – judgment delivered 29 August 2006.

179 *Collins v Lowndes* (unreported, High Court, Auckland, AP115-SW02, Harrison J, 6 March 2003).

180 *White v Northumberland*, above n 125 at para [10]. The proper exercise of discretion is also recognised as the fourth step of Balcombe LJ's 'shades of grey' analysis.

181 *Clarke v Carson* [1996] 1 NZLR 349 at 351 (HC).

182 *White v Northumberland*, above n 125 at paras [50] – [52].

183 *Zaffino v Zaffino (Abduction: Children's Views)* [2006] 1 FLR 410, in particular at paras [13], [19], [24], [49] and [52] (CA).

184 *White v Northumberland*, above n 125 at paras [54] – [55] (Emphasis added).

As a subsidiary point under this head, the Court of Appeal rejected a submission regarding the direct relevance of its earlier conclusions in *HJ v Secretary for Justice*¹⁸⁵ vis-à-vis the exercise of discretion under s 106(1)(a) – instead holding that the child objects defence gives rise to ‘quite different’ discretionary considerations.¹⁸⁶

B. *Secretary for Justice v HJ* [2007] 2 NZLR 289 (SC)

Secretary for Justice v HJ represents the first, and to date only, *Hague Convention* case to reach the Supreme Court.¹⁸⁷ The unanimous decision refusing the return of two young children to Australia was delivered in three separate judgments.¹⁸⁸ Whilst the facts in *HJ* are unusual and largely specific to the Art 12/s 106(1)(a) defence, the decision attracts significance for its extensive obiter comments regarding the Court’s exercise of discretion upon finding a s 106(1) defence established.

The brief facts of this case are that the abducting mother obtained the equivalent of a protection order in three Australian States. The left-behind father apologised for his violent behaviour and offered the mother some space. However, in his letter agreeing that the children could have passports, he stated, ‘when you go I want to know where you are and you have 14 days to return’.¹⁸⁹ Without informing the father, the mother left Australia with the children. When the father attempted to locate them some 15 months later, he discovered that they had moved to New Zealand. Seven months later the father initiated *Hague Convention* proceedings. By this time the children had been living in New Zealand for nearly two years.¹⁹⁰

The Family and High Courts ordered the children’s return – holding that the mother had failed to establish a defence under ss 106(1)(b) and 106(1)(c) and that, although the children were ‘settled’, the mother’s concealment of them meant that it would undermine the integrity of the *Hague Convention* if return was refused under s 106(1)(a). In a judgment focused solely on ss 106(1)(a) and 106(1)(c) issues and taking a different view of the factual basis for the children’s return, the Court of Appeal substituted its discretion for that of the lower Courts and set aside the order for return.¹⁹¹ The Supreme Court upheld that decision on s 106(1)(a) grounds – ‘grave risk’/s 106(1)(c) matters not falling for consideration in the appeal.

With respect to the exercise of discretion under s 106(1), the Supreme Court’s conclusions can essentially be grouped into three areas:

1. Whether there is ‘a presumption of return in exercising a discretion in keeping with the purpose of the Convention’;¹⁹²

185 *HJ v Secretary for Justice*, above n 7.

186 *White v Northumberland*, above n 125 at para [56].

187 It is noted that in relation to *Andrews v Secretary for Justice* [2007] NZFLR 891, the Supreme Court recently refused leave to appeal: *KMA v Secretary for Justice* [2007] NZSC 56.

188 The first by Elias CJ at paras [1] – [30]; the second by Tipping on behalf of Blanchard, Tipping and Anderson JJ at paras [31] – [117]; and the third by McGrath J at paras [118] – [146].

189 *Secretary for Justice v J* (unreported, Family Court, Hastings, FAM: SAM-2004-020-76; 020/147/03, von Dadelsen DCJ, 16 April 2004) at para [8].

190 *HJ v Secretary for Justice (as the New Zealand Central Authority on Behalf of TJ)*, (unreported, High Court, Wellington, CIV-2004-441-263, Ellen France J, 15 June 2004) at paras [3] – [8].

191 *HJ v Secretary for Justice* [2006] NZFLR 1105 (CA) – the near two year delay from the hearing in the High Court is somewhat unexplained.

192 *Secretary for Justice v HJ* [2007] 2 NZLR 289 at para [66] (NZSC).

2. How the Court ought to deal with any alleged settlement based on concealment or deceit; and
3. How the Courts should generally approach the s 106(1)(a) discretion, particularly in terms of any hierarchy of relevant factors and their weight.

On the issue of whether the Court of Appeal erred by failing to apply a ‘presumption of return’ when exercising its discretion under s 106(1), the majority distinguished the comments of the Court of Appeal in *S v S*¹⁹³ as merely providing a ‘broad introductory overview of the purpose of the Convention’. Subsequently, their Honours held that it was inappropriate to ‘speak in terms of a presumption of return in a discretionary situation’.¹⁹⁴ Similarly, through reference to the ‘high threshold’ of harm implicit in the s 106(1)(c) and s 106(1)(e) exceptions, Elias CJ concluded that neither *COCA* nor the *Hague Convention* supported a presumption of return where a s 106(1) ground was found established.¹⁹⁵

Regarding the proper approach to settlement achieved through concealment or deceit, the Court articulated a preference for dealing with the issue as a factor weighing in the exercise of discretion. The majority approved the Court of Appeal’s adoption of the test for ‘manipulative delay’ as discussed by Thorpe LJ in *Cannon v Cannon*^{196,197} Their Honours held that treating ‘manipulative delay’ as a discretionary factor was likely to ‘better achieve’ the Convention’s policy objective of precluding abductors from obtaining an advantage from their own wrongdoing than any attempt to address the issue indirectly in a settlement assessment.¹⁹⁸ McGrath J generally agreed with the majority approach on this point. However, His Honour was careful to emphasise that, in a s 106(1)(a) proceeding, the Convention’s purposes were unlikely to be ‘well served’ by a comparison of relative parental responsibilities if the Court was satisfied that there was no ‘manipulative delay’ giving rise to invoking of the exception.¹⁹⁹

Unwilling to weigh the presence of concealment or deceit as heavily as the majority, Elias CJ stressed that, on her construction of s 4 of *COCA*, any inquiry into the relative responsibilities of parents in establishing a s 106(1) exception appeared to be a ‘wrong approach’.²⁰⁰ Indeed, in Her Honour’s opinion, by way of s 4(3) of *COCA*, it is only where a child’s return is not adverse to his/her best interests and welfare that conduct of an abducting parent can ‘assume any real significance’.²⁰¹

The most significant level of divergence between the Court’s three judgments occurs with respect to the issue of how Courts should generally exercise the s 106(1) discretion.

In the majority’s opinion, exercise of discretion under s 106(1)(a) is a ‘balancing exercise’. The exercise requires a Court to ‘compare and weigh’ the two considerations of ‘the welfare and best interests of the child’ and the ‘general purpose of the Convention in the circumstances of the particular case’.²⁰² In terms of factors relevant to a child’s best interests, ‘everything logically capable of bearing on whether it is in the best interests of the child to be returned should be con-

193 *S v S* [1999] 3 NZLR 528 at para [9] (CA).

194 *Secretary for Justice v HJ*, above n 7 at paras [67] – [68].

195 *Ibid*, paras [2] and [21].

196 *Cannon v Cannon* [2005] 1 WLR 32 at para [59] (CA).

197 *Secretary for Justice v HJ*, above n 7 at para [79] citing *HJ v Secretary for Justice*, above n 7 at paras [59] – [60].

198 *Secretary for Justice v HJ*, *ibid*, para [69].

199 *Secretary for Justice v HJ*, above n 7 at para [142].

200 *Ibid*, paras [3] and [22].

201 *Ibid*, paras [23] – [24].

202 *Ibid*, para [85]. Acknowledgment that ‘these two considerations will not necessarily be in conflict’ is also important.

sidered'.²⁰³ If a Court concludes that return is not in a child's best interests, policy factors favouring return in the interests of avoiding 'perverse incentives' become relevant. Where a Court finds no such competing factors, the child's return should be refused.²⁰⁴ However, notwithstanding the need to recognise the exceptions' shared context, both general and particular 'statements in judgments or other writings about one ground should not be applied automatically or uncritically to another'.²⁰⁵

Similarly, regarding the s 106(1) discretion generally, McGrath J held that the 'starting point' is that:²⁰⁶

the legislative purpose is that the power to return a child in circumstances covered by s 106(1) is intended to be exercised in the context of the Convention, having regard in particular to what would give effect to the Convention's purposes in relation to this provision.

With respect to s 106(1)(a), McGrath J acknowledged that, after 12 months, the Convention's principal objects have much less relevance. However, His Honour held that welfare considerations do not become the overriding determinant. McGrath J also held that the word 'limit' in s 4(7) of COCA did not prompt application of the paramountcy principle in the exercise of discretion. Rather, in His Honour's opinion, a Court exercises the s 106(1)(a) discretion with a 'blank slate, taking account of all the relevant circumstances and considerations, in light of the shifting policy of the Convention'.²⁰⁷

In somewhat stark contrast, Elias CJ was of the firm view that once a s 106(1)(a) defence was established, it was a 'judicial determination'²⁰⁸ of a child's 'welfare and best interests' which must prevail as the 'first and paramount consideration'²⁰⁹ in any decision to refuse/order a child's return. Furthermore, Her Honour held that this approach/application of the 'overarching principle contained in s 4(1)'²¹⁰ was unaffected by s 4(7)'s provision that s 4 'does not limit' subpart 4 of Part 2.²¹¹ In support of this proposition, Elias CJ emphasised that s 4 'applies to the extent that it does not 'limit' subpart 4'.²¹² Additionally, at paragraph [26], Her Honour opined that s 4(1) 'does not displace other policies of the Convention, as implemented in the [COCA]'. Indeed, as Her Honour stated at paragraph [25]:

Because the exception is directed at the interests of the children, applying s 4(1) to the decision to order non-mandatory return does not 'limit' subpart 4. Its application is consistent with the 'paramount importance' of the interests of children emphasised in the Preamble of the Convention.

Whilst the s 106(1)(c)/'grave risk' exception did not fall for consideration by the Supreme Court, the Court of Appeal's conclusions vis-à-vis the conflicting *KS v LS*²¹³ and *El Sayed*²¹⁴ approaches requires comment.

203 Ibid, para [86].

204 Ibid, para [87].

205 *Secretary for Justice v HJ*, above n 7 at paras [39] – [40].

206 Ibid, para [136].

207 Ibid, at para [138].

208 Ibid, para [23].

209 Ibid, paras [24] and [28].

210 Ibid, para [24].

211 For a discussion of COCA, s 4(7) and its application see above Part III and below Part V.

212 *Secretary for Justice v HJ*, above n 7 para [24].

213 *KS v LS* [2003] 3 NZLR 837 (HC, Full Court).

214 *El Sayed v Secretary for Justice ex parte El Sayed* [2003] 1 NZLR 349 (HC, Full Court).

On the issue of whether the lower Courts erred in applying *KS v LS*, the Court of Appeal articulated a preference, ‘on the whole’, for the approach taken in *KS v LS* to that set out in paragraphs [58] - [61] of *El Sayed*.²¹⁵ However, whilst acknowledging that, ‘in the normal course of events, the legal systems of other countries will protect children from harm’,²¹⁶ the Court also stated that ‘it had no difficulty with [the] proposition’ that the grave risk exception could be invoked to refuse a child’s return to a country possessing a ‘perfectly adequate legal system’.²¹⁷ Additionally, the Court opined that the ‘difference between the *KS v LS* and *El Sayed* approaches may be little more than semantic’.²¹⁸ Perhaps most critically, the Court drew on the High Court of Australia’s *DP/JLM v Commonwealth Central Authority* decision and held:²¹⁹

We recognise that the integrity of the Convention and its underlying policies may (and usually will) be important considerations when a discretionary defence is invoked. As well, the s 106 exceptions are defined so narrowly that there are comparatively few cases in which they apply. To that extent we agree with *KS v LS*. But there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercised involved when one or more of the exceptions is invoked, cf *DP v The Commonwealth Central Authority* (2001) 180 ALR 402. So to that extent we agree with *El Sayed*.

C. *Smith v Adam* [2007] NZFLR 447 (CA)

*Smith v Adam*²²⁰ continues the series of New Zealand cases seeking to invoke the grave risk exception on the ground that return would risk harm to the abducting mother’s health, and by extension, her ability to care for her child/children. In the context of allegations that the mother would suffer a ‘major depressive episode’ if forced to return to England, the critical issues before the Court were:

1. Whether the lower Courts²²¹ erred in interpreting s 106(1)(c) narrowly?
2. Whether any relevant ‘grave risk’ could be ameliorated?
3. Whether conditions ought to have been attached to the return order?²²²

With respect to the proper interpretation to be applied to s 106(1)(c), *Smith v Adam* builds on the *HJ v Secretary for Justice*²²³ decision in its conclusion that the approach taken in *HJ* does not differ to that of the Australian High Court in *DP/JLM*^{224, 225}. Additionally, the decision attracts significance for its statement that, between contracting states, it will usually be expected that relevant

215 *HJ v Secretary for Justice*, above n 7 at para [31].

216 *Ibid*, para [33].

217 *Ibid*, para [31].

218 *Ibid*, para [32].

219 *Ibid*.

220 *Smith v Adam* [2007] NZFLR 447 (CA) – judgment delivered 22 November 2006.

221 *DA v MS* (unreported, Family Court, Waitakere, Mather DCJ, 10 March 2006); *S v A* (unreported, High Court, Auckland, CIV-2006-404-1646, Winkelmann J, 14 July 2006).

222 *Smith v Adam*, above n 220 at para [5].

223 *HJ v Secretary for Justice*, above n 7 (CA).

224 *DP v The Commonwealth Central Authority*; *JLM v Department of Community Services* (2000) 180 ALR 402 (HCA). Note paras [41] – [45], [191] and [9].

225 *Smith v Adam*, above n 220 at paras [8] and [10]. At para [10] the Court also notes that even if there had been a difference in approach, application of *R v Chilton* [2006] 2 NZLR 341 suggests ‘no basis for any departure from the principles set out in *HJ*’.

health and welfare systems will be ‘designed to keep people well and to protect children from harm’.²²⁶

On the issue of discretion, the decision similarly attracts attention for its holding that the conclusion of the *HJ* Supreme Court majority at paragraph [87] with respect to s 106(1)(a) is ‘equally applicable to the s 106(1)(c) defence’.²²⁷

Regarding the issue of risk, the Court emphasised that, in discharging her burden of establishing ‘grave risk’, the abducting mother had to show *why* the legal, health and welfare systems of England would fail to protect her child against that risk pending the custody and access issues being decided. Drawing on *HJ*, the Court held, that in the absence of evidence to the contrary, the Judge was entitled to assume that such protections would be available.²²⁸ Furthermore, the Court concluded that it was proper to ‘require’ the abducting mother to ‘take steps to keep herself well by accepting assistance and support from those structures’.²²⁹

In terms of the appropriateness of attaching conditions to any return order, whilst the Court noted the possibility of alerting the United Kingdom welfare authorities before the mother’s arrival, it made clear that attachment of conditions in the absence of establishment of a defence was inappropriate.²³⁰

D. *Andrews v Secretary for Justice* [2007] NZFLR 891 (CA)

An extensive range of issues were advanced by the abducting mother in this appeal.²³¹ However, the decision is most notable for its holding that, in situations of ‘likely financial hardship’ in the requesting state, a Court may properly exercise its discretion under s 106(1)(c) to refuse an order for return.²³²

Whilst the *Andrews* development that ‘financial hardship’ can constitute an ‘intolerable situation’ is significant, the Court’s statement that the defence remains difficult to establish is also important to acknowledge. Indeed, in reaching its conclusion that Ms Andrews could not avail herself of the s 106(1)(c) defence, the Court was careful to emphasise that the onus remained on the applicant to satisfy the high hurdle²³³ that a ‘grave risk’ of financial hardship was a real risk in the child’s state of habitual residence.²³⁴ With respect to cases generally seeking to invoke the

226 *Smith v Adam*, above n 220 at para [7].

227 *Ibid*, para [13] citing *Secretary for Justice v HJ*, above n 7 at para [87].

228 *Smith v Adam*, above n 220 at para [20] (Emphasis added).

229 *Ibid*, paras [21] – [22].

230 *Ibid*, para [26].

231 As set out at para [12], issues raised include: failure to appoint a lawyer to represent the children; absence of a proper psychological report under s 133; High Court erring in its treatment of particular evidence; failing to consider the ‘fundamental rights’ defence under s 106(1)(e); adopting an erroneous approach to custody rights and their exercise as well as to the issues of consent and removal.

232 *Andrews v Secretary for Justice* [2007] NZFLR 891 at para [60] (CA) – judgment delivered 5 June 2007.

233 Affirming its comments in *HJ v Secretary for Justice*, above n 7 the Court of Appeal stated at para [51]:

[51] The defence is not an easy one to make out. As William Young P said, delivering the judgment of the Court in *HJ v Secretary for Justice* [2006] NZFLR 1005:

[33] The s 106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression ‘grave risk’ and in part because of judicial expectations that, in the normal course of events, the legal systems of other countries will protect children from harm.

234 *Andrews v Secretary for Justice*, above n 232 at paras [60] and [67].

defence, the Court held that objective information relating to the applicant's financial position is required.²³⁵ Furthermore, consistent with assumptions about other contracting states' legal, health and welfare systems, the Court held that, in the absence of evidence to the contrary, Courts will assume that the requesting state will provide some form of financial assistance, eg emergency/ other benefit, if necessary.²³⁶ Significantly, the Court also opined that a requesting state's actual/ probable denial of legal aid to an abducting parent does not categorically preclude an order for an abducted child's return.²³⁷

E. Butler v Secretary for Justice [2007] NZFLR 791 (CA)

The significance of *Butler v Secretary for Justice*²³⁸ lies in two key areas, specifically:

1. Whether delay itself after the commencement of a proceeding can establish an 'intolerable situation' under s 106(1)(c); and
2. Whether *COCA* requires appointment of counsel to represent the child in all cases?²³⁹

In reaching its conclusion on both issues, the Court of Appeal drew heavily on the English House of Lords decision in *Re D (A Child) (Abduction: Rights of Custody)*.²⁴⁰ Additionally, the Court acknowledged Pankhurst J's conclusion in the High Court that *A v Central Authority for New Zealand*²⁴¹ remained the 'leading case in New Zealand on s 106(1)(c)', as well as His Honour's opinion that the Court of Appeal's conclusions at paragraphs [32] and [33] in *HJ* were in a 'similar vein'.²⁴²

The Court of Appeal held that 'it is obviously conceivable that the consequences of delay might contribute to what would be an intolerable situation for a child if returned'.²⁴³ However, in rejecting the abducting mother's claim that the four year-old child's living in New Zealand for some 25 months since Hague proceedings were initiated established an 'intolerable situation', their Honours also reasoned that Courts 'should be slow' to hold that the 'ordinary consequences of inevitable delays (ie delays which are part and parcel of litigation)' establish the s 106(1)(c)(ii) defence.²⁴⁴

235 Ibid, para [67].

236 Ibid, paras [62], [63] and [68].

237 Ibid, para [64] citing *In the Marriage of CD and JC McOwan* (1993) 17 Fam LR 337 (FCA).

238 *Butler v Secretary for Justice* [2007] NZFLR 791 (CA) – judgment delivered 30 May 2007.

239 Ibid, para [3].

240 *Re D (A Child) (Abduction: Rights of Custody)* [2006] 3 WLR 989 (HL).

241 *A v Central Authority for New Zealand* [1996] 2 NZLR 517 at 523 (CA).

242 *Butler v Secretary for Justice*, above n 238 at para [22] citing paras [59] and [60] of Pankhurst J's 9 March 2007 judgment in the High Court.

243 Ibid, para [23]. Compare comments of Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)*, above n 240 at para [53] regarding delay of 3 years 10 months vis-à-vis child of 4½ years:

In this context a delay of this magnitude in securing the return of the child must be one of the factors in deciding whether the summary return, without any investigation of the facts, will place him in a situation which he should not be expected to have to tolerate.

244 *Butler v Secretary for Justice*, above n 238 at paras [1], [4], [5] and [23].

On the issue of whether Panckhurst J erred in holding that appointment of counsel for the child was unnecessary, with reference to s 6 of COCA, *Re D*²⁴⁵ and evolving Hague Convention practices, the Court acknowledged the general importance of the submission that there is now/should be, 'a principle in Hague Convention proceedings which requires the appointment of a lawyer to represent the child unless no useful purpose would be served by such an appointment.'²⁴⁶

The Court agreed with Panckhurst J that in light of *Re D*, 'existing practice as to the appointment of counsel may require re-consideration'.²⁴⁷ However, in their Honours' opinion, Panckhurst J's reference to *Re D* created difficulties vis-à-vis the appropriateness of the point as a proper ground for leave to appeal.²⁴⁸ Accordingly, the Court dismissed the application for leave to appeal on both grounds.

F. *Coates v Bowden* (2007) 26 FRNZ 210 (HC)

Concerning a situation of three notable incidents of domestic violence, *Coates v Bowden*²⁴⁹ is significant for its conclusions regarding factors relevant/irrelevant to the exercise of discretion where the 'grave risk' of 'physical or psychological harm'²⁵⁰ and 'child objects'²⁵¹ defences are found established.²⁵²

In exercising the residual discretion under s 106(1), the Court adopted the 'balancing' approach articulated by the majority at paragraphs [85] – [86] in *Secretary for Justice v HJ*.²⁵³ Regarding the relevance of the Supreme Court's 'balancing exercise' to the s 106(1)(c) defence, the Court applied *Smith v Adam* in its statement that:²⁵⁴

Where the grave risk exception is made out, it would obviously not be in the best interests of the particular child to order return. We find it difficult to envisage a situation where the competing policy factors of the Convention would, in terms of the Supreme Court test, clearly outweigh the interests of the child in such a situation.

As further support for this proposition and refusing an order for the children's return, the Court cited *Re D*, where Baroness Hale stated:²⁵⁵

245 *Re D (A Child) (Abduction: Rights of Custody)*, above n 240 inter alia at para [59]:

It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto.

246 *Butler v Secretary for Justice*, above n 238 at paras [14] – [15].

247 *Ibid*, para [18].

248 *Butler v Secretary for Justice*, above n 238 at paras [15] – [16].

249 *Coates v Bowden* (2007) 26 FRNZ 210 (HC) – judgment delivered 30 May 2007.

250 COCA, s 106(1)(c)(i) – as discussed at paras [33] – [57]. Note also paras [58] – [63] regarding unsuccessful appeal as to establishment of an 'intolerable situation' under s 106(1)(c)(ii).

251 As discussed at paras [64] – [81].

252 As detailed at paras [9] – [13], specifics of relevant incidents of domestic violence include: kicking the abducting mother while pregnant; pouring kerosene over the mother and the house where her and her children were living then threatening to kill them; and tripping one of the children and attacking the mother while she held the other in her arms. Additionally, allegations of violence towards the children and their pet dog were also raised: paras [15] – [19].

253 *Secretary for Justice v HJ*, above n 7 at paras [85] – [86], as cited in *Coates v Bowden*, above n 249 at paras [86] – [87].

254 *Smith v Adam*, above n 220 at para [14] as cited in *Coates v Bowden*, above n 249 at para [88].

255 *Re D (A Child) (Abduction: Rights of Custody)*, above n 240 at 1008, as cited in *Coates v Bowden*, *ibid*, para [89].

It is inconceivable that a Court which reached the conclusion that there was a grave risk that the child's return would expose him to physical harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.

In terms of policy considerations relevant to the Supreme Court's balancing test, the Court held that the fact that the children had been in New Zealand for two years and were now settled in their schools was important.²⁵⁶ The Court acknowledged that the abducting mother had provided the children with information which was 'highly inappropriate' and 'would have reinforced their views' of their father and their 'reluctance to return to Australia'. However, applying *Secretary for Justice v HJ*, the Court held that, in the absence of a causal connection between the mother's behaviour and establishment of the s 106(1)(c) and (d) defences, the Convention's policy objectives did not require a 'punitive approach'.²⁵⁷ Importantly, the Court also held that even where the threshold for establishment of another s 106(1) defence is not met, it is proper for evidence adduced in support of that defence to be taken into account as part of the Court's 'best interests' inquiry when exercising discretion.²⁵⁸

V. INTERNATIONAL CASE LAW

Consistent with the New Zealand situation, recent years have witnessed a dramatic increase in the number of appellate-level *Hague Convention* decisions internationally.²⁵⁹ Growing recognition of abduction's changed social context²⁶⁰ and heightened judicial sensitivity toward children and abductors' welfare upon return have likewise occasioned some important doctrinal changes within various signatories' *Hague Convention* jurisprudence. Accordingly, this section traces and teases out developments and current approaches applied in the major contracting states to which children are abducted. Noting in particular the breadth of situations alleging 'grave risk', this Part's comparative discussion focuses on similarities and differences in interpretation vis-à-vis issues raised in the six cases discussed in Part IV.

A. Canada

Perhaps reflecting Canada's considerable involvement in the Convention's drafting process and position as one of the first three ratifying states, Canadian statements of appellate authority are relatively limited and consistently evidence strict adherence to a narrow interpretation of the Convention's exceptions.²⁶¹ Likewise, in decisions specifically dealing with the exercise of discretion, a strong focus on the Convention's policy is apparent.

256 *Coates v Bowden*, above n 249 at para [94].

257 *Ibid*, paras [90] – [91] and [97].

258 *Ibid*, para [99].

259 For example, as M Weiner, 'Navigating the Road', above n 9 observes at 277, the volume of United States federal decisions now dwarfs the number of published state opinions. Indeed, between 1993-2001, the quantity of federal decisions increased by more than 300%.

260 See above, Part II (F).

261 As to the two key Supreme Court decisions largely responsible for this approach, see *W(V) v S(D)* [1996] 2 SCR 108 at 135-136 (SCC) and *Thomson v Thomson* [1994] 3 SCR 551 at paras [40] – [43] (SCC). Indeed, as M Bailey, 'The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction: Articles and Remarks on Canada's Implementation' (2000) 33 *N.Y.U. J. Int'l L. & Pol.* 17 at 34 notes, Art 13(b) is pleaded in nearly 50% of reported cases but is rarely met with success.

Thomson v Thomson remains the leading statement of authority regarding the interpretation framework applicable to Convention applications generally and the parameters of the Art 13(b) 'grave risk' exception in particular.²⁶² However, *Pollastro v Pollastro*²⁶³ and *NP v ABP*²⁶⁴ also attract attention for their impact on the stringency of the 'grave risk' requirement.

Internationally, *Pollastro* arguably marks the beginning of wider judicial recognition of the indirect and deleterious effects a mother's suffering can have on a child. *Pollastro* provides authority for the proposition that returning a child to a violent environment can place that child in an 'inherently intolerable situation', in addition to exposing the child to 'a serious risk of physical or psychological harm'.²⁶⁵ Where a child's interests are 'inextricably tied' to an abducting mother's psychological and physical security,²⁶⁶ the possibility of harm to that parent is a proper consideration in 'grave risk' determinations.²⁶⁷ However, the evidence adduced must be credible and additionally satisfy the high threshold outlined in *Thomson*.²⁶⁸

The approach of the Quebec Court of Appeal in *NP v ABP*²⁶⁹ similarly echoes elements of the minority view in *Thomson* regarding the relevance of a child's best interests.²⁷⁰ In *NP v ABP*, the Court held that the mother's refusal to return to Israel because of a real fear of the child's father who was engaged in the prostitution business was sufficient to establish an 'intolerable situation'. However, like *Pollastro*, the Court also affirmed that a narrow Art 13(b) interpretation applied and that ordinarily an abducting parent's refusal to return with a child would not support a Court's decision to refuse return.²⁷¹ Consequently, the Court's holding that in most situations conditions/undertakings sufficient to protect the child's safety can be imposed is significant in terms of the

262 *Thomson v Thomson*, above n 15. In *Thomson*, the Court held that a 'grave risk' of physical or psychological harm must also amount to an 'intolerable situation'.

263 *Pollastro v Pollastro* (1999) 171 DLR (4th) 32 (Ont. CA). Hereafter also 'Pollastro'.

264 *NP v ABP* [1999] RDF 38 (Que. CA).

265 *Pollastro v Pollastro*, above n 263 at para [33].

266 Note the potential for this formulation to give rise to a differing 'grave risk' standard depending on whether the abductor is the child's mother or father.

267 *Pollastro v Pollastro*, above n 263 at para [34]. In the New Zealand pre-COCA context, compare *Armstrong v Evans* (2000) 19 FRNZ 609 (DC) – re mother's threat of suicide, and contrast *KS v LS* [2003] NZFLR 817 (HC, Full Court) – child's needs not inextricably tied to mother and need to be with during operation. Indeed, as L'Heureux-Dubé J notes at p. 11 in 'Cherishing our Children: The Role of the Hague Convention on the Civil Aspects of Child Abduction' Conference Paper of Speaker Presentation given at 3rd World Conference on Family Law & Rights of Children and Youth, Bath, England, 20-22nd September 2001, <<http://www.lawrights.asn.au/docs/dube2001.pdf>> viewed 20 July 2007, the *Pollastro* decision, 'demonstrates the tremendous responsibility placed on the shoulders of Judges implementing the Convention, because once the child is returned, the Court no longer has jurisdiction to protect his or her interests or the inextricably linked interests of an abused mother.'

268 *Pollastro v Pollastro*, above n 263 at paras [29] – [32]. Whilst much evidence in *Pollastro* was disputed, the Court held that there was compelling evidence supporting the mother's allegations of extreme violence, death threats and parental irresponsibility by the father.

269 *NP v ABP*, above n 264.

270 *Thomson v Thomson*, above n 15 at 303-305 per L'Heureux-Dubé J – see also Part II(C) discussion above. Indeed, in *Pollastro*, above n 263 at para [28], the Court held that the 'grave risk' assessment was difficult, if not impossible, 'without reference to the interests and circumstances of the particular child.'

271 Compare comments Court in *C v C* [1989] 1 WLR 654 at 661 (CA) per Butler-Sloss LJ.

particular facts of *NP v ABP* being so exceptional that any attempt to impose conditions would be ineffective.²⁷²

*Finizio v Finizio-Scoppio*²⁷³ and *Jabbaz v Mouammar*²⁷⁴ are also important in terms of distilling the current Canadian position. In *Finizio*, the Court affirmed that the exceptional situations in *Pollastro* and *NP v ABP* did not represent a sea change in the law vis-à-vis Art 13(b)'s stringency. Significantly with respect to *HJ*,²⁷⁵ in approving the English Court of Appeal decision in *C v C*,²⁷⁶ the *Finizio* Court held that, in the absence of compelling evidence, Courts should presume that 'the Courts of another contracting state are equipped to make, and will make, suitable arrangements for the child's welfare'.²⁷⁷ Regarding the exercise of discretion, the *Finizio* Court held that undertakings are an 'important factor' and that Counsel ought to 'deal fully' with the issue of how a child is to be returned.²⁷⁸

In the context of uncertainty over an abducting mother's immigration status, *Jabbaz* likewise emphasises Canada's reluctance to engage in any broadening of the 'grave risk' exception.²⁷⁹ Indeed, in holding that some instability in a child's residence is not intolerable, the Court reasoned that, within Art 13(b), the term 'intolerable', 'speaks to an extreme situation, a situation that is unbearable; a situation that is too severe to be endured'.²⁸⁰ Subsequently, the Court approved the Court's observations in *F(R) v G(M)*²⁸¹ and held that, 'Courts should be very wary of grafting new

272 Indeed, in concluding that the child's return without his mother would be 'wholly inappropriate', the Superior Court (with which the Court of Appeal agreed) stated:

This woman was taken to Israel on false pretences, sold to the Russian Mafia, and resold to the Applicant who forced her to prostitute herself through his Unique Escort Agency. She was locked in, beaten by the Applicant, and raped. She was threatened on multiple occasions in no uncertain terms. Obviously, the police authorities of Israel are unaware, so it seems, of the real activities of the Applicant and of his links with the Russian Mafia. Moreover, the Applicant declares that he has 'friends in the police'. He 'gets his information' if needed.

273 *Finizio v Finizio-Scoppio* (1999) 46 O.R. (3d) 226 (Ont. CA) – judgment delivered approximately 5 months after differently constituted Court's decision in *Pollastro*, above n 263.

274 *Jabbaz v Mouammar* (2003) 226 D.L.R. (4th) 494 (Ont. CA).

275 *HJ v Secretary for Justice*, above n 7 at para [32]; *Secretary for Justice v HJ*, above n 7.

276 *C v C* [1989] 1 W.L.R. 654 at 664 (CA) per Lord Donaldson of Lynton MR.

277 *Finizio v Finizio-Scoppio*, above n 273 at paras [34] – [35]. Compare in the New Zealand pre-COCA context *A v Central Authority for New Zealand*, above n 8 at 522-523 and *S v S*, n 8 at 630-632.

278 *Finizio v Finizio-Scoppio*, above n 273 at paras [36] – [39] citing La Forest J in *Thomson v Thomson*, above n 15 at 599:

Through the use of undertakings, the requirement in Art 12 of the Convention that 'the authority concerned shall order the return of the child forthwith' can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the Court of the child's habitual residence, and any short-term harm to the child is ameliorated.

279 Compare also *Garcia v Canada* [2007] FCA 75 (Federal Court, Montreal) at paras [22] – [24] holding that a return order under the Hague Convention does not override a deportation order under the *Canadian Immigration and Refugee Protection Act* 2001, s 50(a).

280 *Jabbaz v Mouammar*, above n 274 at para [23].

281 *F(R) v G(M)* (2002) 116 A.C.W.S. (3d) 550 at para [30] (Que. CA):

The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also, in my view, a fragile tool and any interpretation of short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

public policy exceptions onto the Convention in the face of the very clear public policy represented in the Convention itself'.²⁸²

Accordingly, following the high threshold set by *Thomson*,²⁸³ Canadian Courts appear willing to find 'grave risk' of psychological harm/an otherwise 'intolerable situation' established only in situations where the left-behind parent is effectively beyond the control of the Police and other law-enforcement agencies.²⁸⁴ However, as Weiner notes, the *Pollastro* Court's failure to identify the legal protections available to Ms Pollastro upon her return to California is 'truly unique'.²⁸⁵

On the issue of whether a child's medical condition/special needs can properly establish a 'grave risk',²⁸⁶ the Manitoba Court of Appeal's decision in *Chalkley v Chalkley*²⁸⁷ is notable. In *Chalkley*, substantial medical evidence was adduced regarding the 14 year-old girl's spina bifida and Arnold-Chiari malformation type II conditions. The Court accepted evidence that in times of severe emotional stress the child's laryngeal paralysis became more apparent – diminishing her ability to speak. However, citing *C v C*,²⁸⁸ the Court held that the temporary nature of any worsening of her condition meant that, on its own, the child's spina bifida fell short of satisfying the high 'grave risk' threshold.²⁸⁹ By contrast, regarding the child's Chiari II malformation brainstem symptoms, the Court held that the possibility of sudden death from severe distress properly supported a finding of 'grave risk' when taken together with the child's fear of abandonment, need for emotional support and strong objection (involving a threat of suicide) to return.²⁹⁰

With respect to *COCA*'s introduction and the New Zealand Courts' reasoning in *White v Northumberland*²⁹¹ and *HJ*²⁹² vis-à-vis the relevance of welfare, Quebec's implementation and interpretation of the Convention is particularly interesting. Indeed, in contrast to most other terri-

282 *Jabbaz v Mouammar*, above n 274 at para [39].

283 *Thomson v Thomson*, above n 15.

284 As ostensibly was the case in both *Pollastro v Pollastro*, above n 263 and *NP v ABP*, above n 264.

285 M Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593 at 653. Note that both *NP v ABP*, *ibid*, and *Pollastro*, *ibid*, were decided prior to *DP/JLM*, above n 9, but do not appear to have influenced the High Court of Australia's reasoning in any significant manner. For examples of authority explicitly noting the availability of legal protections in the child's state of habitual residence, see *In the Marriage of Murray and Tam* (1993) 16 Fam 982 – noting availability protection orders; *Walsh v Walsh* 221 F. 3d 204 (1st Circ, 2000) – examining whether legal mechanisms 'practically ineffective'; *A v Central Authority for New Zealand*, above n 8. Compare *DR v AAK* [2006] ABQB 286 at para [8] (QB) refusing return on grounds that:

[A]ll of the participants in the French administration of justice ... were so blinded by the history of the domestic dispute between the mother and father so as to fail to take precautions in the child's interest while investigating the allegations in a neutral fashion. Their collective failure to introduce sufficient protections for the child, until that investigation happened and was concluded, gave the mother no choice but to take steps invoking Art 13(b) to protect the child.

286 In the post-*COCA* New Zealand context compare *Smith v Adam* [2007] NZFLR 447 (CA).

287 *Chalkley v Chalkley* (1995) 10 R.F.L. (4th) 442 (Man. CA); leave to appeal refused: (1995) 11 R.F.L. (4th) 376n (SCC); trial decision varied on appeal: (1994) 96 Man. R. (2d) 56 (QB).

288 *C v C*, above n 276 per Lord Donaldson of Lynton MR.

289 *Chalkley v Chalkley*, above n 287.

290 *Ibid*.

291 *White v Northumberland*, above n 125. See discussion Part IV(A) above.

292 *Secretary for Justice v HJ*, above n 7.

tories and provinces, Quebec's implementing legislation adopts the Convention's principles rather than directly incorporating its text.²⁹³

In *C[M.L.L.] v R[J.L.R.]*,²⁹⁴ the Quebec Court of Appeal expressly considered the extent to which Quebec's implementation regime required application of Art 33 of the Quebec Civil Code – essentially stating the paramountcy principle.²⁹⁵ The minority opined that Art 33 did apply to Convention applications. However, applying *Thomson*,²⁹⁶ the majority affirmed that the position under Quebec legislation is consistent with that applied elsewhere in Canada, ie a Convention application does not engage the best interests of the child test; relevant presumptive interests are those set out in the Convention's preamble. Furthermore, when exercising discretion under the Art 12/'settled' exception, it is the interests of the child and not the conduct of the abducting parent which attract priority in any necessary balancing of these factors against the Convention's policy/objectives.²⁹⁷

Regarding the general exercise of discretion under the Convention, the Nova Scotia Court of Appeal's decision in *Aulwes v Mai*²⁹⁸ is important. Indeed, like the majority in *HJ*,²⁹⁹ *Aulwes v Mai* emphasises that the exercise of discretion requires balancing the relevant child's interests against the Convention's policy.³⁰⁰ Furthermore, adopting the Scottish Court's formulation in *Soucie v Soucie*, the Court makes clear that welfare is determinative only to the extent that the policy favouring entrusting a child's return to his/her state of habitual residence is 'no longer strong'³⁰¹:

[T]he key question is whether '... the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place.'³⁰²

293 Whilst New Zealand does not simply implement the Convention's principles, COCA's method of implementation – see Part III above, is likewise distinctive in terms of the interplay of provisions consequently engendered.

294 *C[M.L.L.] v R[J.L.R.]* [1997] R.D.F. 754 (Que. CA).

295 Article 33 of the Civil Code of Quebec (1991) provides that 'every decision concerning a child shall be taken in light of the child's interests and the respect of his rights'.

296 *Thomson v Thomson*, above n 15.

297 In *C[M.L.L.] v R[J.L.R.]*, above n 294, the Court emphasised that the abducting father's conduct in wrongfully retaining and concealing his son's whereabouts from his mother for some 5 years was both 'illegal and reprehensible'. However, finding that the child was settled in Canada and objected to a return to Spain, the Court reversed the lower Court's decision and refused the child's return. Compare comments NZ Courts in *Secretary for Justice v HJ*, above n 7 and *White v Northumberland*, above n 125.

298 *Aulwes v Mai* (2002) 22 D.L.R. (4th) 577 (NSCA).

299 *Secretary for Justice v HJ*, above n 7.

300 At para [68], the Court opines that:

[R]elevant objectives include first, general deterrence of international child abduction by parents; second, prompt return of the child facilitated by precluding a full inquiry into the 'best interest' of the child in the state to which the abductor has fled with the child; third, restoration of the status quo; and fourth, entrusting to the courts of the place of habitual residence the ultimate determination of what the best interests of the child require.

301 *Aulwes v Mai*, above n 298 at para [78].

302 *Ibid*, para [62] citing *Soucie v Soucie* [1995] S.L.T. 414 at 417 (Extra Division).

Additionally, where a child continues to have links with his/her country of habitual residence, an order refusing return should not lightly be made.³⁰³

Regarding the discretionary relevance of the need for an abductor to present with ‘clean hands’ – a proposition rejected by all members of the Supreme Court in *HJ* except McGrath J, *Aulwes v Mai* also attracts significance. In *Aulwes v Mai* the Court suggests that where a parent uses abduction to deliberately thwart otherwise effective judicial processes, rather than, for example, to escape domestic violence/other safety threats after available legislative mechanisms have been exhausted, such conduct cannot escape unchecked if a Court wishes to make clear its position that the abducted-to country is not a ‘safe haven’ for abductors.³⁰⁴ Indeed, as the order for return of the child in *Aulwes v Mai* after some 7 years demonstrates, at least in Canada, deception and a lack of impulsive flight necessitate strong emphasis on the Convention’s deterrence objective when exercising discretion.³⁰⁵

B. United States

Like Canada, United States’ federal appellate-level Convention authority prior to 1999 and *Friedrich v Friedrich*³⁰⁶ in particular is limited. Nevertheless, within early decisions regarding ‘grave risk’ and the general exercise of discretion, strict adherence to a narrow approach and a commitment to uniform interpretation are discernible.³⁰⁷ Indeed, the frequently cited *Friedrich* decision identifies just two situations where the ‘grave risk’ exception ought to succeed.³⁰⁸ Furthermore, where Courts initially found Art 13(b) established, an order refusing the child’s return tradition-

303 Ibid, paras [78] – [81]. At para [79], the Court stressed that whilst the child was established in her environment in terms of school, friends and activities, given that the child’s extended family remained in Iowa, it could not ignore the ‘justice and logic’ of entrusting the child’s welfare/best interests to the Iowa Courts. That allegations of abuse needed to be judicially addressed and therapeutically resolved before there could be any ‘realistic prospect’ of Mr Aulwes having any meaningful relationship with his daughter also weighed heavily in the Court’s exercise of discretion to order return notwithstanding the long passage of time – equating to some 7 years.

304 *Aulwes v Mai*, above n 298 at paras [77] and [80].

305 Ibid, paras [77] and [80] – [81].

306 *Friedrich v Friedrich* 78 F.3d 1060 (6th Cir. 1996). Hereafter also ‘Friedrich’.

307 See for example: *Ryder v Ryder* 49 F. 3d 369 (8th Cir. 1995) – holding that specific evidence of psychological harm resulting from primary carer-child separation is required; *Nunez-Escudero v Tice Menley* 58 F. 3d 374 (8th Cir. 1995) – citing Canadian Supreme Court decision in *Thomson v Thomson*, above n 15 at 286 held child’s witnessing of domestic violence held not to constitute ‘grave risk’; *Tahan v Duquette* 613 A. 2d 486 at 489 (N.J. Super. Ct. App. Div. 1992) – holding that whilst ‘the scope of trial Court’s inquiry under the [Art 13(b)] exception is extremely narrow’, the requisite inquiry involves ‘more than a cursory evaluation of the home jurisdiction’s civil stability and the availability there of a tribunal to hear the custody complaint’.

308 *Friedrich v Friedrich*, above n 95 at 1069 the Court stated:

First, there is a grave risk of harm when return of the child puts the child in ‘imminent danger’ prior to the resolution of the custody dispute, eg returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse of neglect or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or is unwilling to give the child adequate protection.

For similar sentiments in the pre-COCA New Zealand context, compare *A v Central Authority for New Zealand*, above n 8.

ally followed unquestioned – Courts opining that the potential harm to the child outweighed any need to extensively consider the residual exercise of discretion.³⁰⁹

*Blondin v Dubois*³¹⁰ marks an important change in judicial attitudes regarding application of the ‘grave risk’ exception and factors relevant to the exercise of discretion.

In *Blondin IV*, the Second Circuit upheld the District Court’s finding that the children would be exposed to a ‘grave risk’ of psychological harm if returned to France and the custody of their allegedly abusive father.³¹¹ However, in contrast to all previous United States’ authority,³¹² the Second Circuit imposed a further requirement that Courts must ‘examine the full range of options that might make possible the safe return of a child to the home country’ before denying repatriation under Art 13(b).³¹³ The Second Circuit accepted that ‘France could protect the children from further abuse’.³¹⁴ Nevertheless, relying heavily on expert evidence reporting that the children were likely to suffer a recurrence of PTSD if returned, the Court held that France could not protect the children from ‘the trauma of being separated from their home and family and returned to a place where they were seriously abused’.³¹⁵

On the issue of Art 13(b)’s scope, *Blondin IV* also attracts significance for its holding that a cumulative assessment of individually non-determinative factors can properly support a finding of ‘grave risk’.³¹⁶ In particular, a child’s settlement or objection to return which falls outside the am-

309 See for example *Steffen F. v Severina P.* 966 F. Supp. 922 at 928 (D. Ariz. 1997) – only decision finding grave risk on Friedrich standard; *Rodriguez v Rodriguez* 33 F. Supp. 2d 456 at 462 (D. Md. 1999); *Blondin v Dubois* 19 F. Supp. 2d 123 at 127 (S.D.N.Y. 1998).

310 *Blondin v Dubois* 238 F. 3d 153 (2nd Cir. 2001). Hereafter ‘*Blondin IV*’. The case was initially heard in 1998: *Blondin v Dubois* 19 F. Supp. 2d 123 (SDNY, 1998) (‘*Blondin I*’) and subsequently *Blondin v Dubois* 189 F. 3d 240 (2nd Cir. 1999) (‘*Blondin II*’); and *Blondin v Dubois* 78 F. Supp. 2d 283 (SDNY, 2000) (‘*Blondin III*’).

311 It is perhaps significant that Mr Blondin made no evidential attempt to contradict the conclusions of the expert procured by Ms Dubois regarding the likely psychological impact a return to France would have on the children: *Blondin IV*, *ibid.*, 160. Thus, the PTSD conclusions of the Ms Dubois’ expert stood uncontroverted.

312 L Silberman, above n 9.

313 *Blondin IV* at 163. This ‘further analysis’ requirement effectively functions in the same way as explicit consideration of how the residual discretion ought to be exercised commonplace in other jurisdictions. Arguably a key difference between approaches in the United States and other jurisdictions is at what point and to what extent Convention policy considerations and a particular child’s welfare are balanced. Significantly, in its discussion of the ‘further analysis’ requirement, the *Blondin II* Court, above n 310 at 242 emphasised that ‘comity is at the heart of the [Hague] Convention’ and noted the importance of trust and respectful reciprocity:

the careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations – whose Courts, under the legal regime created by this treaty, are expected to offer reciprocal protection.

314 *Blondin III*, above n 310 at 298.

315 *Blondin III*, *ibid.*

316 For additional authority holding that a cumulative assessment of intolerability is permissible, see generally *Walsh v Walsh* 221 F. 3d 204 (1st Cir. 2000); *Danaipour v McLarey* 286 F. 3d 1 (1st Cir. 2002); *Didur v Viger* 392 F. Supp. 2d 1268 (D. Kan. 2005). Compare also comments Hale LJ (dissenting) in *TB v JB* [2001] 2 FLR 515 at para [57] (CA) where Her Ladyship adopts a ‘totality of the situation’ approach toward the alleged ‘serious psychological and economic pressures’ in finding an Art 13(b) defence established.

bit of Arts 12 or 13(2), are permissible 'grave risk' considerations.³¹⁷ Hence, through its acceptance of additional circumstances which can properly constitute 'grave risk' and its requirement that Courts explore 'ameliorative measures'³¹⁸/undertakings³¹⁹ which might reduce the relevant risk to something less than 'grave', *Blondin IV*³²⁰ appears to both broaden and narrow Art 13(b)'s application, at least vis-à-vis the *Friedrich*³²¹ standard.

Whilst some Courts and commentators have welcomed *Blondin IV* as a necessary step in curbing abuse of Art 13(b),³²² decisions such as *Danaipour v McLarey*³²³ and *Van De Sande*³²⁴ directly challenge the appropriateness of undertakings in the exercise of discretion as expounded in *Blondin IV*. Indeed, in *Van De Sande*, the Seventh Circuit cautioned against 'blind reliance' on undertakings in Art 13(b) cases, holding that a Court must 'satisfy itself' that children 'will in fact, and not just in legal theory', be protected upon return.³²⁵ Likewise, in *Danaipour*, the First Circuit opined that where 'grave risk' is found established, the potential for a Requested Court to become embroiled in the merits of underlying custody issues weighs against the entering of extensive undertakings as an alternative to denying a return request.³²⁶

Since 2005, numerous decisions have reiterated the need for uniformity and that a narrow/purposeful approach to interpretation continues to prevail in the United States.³²⁷ Significantly with respect to *Andrews v Secretary for Justice*,³²⁸ United States Courts have affirmed that whilst the

317 *Blondin IV*, above n 310 at 163-164 (settlement); 166-168 (child's objection). In *Blondin IV*, the Court specifically noted that it 'did not rule out the possibility' of a child being 'so deeply rooted' in the Requested State that a 'grave risk' of psychological harm was established. Regarding a child's objection, the Court held that consideration as part of a broader 'grave risk' analysis provided an appropriate means for giving consideration to a younger child's testimony. Given the United States' general unwillingness to uphold the Art 13(2) exception/consider the view of children aged under 14-years – a position arguably reflecting legislative statements giving few rights to children under 14-years in custody matters and the United States' failure to ratify UNCROC, *Blondin IV*'s acceptance of a child's objection as part of a broader Art 13(b) analysis is particularly interesting from at least a children's rights perspective. For similar statements of authority see also *Olguin v del Carmen Cruz Santana* (2005) U.S. Dist. LEXIS 408 (E.D.N.Y. 2005); *Elyashiv v Elyashiv* 353 F. Supp. 394 (E.D.N.Y. 2005).

318 *Blondin II*, above n 310 at 248.

319 As the Court explained in *Danaipour v McLarey* 286 F. 3d 1 at 21 (1st Cir. 2002):

The concept of 'undertakings' is based neither in the Convention nor in the implementing legislation of any nation. ... Rather, it is a judicial construct, developed in the context of British family law.

320 *Blondin IV*, above n 310.

321 *Friedrich v Friedrich*, above n 95.

322 L Silberman, above n 9.

323 *Danaipour v McLarey* 286 F. 3d 1 at 21 (1st Cir. 2002) upheld on appeal: *Danaipour v McLarey* 386 F. 3d 289 (1st Cir. 2004).

324 *Van De Sande v Van De Sande* 431 F. 3d 567 (5th Cir. 2005).

325 *Ibid*, 571-572. Note, however, Court's comments that a Court is not required to make findings regarding the institutional capacity of the Requesting State in all cases. Nevertheless, if 'handing over custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some non-negligible probability injure the child, the child should not be handed over, however severely the law of the parent's country might punish such behaviour': at 571.

326 It is, however, perhaps important to note that in both *Van De Sande*, *ibid*, and *Danaipour v McLarey*, above n 319, physical harm to the children was also alleged.

327 See for example *Gaudin v Remis* 415 F. 3d 1028 (9th Cir. 2005); *In re Adan* 437 F. 3d 381 (3rd Cir. 2005). Note also *Air France v Saks* 470 U.S. 392 at 404 (1985): 'in interpreting the language of treaties we find the opinions of our sister signatories to be entitled to considerable weight'.

328 *Andrews v Secretary for Justice* [2007] NZFLR 891 (CA).

‘intolerable situation’ portion of the ‘grave risk’ exception encompasses an ‘evaluation of the people and circumstances awaiting the child in the country of their habitual residence’,³²⁹ financial hardship falls short of the severe harm required to trigger Art 13(b).³³⁰ Likewise, a comparison of available medical/special needs facilities will not lightly be entered into.³³¹

Regarding *HJ*³³² and the exercise of discretion under the ‘settled’ exception where a child’s concealment is at issue, the recent *Matovski v Matovski*³³³ decision is interesting. In particular, *Matovski* notes the absence of United States consensus regarding the appropriateness of equitable tolling.³³⁴ Through reasoning that the one-year Art 12 period is not a limitation period and that any acceptance of tolling effectively renders the Applicant parent’s interests superior to those of the child,³³⁵ *Matovski* concludes that application of equitable tolling to Art 12 is ‘inconsistent with the Convention’s careful balancing of interests’.³³⁶ Subsequently, like *HJ*³³⁷ and the English Court of Appeal in *Cannon v Cannon*,³³⁸ *Matovski* emphasises that the discretionary nature of Art 12 means that tolling is unnecessary to prevent abductors from concealing the whereabouts of a child.³³⁹ Nevertheless, where concealment/deceit is at issue, the Applicant parent’s interests/abductor’s conduct are relevant considerations in the exercise of discretion.³⁴⁰

329 *Nunez-Escudero v Tice Menley*, above n 307 at 377; *Tahan v Duquette* 259 N.J. Super 328 (NJ Superior Court).

330 *Baxter v Baxter* 324 F. Supp. 2d 536 (3rd Cir. 2005). Indeed, the United States Department of State expresses similar sentiments in its guidelines regarding Art 13(b), stating at Hague Convention, 51 Fed. Reg. 10, 510 (March 1986) that:

A review of deliberations on the Convention reveals that ‘intolerable situation’ was not intended to encompass return to a home country where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an ‘intolerable situation’ is one in which a custodial parent sexually abuses a child.

331 *Kufner v Kufner* 480 F. Supp 2d 491 (D.R.I. 2007) – availability treatment facilities for sleep apnea in Germany meant no ‘grave risk’; *Olguin v del Carmen Cruz Santana* (2005) U.S. Dist. LEXIS 408 (E.D.N.Y. 2005) – availability of counselling services. The exception appears to be situations where a child’s treatment outcomes depend on already-established therapist relationships, eg in cases where sexual abuse is alleged. However, such cases are more frequently (and properly) argued under ‘psychological harm’ than an ‘intolerable situation’. Compare comments *Smith v Adam* [2007] NZFLR 447 (CA) in Part IV(C) above.

332 *Secretary for Justice v HJ*, above n 7.

333 *Matovski v Matovski* (2007) U.S. Dist. LEXIS 65519 (S.D.N.Y. 2007).

334 Compare and contrast *Furnes v Reeves* 362 F. 3d 702 at 723 (11th Cir. 2004); *Lops v Lops* 140 F. 3d 927 (11th Cir. 1998); *Mendez Lynch v Mendez Lynch* 220 F. Supp. 2d 1347 at 1362-63 (M.D. Fla. 2002); *Anderson v Acree* 250 F. Supp. 2d 872 at 875 (S.D. Ohio, 2002).

335 On this point, compare comments of English Court of Appeal in *In re L (A Child) (Contact: Domestic Violence)* [2001] 2 WLR 339 at 352D-E; 363G-H and 376C-D (CA) – holding that ‘where there is a serious conflict between the interests of the child and one of its parents which could only be resolved to the disadvantage of one of them, the interests of the child had to prevail under article 8(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms’.

336 *Matovski v Matovski*, above n 333 at paras [19] – [21].

337 *Secretary for Justice v HJ*, above n 7.

338 *Cannon v Cannon* [2005] 1 WLR 32 (CA) – rejecting application of equitable tolling in principle. Indeed, as Thorpe LJ stated at para [51], a tolling rule is ‘too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome’.

339 *Matovski v Matovski*, above n 333 at paras [18] and [21].

340 *Ibid*, para [21].

C. United Kingdom

Bruch³⁴¹ describes the English Courts as ‘leaders in providing a narrow (perhaps grudging) interpretation of Article 13(b)’. Similarly, Professor Lowe³⁴² remarks that, within the United Kingdom, ‘it is hard to establish any of the exceptions provided for by Articles 12 and 13 – a fact that permits harsh results in [some] cases’. Certainly, since the early seminal decisions of *Re A (A Minor) (Abduction)*³⁴³ and *C v C*,³⁴⁴ the English Courts’ enduring commitment to a restrictive interpretation of the Convention’s exceptions and purposive approach towards the exercise of discretion have been well emphasised in key decisions such as *Re F*,³⁴⁵ *TB v JB*³⁴⁶ and *Re S*.³⁴⁷

With respect to international ‘grave risk’ developments, *TB v JB*³⁴⁸ attracts particular significance for its acknowledgment of the changed profile of abductors since the Convention’s drafting, and also for its statement that Courts internationally are ‘now more conscious of the effects [of violence], not only on the immediate victims but also on the children who witness it’.³⁴⁹ Critically, however, the majority’s assumption regarding the existence of legal protections in a Requesting State and its requirement that the abducting parent ‘take all reasonable steps’/‘make all appropri-

341 C Bruch, ‘The Unmet Needs of Domestic Violence Victims and their Children in Hague Abduction Convention Cases’ (2004) 38 *Family Law Quarterly* 529 at 533.

342 N Lowe, ‘The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint’ (2000) 33 *N.Y.U.J. Int’l L. & Pol.* 179 at 189.

343 *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 122E per Lord Donaldson MR.

344 *C v C (minor: abduction: rights of custody abroad)* [1989] 1 WLR 654 (CA). Note that the *C v C* approach has, to some extent, been refined by *In re S* [2002] 1 WLR 3355 (CA) and the now frequently-cited *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* 2 FLR 478 (CA) decision, the *Re C* Court stating at 477-478:

In testing the validity of an Art 13(b) defence, trial judges should usefully ask themselves what were the intolerable features of the child’s family life immediately prior to the wrongful abduction? If the answer is scant or non-existent, then the circumstances in which an Art 13(b) defence would be upheld are difficult to hypothesise. In my opinion Art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother’s motivation from flight is to remove the child from a family situation that is damaging to the child.

345 *Re F (minor: abduction: rights of custody abroad)* [1995] 3 All ER 641 (CA). Importantly, *Re F* is the first English decision finding the ‘grave risk’ exception established – the Court holding the child’s ‘extreme’ behavioural reactions to the prospect of return justified an order refusing return on grounds of intolerability. Nevertheless, Sir Christopher Slade stated at 653:

I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the court’s discretion under article 13(b) are satisfied. ... They are in my view quite right to be cautious and apply a stringent test. The invocation of article 13(b), with scant justification, is all too likely to be the last resort of parents who wrongfully remove their child to another jurisdiction.

346 *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 (CA). Hereafter ‘*TB v JB*’. Indeed, at para [40], Hale LJ (dissenting, but with whom the majority agreed on this point) stated that ‘Courts in this country have always adopted a strict view of Art 13(b)’.

347 *In re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355 (CA). Hereafter ‘*Re S*’.

348 In *TB v JB*, above n 99, the abducting mother fled New Zealand to escape her second husband who she alleged had been physically and sexually violent. Analogous with the Australian Court in *In the Marriage of Murray and Tam v Director Family Services (ACT) (Intervener)* (1993) 16 Fam LR 982 (FCA), the majority held that it must assume, until the contrary was proved, that there were legal protections available in New Zealand to protect the mother from future violence. However, consistent with the United States’ *Blondin IV*, above n 310 decision, Hale LJ (dissenting) opined that even if a protection order was readily available, it ‘would not solve all of the [mother and children’s] problems’.

349 *TB v JB*, above n 99 at paras [43] – [44] per Hale LJ and para [105] per Arden LJ.

ate use' of available Court orders to achieve protection for themselves and their child,³⁵⁰ leaves very little room for any factual assessment of a Requesting State's 'inability' or 'unwillingness'³⁵¹ to actually protect against potential harm.³⁵² Nevertheless, regarding the availability of medical services, whilst not explored further in the decision, *TB v JB* arguably leaves open the issue of whether unavailability of 'appropriate' services can, in law, constitute 'grave risk'.³⁵³

On the issue of discretion, *TB v JB* 'assum[es] without deciding', that the factors first outlined by Waite J in *W v W (Child Abduction: Acquiescence)*³⁵⁴ apply equally in Arts 13(b) and 13(2) cases. However, *TB v JB* also goes further in its suggestion that, with respect to the 'child objects' exception, in cases involving primary carer abductions, the policy of the Convention 'weighs rather less heavily when the children wish to remain with their primary carer'.³⁵⁵ Additionally, consistent with Canadian authority,³⁵⁶ *TB v JB* makes clear that a child's continuing links with their habitual residence is an important factor that will tend to outweigh any adverse return reactions in a primary carer abductor, eg worsening of depression/possible threat of suicide, in all but the most extreme cases.³⁵⁷

In light of the New Zealand Court of Appeal's articulated post-COCA acceptance of the 'grave risk' reasoning applied in the *DP/JLM*³⁵⁸ and *El Sayed*³⁵⁹ cases,³⁶⁰ *Re S*³⁶¹ is also important. In *Re S*, the Court identified three aspects of Art 13(b) as requiring consideration, specifically:

350 *Ibid*, paras [97] – [101].

351 *Friedrich v Friedrich*, above n 95.

352 See generally, M Weiner, above n 9. Compare also similar statements of Court in *Re H (Abduction: Grave Risk)* [2003] 2 FLR 141 at paras [32] – [37] (CA) – holding that English Courts are neither 'entitled to assume a lack of will [by a Requesting State] to protect children' nor that a left-behind parent is 'an uncontrollable risk' that the Requesting States' authorities would be 'unable to manage'.

353 *TB v JB*, above n 99 at para [101]:

As regards therapeutic help (counselling) for herself and her children, the mother did not seek to suggest that appropriate assistance of this kind is not available in New Zealand.

Compare comments Australian High Court in *DP/JLM*, above n 9; United States' Courts in *Blondin IV*, above n 310 and *Olguin v del Carmen Cruz Santana*, above n 331; and New Zealand High Court pre-COCA in *KS v LS*, above n 8 and Court of Appeal post-COCA in *Smith v Adam*, above n 220.

354 *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211. Note that these same factors were later adopted by Waite LJ in the Court of Appeal in *H v H (Abduction: Acquiescence)* [1996] 2 FLR 570 (CA) at 574. Notably, *H v H* received brief acknowledgment by the majority of the Supreme Court in *Secretary for Justice v HJ*, above n 7 at para [83].

355 *TB v JB*, above n 99 at paras [55] – [56] per Hale LJ and paras [106] – [107] per Arden LJ. Conversely, at para [56], Hale LJ opines that Convention policy:

weighs particularly heavily in those cases where children come to visit a parent living here and wish to remain: unless their objections are very cogent indeed, they should return to their primary carer for the dispute about a change in primary care to be settled in their home country.

356 See Part V(A) above and note comments of Court in *Aulwes v Mai*, above n 298 and *Thomson v Thomson*, above n 15 in particular.

357 *TB v JB*, above n 99 at paras [106] – [107] per Arden LJ.

358 *DP/JLM*, above n 9.

359 *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 (HC, Full Court).

360 See *HJ v Secretary for Justice*, above n 7; *Smith v Adam*, above n 220.

361 *Re S*, above n 347.

1. Is the case advanced by the mother capable in law of amounting to an Art 13(b) defence?³⁶²
2. Is there some linkage between the elements of Art 13(b)?³⁶³
3. Are the defences to be narrowly circumscribed?³⁶⁴

Regarding the appropriateness of a 'narrow'/restrictive approach to Art 13(b)'s exceptions, the Court noted that time had not permitted full argument on the point, but stated that its 'tentative view' was that it 'was not confident that this Court would take the same view as the majority in the High Court of Australia'.³⁶⁵ As justification for this proposition, the Court subsequently reasoned:³⁶⁶

It seems to us to follow that since the court requires compelling and convincing evidence, then the court is imposing a strict test and, by being stringent, the court is drawing tight conditions for return. ... even though the return of the child may seem contrary to her welfare, the Court must steel itself against too freely allowing this exceptional defence and the defendant must be put to strict proof.

As a further statement of authority on the general exercise of discretion under the Convention, the decision in *Re D (Abduction: Discretionary Return)*³⁶⁷ is interesting in terms of its suggestion that various factors may weigh more/less heavily in the discretionary exercise depending on which exception succeeds. Specifically, *Re D* suggests that where the 'child objects' or 'grave risk' exceptions are found established, 'it is more likely that those same grave impediments to a return will dictate the result of the discretionary exercise which follows'. Conversely, where the exception established is consent or acquiescence, the 'spirit of the Convention', ie that abducted children should be returned to their state of habitual residence, whilst always important in the discretionary exercise, is 'a less potent factor in favour of return than in other cases under Art 13'. Although the Court's perception of welfare is important in all cases, welfare is never the paramount consideration.³⁶⁸

Whilst *Re D* makes no specific comment on the exercise of discretion under the 'settled' exception, *Cannon v Cannon* and the very recent House of Lords' decision in *Re M and another (children)*³⁶⁹ 'definitively' settle the 'issues arising under Art 12(2)' and the proper approach to

362 The Court held that the particular facts pleaded by the mother regarding the child's return to Israel and her own psychological problems (including recognised psychiatric conditions of moderate-severe panic disorder and agoraphobia), may, in some situations, satisfy the strict Art 13(b) threshold of grave harm or intolerability. However, on *Re S*'s particular facts, the Court held that the 'very real and worrying problems' likely to confront the mother and daughter in Israel did not produce a situation which could properly be said to be 'intolerable': 'The word 'intolerable' is so strong that by its very meaning and connotation it sets the hurdle high': para [92].

363 Following a review of English and international authority, on this point, the *Re S* Court concluded at para [41] that there was 'considerable international support for the view that there is a link between the limbs of Art 13(b)'. Accordingly, given that Australia (*Gsponer v Johnson* (1988) 12 Fam LR 753 (FCA, Full Court)) and New Zealand (*Damiano v Damiano* [1993] NZFLR 548 (FC)) have elected to apply Art 13(b) as disjunctive exceptions, it is questioned whether this factor alone ought to impact upon England's ability to follow the *DP/JLM*, above n 9 decision, even if not specific to an interpretation under implementing Regulations.

364 *Re S*, above n 347 at para [29].

365 *Ibid*, para [45].

366 *Ibid*, paras [45] and [49].

367 *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 (FD).

368 *Ibid*.

369 *Re M and another (children)* [2007] UKHL 55 (HL) – judgment delivered 5 December 2007. Hereafter '*Re M*' or '*Re M and another (children)*'.

discretion generally.³⁷⁰ Perhaps most critically vis-à-vis New Zealand's *HJ*³⁷¹ decision, *Cannon* affirms that the exercise of discretion under the Convention 'requires the Court to have due regard to the overriding objectives of the Convention' whilst simultaneously 'acknowledging the importance of the child's welfare'.³⁷² In *Re M*, Baroness Hale expressly affirms the correctness of this statement, adding only emphasis that the word 'overriding' does not mean that the Convention's objectives 'will always be given more weight than other considerations'.³⁷³ Indeed, the Convention's 'simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children' means that the Convention's policy 'does not yield identical results in all cases'.³⁷⁴ Hence, various Courts' emphasis of Lord Donaldson of Lymington MR's comments in *Re A* remain apposite.³⁷⁵ Accordingly, it is interesting to compare the similarities between these statements and Elias CJ's judgments in *HJ* and *Clarke v Carson*.³⁷⁶

In a similar fashion, the Courts in Ireland and Scotland also have affirmed that discretionary exercises under the Convention are 'quite different from the discretion exercisable in an ordinary custody case'.³⁷⁷ Consequently, exercise of the Convention's residual discretion 'in the context of the Convention' is 'a matter of balance', with Courts being required to weigh the policy of the Convention on the one hand against the welfare/best interests of the child on the other.³⁷⁸

370 *Cannon v Cannon* [2005] 1 WLR 32 (CA) at para [63]. *Cannon v Cannon* concerned an extreme example of deliberate concealment involving the fabrication of new identities by the abducting mother for herself and the child, the mother obtaining new birth certificates in assumed names selected from gravestone inscriptions: para [5].

371 *Secretary for Justice v HJ*, above n 7.

372 *Cannon v Cannon*, above n 107 at para [38] per Thorpe LJ. Whilst New Zealand's legislative regime renders the point somewhat less relevant, *Cannon* also affirms that, as a matter of principle, 'a finding of settlement does not result in the dismissal of the plaintiff's application under the Convention'. Rather, Art 18 (or, if necessary, an inference under Art 12) ensures that any such finding merely 'opens the gate to the exercise of a judicial discretion' regarding return: paras [38] and [62].

373 *Re M and another (children)*, above n 369 at para [43] per Baroness Hale. As to relevant considerations note potential application of those canvassed in *Re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 (HL).

374 *Ibid*, para [48].

375 *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 122E:

[T]he discretion must be exercised 'in the context of the approach of the Convention'. The welfare of the children is not paramount but is a factor; and it is hard to conceive that if established under Article 12, the settlement of children could ever be unimportant. But the discretion is to choose the jurisdiction which should determine the merits of the issue as to with whom, and in which country the children should live and therefore where they should reside in the meantime; that is the context in which, as one factor, their welfare falls to be appraised.

376 *Secretary for Justice v HJ*, above n 7; *Clarke v Carson*, above n 8. Indeed, whilst the importance of the Convention's policy is strongly emphasised in *Clarke v Carson* – a decision clearly consistent with *Cannon* and other international authority, Elias CJ subsequently demonstrates a marked change of heart on the issue in *HJ*.

377 *In re BAD (An infant); MD v ATD* (unreported, High Court, Ireland, 1997/113M, O'Sullivan J, 6 March 1998); *BB v JB* [1998] 1 IR 299 (IRSC).

378 *BB v JB* [1998] 1 IR 299 (SC). See also, *In the matter of TM and DM (minors)* [2003] 3 IR 178 (IRSC); *J v K* [2002] SC 450 (Outer House); *Soucie v Soucie* [1995] SC 134 (Extra Division). In *BB v JB*, the Irish Supreme Court also articulates a series of factors specifically relevant to the exercise of discretion. The Art 13 provision allowing a court to have regard to 'information relating to the social background of the child' is included in this list. Importantly, all members of the Court approve Lord Donaldson MR's comments in *Re A*, above n 343 and, citing *Re C (Abduction: Consent)* [1996] 1 FLR 414 at 417 identify four reasons why it is appropriate for the Court not to be mandated, but rather to have a discretion following establishment of one of the Convention's exceptions.

Consistent with the strict approach toward Art 13(b) adopted in England and Wales, Ireland and Scotland are steadfast in their maintenance of the *Friedrich*³⁷⁹ standard regarding ‘grave risk’.³⁸⁰ Consequently, the Irish Supreme Court’s acceptance of the proposition that, in some exceptional cases, a comparison of health, education or other available services is properly entered into in judicial determinations of ‘grave risk’ is important.³⁸¹ Likewise, in light of *HJ*³⁸² and *Butler v Secretary for Justice*,³⁸³ the Court’s conclusions in *P v B (No. 2)* regarding the proper treatment of both manipulative and non-manipulative delay are notable. Specifically, *P v B (No. 2)* holds that whilst delay per se is insufficient to invoke the Art 13(b) exception, where any form of delay is established, that delay is a factor to which a Court ‘must have regard’ when exercising discretion. Furthermore, notwithstanding that the conduct of an abductor is ‘crucial and determinative’ in most cases, in some situations of manipulative delay, it is proper for a Court to ‘look past’ an abductor’s wrongdoing and consider the manifest needs of the child.³⁸⁴

Attempting to place jurisdictions on a continuum of stringency regarding establishment of Art 13(b) and discretionary exercises under the Convention, it is argued that the above analysis suggests that the United Kingdom is somewhat stricter than its Canadian and United States counterparts when it comes to ultimately refusing children’s return. Accordingly, introduction of the Brussels II Revised Regulation³⁸⁵ justifies attention for its likely impact on the future direction of *Hague Convention* jurisprudence, particularly in terms of the potentially changed relevance of welfare considerations and European Union (‘EU’) members’ reduced ability to deny return applications.

Critically, by way of the *Hague Convention* not being ‘communitarised’ by *Brussels II Revised*, the European Court of Justice remains ‘not competent’ to interpret the *Hague Convention*’s

379 *Friedrich v Friedrich* 78 F. 3d 1060 (6th Cir. 1996).

380 See for example *P v B (No. 2) (Child Abduction: Delay)* [1999] 4 IR 185 (IRSC) – hereafter ‘*P v B (No. 2)*’; *J v K*, above n 378.

381 In the matter of *TM and DM (minors)*, above n 378, Denham J for the Court stating:

The High Court Judge erred in conducting an analysis of the health systems of the two jurisdictions. Whilst very rare situations may arise where such a comparison may be relevant, at this time I cannot conceive of any such situations. ... I wish to make quite clear that I am not excluding for all time a situation where a comparison of health or education or other services should be excluded from a case where the grave risk exception is in issue. However, any such situation would be exceptional.

Note, however, Court’s subsequent comment that ‘it is clear from Irish case law that the grave risk exception arising under article 13(b) is one which should be strictly applied in the narrow context in which it arises’ (emphasis added). Compare also comments of majority in *DP/JLM*, above n 9 and see discussion infra Part V(D).

382 *Secretary for Justice v HJ*, above n 7.

383 *Butler v Secretary for Justice* [2007] NZFLR 791 (CA).

384 *P v B (No. 2)*, above n 378. In *P v B (No. 2)*, the father filed his application for return 20 months after the child’s wrongful removal. The Supreme Court held that despite ‘the opprobrium to be cast upon the defendant [mother] for wrongfully removing R [the child] from Spain’, the father’s delay was ‘inappropriate’ and hence satisfied the Court its discretion ‘should be exercised in favour of the child remaining in Ireland in its new settled environment’. Note, however, that in light of Brussels II Revised – see comments re settlement and subterfuge above, between EU member states, the strictness in application of these conclusions is perhaps questionable.

385 Brussels II Revised, above n 108.

provisions.³⁸⁶ However, in its directions as to how the *Hague Convention* is to be applied between EU member states, *Brussels II Revised* takes precedence.³⁸⁷

Pursuant to Art 11(4) of the Regulation,³⁸⁸ EU member states can no longer deny a child's return to one another under Art 13(b) of the *Hague Convention* if it is established that appropriate arrangements have been made to secure the child's protection following return.³⁸⁹ Additionally, where a Court does deny return, Arts 11(6) and 11(7) – a Danish-brokered compromise,³⁹⁰ require the Requested State to immediately transmit a copy of the order and all other relevant documents to the Requesting State. The Court or Central Authority receiving this information must then notify the parties and invite them to file submissions on the child custody issues. Where the Court receives no submissions within three-months, the case is closed. However, if submissions are filed, following a custody hearing, the Requesting State can require the child's return.³⁹¹ Pursuant to Arts 11(8), 40(1)(b) and 42, such orders are automatically enforceable.³⁹²

As various Courts have affirmed, *Brussels II Revised* is aimed at increasing judicial cooperation between EU members and closing perceived 'loopholes' in application of the *Hague Conven-*

386 Hence, as opposed to European Community law, between EU member states, the legal basis for an order refusing/ granting return remains the Hague Convention's treaty obligation under public international law.

387 *Brussels II Revised*, above n 108, Art 60(e). This effective 'trumping'/introduction of a two-tiered system for dealing with Convention applications between EU member and Non-member States is expressly permitted by Art 36 of the Hague Convention, which provides that:

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

388 *Brussels II Revised*, above n 108, Art 11(4). Article 11(4) provides that:

A Court cannot refuse to return a child on the basis of Art 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his/her return.

389 However, according to the Regulation's Practice Guide for the Application of the new *Brussels II Regulation* (June 2005) at 32, authored by Commission Services in consultation with the European Judicial Network in civil and commercial matters, <http://ec.europa.eu/justice_home/doc_centre/civil/doc/parental_resp_ec_vdm_en.pdf> viewed 1 November 2007, the existence of mere procedures is insufficient to require return. Rather, the Requesting Member State 'must have taken concrete measures to protect the child in question', although which party bears the onus of establishing such measures is left unclear. Compare similarities of approach with United States' *Blondin IV* decision, above n 310.

390 For additional details regarding the compromise retaining application of the Hague Convention rather than also introducing into *Brussels II Revised* stand-alone rules governing child abduction cases, see A Schulz, 'The New *Brussels II Regulation* and the Hague Conventions of 1980 and 1996' [March 2004] *IFLJ* 22.

391 Significantly, no time limit is imposed on this Article. Hence, in cases where the 'settled' exception is found established, for example, a Requesting State could conceivably require a child's return after a long period away – undermining the Hague Convention and arguably having at least some deleterious welfare consequences for the child.

392 As Art 42(1) explains, that is 'without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2'.

tion's Art 13(b).³⁹³ Whilst the provisions may initially appear merely declaratory when viewed against common law decisions such as *TB v JB*³⁹⁴ and *Re H*³⁹⁵ – respectively turning on the issue of New Zealand and Belgium's ability to sufficiently protect the children concerned, the Regulation will likely effect significant change in civil law³⁹⁶ jurisdictions. However, whether *Brussels II Revised*'s tightening of EU members' ability to refuse children's return will also flow over into *Hague Convention* decisions of the traditionally somewhat problematic jurisdictions such as Germany³⁹⁷ in their relations with non-member EU contracting states remains unclear. Certainly, *Re M* suggests future approaches will be no less stringent.³⁹⁸

In light of New Zealand's recent Convention decisions, the two English decisions *Vigreux v Michel*³⁹⁹ and *Re D (a child) (foreign custody rights)*⁴⁰⁰ governed by *Brussels II Revised* are particularly important from a comity perspective. Specifically, *Vigreux* attracts importance for its holding that the Regulation 'raise[s] the bar against abductors' only in terms of Art 13(b) – *Zaffino*⁴⁰¹ hence remaining the appropriate Art 13(2) test. However, perhaps most critically given the provisions of the *Children Act 1989 (Eng.)* and its checklist of welfare considerations,⁴⁰² *Vigreux* makes clear that the introduction of peripheral welfare considerations, eg education and disruption

393 See for example comments of Her Ladyship Baroness Hale of Richmond in *Re D (a child) (foreign custody rights)* [2007] 1 AC 619 (HL). Compare views of United States commentators calling for a new abduction convention protocol, eg L Silberman, 'Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA' (2003) 38 *Tex. Int'l L.J.* 41, and contrast P McElevay, 'The Brussels II Regulation: How the European Community has Moved into Family Law' (2002) 51(3) *JCLQ* 883 arguing that 'it is wasteful and short sighted to try and deal with any [Convention] shortcomings by simply creating an alternative salutation in a new instrument'. Similarly, note conclusions of N Lowe, 'Negotiating the Revised Brussels II Regulation' [November, 2004] *IFLJ* 205 that any changes ought to have been left to the Hague Conference and that Brussels II Revised changes would have been better achieved by 'wholesale ratification of the Hague Protection Convention'.

394 *TB v JB*, above n 99.

395 *Re H (Abduction: Grave Risk)* [2003] 2 FLR 141 (CA).

396 Indeed, the majority of current EU member states operate under civil law systems: <http://www.europa.eu/index_en.htm> viewed 1 November 2007.

397 Note long-standing debate between United States and Germany regarding Germany's historically low overall rates of return: N Lowe, above n 144.

398 *Re M and another (children)* [2007] UKHL 55 (HL) – upholding decision to return children to Zimbabwe.

399 *Vigreux v Michel* [2006] 2 FLR 1180 (CA). *Vigreux* was the first decision to consider the impact of Brussels II Revised on the Hague Convention.

400 *Re D (a child) (foreign custody rights)* [2007] 1 AC 619 (HL). Hereafter 'Re D'.

401 *Zaffino v Zaffino* [2006] 1 FLR 410 (CA), noting that 'the policy of the Convention must always be a very weighty factor to consider when exercising the discretion'.

402 Pursuant to the *Children Act 1989*, Ch. 41, s 1(1) (Eng.), when dealing with any matter concerning a child's upbringing or property, the child's welfare must be the Court's 'paramount consideration'. Furthermore, like New Zealand's COCA, s 1(3) of the *Children Act 1989* contains a 'checklist' of welfare considerations to which Courts must 'have regard' when making any s 8 order. Particularly notable is s 1(3)(a), which requires a Court to ascertain the 'wishes and feelings of the child concerned (considered in the light of his age and understanding)'. Whilst the Hague Convention is implemented through the *Child Abduction and Custody Act 1985 (Eng.)* – a statute simply declaring that subject to Brussels II Revised the Act 'shall have the force of law in the United Kingdom': s 1(2), note similarities between United Kingdom and New Zealand legislative regimes: COCA, ss 4-6 and 94-108. Subsequently compare reasoning *Vigreux v Michel* [2006] 2 FLR 1180 (CA) and *Secretary for Justice v HJ*, above n 7; *White v Northumberland*, above n 125.

issues, into discretionary conclusions under the *Hague Convention* is inappropriate.⁴⁰³ Accordingly, in Art 13(2) situations, Courts are entitled to weigh only ‘the nature and strength of the child’s objection’ against ‘the policy of the Hague Convention buttressed by the provisions of Brussels II Revised’.⁴⁰⁴ Furthermore, where permissible welfare considerations are ‘neutral’/‘evenly balanced’, the discretion applicable to all exceptions must be exercised in favour of return.⁴⁰⁵

Likewise, *Re D* is notable for its conclusions regarding delay and its suggestion that some differentiation in the weight afforded to Convention policy as a factor influencing discretionary exercises is appropriate.⁴⁰⁶ More particularly, whilst *Re D* affirms the continuing need for ‘restrictive application’ of the Convention’s exceptions,⁴⁰⁷ in situations of non-manipulative delay of a significant magnitude,⁴⁰⁸ *Re D* holds that such delay is properly considered as one factor in Courts’ evaluations of whether an ‘intolerable situation’ exists.⁴⁰⁹ Regarding factors relevant to the exercise of discretion, Baroness Hale’s ostensible distinguishing between Arts 12(2) and 13 is interesting. Indeed, Her Ladyship suggests that, in cases of consent or acquiescence, return is much more likely to be ordered than in situations where ‘grave risk’ is found established.⁴¹⁰ However, perhaps reflecting the absence of any reference to *Cannon v Cannon*,⁴¹¹ no mention is made of the discretion under Art 12(2).⁴¹² Nevertheless, since *Re D*, *Re M* has since clarified the position – Art 12(2) clearly envisaging that a ‘settled’ child might be returned.⁴¹³

403 Indeed, as the Court notes, the Regulation’s Art 11(3)’s requirement that cases be dealt with within a six-week time frame in all but exceptional cases is designed precisely to ensure that broader welfare considerations are eliminated from return decisions: paras [33] per Thorpe LJ and paras [88] – [89] per Wall LJ. Compare Art 11 Hague Convention conferring a right to request a statement of reasons for delay if an application has not been resolved within six weeks.

404 *Vigreux v Michel*, above n 399 at para [35] per Thorpe LJ; paras [49] and [79] – [80] per Wall LJ.

405 *Ibid*, paras [75] – [76] and para [83] per Wall LJ – cautioning that it is ‘only too easy for different jurisdictions operating international conventions to retreat into their own national bunkers and refuse to return children who should be returned’, and holding, at para [82], that it is:

incumbent on English judges, if they are not going to return the child or children in question, not only to ensure that they are not trespassing on the foreign court’s jurisdiction, but also to explain clearly both why they have decided on that course of action, and why they take the view that it is not inconsistent with comity and international judicial co-operation.

406 Especially relevant in the New Zealand context vis-à-vis *Secretary for Justice v HJ*, above n 7 and *Butler v Secretary for Justice*, above n 238.

407 *Re D*, above n 393 at para [51] per Baroness Hale.

408 Being some 3 years and 10 months in the life of a 4½ year-old child in the *Re D* case.

409 *Re D*, above n 393 at paras [52] – [53] per Baroness Hale.

410 *Ibid*, para [55]. Nevertheless, picking up on obiter comments in *Vigreux*, above n 399 the Court appears to suggest that an ‘exceptional’ dimension is required in a case before the Court will exercise discretion to deny return. Note also that Baroness Hale appears to contradict herself in paras [52] and [55]. Indeed, in para [52] Her Ladyship suggests that, in some cases, conditions/undertakings can sufficiently alleviate establishment of a ‘grave risk’ defence. However, at para [55], Baroness Hale opines that ‘it is inconceivable’ a Court finding ‘grave risk’ would ‘nevertheless return him to face that fate’. At para [68], Her Ladyship concludes by emphasising that whilst ‘few in number’, there are some cases where return of a child wrongfully brought to the jurisdiction ‘is not required’.

411 *Cannon v Cannon* [2005] 1 FLR 169 (CA).

412 Indeed, regarding treatment of an abductor’s wrongdoing, Baroness Hale’s preference that Courts refrain from assessing the ‘morality’ of abductor actions appears restricted to Art 13, noting at para [56] that:

By definition, one does not get to art 13 unless the abductor has acted in wrongful breach of the other party’s rights of custody. Further moral condemnation is both unnecessary and superfluous.

413 *Re M and another (children)*, above n 369 at para [31].

D. Australia

As decisions such as *In the Marriage of Murray and Tam*⁴¹⁴ demonstrate, early Australian authority evidences a strong commitment to trusting the institutions and procedures of a Requesting State to provide appropriate protections for a child/abductor upon return. However, relying on the natural meaning of the words used in Australia's implementing Regulations,⁴¹⁵ the High Court of Australia's majority decision in *DP v Commonwealth Central Authority; JLM v D-GNSW Department of Community Services*⁴¹⁶ marks an important change in Australia's interpretation of the 'grave risk' exception. Indeed, in contrast to the 'restrictive approach'⁴¹⁷ applied by a strong majority of jurisdictions internationally, *DP/JLM* embraces a more interventionist approach which 'requires Courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child', ie an effective adjudication of the merits of the custody dispute.⁴¹⁸

Notwithstanding other international developments, since *DP/JLM*, the issue of Art 13(b)'s appropriate scope does not appear to have been expressly reconsidered by the Australian Courts.⁴¹⁹ Accordingly, the *DP/JLM*-driven series of decisions focusing greater attention on the risk to the child and the post-return situation is important to acknowledge given New Zealand's recent Convention decisions.

414 *In the Marriage of Murray v Tam v Director Family Services (ACT) (Intervener)* (1993) 16 Fam LR 982 (Fam CA). Indeed, in *Murray* where the left-behind father was a member of the Mongrel Mob and had admitted acts of relatively serious violence, the Court held that:

It would be presumptuous and offensive in the extreme for a Court in this country to conclude that the wide and children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders made by the Courts.

Similarly, note also *Gsponer v Johnson* (1988) 12 Fam LR 755 (Full Court).

415 From an international perspective, Australia's method of Convention implementation via Regulations is unusual. Pursuant to s 111B(1) of the Family Law Act, the Regulations are made in order to 'enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention'. Whilst for all relevant purposes, Reg 16(3)(b) is identical to Art 13(b), as a matter of construction, it is the Regulations which prevail over the provisions of the Convention: *DP/JLM*, above n 9 at paras [34], [99] – [102], [119] – [122] and [130]. Note also comments of the High Court majority in *De L v D-GNSW, Department of Community Services* (1996) 139 ALR 417 at 421 – 422 (HCA) – holding that Reg 16 is not rendered invalid because of any inconsistency with the paramountcy principle, and that because the Regulations are enacted under the Family Law Act, the Regulations are not required to be consistent with the Act.

416 *DP v Commonwealth Central Authority; JLM v Department of Community Services* (2000) 180 ALR 402 at para [44] (HCA) per Gaudron, Gummow and Hayne JJ. Hereafter '*DP/JLM*'. At para [44], the majority held:

[There is no warrant for] a conclusion that reg 16(3)(b) [which implements Art 13(b) of the Convention] is to be given a 'narrow' rather than a 'broad' construction. There is, in these circumstances, no evident choice to be made between a 'narrow' and 'broad' construction of the regulation. If that is what is meant by saying that it is to be given a 'narrow' construction' it must be rejected. The exception is to be given the meaning its words require.

417 Emphasised as being critical to the Convention's long-term success in the Perez-Vera Report, above n 2 at para [34].

418 *DP/JLM*, above n 9 at para [41]. See generally also F Bates, 'Grave Risk, or Psychological Harm or Intolerable Situation: The High Court of Australia's View' (2003) 11 *Asia Pacific Law Review* 43.

419 Note, for example, *State Central Authority v Sigouras* [2007] Fam CA 250 at para [64] holding that: '[t]he proper interpretation of Reg 16(3) has been settled by the majority judgment of the High Court cases in [*DP/JLM*]'. Hereafter '*Sigouras*'. Compare also F Bates, 'The Child Abduction Convention: Troubles in Australia' (2007) *IFLJ* 24 – expressing disquiet with the 'unsatisfactory nature' of the way Australian law has developed in a 'piecemeal' and non-continuing manner, often with a failure to properly 'conceptualise the position at large'.

With respect to *Andrews v Secretary for Justice*⁴²⁰ and the issue of financial hardship potentially constituting a situation of intolerability, the Family Court decisions in *McDonald v D-GNSW, Department of Community Services*⁴²¹ and *State Central Authority v Sigouras*⁴²² are important.⁴²³ Indeed, in *McDonald*, the Court held that the mother's lack of housing and inadequate financial support in Belgium were two important considerations 'out of the many difficulties' undertakings could not alleviate which subsequently justified refusing the children's return.⁴²⁴ By contrast, in *Sigouras*, the Court held that the mother's ability to access around \$8,000 from a bank account and unencumbered ownership of a rental property returning approximately \$8,000p.a. meant her alleged inability to obtain a job and financially support herself/adequately care for her children if forced to return to Greece fell short of the extreme situation required under Art 13(b).⁴²⁵

Likewise, regarding *Smith v Adam*'s⁴²⁶ conclusion that contracting states' health/welfare systems can be presumed to protect children and abductors from harm, the decisions in *SCA v M*⁴²⁷ and *State Central Authority v Maynard*⁴²⁸ are significant.⁴²⁹ In *SCA*, drawing heavily on the Canadian and United States' *Pollastro* and *Walsh* lines of authority, the Kay J held that ongoing violence necessitating constant moves and depriving children of any form of security could properly establish 'grave risk'. Similarly, in *Maynard*, the Court held that the 3-month old child's serious epilepsy condition which prevented the child from being able to fly, justified an order refusing the child's return.⁴³⁰ However, not convinced that the mother was 'incapacitated in the same manner as the mother in *JLM*', the Court rejected the mother's more subtle submission that an order for

420 *Andrews v Secretary for Justice* [2007] NZFLR 891.

421 *McDonald v D-GNSW, Department of Community Services* (2006) 36 Fam LR 468 (Fam CA). Hereafter '*McDonald*'.

422 *State Central Authority v Sigouras*, above n 419.

423 Note that in the context of financial hardship, *DP/JLM*, above n 9 at para [38], appears to draw a distinction between abducting fathers and primary-carer mothers. In the case of primary-carer mothers, the Court implies a need for 'adequate maintenance' and prompt resolution of custody issues upon return. However, in the case of fathers, the Court suggests that, particularly in the case of young children, summary return is more easily justified.

424 *McDonald v D-GNSW, Department of Community Services*, above n 421 at paras [53] – [61]. Other relevant discretionary considerations included the mother's PTSD condition – attributed to domestic violence and her former partner's drug and alcohol problems, the substantial 'passage of time' since the children's removal, and the likely absence of legal representation. Note, however, that the Court was careful to emphasise that it would be 'presumptuous to assume that Belgium does not have appropriate healthcare (whatever that means) available to persons within its borders': para [63].

425 *State Central Authority v Sigouras*, above n 419 at paras [66] – [73].

426 *Smith v Adam* [2007] NZFLR 447 (CA).

427 *SCA v M* (2003) Fam CA 1128 (Fam CA).

428 *State Central Authority v Maynard* (unreported, Family Court of Australia, Melbourne, MLF4286/2003, Kay J, 3 September 2003).

429 Interestingly, the *DP/JLM*, above n 9, majority appears to have been willing to assume the worst about the impartiality of the Mexican Courts and the state of Greek health services. Contrast the Court's rejection of a 'grave risk' defence in *HZ v State Central Authority* (2006) 35 Fam LR 489 (Fam CA). Importantly, in *HZ*, despite noting the changed profile of abductors and extensively reviewing the *Pollastro*, *Walsh* and *Blondin IV* lines of authority, the *HZ* Court held that the mother had failed to adduce sufficient evidence that the Greek authorities would be unable to protect her and the children from the father's alleged violence and other harm.

430 Importantly, the Court also held that the seriousness of the child's medical condition meant any exercise of the residual discretion was a non-event – a return flight being unable to be ordered in the foreseeable future.

return carried a 'grave risk' of psychological harm by virtue of the child's welfare being compromised if she, as primary carer, was forced to return to England.⁴³¹

Regarding the exercise of discretion, the High Court's majority decision in *De L*⁴³² remains the leading statement of Australian authority. Significantly, *De L* affirms that the paramountcy principle does not apply to applications under the Regulations.⁴³³ Consequently, although relevant factors will 'vary according to each case',⁴³⁴ the 'basic proposition' is that the discretion is a 'balancing' exercise whereby Courts must exercise their discretion 'judicially', 'having regard to the subject matter, scope and purpose of the Regulations.'⁴³⁵ Whilst the scope of the discretion is 'unconfined', 'significant weight' should be given to the underlying objectives of the Convention as stated in the preamble'. Similarly, without making it the paramount consideration, welfare is a 'proper matter to take into account'.⁴³⁶ Additionally, regarding *HJ* and the Art 12(2) discretion in particular, it is perhaps interesting to note that, like *DP/JLM*, Australia appears to prefer a more limited/literal interpretation of Art 12(2) than other jurisdictions⁴³⁷ – the issue of whether in fact discretion exists following a finding of 'settlement' being left open since *Graziano v Daniels*.⁴³⁸

VI. IMPLICATIONS OF NEW ZEALAND'S RECENT DECISIONS

With themes of trust and respectful judicial cooperation at their core, the above analysis essentially highlights two key lines of development in 'grave risk' *Hague Convention* jurisprudence internationally. Specifically, on the one hand, an approach further tightening the traditional 'narrow/'

431 *State Central Authority v Maynard*, above n 428 at paras [37] – [38]. Critically, whilst acknowledging that the child's wellbeing would 'obviously depend on the parenting ability of the parent', the Court opined that 'even in the eventuality that [the mother] is required to return to England ... her level of motivation, commitment and devotion to the child will remain unchanged', albeit 'that this may also entail a significant and even enormous emotional burden and especially so if she is unable to access supports'. Contrast *Director-General, Department of Families v RSP* (2003) 30 Fam LR 566 – holding (consistently with *DP/JLM*, above n 9) that unchallenged evidence regarding the mother's history of depression, intense need for the comfort and support of family, and threatened suicide if returned established a 'grave risk' defence, there being no condition/undertaking which could alleviate the threat of suicide: para [48].

432 *De L v D-GNSW, Department of Community Services* (1996) 139 ALR 417 (HCA) per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. Hereafter '*De L*'.

433 *Ibid*, 422.

434 *Richards v Director-General, Department of Child Safety* [2007] Fam CA 65 (Fam CA) at para [20].

435 *De L*, above n 432 at 431 – noting also that the Regulations are silent as to relevant discretionary factors. For subsequent decisions identifying specific factors relevant to discretionary exercises and affirming extension of *De L* (focused on the 'child objects' exception) to 'grave risk', 'consent' and 'acquiescence', see *State Central Authority v Sigouras*, above n 419 at paras [163] – [180]; *HZ v State Central Authority*, above n 429; *D-G, Department of Youth and Community Services v Reissner* (1999) 25 Fam LR 330 (Fam CA) and *Secretary, Attorney-General's Department v TS* (2000) 21 Fam LR 376 (Fam CA).

436 *De L*, above n 432 at 431; *Richards v Director-General, Department of Child Safety*, above n 434; *D-G, Department of Youth and Community Services v Reissner*, above n 435 – additionally holding that Convention policy is the 'most significant matter to be taken into account' and *D-G, Department of Families, Youth and Community Care v Thorpe* (1997) FLC 92-785 at paras [4.2] – [4.4] (Fam CA).

437 *Cannon v Cannon*, above n 411. Compare also comments of Court in *Secretary for Justice v HJ*, above n 7.

438 *Graziano v Daniels* (1991) 14 Fam LR 697.

‘restrictive’ construction is discernible.⁴³⁹ However, moving towards the opposite end of the spectrum, on the other hand is a more literal interpretation, which arguably lessens the ‘weighty burden’ on abductors to satisfy Courts that there is a ‘grave risk’.⁴⁴⁰ Nevertheless, regarding the residual exercise of discretion applicable to all exceptions, international authorities appear unanimous in their agreement that a balancing exercise – under which the Convention’s policy attracts at least ‘significant weight’ and welfare is an important, but not paramount consideration, is invoked. Accordingly, the critical question becomes, do post-*COCA* New Zealand decisions appear to reinforce New Zealand’s historically strong reputation for upholding the Convention’s spirit and integrity,⁴⁴¹ or do they somewhat isolate⁴⁴² New Zealand from the international community?

On the issue of Art 13(b)’s construction and the subsequent scope of situations properly establishing a ‘grave risk’ defence, acknowledging that the majority of New Zealand’s abduction cases involve Australia,⁴⁴³ it is argued that *HJ*⁴⁴⁴ and *Smith*’s⁴⁴⁵ adoption of the *DP/JLM*⁴⁴⁶ approach is disappointing for several reasons.

First, as noted above, uniform interpretation of the Convention’s exceptions and maintenance of mutual trust between contracting states is fundamental to the Convention’s continued success.⁴⁴⁷ By permitting an increased focus on risks to an abducted child and the post-return situation, *HJ* and *Smith* have potential to bring New Zealand dangerously close to adjudicating the merits of custody issues most properly left for determination by Requesting States.

Secondly, as a means of ensuring that the Convention remains responsive to the changing social context of abduction, adoption of *DP/JLM*’s approach was unnecessary. Indeed, through decisions such as *Mok v Cornelisson*⁴⁴⁸ and *Armstrong v Evans*,⁴⁴⁹ the New Zealand Courts have demonstrated their ability to fashion ‘just’ responses which contemporaneously ensure the safety of children/abductors and uphold the Convention’s spirit without doctrinal shift.⁴⁵⁰

439 The EU member state approach under Brussels II Revised being the most strict, followed closely by the United Kingdom’s general approach toward non-member EU contracting states. Less stringent, but still maintaining a high standard of strictness and commitment to Convention policy, is the United States’ *Friedrich* and ‘further analysis’ approach under *Blondin IV*, followed by, if not comparable with, the general Canadian position since *Thompson*.

440 Most notably represented by the *DP/JLM*, above n 9, approach followed in Australia.

441 Achieved through decisions such as *A v Central Authority*, above n 8; *S v S*, above n 8; *KS v LS*, above n 8.

442 As *DP/JLM*, above n 9, appears to have done. Note express comments English Court of Appeal in *Re S*, above n 347 at para [45] – holding English Courts unlikely to similarly follow any ‘broadening’.

443 *KS v LS* [2003] NZFLR 817 at paras [105] and [114] (HC, Full Bench) – uniformity in interpretation between NZ and Australia therefore being desirable.

444 *HJ v Secretary for Justice* [2006] NZFLR 1005 (CA) at para [32].

445 *Smith v Adam* [2007] NZFLR 447 at paras [7] – [10].

446 *DP/JLM*, above n 9.

447 See Parts II(B) and II(D) above.

448 *Mok v Cornelisson* [2000] NZFLR 582 (FC). In *Mok*, the children’s likely recurrence of PTSD – a result of being exposed to their father’s abusive behaviour, was found to constitute ‘grave risk’.

449 *Armstrong v Evans* (2000) 19 FRNZ 609 (DC). In *Armstrong*, the Court held that the mother’s PTSD condition – related to post-natal depression and giving rise to a very real threat of suicide if returned, properly established ‘grave risk’.

450 Compare also Canadian *Pollastro v Pollastro* (1999) 171 DLR (4th) 32 response and note role of undertakings/conditions in United Kingdom and United States.

Thirdly, English Courts have, at least tentatively, expressly distanced themselves from the *DP/JLM* approach.⁴⁵¹ Similarly, current approaches in other major jurisdictions⁴⁵² reveal no suggestion of any intention to depart from their commitment to the strict/narrow interpretation emphasised as being paramount by the Perez-Vera Report.⁴⁵³ Additionally, the Art 13(b) changes effected by *Brussels II Revised* support the proposition that, if anything, comity and broader abduction-deterrence interests require application of a more, rather than less, restrictive approach toward refusing children's return.⁴⁵⁴

Likewise, on the issue of discretion and the relevance of welfare and Convention policy considerations, *HJ*⁴⁵⁵ and decisions subsequently affirming extension of its Art 12(2)-driven discretionary conclusions to the Convention's other exceptions, appear out of step with the weight of international authority.

In *HJ*, both Elias CJ and the majority approaches toward discretionary exercises appear to prefer first determining whether a child's return is in his/her best interests and then secondly considering the impact of the Convention's competing policy factors. Whilst this approach perhaps reflects their Honours' conclusions regarding *S v S*⁴⁵⁶ and the absence of 'a presumption of return',⁴⁵⁷ the approach is opposite to that adopted in most 'balancing' exercises conducted internationally. Indeed, in *Re M*, the House of Lords very recently articulated a preference that Courts 'start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there.'⁴⁵⁸

Furthermore, regarding *HJ's S v S*⁴⁵⁹ conclusions,⁴⁶⁰ with respect, it is submitted that the Supreme Court majority's conclusion that use of the word 'nevertheless' by the Court of Appeal in *S v S*,⁴⁶¹ 'clearly shows that the Court was not approaching the discretion in terms of their being any presumption of return after the establishment of a ground for refusal',

misconstrues *S v S's* conclusions. Rather, it is argued that 'nevertheless' simply indicates that a Court's finding of an exception established is not determinative – the Court still retaining a discretion to return the child. On this point, attention is again drawn to *Re M* where Baroness Hale employs use of the word 'nevertheless' in a manner similar to *S v S*.⁴⁶²

451 See *In re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355 at para [45].

452 For example, Canada, the United States and South Africa. Whilst South Africa is not discussed in detail above, note influential decisions of South African Constitutional Court in *Sonderup v Tondelli* (2001) 1 SA 1171.

453 Perez-Vera Report, above n 2; Indeed, numerous Convention advocates have expressed concern Art 13(b) will be the Convention's 'Achilles heel'. See generally, L Silberman, above n 9; M Weiner, above n 9.

454 Indeed, with Art 11 of Brussels II Revised now rendering it increasingly unlikely that an Art 13(b) defence under the Hague Convention will succeed in applications between EU member states, where the realities of New Zealand's adoption of DP/JLM afford abductors additional scope to establish Art 13(b), potential abductors in EU member states may be encouraged to exploit the divergence interpretation – something drafters of the Hague Convention most definitely sought to avoid.

455 *Secretary for Justice v HJ*, above n 7.

456 *S v S* [1999] NZFLR 625 (HC & CA).

457 *Secretary for Justice v HJ*, above n 7 at paras [66] – [68].

458 *Re M* and another (children) [2007] UKHL 55 at para [39] (HL) per Baroness Hale.

459 *S v S* [1999] NZFLR 641 at paras [8] and [9] (CA).

460 *Secretary for Justice v HJ*, above n 7 at paras [66] – [68].

461 *S v S* [1999] NZFLR 641 at para [11].

462 *Re M* and another (children), above n 369 at para [15] per Baroness Hale; *S v S*, above n 8 at paras [8] – [11].

Additional support for the argument that *HJ*'s discretion approach is contrary to the weight of international authority is provided by the fact that in no jurisdiction does welfare prevail as the paramount consideration when it comes to the exercise of discretion.⁴⁶³ Critically also, in jurisdictions such as Canada and England where the relevant statutory regime closely resembles that of New Zealand post-*COCA*, Courts have expressly rejected the relevance of broad welfare considerations.⁴⁶⁴ Accordingly, from a comity standpoint, it is submitted that the approach articulated in *White v Northumberland*, ie that Hague cases 'continue to be determined according to past precedents and on a uniform international basis' is preferable.⁴⁶⁵

That it is arguable that *HJ*'s changed difference in the discretion start point is simply one of semantics is acknowledged. However, it is submitted that when it comes to return outcomes, the distinction is important, particularly in the more marginal/closely balanced cases. Indeed, where Courts start from the position of first assessing whether return is in a child's best interests, an order refusing return is rendered much more likely than if beginning from a start position of considering the Convention's policy interests/'presumption of return'. The reason for this is that, in the case of 'settlement' for example, under the former approach, it becomes more difficult for the Convention's policy objectives as articulated in the Preamble to outweigh the child's interests in remaining in the Requested State, especially once other properly-considered discretionary factors such as delay and financial hardship are weighed.⁴⁶⁶ Conversely, where Courts begin from a 'presumption of return' or at least adopt a 'blank slate',⁴⁶⁷ a child's interests in remaining are required to be much more cogent.

It is argued that the Court of Appeal's *Smith v Adam*⁴⁶⁸ decision well illustrates why *HJ*'s changed approach is of concern. Indeed, in *Smith*, the Court of Appeal held that 'where the grave risk exception is made out, it would obviously not be in the best interests of the particular child to order return'. Additionally, the Court stated that 'We find it difficult to envisage a situation where the competing policy factors of the Convention would, in terms of the Supreme Court test, clearly outweigh the interests of the child in such a situation'.⁴⁶⁹

It is acknowledged that in cases involving 'grave risk', the interests of the child establishing that exception do properly weigh more heavily in the exercise of discretion than is the case when other exceptions are invoked. However, it is submitted that the Court of Appeal's effective exclusion of Judges' ability to order return after finding 'grave risk' established undermines the Convention's spirit and has important implications vis-à-vis other contracting states' willingness to order return of New Zealand children.⁴⁷⁰ Indeed, the New Zealand Courts' conclusions on this point stand in stark contrast to at least the United Kingdom, Canadian and United States' approaches where Courts continue to actively seek to find ways to return abducted children following the establishment of an Art 13(b) exception via, for example, undertakings/conditions and oth-

463 Importantly, this proposition appears to apply regardless of whether the discretion is exercised under Art 18 or a particular exception, eg Art 13.

464 Note, for example, *Vigreux v Michel* [2006] 2 FLR 1180 (CA).

465 *White v Northumberland* [2006] NZFLR 1105 at paras [49] – [53] (CA).

466 For example, the objective of prompt return is significantly less relevant: *Aulwes v Mai*, above n 298.

467 *Secretary for Justice v HJ*, above n 7 at para [138] per McGrath J.

468 *Smith v Adam*, above n 220.

469 *Ibid*, para [14].

470 Note observations Fisher J in *S v S*, above n 8; Kirby (dissenting) *DP/JLM*, above n 9 at paras [155] – [157]; *Re M and another (children)*, above n 369 at para [42].

er measures ameliorating the relevant risks to something less than ‘grave’.⁴⁷¹ Furthermore, *Smith*’s conclusion is directly contrary to the English Court of Appeal’s holding that where a residual discretion arises from establishment of a Convention exception, that discretion must be exercised before the Court can proceed with determining the merits of any underlying custody dispute.⁴⁷² Importantly, the conclusion also appears inconsistent with the Perez-Vera Report’s statement that children’s return ‘should take place only after an examination of the merits of the custody rights exercised over it’.⁴⁷³

Similarly, noting *Coates v Bowden*’s⁴⁷⁴ reliance on *Smith* and Baroness Hale’s ‘grave risk’ comments in *Re D*,⁴⁷⁵ attention is also drawn to Her Ladyship’s apparent contradiction of herself in suggesting both that undertakings can alleviate ‘grave risk’ and that a return order following a finding of ‘grave risk’ is ‘inconceivable’. Additionally, from a policy perspective, Wall LJ’s cautioning in *Vigreux*⁴⁷⁶ that it is ‘only too easy for different jurisdictions operating international conventions to retreat into their own national bunkers and refuse to return children who should be returned’ is emphasised.

Likewise, given the fairly fundamental differences in relevant Convention policy considerations applicable when the ‘settled’ exception is invoked,⁴⁷⁷ it is argued that *HJ*’s statement emphasising the need for care when applying conclusions regarding one exception to those of another⁴⁷⁸ perhaps warranted greater consideration by the *Smith* Court before reaching the conclusion that the Supreme Court approach was ‘equally applicable to the s 106(1)(c) defence’.⁴⁷⁹ Certainly, there is international authority in support of the proposition that relevant discretionary factors and their weight can, and should, vary depending on which exception is established.⁴⁸⁰

On the issue of concealment, however, it is argued that the *HJ* Court’s approach is consistent with international jurisprudence that in cases of moral wrongdoing it is the child’s rather than the applicant-parent’s interests which must remain superior.⁴⁸¹ However, in light of substantial authority suggesting that where a child retains links with his/her home jurisdiction return should not lightly be refused,⁴⁸² the absence of express consideration of this point by the *HJ* Court is arguably also important in terms of New Zealand further distancing itself from the international commu-

471 See case discussions Part V above.

472 P Nygh, (formerly Nygh J) ‘The international abduction of children’ in *Children on the Move, How to Implement their Right to Family Life* (1996) at 42.

473 Perez-Vera Report, above n 2 at para [107] – regarding interpretation of Arts 12 and 18.

474 *Coates v Bowden* (2007) 26 FRNZ 210.

475 *Re D (a child) (foreign rights of custody)* [2007] 1 AC 619 at paras [52] and [55] – [56] (HL).

476 *Vigreux v Michel* [2006] 2 FLR 1180 at para [83].

477 See discussion above, Parts IV and V. Note *Re M and another (children)*, above n 369 at para [57] – holding that Art 12(2) cases ‘are the most ‘child-centric’ of all child abduction cases; *Re C (Abduction: Settlement)* [2005] 1 FLR 127 per Singer J.

478 *Secretary for Justice v HJ*, above n 7 at paras [39] – [40].

479 *Smith v Adam*, above n 220 at para [13].

480 For example, *Re D* (discretionary return), above n 367; *Re M and another (children)*, above n 369 at paras [32], [39] and [43] – [48] noting that the weight attached to relevant discretionary factors can ‘vary enormously from case to case’ and that the ‘policy of the Convention does not yield identical results in call cases’. Compare also United States’ approaches such as *Blondin IV*, above n 310 where initial onus of proof is considered relevant to weight of Convention policy subsequently applied in ‘further analysis’ test.

481 Refer Part V above.

482 *Aulwes v Mai*, above n 298; *Matovski v Matovski*, above n 333 for example.

nity. Similarly, given judicial acknowledgment of changed abductor profiles and *DP/JLM*'s suggestion that differential treatment of primary carer mothers and aggrieved fathers is permissible,⁴⁸³ it is also disappointing that the Supreme Court chose not to deal with this factor in terms of its relevance to 'grave risk' and any discretionary exercise.

VII. CONCLUDING REMARKS

Long-term success of the *Hague Convention* relies heavily on consistent and fair decision-making so that signatory states and potential abductors understand that there are 'no safe havens among contracting states'.⁴⁸⁴

Overall, contracting states have generally welcomed development of 'just' solutions to 'difficult recurring fact patterns' ostensibly absent from consideration during the Convention's drafting process, eg domestic violence/primary carer abductions.⁴⁸⁵ However, as Torez J emphasises, approaches that 'essentially encourage backdoor custody evaluations' must be avoided.⁴⁸⁶

From a comparative perspective and having particular regard to the Convention's policy, this paper has highlighted several specific problems potentially stemming from the *HJ*⁴⁸⁷ decision. Critically, through the Court of Appeal's adoption of *DP/JLM*⁴⁸⁸ and the Supreme Court's conclusions regarding discretionary exercises, New Zealand appears to have taken a significant step in distancing itself from its sister signatories. Certainly *HJ* appears to have aligned New Zealand much more closely with the relatively isolated interpretations of Australia. Whilst this divergence in approach may have once been manageable had other jurisdictions also followed the Australian High Court's lead, the United States' 'further analysis' approach and the introduction of *Brussels II Revised* leaves one questioning whether New Zealand has indeed struck the correct balance between uniformity and progress.

It is with these difficult questions in mind that this paper draws the curtain on the first 2½ years of child abduction jurisprudence since *COCA* and looks ahead to what this author hopes is a strong future for the Convention.

483 *TB v JB*, above n 99; *Aulwes v Mai*, *ibid*; *Pollastro v Pollastro*, above n 263 for example; *DP/JLM*, above n 9 at para [38].

484 *Re M and another (children)*, above n 369 at para [43]. See generally, M Weiner, above n 9; L Silberman, above n 9.

485 M Weiner, above n 9 at 279.

486 Torez J, above n 32 at 51.

487 *Secretary for Justice v HJ*, above n 7; *HJ v Secretary for Justice*, above n 7.

488 *DP/JLM*, above n 9.

BODY CORPORATE RULES: TENSIONS

THOMAS GIBBONS*

I. INTRODUCTION

The Unit Titles Act 1972 (UTA) is described in its long title as:

An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors, and common property that is to be owned by all the unit proprietors as tenants in common, and to provide for the use and management of the units and common property.

This long title makes it clear that the UTA reflects both individual and collective considerations: units are to be owned by individual proprietors; while common property is to be held collectively.

But there is much more to the UTA than is set out in the long title. This article will show that unit title ownership involves an inherent tension between individual and collective considerations: not just in respect of terms of individual ownership of units as against collective ownership of common property, but in many other ways as well. This tension is most apparent in the notion that individual owners own their units in a 'private' capacity, but these owners collectively constitute a body corporate, which is subject to 'public' considerations such as administrative law rules. In particular, this article examines a number of recent cases on the validity of body corporate rules, rules which regulate the relationship between proprietors and the body corporate. This analysis highlights the factors that make unit title ownership very different from ownership of an estate in fee simple, and shows that the tension between individual and collective considerations in unit title ownership is not altogether a bad thing, as the protection of the collective and democratic nature of body corporate decision making through the UTA has also helped to protect the integrity of individual unit ownership and the rights of individual unit owners.

II. CONCEPTIONS OF PROPERTY

If unit title ownership involves a tension between individual and collective considerations, then to understand this tension it is helpful to examine some commentary on the nature of private property and its relationship to collective and public property. 'Property' is a complex term that today is almost universally understood to involve both individual and collective (or public and private) considerations.

The starting point is Blackstone. In his *Commentaries on the Laws of England*, first published between 1765 and 1769, William Blackstone observed that:¹

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1 Sir William Blackstone, *Commentaries on the Laws of England* (New ed, 1857) Vol II, 1.

There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Despite – or perhaps because of – his rather heroic and colorful language, Blackstone is hardly a popular jurist these days. Indeed, criticism of passages such as this has come from a number of directions. While acknowledging that Blackstone's *Commentaries* (as the four-book work is commonly known) is virtually the only systematic attempt to present a theory of the whole common law system, critical legal studies writer Duncan Kennedy regarded Blackstone's 'great vice' (though one among many) as being his disregard for the ambiguities that exist in the use of the word 'property'. 'Property', in Kennedy's view, could mean either a thing or a right – and often a right in a thing (such as an easement over land), or perhaps even any right at all.² In Kennedy's words:³

If property means 'absolute dominion over the external things of this world', then it is only a small part of private law.... If property simply means 'right', then it includes all of private law. There is nothing that compels us to adopt one particular usage or categorical scheme rather than another. But it *is* essential to use the usage adopted consistently.

Kennedy, concerned as he was with the structure of Blackstone's thought, was unhappy with the arbitrary nature of much of the way in which Blackstone categorized legal concepts and ideas. But others have criticised Blackstone from differing perspectives. Kevin and Susan Gray, for example, have accused Blackstone of treating property as 'a solid, reassuringly three-dimensional concept ... absolute, unequivocal and quite possibly cosmic in its implications'⁴ – a narrower view of Blackstone's treatment of the topic than Kennedy, perhaps, but no less withering: the Grays go on to note that '[m]odern property theory has long such disavowed such naïve accounts [accepting] that 'property' is not a thing or a resource, but a power relationship'.⁵ In fact, the Grays argue:⁶

It is beginning to be agreed that the power relationship implicit in 'property' is not *absolute* but *relative*: there may well be *gradations* of 'property' in a resource Far from being a monolithic notion of standard content and invariable intensity, 'property' has come to be viewed as having an almost infinitely divisible and commensurable quality.

What Kennedy and the Grays are saying is partly the same thing: Blackstone has overreached himself in describing property as a 'sole and despotic dominion' – 'property' is not just a thing, or a right, but an expansive concept that can mean very different things in different situations. The Grays go on to describe property as a 'spectrum' concept, with the allocation to different persons of differing quantum of 'property' in the same resource depending upon collective perceptions of the public merit attaching to competing users of the resource.⁷

The differing approaches of Blackstone, Kennedy and the Grays can be further illuminated by considering the work of Geoffrey Samuel, who has fleshed out some valuable historical insights in this field. In Samuel's view, two models underpin Western conceptions of property. One is the

2 Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 209, 318-319.

3 *Ibid.*, 319.

4 Kevin Gray and Susan Francis Gray, 'Private Property and Public Propriety' in Janet McLean (ed), *Property and the Constitution* (1999) 11, 12.

5 *Ibid.*, 12.

6 *Ibid.*

7 *Ibid.*, 13.

Roman conception, based on a unitary notion of ownership, giving rise to an exclusive power relationship between a person and a thing – a kind of *dominium*, to use the language of the Romans.⁸ The other is the feudal conception, emphasizing a strong distinction between moveable and immoveable property, and recognizing that a range of different people could each have a different interest in a single piece of land. The feudal conception approached property as a matter of different legal rights rather than physical things.⁹ Whatever the limitations of Blackstone's terminological consistency, it is clear from Kennedy's commentary that Blackstone was influenced by both the roman and feudal conceptions.

The difficulty for theorists like the Grays has proved to be the application of what they call 'modern' conceptions of property in decided cases. It is one thing for a Court to take the view that 'property is not the land or thing, but is *in* the land or thing'.¹⁰ It is quite another for a Court to entertain the 'spectrum' notion of property. The House of Lords, for example, relatively recently voiced an approach which, in its claim to certainty, would surely be criticized by the Grays as old-fashioned, even Blackstonian:¹¹

Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon 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.

Clearly, then, the tension between differing conceptions of 'property' is not entirely a thing of the past. As Kennedy identified, 'property' can mean both a thing and a right; and as the Grays rightly point out, not all kinds of 'property' are exclusory or despotic. To the Grays, 'property' is not a 'private' matter, but has 'public' aspects: while we still talk of private property ownership, and many property relationships are seen as private, the vast majority of property relationships are best described as 'quasi-public', resting not at one end or the other of a public-private dichotomy, but rather in the middle of a gradated field with a multitude of finely intercalated distinctions.¹²

Another theorist deserves attention. Carol Rose, while acknowledging that the notion of 'exclusivity' is important to property theory,¹³ also notes that property is 'a highly malleable institution',¹⁴ and that different kinds of rights (such as exclusivity) necessarily apply to different kinds of property: you can fence land, but you can't fence water, and so regimes for the ownership of water rights are different to ownership regimes for land.¹⁵ Property rights, in Rose's view, are constantly in flux and may change to meet new demands – but the fact that particular kinds of property rights may be 'fuzzy' does not mean that they are not rights: in Rose's own language, 'fuzzy rights are rights too'.¹⁶

8 Geoffrey Samuel, 'The Many Dimensions of Property' in Janet McLean (ed), *Property and the Constitution* (1999) 40.

9 *Ibid.*, 42.

10 *Dorman v Rodgers* (1982) 148 CLR 365, 372, cited in Gray and Gray, above n 4, 12.

11 *Foskett v McKeown* [2000] 3 All ER 97, para 3 of the judgment of Lord Millett.

12 Gray and Gray, above n 4, 18.

13 Carol Rose, 'Property in All the Wrong Places?' (2005) 114 *Yale Law Journal* 991, 994.

14 *Ibid.*, 993.

15 *Ibid.*, 1005.

16 *Ibid.*, 1006.

Rose has also made the point that many of Blackstone's critics appear not to have read much of Blackstone 'beyond the first few pages, or indeed beyond the first few lines'.¹⁷ In her view, the 'despotic' quote set out above is more metaphor than literal description.¹⁸ What is more interesting to her is the way Blackstone avoided trying to justify the uneven allocation of property (particularly land) through society, and emphasized doctrinal aspects of property.¹⁹

It is important to keep in mind that Blackstone may not have meant the quote set out above to be taken at face value, or to be taken out of context. Albert Alschuler, for example, has noted that while Blackstone sometimes spoke of property in 'rapturous tones', he also emphasised the importance of governmental and societal controls on property, and 'tended to see individualism and community as reciprocal rather than opposing values'.²⁰ Even as metaphor, however, Blackstone's dictum about property has proved of lasting impact, if only as a 'straw man' for theorists such as the Grays to knock down. In addition, even if we acknowledge that Blackstone saw property as having both individual and collective aspects as much as modern theorists do, this doesn't take anything away from modern theorists; and amplifies rather than diminishes the notion that 'property' is a concept with both individual/collective and public/private – 'quasi-public' – considerations.

Property rights in unit titles, as we will see, fit easily into the Grays' notion of the 'quasi-public'. A fee simple estate, for example, is, following the leads of the Grays and Rose, subject to general laws, town planning regulations, and society's decisions about resource allocation. It is not a 'sole and despotic dominion' but is seen to represent a bundle of rights greater than that in any other modern legal estate in land.²¹ As we will see, a stratum estate under the Unit Titles Act 1972 involves a very different bundle of rights of a much less private and exclusory nature.

III. THE UNIT TITLES ACT 1972

A. *The Nature of Land*

In his discussion of 'land' – comprehending 'all things of a permanent, substantial nature'²² – Blackstone noted that land had, 'in its legal signification, an indefinite extent, upwards as well as downwards' – no building could overhang another's land, and anything in a direct line between the surface of land and the centre of the land belonged to the owner of the surface.²³ 'Land', in this sense, begins at the centre of the earth, crosses through specified boundaries at the earth's surface, and continues into space.²⁴ It was inevitable that this model would cause difficulties, and the com-

17 Carol Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' in Jack M Balkin and Sanford Levinson (eds), *Legal Canons* (1999) 66, 67.

18 *Ibid.*, 66.

19 *Ibid.*, 67 and generally.

20 Albert W Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 30-31, 46 and generally.

21 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252: '[I]n jurisdictions of common law derivation, the amplest or fullest bundle of rights which can exist in relation to land is the fee simple estate ... [t]he rights enjoyed by the owner of the fee simple come closest to ... *dominium*'.

22 Blackstone, above n 1, 14. Rose, above n 17, 77 also notes that land 'sticks around indefinitely', and this is why it is subject to so many claims and doctrines.

23 Blackstone, above n 1, 16.

24 It should be noted that this conception of land was not invented by Blackstone: it has existed since at least the 13th century. See Gray, above n 21, 253.

mon law was quite comfortable with strata titles, under which different persons could own different levels of a building, though there were some problems with multi-level ownership under the Torrens system, primarily because of the complexity of the easements that would be required.²⁵

In the context of increasing urbanization in New Zealand after World War II, there were calls for the subdivision of land to be made easier and more flexible.²⁶ Town planning restrictions favoured single-level section no less than a quarter-acre in size,²⁷ and even in 1972, New Zealand could be called a 'quarter acre paradise'.²⁸ Two main mechanisms emerged to allow separate titles for separate flats and offices within a single building or area. The first is now known as the company share scheme, under which a company would own a building, and the shareholders of the company would each hold a licence from the company to occupy a particular flat, with a certificate of title being issued for this type of 'ownership'. A number of problems arose however, particularly in relation to raising mortgage finance and transferability.²⁹ The second was the cross-lease system, first developed during the 1960s to avoid town planning restrictions on subdivision.³⁰ This provided for adjacent owners to each own a share in a fee simple estate, with all owners of the fee simple granting leases for (commonly) 999 years over particular buildings. A cross-lease owner holds an undivided share in a fee simple estate, and a leasehold estate in a certain building (or part thereof), often with the right to exclusive use of a further area under the lease. A number of difficulties with cross leases have been identified, however, and they have rarely been seen as suitable for high rise buildings.³¹ Problems associated with both the flat-owning company regime and the cross-lease system, provided a strong impetus for reform in this area.³² There were calls for a legislation allowing for the separate ownership of flats and offices on a number of occasions during the 1960s, and a Flat and Office Ownership Bill was introduced into Parliament in December 1971.

B. The Unit Titles Act 1972

The Flat and Office Ownership Bill – based largely on Australian models – was designed to eliminate these difficulties.³³ Each owner would be entitled to a stratum estate in his or her unit, which could be dealt with freely without the consent of other owners. The Bill allowed the subdivision of land into units, whether side by side or vertical, and provided for the deposit of a three-dimensional plan; though we have seen that strata titles could exist under common law, in discussing the Bill, Parliament understood deposited plans only in two-dimensional terms.³⁴

25 See D W McMorland, 'Titles to Flats, Town Houses, and Offices' in Hinde, McMorland and Sim, *Land Law in New Zealand* (looseleaf, updated 2007), para 14.001; Rod Thomas, 'Unit Titles' in *New Zealand Land Law* (2005) 887, 891; and Munro (1972) NZPD 1770.

26 Thomas, *ibid.*, 889.

27 McMorland, *above n 25*, para 14.008.

28 See Austin Mitchell, *The Half-Gallon Quarter Acre Pavlova Paradise* (1972).

29 McMorland, *above n 25*, para 14.006.

30 *Ibid.*, para 14.008.

31 *Ibid.*, paras 14.020(i) and 14.022.

32 See McMorland, *above n 25*, para 14.022; and Wall, (1972) NZPD 1771.

33 Munro (1972) NZPD 1089; Jack (1972) NZPD 1763.

34 Jack (1972) NZPD 1763-1764. See also Riddiford (1972) NZPD 1773-1774 for some key benefits of the UTA as understood at the time.

The name of the statute morphed on its way towards enactment, and the Unit Titles Act 1972 as passed reflected a number of varying considerations. The Long Title describes it as '[a]n Act to facilitate the subdivision of land into units'.³⁵ Under s 2 of the UTA, 'unit' means 'a part of [any] land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership'.³⁶ The proprietor of an estate in fee simple or leasehold can subdivide that land into two or more principal units, accessory units, and common property, being land not comprised in any unit.³⁷

An outline of the Act is helpful to understanding its scope and scheme. Section 12(1) provides that on the deposit of a unit plan, the registered proprietor of the land to which the subdivision relates 'shall become a body corporate'.³⁸ The 'body corporate'³⁹ is defined in s 2 as '... the body corporate that comprises the said proprietor or proprietors in accordance with section 12': circular definitions are not unknown in statute law.⁴⁰ Thereafter, under s 12(2), the proprietor or proprietors for the time being of all the units comprised in the unit plan comprise the body corporate.⁴¹ The body corporate is a separate legal entity, 'capable of suing and being sued in its corporate name',⁴² and has perpetual succession.⁴³ Section 15 imposes various duties on the body corporate, including insuring all buildings and improvements on the land owned by the proprietors comprising the body corporate, maintaining the common property, maintaining an administrative fund, and levying proprietors to carry out these duties.⁴⁴ More broadly, section 16 states that, subject to the UTA, the body corporate has 'such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules', but that it does not have the power to carry on trading activities.⁴⁵

The provisions relating to the body corporate rules – the primary focus of this essay – are set out in section 37 of the UTA. Section 37 is set out in full in Appendix One of this article, but an outline at this point is desirable. Section 37(1) provides that, except as provided elsewhere in the UTA, the 'control, management, administration, use and enjoyment' of the units and common property, and 'the activities of the body corporate', are regulated by the rules of the body corpo-

35 Compare clause 3 of the Unit Titles Bill (the Bill): 'The purpose of this Act is to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individual owners

36 The definition in clause 5 of the Bill is unchanged.

37 *Unit Titles Act 1972*, Section 3. This provision is the same in the Bill.

38 Compare clause 62(1) of the Bill: 'When a unit plan is deposited ... a body corporate is created and is the body corporate for that unit plan'.

39 An uneasy term, as it applies to many kinds of corporate entities outside those contemplated by the Unit Titles Act 1972.

40 Clauses 5 and 62 of the Bill are similarly circular: 'body corporate' means a body corporate of a unit title development created under section 62 on the deposit of that unit plan ...', while clause 62 provides that '[w]hen a unit plan is deposited ... a body corporate is created and is the body corporate for that unit plan'.

41 Compare clause 63(1) of the Bill: 'The members of a body corporate for a unit plan are the unit owners of all the units in the unit plan'.

42 *Unit Titles Act 1972*.Section 13(1).

43 *Unit Titles Act 1972*.Section 12(4).

44 Clause 72 of the Bill sets out the main powers and duties of a body corporate under the Bill.

45 Compare clauses 64-66 of the Bill: A body corporate may do anything authorised by the Bill, or any other Act, and anything a natural person of full age and capacity can do – but only for the purposes of performing its duties or exercising its powers.

rate. The rules are those set out in the Second and Third Schedules of the UTA, unless these are amended.⁴⁶ The Second Schedule rules may only be amended by unanimous resolution of the proprietors comprising the body corporate, while the Third Schedule rules may be amended by majority resolution of proprietors.⁴⁷ Section 37(5) states that:⁴⁸

Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

Section 36(6) provides that no rule may restrict the transfer of a unit, while section 37(7) provides that any amendments to the rules must be recorded with the titles for the units. Section 37(8) and (9) require the body corporate to keep a copy of the rules, and provide a copy to proprietors on request. Section 37(11) states that the rules bind the body corporate, the proprietors, and any person in occupation, and 'enure for the benefit of the body corporate and every proprietor', and s 37(12) states they may be enforced in any court by an order for performance, restraint, or damages.

Section 41 sets out some restrictions on voting rights, such as that persons voting must be over 18.⁴⁹ Section 42 sets out that in any case where a unanimous resolution is required but not obtained, then as long as a majority of '80 per cent or more of those entitled to vote' has supported the resolution, a person in the majority may apply to Court for an order that the resolution be deemed unanimous. Conversely, where a resolution or consent is passed, any person who voted against it may apply to the Court to have the resolution or decision declared of no effect, on the grounds that the consequences of the resolution would be inequitable for the minority.⁵⁰ There are also some further sections in the UTA, not relevant to our considerations here.

IV. THE INDIVIDUAL AND THE COLLECTIVE

It is useful at this point to consider an interesting aspect of unit title ownership. One of the concerns of those drafting the Unit Titles Act was to ensure that a unit title would be freely transferable,⁵¹ and this is reflected both in the statute,⁵² and in common parlance: a unit title would

46 Section 37(2) refers to rules being 'added to, amended or repealed'. For simplicity, all of these are referred to in this dissertation as 'amendment'. In the Bill, 'body corporate operational rules' bind the body corporate: clause 91(5), though these operational rules are to be effected through regulations which have not yet been made publicly available.

47 Sections 37(3) and (4). These 'default rules' are set out in full in Appendix Two. The Bill provides that the body corporate operational rules may be amended, revoked or added to by ordinary resolution of the body corporate.

48 Compare clause 91(3) of the Bill: 'Any amendment or addition must relate to the control, management, administration, use, or enjoyment of the principal units, accessory units, and the common property, or to the regulation of the body corporate, and no powers or duties may be conferred or imposed on the body corporate that are not incidental to the powers or duties conferred or imposed on the body corporate under this Act.'

49 The Bill is much more prescriptive as to voting: clauses 75 set out specific requirements as to meetings, quorums, proxies, and polls; matters which are left to body corporate rules under the Unit Titles Act 1972.

50 *Unit Titles Act 1972*, Section 43.

51 See eg Riddiford (1972) NZPD 1092.

52 *Unit Titles Act 1972*, s 37(6).

generally be seen as private property. As such, an individual can enter into a contract to purchase a unit title with another individual without recourse to any other person: an agreement to purchase and sell a unit title property is a matter of private contract. Upon becoming the owner of the unit title, however, the purchaser, while remaining an individual owner, also becomes part of the body corporate. As an individual unit proprietor, the owner must comply with the body corporate rules. The body corporate must also comply with these rules, some of which relate to duties to proprietors. An individual unit owner becomes part of a collective, which, in turn, has duties to other individuals who comprise the collective.

The nature of the body corporate collective deserves some attention. A body corporate has a legal personality separate from the individual proprietors: it has perpetual succession, and is capable of suing and being sued.⁵³ On the other hand, it can be seen as essentially a collective of proprietors. As section 12(2) of the UTA states, ‘the proprietor or proprietors for the time being of all the units comprised in the unit plan shall, by virtue of this Act, be the body corporate’.⁵⁴

These two notions of the body corporate – as an independent entity and as a collective of proprietors – have been further discussed in case law. In *World Vision of New Zealand Trust Board v Seal*,⁵⁵ (*World Vision*) Heath J set out what he saw as the ‘underlying principles’ of the UTA, the first being:⁵⁶

The need to synthesise the conflicting views, needs and desires of proprietors who have differing interests through the adoption of a democratic model. That model is designed to enable proprietors to make collective decisions (through the body corporate) about the use of common property and proposals to make structural changes or additions to the property likely to affect the use, enjoyment or value of units owned by other proprietors.

Heath J’s view sees the body corporate essentially as a kind of mini-democracy allowing proprietors to make collective decisions, and emphasizes the collective nature of a body corporate.

The case of *Velich v Body Corporate No. 164980*⁵⁷ (*Velich*) illustrates the other notion of a body corporate as a legal entity separate from the relevant unit proprietors. *Velich* concerned a decision by a body corporate to withhold consent to a proprietor’s alterations to his unit. The Court took the view that the body corporate could not unreasonably or arbitrarily withhold consent: the case had a ‘public law dimension’,⁵⁸ as decisions by bodies corporate involved the exercise of statutory power, with the court having jurisdiction to review ‘irrational’ decisions under the Judicature Amendment Act 1972.⁵⁹

In commenting on the decision in *Velich*, administrative law specialist Michael Taggart has compared a body corporate to a public authority, with its decisions subject to judicial review (though in Taggart’s view the courts should intervene under their inherent supervisory jurisdic-

53 *Unit Titles Act 1972*, sections 12 and 13.

54 The Bill is more express about this collective aspect: clause 3 specifically states that the Bill is concerned with ‘communities of individual owners’.

55 [2004] 1 NZLR 673.

56 *World Vision*, para 51.

57 (2005) 5 NZConvC 194,138.

58 *Ibid* para 45.

59 *Ibid*.

tion, rather than under the Judicature Amendment Act).⁶⁰ In other words, a body corporate can be seen as subject to administrative law considerations.⁶¹

The conceptions of the body corporate in *World Vision* and in *Velich* – though both deriving from the UTA – can be seen as somewhat contradictory. In *World Vision*, the body corporate is a democratic vehicle for collective decision making by proprietors; in *Velich*, the body corporate is an entity separate from the proprietors themselves, and charged with an obligation of reasonableness in decision making. One conception of the body corporate sees it as a collective of proprietors; while the other sees it as an independent body with quasi-public functions and subject to administrative law considerations. There is a tension here between the body corporate's collective function and its independent responsibilities.

But if a tension exists in the nature of the body corporate, a greater tension exists for individual proprietors. As noted above, an individual can acquire a unit title through private contract. Through ownership, that proprietor becomes a member of the body corporate and, through the democratic model described by Heath J, a voice in the body corporate's collective decisions. But the proprietor's 'democratic' rights are not unfettered: decisions of the body corporate must be reasonable, and this means that the voice of the proprietor must also be reasonable. A proprietor considering a body corporate decision must not only consider his or her own interests, but also the administrative law duties of the body corporate. In certain circumstances, a proprietor mindful of these duties might be required to make a decision that would go against the interests of that proprietor. In this way, the notion of the body corporate as an entity separate from the proprietors may trump the notion of a body corporate as a kind of mini-democracy: the body corporate remains in each case a vehicle for collective decision-making, but the way in which it must exercise its duties and discretions mean that it cannot always be democratic, in the sense of proprietors as voters having a free choice in their contributions to collective decision making. Proprietors may as individuals have their own interests and agendas, but when they put on their hats as members of the body corporate, these may have to be set aside to allow the body corporate to properly carry out its duties as an entity separate from its proprietors.

These tensions arise from the UTA, but they are more hinted at than expressed. To better understand these tensions, it helps to look to two sources: first, the way the UTA provides for body corporate rules to regulate relationships between proprietors and the body corporate; and second, to some recent cases on invalid body corporate rules, which show the courts grappling with these tensions and how the UTA seeks to mediate them through body corporate rules. The cases in particular illustrate how developers have sought to avoid these tensions through limiting the powers or collective nature of the body corporate, and how the courts have resisted most attempts of this kind by developers. The courts have instead upheld the tensions between individual and collective considerations, in effect supporting the view that these tensions are an integral part of the scheme of the UTA.

60 Michael Taggart, 'Administrative Law' (2006) *NZ Law Review* 75, 99-100.

61 *Ibid.*, and *Velich*, para 48.

IV. BODY CORPORATE RULES

The default rules are set out in Schedules 2 and 3 of the UTA. Schedule 2 begins with duties of a proprietor, such as permitting the body corporate (or its agents or servants⁶²) to enter the unit for the purposes of maintaining common property or ensuring compliance with the rules; complying with all relevant laws; paying all rates; and not making any structural alterations to the unit without the consent of the body corporate. Right from the outset, it is clear that exclusivity and despotic dominion are not integral to unit title ownership. Schedule 2 continues with the duties of the body corporate, including repair and maintenance of common property; and providing proprietors and mortgages with insurance information on request; and the powers of the body corporate, including borrowing and investing money; establishing bank accounts; entering into agreements with proprietors for the provision of amenities to units. These provisions – which state the duties of proprietors and the powers and duties of the body corporate, which are clearly of considerable importance to proprietors both in their role as private owners and as members of the body corporate – occupy just 3 of the 34 clauses of rules set out in Schedule 2.

Rules 4-13 of Schedule 2 set out provisions for the establishment of a body corporate committee, to which the powers and duties of the body corporate may be delegated if there are more than three proprietors.⁶³ The default rules state that the committee ‘shall’ be established if there are more than three proprietors, and go on to specify quorum requirements, provisions for decision making by the committee, conduct of meetings, and minute keeping. Rules 14-31A set out the provisions for general meetings of the body corporate, to be held at least annually and otherwise in certain circumstances. These rules set out quorum, voting, and other procedural requirements. Rules 32-34 provide for the body corporate to have a common seal, and rules concerning special resolutions.

As noted above, s 37(2) of the UTA provides that the Second Schedule rules may be ‘added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise’. The rules in the Third Schedule, by contrast, may be added to, amended or repealed by (simple) resolution of the body corporate at a general meeting.⁶⁴ The Third Schedule rules impose further duties on proprietors: not to use any unit for any purpose illegal or injurious to the reputation of ‘the building’; not to make undue noise in or around any unit or the common property; keep any animal without the consent of the body corporate or its committee; not use the common property in a way that interferes with the use and enjoyment of other proprietors; and not to use a unit in such a manner as to cause a nuisance or disturbance to any occupier or proprietor.

The right to amend the rules is not unrestricted. As noted above, ss 37(5) and 37(6) contain some important restrictions on amendment. To paraphrase, any amendment must relate to:

- The control, management, administration, use or enjoyment of the units or the common property; or
- The regulation of the body corporate; or
- The powers and duties of the body corporate;

but

- No power may be conferred or duty imposed that is not incidental to the powers and duties under the UTA;

⁶² An interesting phrasing, considering the body corporate can *only* act through agents or servants.

⁶³ *Unit Titles Act 1972*, Rule 4, Schedule 2.

⁶⁴ *Unit Titles Act 1972*, Section 37(4).

- No power may be conferred or duty imposed that would enable the body corporate to acquire or hold any interest in any land or chattel real, or to carry on business for profit;
- No amendment may restrict the devolution of units or any dealing with any unit;
- No amendment may destroy or modify any right implied or created by the UTA.

As should be clear from this paraphrase, there are specified parameters for amendment; and, even if amended rules are within these parameters, there are further restrictions – some specific, such as the restriction on the body corporate carrying on business; and some general, such as the restriction on amendments which may modify any right implied under the UTA.

There have been a number of cases relating to the interpretation of rules – perhaps most notably, a 1999 decision on whether a Rhodesian Ridgeback dog was a ‘small domestic animal’.⁶⁵ Until a few years ago, no body corporate rules had been found to contravene the UTA. This may be partly because unit title developments were unpopular for a number of years:⁶⁶ even in 1993, it was necessary for the Court of Appeal to enter into a detailed discussion of some of the key concepts of the UTA.⁶⁷ In recent years, however, there have been a number of cases where certain body corporate rules have been found to be *ultra vires* on the basis that they are outside the restricted powers of amendment contained in the UTA.

The rules found invalid – or *ultra vires* – to date have been found invalid on one of two bases: that the amended rule imposes a power or duty that is ‘not incidental’ to the powers and duties under the UTA,⁶⁸ or that the amended rule modifies a right implied or created by the UTA. Amended rules found to be *ultra vires* are interesting for three reasons. First, there have been a number of cases in recent years in which amended rules have been found to be invalid, and these cases are thought to represent just the tip of the iceberg: many more invalid rules may exist that have not come before the courts as yet, but may in future.⁶⁹ Second, these cases illustrate the strict boundaries set out in the UTA for the amendment of rules: the statute expressly allows the amendment of rules, almost suggesting that amendment can be a regular thing, but the courts have shown that the parameters for amendment are narrow: amended rules have only occasionally been found to be valid when challenged.⁷⁰ Third, these cases clearly show the tensions between individual and collective considerations present in the UTA. It is this third reason which is most important for these purposes.

In illustrating the tension between individual and collective considerations in the UTA, it is argued here that invalid rules can be divided into two categories, categories based not on which part of the UTA the rules breach, but on the way the rules illustrate the individual/collective tension. The tension between individual and collective considerations is reflected in amended rules that seek to alter the statutory composition of the body corporate and in amended rules that relate to decisions by the body corporate. Each category reflects the tension between understanding the body corporate as a collective of proprietors and understanding it as a separate legal entity; and the tension between proprietors with individual interests whose property is not wholly private or exclusory, but who are subject to body corporate rules, and the administrative law duties imposed on the body corporate to which those proprietors belong.

65 *Godoy v Body Corporate No. 164980*, unreported [14 June 1999] HC, Auckland, M 1906/98.

66 Thomas, above n 25, 889.

67 *Disher v Farnworth* [1993] 3 NZLR 390.

68 The wording ‘not incidental’ is repeated in clause 91(3) of the Bill.

69 See eg Rod Thomas, ‘Fifer, Unit Titles and No 8 Wire’ [2006] *New Zealand Law Journal* 152.

70 See eg *Young v Body Corporate No.120066*, unreported [6 December 2007] HC, Auckland, CIV 2007-404-002375.

V. COMPOSITION OF THE BODY CORPORATE

The first conception of the body corporate described above was as a collective of proprietors, a view supported by the comments of Heath J in the decision in *World Vision*. Under this conception, the composition of the body corporate is greatly significant. If the membership of the body corporate or the voting rights on the body corporate are altered from those specified in the UTA, then the body corporate cannot properly operate – or be understood – as a collective of proprietors. These cases show situations where developers have attempted to alter the composition of the body corporate, or the voting rights of the proprietors that would normally comprise the body corporate. In doing so, the tensions between proprietors interests present in the UTA have been upset in favour of a particular proprietor (the relevant developer). The courts have stepped in under the UTA, and in doing so have preserved the tension for the benefit of proprietors.

The first New Zealand case on the invalidity of body corporate rules was *Chambers v Strata Title Administration Ltd*⁷¹ (*Chambers*). This case concerned a staged development under the Unit Titles Amendment Act 1979, which allows titles to be issued for principal and accessory units as well as a ‘future development unit’ (FDU), to be turned into a principal unit in future. The owner of an FDU, however, is not a member of the body corporate and has no voting rights.⁷² To try to maintain control of the body corporate, the developer amended the default rules in the UTA to provide that as long as there was an FDU, Strata (the defendant) would be the body corporate secretary, and the developer would have to approve all resolutions of the body corporate. Disagreement soon arose between the unit owners on the one hand, and Strata and the developers on the other. The members of the body corporate sought to remove Strata as body corporate secretary, and the matter went to court, where the validity of two amended rules was challenged. One of these was rule 10A, which provided that as long as there was a future development unit in the development, the body corporate committee would comprise the body corporate secretary, the future development unit owner, and another representative of the proprietors. In the court’s view, this rule contravened s 37(6) of the UTA as it modified a right implied or created by the UTA – namely, the right of proprietors to manage their own affairs, as the future development unit owner could not, by statute, be a member of the body corporate. Rule 10A was therefore ultra vires.⁷³

It was noted above that amended rules will be ultra vires if they contravene the amending powers set out in the UTA, and this is of course the basis on which the court in *Chambers* found Rule 10A invalid. It is submitted here that the rule was also invalid because it disturbed the composition of the body corporate (and in particular its elected decision making arm, the body corporate committee). In doing so, Rule 10A prevented the body corporate being a vehicle for collective decision making by proprietors, and instead made it a collective at the mercy of a particular individual – the developer. In this way, the rule disturbed the tension between individual and collective considerations that is a necessary part of the UTA.

This point can be clarified by reference to some further cases in which rules which depart from the notion of the body corporate as a collective of proprietors have been found ultra vires. In *Body Corporate 199883 v Clarke Family Associates Limited*⁷⁴ (*Clarke*), Rule 35 stated (first) that as long as the developer owned a unit or FDU, the body corporate could not pass any resolution,

71 (2004) 5 NZConvC 193,864.

72 Section 9, *Unit Titles Amendment Act 1979*.

73 *Chambers*, para 46-47.

74 (2005) 5 NZConvC 194,087.

form any committee, or use the common seal without the consent of the developer; and (second) that the body corporate would sign any documents necessary to enable the developer to divide the existing unit 7 to be subdivided into 5 further units.⁷⁵ The 17 applicants, being the proprietors constituting the body corporate, argued that this Rule 35 was ultra vires.

The first part of Rule 35, which gave the developer a veto over any substantive action by the body corporate, was found to breach s 37(6) of the UTA and so was ultra vires.⁷⁶ The second part of Rule 35 provided that the body corporate would do all things required to allow the developer to divide unit 7 into five further units. The applicants relied on *Chambers*, particularly the finding that a rule which differed from the Second Schedule rules would be ultra vires if outside the amending power conferred by the UTA,⁷⁷ and the court agreed that 'incidental' meant 'naturally attached to or pertaining to the duties and powers set out in the Act'.⁷⁸ Here, the duty imposed on the body corporate was found to be 'well beyond' anything arising under s 44 of the UTA, which governed redevelopment.⁷⁹ Rule 35 was 'not incidental' and essentially sought to override other provisions of the UTA. It was therefore contrary to s 37(5).⁸⁰ It was also contrary to s 37(6), as it modified the usual right of proprietors to consent or otherwise to a plan of redevelopment. The Court declared that Rule 35 was ultra vires the UTA.⁸¹

In *Clarke*, similar to as in *Chambers*, part of Rule 35 stated that as long as the developer owned a unit or future development unit, the body corporate could not pass any resolution, form any committee, or use the common seal without the consent of the developer. This rule severely restricted the ability of the body corporate to make decisions or take actions on behalf of the proprietors, and undermined the collective model of the body corporate set out in the UTA by effectively making the developer the controller of the body corporate.

*Body Corporate No. 86975 v Cassels*⁸² (*Cassels*) provides a further illustration of an ultra vires rule relating to the composition of the body corporate. Cassels was the owner of a future development unit, which had been developed and was tenanted, but which had never become a principal unit, and so was not part of the body corporate. The body corporate attempted to levy Cassels on the basis that the body corporate rules required Cassels to pay. Cassels denied liability on the basis that the body corporate rules were ultra vires.

The relevant amendments to the default rules were numbered 40 – 42. Rule 40 provided that until a final unit plan was deposited, the unit proprietors would contribute levies according to their unit entitlements on the proposed development plan, notwithstanding that the proprietorship might only be over a future development unit. Rule 41 provided that until all titles had issued, the proprietors would have voting rights for body corporate affairs based on the unit entitlement in the proposed unit plan. Under Rule 42, every future development unit proprietor was deemed to be the proprietor of a principal unit. The intention of these rules was relatively clear: they were designed to ensure that the owner of a future development unit was treated as a member of the body corporate and would contribute levies at a similar rate to other unit owners. Looking to the 'incidental'

75 Ibid paras 10-11.

76 Ibid para 34.

77 *Chambers*, para 39, cited in *Clarke* para 38.

78 *Clarke*, para 39.

79 Ibid para 40.

80 Ibid para 41.

81 Ibid para 42.

82 (2005) 6 NZCPR 733.

test in the UTA, the court found that the amended rules appeared to confer a power and impose a duty on the BC that was ‘more than incidental’ to those under the UTA.⁸³ The court also noted that the amended rules modified the rights of the future development unit in relation to the body corporate, and in conferring voting rights on the future development unit also diluted and modified the voting rights of the principal units. Rules 40-42 were outside the scope of the amending power in the UTA and were ultra vires.⁸⁴ Reading *Cassels* another way, Rule 41 altered voting rights and Rule 42 altered the composition of the body corporate by making owners of future development units members of the body corporate. The rules purported to alter the composition of the body corporate, and offended against the model for collective decision making set out in the UTA.

If we understand the body corporate as a kind of ‘mini-democracy’, and as a vehicle for collective decision making by proprietors, it is clear that any rule which alters the composition of the body corporate (or the body corporate committee) or the voting rights of proprietors will upset the tension between individual and collective considerations in the UTA. This kind of rule will prevent properly collective decision making: most notably, in the case of case in *Clarke Family*, by placing the body corporate at the mercy of particular person with a veto right, such as the developer; but also, as in the case of *Cassels*, by giving someone voting rights who is not actually part of the body corporate, such as a future development unit owner. If the body corporate is understood as a collective of unit proprietors, then its integrity as a collective is disturbed if persons other than (principal) unit proprietors are able to become members and exercise voting rights; and by disturbing the integrity of the collective, the rights of individual unit owners are also affected.

VI. DECISIONS BY THE BODY CORPORATE

The second kind of ultra vires rules are amended rules which relate to the manner in which the body corporate makes or may make decisions. These kinds of rules may be of a similar kind to the first type described above: there is a degree of fusion between the two categories.

In *Fifer Residential Limited v Giesege*⁸⁵ (*Fifer*), Parkbrook made plans to develop a seven-level apartment block in Parnell in the mid-1990s, though the units were marketed and sold as being part of a six-level development. Fifer took an assignment of the development in 2002, after a number of units had been sold, and claimed the right to develop a seventh floor, a claim proposed by a number of proprietors, some being original purchasers and some being on-purchasers.⁸⁶ Rule 2.2(g) of the amended body corporate rules provided that the body corporate would permit a re-development of the building, utilizing the seventh floor airspace. The rule was argued by the unit proprietors to contravene s 37(5) of the UTA, which provides that a duty imposed on the body corporate must be ‘incidental’ to the duties imposed by the UTA. With reference to *Chambers* and *Clarke Family*, the court held that the duties of the body corporate were quite limited under the UTA, and that Rule 2.2(g) was not ‘incidental’ – it was not naturally appertaining to the statutory duties, and rather purported to create an entirely independent duty requiring the body corporate to

83 *Cassels*, para 23.

84 *Cassels* was appealed to the High Court on issues unrelated to the rules: the High Court agreed with the DC’s finding as to the relevant rules being ultra vires. See *Cassels v Body Corporate Number 86975*, unreported [13 June 2007] HC, Wellington, CIV 2006-485-701.

85 (2005) 6 NZCPR 306.

86 *Ibid* paras 8-9.

consent to the seventh floor development. Falling outside the scope of s 37(5), it was ultra vires.⁸⁷ The court held that the rule also contravened s 37(6), which provided that no amended rule could destroy or modify and right implied or created by the UTA. Drawing on *Clarke*, the Court noted that one of the rights implied or created by the UTA was the right of a proprietor to consent to a redevelopment. If Rule 2.2(g) required consent, it would override s 44 of the UTA and therefore be ultra vires on this basis.⁸⁸ Following the approach advanced here, the rule can be seen to have restricted proprietors from making decisions in accordance with the democratic processes set out in the UTA, by binding unit owners to a certain course of action. A similar approach was taken with the second part of Rule 35 in *Clarke*, which stated that the body corporate would sign any documents necessary to enable the developer to subdivide the existing unit 7 into 5 further units.

While *Clarke* and *Fifer* dealt with rules that required a body corporate to make a certain decision, *Velich*⁸⁹ was different. In *Velich*, an office building was converted to apartments in the 1990s, but before the conversion was complete, the developer experienced financial difficulties and a number of purchasers sought to complete their apartments themselves. One apartment, including principal unit 4G and accessory units AU49 and AU50, was sold off the plans, and at the time of the financial difficulties consisted of a shell on the fourth floor, while a further apartment structure and deck (with significant views) were to be built on the fifth floor. A two year time limit was set for work to be completed by owners, but while the fifth floor building work was completed within this two year time frame, the deck itself was not.⁹⁰

Velich purchased apartment 4G in early 2002. He wished to complete the deck and obtained council consent for this. However, he could not obtain the consent of the body corporate. Under Rule 2(1)(f) of the body corporate rules for the development, a proprietor was to 'make no additions or alterations to the unit ... or in any way alter the elevation or external appearance of the unit without the consent of the Body Corporate'. Consent was not to be unreasonably or arbitrarily withheld where:

- (i) The additions and alterations were of a non-structural nature, did not alter the external elevation or appearance of the unit, and were being carried out to fit-out or partition the unit;
- (ii) Prior to the non-structural partitions or alterations, the body corporate was provided with written evidence of builder's insurance; and
- (iii) The proprietor complied with any reasonable rules or regulations of the body corporate.

The body corporate took the view that as the work was structural; its consent was required before Velich could complete the work. In a letter to Velich, it noted that it could arbitrarily withhold consent, but, given that the proposed work would affect other units within the development (essentially as to the outlook and privacy of certain other unit owners), it could withhold consent here even when acting reasonably. Consent was not granted. Velich, feeling some frustration, commissioned the deck building to be done anyway. The body corporate obtained judgment in the High Court requiring Velich to obtain the consent of the body corporate before he completed the deck, and granting a permanent injunction against Velich undertaking any further works without the written consent of the body corporate. In the High Court's view, Rule 2(1)(f) was 'clear and unambiguous' in stating that any additions or alterations to a unit required body corporate consent,

87 *Fifer*, paras 41-44.

88 *Ibid* paras 45-46.

89 (2005) 5 NZConvC 194,138.

90 *Velich*, paras 1-6.

and it was ‘unarguable’ that the construction of the deck would alter the external appearance of the unit, and this was a case in which consent could be arbitrarily or unreasonably withheld.⁹¹

The Court of Appeal’s first main issue was whether Rule 2(1)(f) was ultra vires. If Rule 2(1)(f) applied, then it was ‘perfectly clear’ that the consent of the body corporate was required to Velich’s proposed work.⁹² The default body corporate rules in the second schedule of the UTA had a similar rule – 1(f) – which simply provided that a proprietor could not make any ‘additions or structural alterations’ to its unit without body corporate consent. In the Court of Appeal’s view, it was arguable whether the completion of the deck would require consent under default Rule 1(f).

In this situation, Velich’s title to unit 4G extended over an area including the area above the roof of the fourth floor area included in unit 4G where the deck was originally intended to go. The Court of Appeal expressed the view that Velich’s entitlements as owner necessarily included rights of use in relation to the entire space on the fifth floor of the building in respect of which he has title. These rights were ‘implied or created’ by the UTA for the purposes of s 37(6) and so could not be destroyed or modified through the rules.⁹³ As the Court of Appeal further noted, s 37(5) of the UTA required that amendments to the default rules relate to the ‘control, management, administration, use, or enjoyment’ of the units or common property; the regulation of the body corporate; or the powers and duties of the body corporate (other than those conferred or imposed by the UTA). As Rule 2(1)(f) related to the powers and duties of the body corporate, it was within the scope of the proviso to s 37(5), but would only be valid if the powers and duties conferred were ‘incidental’ to those imposed by the UTA.⁹⁴ In the Court of Appeal’s view, at the time Rule 2(1)(f) was adopted, there was no rule in place which required the body corporate to carry out Rule 2(1)(f) beyond the scope required by default Rule 1(f): Rule 2(1)(f) ‘expanded the powers and duties of the body corporate, and did so appreciably’.⁹⁵ A rule which appreciably expanded the standard powers and duties of the body corporate was not ‘incidental’ to those powers and duties. Rule 2(1)(f) was therefore ultra vires.⁹⁶

This reflects what we could call an orthodox reading of the powers of amendment set out in the UTA, with ss 37(5) and (6) setting out the parameters for amendment. But it is possible to go further, as is proposed by this essay and as was done in *Velich*. The Court of Appeal went on to note that even if Rule 2(1)(f) were lawful, it was ‘plain’ that the body corporate would not be entitled to act capriciously in granting or refusing consent.⁹⁷ Body corporate rules were not contracts, and the ‘public law dimension’ could not be overlooked:⁹⁸

A decision by a body corporate to grant or withhold consent under either rule 2.1(f) or default rule 1(f) would involve the exercise of a statutory power of decision for the purposes of s 3 of the *Judicature Amendment Act* 1972. This does not mean that the body corporate must act as if the rules provided that consent not be declined unreasonably. But we think it elementary that the body corporate, when exercising its statutory power of decision, must give proper effect to the rules and the statutory scheme as a

91 *Velich* High Court decision, paras 67-68, 70, 73, cited in the *Velich* Court of Appeal decision, paras 15-17.

92 *Ibid*, para 23.

93 *Ibid*, para 27.

94 *Ibid*, paras 29-30.

95 *Ibid*, para 31.

96 *Ibid*, paras 31-32.

97 *Ibid*, para 43.

98 *Ibid*, para 45.

whole. It follows that there is jurisdiction to review as irrational and indeed invalid a decision which cannot sensibly be supported in light of that regulatory and statutory scheme.

It would not have been open for the body corporate to pass a rule preventing Velich from using as a deck part of his unit which was designated on the plan as a deck. It would then be ‘surprising’ if it could achieve the same effect by withholding consent to some minor works required to facilitate such use.⁹⁹ It was therefore ‘well arguable’ that any decision by the body corporate to refuse consent would be invalid on administrative law grounds, as ‘[n]o sensible or rational body corporate’ could take exception to the alterations proposed by Velich.¹⁰⁰ The decision of the High Court was set aside, and Rule 2(1)(f) was declared ultra vires.

As noted above, *Velich* represents a conception of the body corporate as something different to – or at least something more than – a collective of proprietors. In the words of the Court of Appeal, the body corporate is a statutory body with statutory powers of decision making. Commentary on *Velich* – also noted above – sees the body corporate as subject to administrative law rules analogous to those applying to public bodies.¹⁰¹

So we can conceive the body corporate not simply as a collective of proprietors, but also as an entity in its own right – and further, as an entity subject to public law considerations and obligations. This further illuminates the tension between individual and collective considerations present in the UTA. Individuals acquire units as ‘private’ property through private dealings. In doing so, they become members of the body corporate, a collective of proprietors. On body corporate matters, individuals may *as individuals* wish to vote a particular way on body corporate matters: Velich’s neighbours, for example, may have had their own views interfered with by the completion of his deck. But the body corporate is not simply a collective. Individuals voting *as members of the body corporate* must be mindful of the public law aspects of the UTA, and in particular, the duties of the body corporate as a statutory body subject to administrative law principles in the exercise of its discretions.

The relevant rule in *Velich* related not to a *required* decision of the body corporate, as was the case with the second part of Rule 35 in *Clarke* and the rule in *Fifer*, but rather to a *discretion* of the body corporate: the decision whether or not to grant consent to alterations in particular circumstances. As noted above, in the Court’s view, Rule 2(1)(f) ‘expanded the powers and duties of the body corporate, and did so appreciably’.¹⁰² It was therefore not ‘incidental’ to the powers and duties of the body corporate under the UTA, and was ultra vires.

Inasmuch as Rule 2(1)(f) expanded the powers and duties of the body corporate, and so was ultra vires, this rule was almost the opposite of many of those noted above. Rather than altering the composition of the body corporate (and so denying proprietors their rights to be properly involved in the body corporate’s decisions), or mandating or restricting certain decisions of the body corporate (and so denying proprietors the right to determine for themselves what actions and decisions the body corporate should take), the ultra vires rule in *Velich* purported to increase the powers of the body corporate. In doing so, however, the rule granted the body corporate certain powers exercisable against proprietors which, under the UTA, the body corporate was not supposed to have. This rule, like many of the others, can be seen to be denying proprietors rights,

⁹⁹ *Velich*, para 46.

¹⁰⁰ *Velich*, para 48.

¹⁰¹ Taggart, above n 60, 98-99, referring to Wade & Forsyth, *Administrative Law* (9th ed, 2004), 355.

¹⁰² *Velich*, para 31.

by permitting certain proprietors (through the body corporate) to make decisions affecting other proprietors that those proprietors should not have had the power to make. In so doing, the rule denied certain proprietors their usual rights in relation to the development. In other words, this rule, like the others, had implications for the operation of the body corporate as a vehicle for collective decision making in accordance with democratic principles: but rather than limiting proprietors' rights in relation to the body corporate, as the other ultra vires rules did, this rule purported to extend the body corporate's rights in relation to proprietors. To draw an analogy, the rule in *Velich* was not about the procedural rights of citizens, but about the powers of the state. This indicates that there are both similarities and differences between the two conceptions of the body corporate advanced here.

The court in *Velich* went further than any other court in the decisions above or the court in *World Vision*: while *World Vision* emphasized the view that the body corporate is a collective of proprietors, *Velich* made it clear that the body corporate is something more – it is a collective that is subject to administrative law considerations. In this sense, it is a fettered collective, and proprietors voting on body corporate matters are fettered democrats as well as owners of 'private' property, a point which makes clear the tension between individual and collective considerations present in the UTA.

VII. DEVELOPER'S RULES

A consistent theme of many of the above cases is the role played by developers. Most obvious is the rule in *Clarke*, which required that the developer approve all resolutions of the body corporate. Less overtly, in *Chambers*, *Fifer* and *Cassels*, a future development unit owner was to have rights not provided for in the UTA: this future development unit owner would generally be a developer seeking to protect rights to develop the future development unit in a particular way: in *Chambers*, for example, the court noted that the developer had relied on Rule 10A to frustrate the wishes of a majority of proprietors.¹⁰³ *Fifer* has been described as illustrating '[a] situation which is not at all uncommon in a unit title situation – endeavours by a developer to retain an unfettered power to control unilaterally a redevelopment aspect of the scheme'.¹⁰⁴

The role of developers in ultra vires rules has been commented on by Rod Thomas, an Auckland barrister who has been involved in a number of unit title cases. In explaining the phenomenon of invalid rules, Thomas places particular blame on developers' solicitors. As he puts it, the ability to alter the default rules is 'quite limited. This however, is not the way lawyers have dealt with the default rules'.¹⁰⁵ He observes that most unit title developments were small until the mid-1980s, and generally involved only three or four units. From the 1990s, more complex developments arose:¹⁰⁶

No doubt under the encouragement of their developer clients, lawyers felt the need to tinker with the default rules, and try to improve them. In doing so, they appear to have been guided primarily by pragmatic reasons, and in doing so, to have paid insufficient attention to the restrictions set out in the legislation, restricting what changes can be validly made [From the mid-1980s]

103 *Chambers*, paras 33-35.

104 D W McMorland, 'Body Corporate Rules and the Ultra Vires Principle' (2005) *Butterworths Conveyancing Bulletin*, 159, 160.

105 Thomas, above n 69, 152.

106 *Ibid* 152-153, 160.

solicitors, no doubt trying to assist their developer clients, undertook ‘creative’ solutions by adopting ‘by-laws’ changing the character of obligations intended by the legislation

Insofar as solicitors have to date, in creating new rules, given inadequate attention to statutory limitations prescribed in the Unit Titles legislation, they embraced a ‘No 8 Wire’ mentality. This has laid the seeds of uncertainty and discord, which will become an increasing problem into the future.

Thomas recognizes that ultra vires rules arise because of non-compliance with the UTA. He also goes further, however, in arguing that ultra vires rules have arisen because of a pragmatic but flawed approach by solicitors, ignoring the restrictions on amendment contained in the UTA; that is, a ‘Number 8 Wire’ mentality on the part of solicitors.

It is submitted here that difficulties have arisen not simply because of a Number 8 Wire mentality, but also because of a misunderstanding of the tension between individual and collective considerations inherent in the UTA. The body corporate is a collective of proprietors, and its composition must not be upset through the rules. The body corporate is also a body charged with administrative law duties. It is not simply a tool of developers. Developers and their solicitors must comply with the provisions of the UTA, to be sure, and where they do not play close attention to the words of the statute, they run a strong risk that amended body corporate rules may be declared ultra vires. But they must also pay attention to what the UTA implies but does not express: a tension between individual and collective considerations – between proprietors and the body corporate - which may prevent proprietors from becoming subject to the whims of developers by protecting the integrity of both private unit ownership and the body corporate, itself both a collective of proprietors and an entity separate from them.¹⁰⁷

VIII. CONCLUSION: THE TENSION

This essay began by pointing out that both individual and collective considerations are an inherent part of the scheme of the UTA. This is uncontroversial. What has been further suggested here is that there is a tension between these individual and collective considerations, both as between proprietors and between proprietors and the body corporate. This can be made clear through a simple analysis: a unit proprietor can purchase a unit through a private contract. That individual then becomes part of the body corporate, a collective of proprietors which has the role of facilitating collective decision making by proprietors through a democratic model. Proprietors cannot, however, act only in their own individual interests: the body corporate is a statutory body and its decisions are subject to administrative law considerations, such as reasonableness. A proprietor is both an individual and part of a collective. In addition, a body corporate is both a collective of proprietors and an independent entity subject to interests and duties which may be very different from those of the majority of the proprietors which comprise it.

These individual and collective considerations are often in tension, as should be clear from the cases discussed above. This tension may however act to protect proprietors from unscrupulous developers – undoubtedly a minority – who try to ignore collective considerations and force a body corporate to act in the best interests of a particular individual: the developer. By mandating that the body corporate be comprised in a particular way, the UTA protects the rights of the proprietors who make up the body corporate and prevents developers controlling the body corporate. By being subject to administrative law duties, the body corporate is also prevented from acting

¹⁰⁷ The Bill is notable for the suspicion it casts on developers: clauses 138-141 place specific disclosure obligations on the original owners of units (that is, developers).

unreasonably or arbitrarily as against proprietors. Proprietors as individuals are protected from both developers and the body corporate; in exchange, they give up some of their own rights by becoming part of a collective subject to both internal rules (the body corporate rules in the UTA) and external rules (administrative law principles).

This raises the question: what would Blackstone think? Though there are individual/private aspects to unit title ownership, the fact that the owning a unit title has necessarily collective implications means Blackstone's model of the 'sole and despotic dominion' of property ownership falls short. As was suggested above, however, this description is better understood as a metaphor than a statement of law. More helpful is the Grays' understanding of property as a power relationship, with most kinds of ownership sitting on a spectrum between 'public' and 'private' ownership. In particular, the Grays have advanced the view that certain kinds of property are 'quasi-public'. One notable example given by the Grays is a shopping mall sitting on private property but open to the public: it is part of the mall's nature that it is open to 'the public', and not everyone can be excluded, as Blackstone would (perhaps) have wished.¹⁰⁸

A unit title, with its peculiar tension between individual and collective rights and duties, can easily be seen as 'quasi-public': an individual proprietor becomes, through the body corporate, subject to public law considerations and limits on discretions. The significance of this 'quasi-public' nature becomes apparent when we compare a unit title to a fee simple title. A fee simple owner, as the Grays would suggest, does not possess a 'despotic dominion' but is subject to community decisions as to resource allocation. But if all titles are public, as the Grays might argue, some are *more public than others*. A fee simple owner is not subject to the kind of individual-collective tensions that a unit title owner is. To draw on the work of Samuel discussed above,¹⁰⁹ fee simple ownership comes close to the Roman notion of *dominium*, a point recognized elsewhere.¹¹⁰ Unit title ownership, on the other hand, is much more like a feudal conception of property: it is a series of complex relationships and rights. This essay has shown that these relationships arise both between individuals and between private individuals and their collective, with the relationships in a tension that both protects proprietors and restricts their discretions and rights.

It is obvious and uncontroversial that a unit title is very different to a fee simple title, and as indicated above, one way commentators have drawn attention to this is to observe that a fee simple title represents a bundle of rights greater than those pertaining to any other title.¹¹¹ What this essay has shown is that a unit title involves a bundle of rights better described as *different* to, rather than lesser than, the rights involved in fee simple ownership. A unit title is subject to a particular statutory regime, but the statute does not express the tension between individual and collective considerations that has been presented in this essay. Rather, this tension is implied.

The tension is clearest when we consider body corporate rules. These mediate relationships between proprietors and between proprietors and the body corporate. The UTA contains the power to amend body corporate rules within certain parameters; courts have found certain rules to be ultra vires when they have failed to comply with the UTA.¹¹² What the courts have also done,

108 See Gray and Gray, above n 4, 20-31.

109 Samuel, above n 8.

110 Gray, above n 21, 252.

111 Ibid.

112 Under the Bill, the scope of rules may be narrower, as indicated by the phrasing 'body corporate *operational* rules', though this is not yet known, as the regulations which will contain the rules have not yet been made publicly available.

wittingly or unwittingly, is to show that unit ownership involves becoming part of a collective, that that collective is fettered by administrative law, and therefore that the rights of proprietors on the collective are fettered, perhaps fuzzied. This does not mean these rights do not exist: as Carol Rose has observed, fuzzy rights are still rights.¹¹³ Through showing this tension between the individual and the collective, and within the collective, the courts have helped protect the rights of proprietors against developers and against the body corporate.

The tension between individual and collective considerations which is part of unit title ownership, then, is not altogether a bad thing. It is widely agreed that the UTA is in need of amendment,¹¹⁴ and new legislation is expected to be passed within the next couple of years.¹¹⁵ What is to be hoped, however, is that any new statute will not undermine the tension between individual and collective rights present in the UTA, particularly inasmuch as this tension is mediated by body corporate rules. Currently, where someone such as a developer tries to alter the nature of the collective, or the collective tries to ignore its responsibilities to individuals, then the courts can intervene to protect the parties. This is as it should be. Unit title ownership is not a 'sole and despotic dominion', but rather a series of complex and intertwined relationships that can aptly be described as 'quasi-public'. Individuals become part of a collective, and the collective becomes responsible to the individual. This creates a tension which fetters the rights of both individual and collective, but which ultimately acts to protect both.

APPENDIX ONE: SECTION 37 OF THE UNIT TITLES ACT 1972

37 Rules

1. Except as otherwise provided by this Act, the control, management, administration, use, and enjoyment of the units and the common property shown on a unit plan, and the activities of the body corporate that comprises the proprietors of those units, shall, while there are more proprietors than one, be regulated by the rules for the time being applicable to that body corporate.
2. Subject to any amendment or repeal thereof or addition thereto the rules applicable to each body corporate shall be those set out in the Schedules 2 and 3 to this Act.
3. The rules in the Schedule 2 to this Act and any additions thereto or amendments thereof may be added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise.
4. The rules in the Schedule 3 to this Act and any additions thereto or amendments thereof may be added to, amended, or repealed in relation to any body corporate by resolution of the body corporate at a general meeting.
5. Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

113 Rose, above n 13, 1006.

114 See eg Regional Growth Forum, *Unit Titles Act 1972: The Case for Review*, Discussion Report (2003) 1: '[the Unit Titles Act 1972] urgently needs reviewing'; Rod Thomas, 'Duties and Powers of Bodies Corporate' [1998] *New Zealand Law Journal* 337 refers to '[t]he dated and inflexible nature' of the Unit Titles Act 1972.

115 See generally Department of Building and Housing, *Review of the Unit Titles Act 1972* <<http://www.dbh.govt.nz/unit-titles-review-index>> at 11 March 2008. That said, 2008 is an election year, and it is easy to anticipate that this may cause delays in the enactment of any new legislation.

Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

6. No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.
7. No addition to or amendment or repeal of any rule pursuant to subsection (3) or subsection (4) of this section shall have effect until the body corporate has lodged a notification thereof in form 4 in the Schedule 1 to this Act with the Registrar, and the Registrar has recorded it appropriately on the supplementary record sheet.
8. The body corporate shall keep a record of the rules in force from time to time.
9. The body corporate shall, on the application of a proprietor, or a person authorised by a proprietor to apply, supply to him a copy of the rules in force, and may require him to pay a reasonable charge.
10. The body corporate shall, on the application of any person who satisfies the body corporate that he has a proper interest in so applying, make the rules available for inspection.
11. The rules shall be binding on—
 - (a) The body corporate;
 - (b) All proprietors; and
 - (c) Any other person in actual occupation of a unit—
and shall enure for the benefit of the body corporate and every proprietor.
12. The body corporate or any proprietor shall be entitled to apply to any Court of competent jurisdiction for an order—
 - (a) Enforcing the performance of or restraining the breach of any rule; or
 - (b) Awarding damages for any loss or damage arising out of the breach of any rule—
by any person bound to comply therewith or by the body corporate.

APPENDIX TWO: SCHEDULES TWO AND THREE OF THE UNIT TITLES ACT 1972

A. *Schedule 2*

Rules that may be amended by Unanimous Resolution Duties of Proprietor

1. A proprietor shall—
 - (a) Permit the body corporate (or its agents or servants) at all reasonable hours to enter into and upon his unit for any of the following purposes, that is to say,—
 - (i) Viewing the condition thereof;
 - (ii) Maintaining, repairing, or renewing any pipes, conduits, wires, cables, or ducts for the time being in, upon, or passing through his unit and capable of being used in connection with the enjoyment of any other unit or common property;
 - (iii) Maintaining, repairing, or renewing any common property; and
 - (iv) Ensuring that the rules are being observed;
 - (b) Comply in all respects with all Acts, bylaws, and regulations for the time being in force in the area in which his unit is situated in so far as they relate to the use, occupation, or enjoyment of his unit:

- (c) Forthwith and at all times carry out all work that may be ordered by any competent local authority or public body in respect of his unit to the satisfaction of that authority or body:
- (d) Duly and punctually pay all rates, taxes, charges, and other outgoings from time to time payable in respect of his unit to any local authority or public body and all sums properly levied in respect of his unit by the body corporate:
- (e) Repair and maintain his unit, and keep it in sufficiently good order, repair, and condition to ensure that no damage or harm shall ensue to the common property or any other unit in the building of which his unit forms part:
- (f) Make no additions or structural alterations to the unit without the consent of the body corporate.

Powers and Duties of Body Corporate

2. The body corporate shall—
 - (a) Repair and maintain all chattels, fixtures, and fittings (including stairs, lifts, elevators, and fire escapes) used, or intended, adapted, or designed for use, in connection with the common property or the enjoyment thereof;
 - (b) Repair and maintain all pipes, wires, cables, ducts, and all other apparatus and equipment of whatsoever kind and wheresoever situate which may be reasonably necessary for the enjoyment of an incidental right which may from time to time exist by virtue of section 11 of the Unit Titles Act 1972:
 - (c) On request, produce to any unit proprietor, or a registered mortgagee of any unit, or any person authorised in writing by any unit proprietor or registered mortgagee of any unit, all policies of insurance effected by the body corporate under the provisions of section 15 of the Unit Titles Act 1972 and the receipt for the last premiums paid in respect thereof.
3. The body corporate may—
 - (a) Borrow any money necessary to enable it adequately to perform its duties or exercise its powers:
 - (b) Invest any money for the time being held by it (whether in a fund established under section 15 of the Unit Titles Act 1972 or otherwise) in any of the modes of investment for the time being authorised by law for the investment of trust funds:
 - (c) Establish a current account at a bank, and nominate for the purposes of this paragraph three persons (including the secretary) of whom any two may operate the account:
 - (d) Enter into any agreement with a proprietor or an occupier of any unit for the provision of amenities or services by it to the unit or to the proprietor or occupier:
 - (e) Grant to a proprietor of a unit or to anyone claiming through him any special privilege (not being a lease) in respect of the enjoyment of part or parts of the common property: Provided that any such grant shall be determinable by special resolution.

Committee of a Body Corporate

4. Where there are more than three proprietors, the powers and duties of the body corporate shall be exercised and performed by a committee, subject to any restriction imposed or direction given at a general meeting of the body corporate:
 Provided that any expenditure of over \$100, not being expenditure which the body corporate is legally obliged or previously authorised to incur, shall be referred to a general meeting; and if the share of the proprietor or proprietors of any principal unit in any expenditure that is referred to a general meeting exceeds \$30, that expenditure shall not be incurred unless it is approved by at least a three-fourths majority of votes.

5. Until the first annual general meeting of the body corporate, the proprietors of all the units shall constitute the committee. Thereafter the committee shall consist of such number of proprietors, not being fewer than three, as is fixed from time to time by the body corporate at an annual general meeting.
6. The members of the committee shall be elected at each annual general meeting, to hold office until the next annual general meeting:
Provided that, unless the committee consists of all the proprietors, the body corporate may by resolution at an extraordinary general meeting remove any member of the committee before the expiration of his term of office and appoint another proprietor in his place to hold office until the next annual general meeting.
7. Any casual vacancy on the committee may be filled by the remaining members of the committee.
8. The quorum necessary for the transaction of the business of the committee may be fixed by the committee; and, unless so fixed, shall be two if there are not more than six members and three otherwise.
9. If the number of committee members is reduced below the number which would constitute a quorum, the remaining members may act for the purpose of increasing the number of members to that number or of summoning a general meeting of the body corporate, but for no other purpose.
10. At meetings of the committee all matters shall be determined by a simple majority of votes. In the case of equality of votes the chairman for the time being of the meeting shall have a casting vote as well as a deliberative vote.
11. Subject to any restriction imposed or direction given at a general meeting, the committee may—
 - (a) Meet for the conduct of business, adjourn, and otherwise regulate its meetings as it thinks fit:
Provided that it shall meet when any member of the committee gives to the other members not less than seven days' notice of a meeting proposed by him, specifying the reason for calling the meeting;
 - (b) Employ for and on behalf of the body corporate such agents and servants as it thinks fit in connection with the control, management, and administration of the common property, and the exercise and performance of the powers and duties of the body corporate;
 - (c) From time to time elect one of its members to act as convener of the committee;
 - (d) Delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke the delegation;
 - (e) Whenever it thinks fit, convene an extraordinary general meeting of the body corporate.
12. The committee shall—
 - (a) Keep minutes of its proceedings;
 - (b) Cause minutes to be kept of general meetings of the body corporate, and include therein a record of all unanimous resolutions;
 - (c) Cause proper books of account to be kept in respect of all sums of money received and expended by it, and the matters in respect of which all such income and expenditure is received or incurred;
 - (d) Prepare proper accounts relating to all money of the body corporate, and the income and expenditure thereof, and arrange for the accounts of the body corporate for each year to

be duly audited by an independent auditor, for a copy of the duly audited annual accounts to be sent to each proprietor before each annual general meeting of the body corporate, and for the duly audited annual accounts to be presented to each annual general meeting of the body corporate:

- (e) On application by a proprietor or a mortgagee of a unit, or any person authorised in writing by either of them, make the books of account and all minutes available for inspection at all reasonable times:
 - (f) Upon a requisition in writing made by proprietors entitled to 25 per cent of the total unit entitlement of the units, convene an extraordinary general meeting of the body corporate.
13. Except as provided in clause 9 of these rules, no act or proceeding of the committee or of any person acting as a member of the committee shall be invalidated in consequence of there being a vacancy in the number of the committee at the time of that act or proceeding, or of the subsequent discovery that there was some defect in the election or appointment of any person so acting, or that he was incapable of being or had ceased to be such a member.

General Meetings of a Body Corporate

14. A general meeting of the body corporate, to be called the annual general meeting, shall, in addition to any other meeting, be held at least once in every calendar year and not more than 15 months after the holding of the last preceding annual general meeting. The first annual general meeting of the body corporate shall be held within 3 months after the date of the deposit of the unit plan or of the first sale of a unit, whichever is the later.
15. All general meetings of the body corporate other than annual general meetings shall be called extraordinary general meetings.
16. At least 7 days' notice of every general meeting of the body corporate specifying the place, the date, and the hour of the meeting, and the proposed agenda shall be given to all persons entitled to exercise a vote in accordance with the provisions of section 41 of the Unit Titles Act 1972 and of clause 23 of these rules:
Provided that accidental omission to give such notice to anyone so entitled shall not invalidate any proceedings at any such meeting.
17. Any notice required to be given under clause 16 of these rules shall be sufficiently given if delivered personally to the person concerned or if left, or sent by letter posted to the person concerned, at the last address of that person notified to the body corporate, or if no such address has been so notified at that person's last known place of residence:
Provided that, if a proprietor advises the body corporate in writing that he requires notices sent to him by post to be sent by registered post, a notice thereafter sent to him by post shall not be sufficiently given unless it is sent by registered post.
18. At a general meeting of the body corporate, the persons entitled, on an ordinary resolution, to exercise the voting power in respect of not less than one-third of the units shall constitute a quorum.
19. Save as otherwise provided in these rules, no business shall be transacted at any general meeting of the body corporate unless a quorum is present at the time.
20. If within half an hour from the time appointed for a general meeting of the body corporate a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same place and time, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the number of persons present and entitled to vote at the expiration of that half hour shall constitute a quorum.

21. At a general meeting of the body corporate, the chairman shall normally be the convener of the committee if he is present. If there is no convener or if the convener is not present or is unwilling to act, a chairman shall be elected at the commencement of the meeting.
22. Save as otherwise provided by the Unit Titles Act 1972 or these rules, all matters at a general meeting of the body corporate shall be determined by a simple majority of votes. In the case of equality of votes the chairman for the time being of the meeting shall have a casting vote as well as a deliberative vote.
23. Subject to the provisions of section 41 of the Unit Titles Act 1972, at any general meeting of the body corporate—
 - (a) Where a unanimous resolution is required each person who is a proprietor shall be entitled to exercise one vote:
 - (b) In all other cases one vote only shall be exercised in respect of each principal unit, and no separate vote may be exercised in respect of any accessory unit.
24. At any meeting of the body corporate any person present and entitled to vote on the matter that is under consideration may demand a poll thereon, which shall be taken in such manner as the chairman thinks
25. The result of the poll shall be deemed to be the resolution of the meeting at which it was demanded. Where a poll is not demanded, a declaration by the chairman that a resolution has been carried shall be conclusive evidence of that fact without proof of the number or proportion of votes recorded for or against the resolution.
26. Any vote to be cast at a general meeting of the body corporate may be exercised personally or by proxy. Where 2 or more persons are jointly entitled to exercise one vote and wish to do so by proxy, that proxy shall be jointly appointed by them and may be one of them. A proxy shall be appointed in writing. If only one of those persons is present at a general meeting and they have not appointed a proxy as aforesaid, he or she may exercise the vote.
27. Where a poll is demanded or a special resolution is before the meeting, each vote shall correspond in value with the unit entitlement of the principal unit and accessory unit (if any) in respect of which it is exercised. In all other cases each vote shall be of equal value.
28. Except where a unanimous resolution is required, a power of voting in respect of a unit shall not be exercised unless all amounts accrued due and payable under the Unit Titles Act 1972 to the body corporate in respect of the Unit in respect of which the vote is exercisable have been duly paid.
29. If there is no committee, the responsibility for the matters set out in clause 12 of these rules except paragraph (a), and the powers given to the committee by clause 11 of these rules except paragraph (a), shall be those of the body corporate; and, unless the context otherwise requires, every reference in these rules to the committee shall be read as a reference to the body corporate.
30. A secretary (who may or may not be a proprietor) shall be appointed by the body corporate at its first annual general meeting for such term, at such remuneration, and upon such conditions as it may approve; and any secretary so appointed may be removed by the body corporate, either at a subsequent annual General meeting or at an extraordinary general meeting called for that purpose. At any such meeting the secretary shall have the right to attend and be heard.
31. The function of the secretary shall be to keep proper books of account in which shall be kept full, true, and complete accounts of the affairs and transactions of the body corporate and

to carry out such other functions as may from time to time be delegated to him by the body corporate.

The secretary shall in each year prepare a statement of financial position showing the body corporate's financial dealings during that year, and shall, within six months after each annual general meeting, send a copy of the latest balance sheet to every proprietor.

Miscellaneous

32. The common seal of the body corporate shall not be used without the authority of the committee of the body corporate previously given. Whenever the seal is affixed to any instrument, that instrument shall be attested by at least two members of the committee or, where an administrator has been appointed or there is only one proprietor, by the administrator or that proprietor.
33. For the purposes of these rules a special resolution means a resolution proposed at a general meeting of the body corporate of which at least 14 days' notice specifying the intention to propose the resolution as a special resolution has been given.
34. Where a resolution is proposed as a special resolution, the vote of the meeting shall be taken in the same way as if it had been proposed as an ordinary resolution and a poll had been demanded:
Provided that a special resolution shall be deemed not to be carried unless persons entitled to exercise not less than three-fourths of the value of the votes and not less than three-fourths of the number of votes exercisable in respect of all the units vote in favour of it.

C. Schedule 3

Rules That May Be Amended By Resolution of Body Corporate

A proprietor or occupier of any unit shall not—

- (a) Use of [sic] permit his unit to be used for any purpose which is illegal or may be injurious to the reputation of the building;
- (b) Make undue noise in or about any unit or common property;
- (c) Keep any animal on his unit or the common property without the prior consent of the committee of the body corporate, or, if there is no committee, of the body corporate;
- (d) Use the common property in such a manner as unreasonably to interfere with the use and enjoyment thereof by other proprietors and their families and visitors;
- (e) Use his unit or permit it to be used in such manner or for such purpose as to cause a nuisance or disturbance to any occupier of any unit (whether a proprietor or not) or the family of any such proprietor.

UNDER THE LAW OF CHARITY, IS THE PRINCIPLE OF 'PUBLIC BENEFIT' BEING HINDERED BY THE DOCTRINAL RULE OF PRECEDENT?

JULIET CHEVALIER-WATTS*

I. INTRODUCTION

There is no explicit definition of what constitutes a 'charitable trust'. S 2 of the *Charitable Trusts Act 1957* defines it as 'every purpose which in accordance with the law of New Zealand is charitable'.

For a trust to be charitable legally, it must be for the public benefit, meaning:

- a) The purpose must be beneficial in a way that is charitable; and
- b) The benefit has to be shown to be available to the public, or a significant portion of it, not just to a distinct group of particular individual (other than in the case of relief of poverty).¹

The definition of 'charitable' owes its origins to the list of purposes contained in the Preamble to the Elizabethan Statute of Charitable Uses Act 1601.

The preamble stated that the following uses were deemed to be charitable:

- a) Relief of the aged, impotent and poor;
- b) Maintenance of sick and maimed soldiers and mariners;
- c) Maintenance of schools;
- d) Free scholars in universities;
- e) Repair of bridges, ports, havens, causeways, churches, sea banks, and highways;
- f) Education and preferment of orphans;
- g) Relief stock or maintenance of houses of correction;
- h) Marriage of poor maids;
- i) Support and help of young tradesmen, handicraftsmen, and persons decayed;
- j) Relief and redemption of prisoners or captives; and
- k) Aid or ease of any poor inhabitant concerning payment of taxes.

These uses suggest that on the one hand the legal definition of charity is wider than the popular meaning, and that on the other, the meaning is narrower than the popular meaning.²

The purposes, however, were not exhaustive: 'those purposes are charitable which that statute enumerates or which by analogies are deemed within its spirit and intendment'.³

This view was endorsed by Lord Macnaghten in *Commissioner for Special Purposes of the Income Tax v Pemsel*, whereby he summarised charitable purposes into four categories:⁴

- (a) Trusts for the relief of poverty;

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1 Andrew Butler (ed), *Equity and Trusts in New Zealand*, (2003), 234.

2 Gino Dal Pont, *Charity Law in Australia and New Zealand*, (2000), 9.

3 *Morice v Bishop of Durham* (1805) 9 Ves 399, 405 (Sir William Grant MR).

4 [1891] AC 531.

- (b) Trusts for the advancement of education;
- (c) Trusts for the advancement of religion;
- (d) Trusts for other purposes beneficial to the community not falling under any of the preceding heads.

It is no surprise perhaps that charitable purposes have been subject to evolution as it is at the mercy of 'changing institutions and societal values'.⁵ However, Hammond J tempered this by stating that this must be balanced with a need for restraint: 'new heads of charity should not be allowed to spring up overnight without close scrutiny'.⁶

Statute certainly has had a role in such an evolution: s 61A of the *Charitable Trusts Act* specifically provides that trusts for recreational and leisure purposes are charitable, and s 38 contains a substantial list of purposes that are deemed to be charitable for the purposes of Part 4 of the Act.

II. THE PUBLIC BENEFIT TEST

To the lay person, the 'public benefit test' implies a 'distinctive, all-encompassing standard',⁷ however, the test is fraught with complexities because of the need to determine such benefit on a case by case basis.

Lord Mcnaghten in *Pemsel* only expressly mentioned the requirement of public benefit in relation the fourth head of charity, however, the element is also required at least in the second and third heads. It is arguable whether there is an explicit public benefit test under the first head of poverty, although this will be addressed later in the paper.

Public benefit has two issues: firstly that of being public and secondly being of benefit.

The former requires the Court to determine whether the class of persons eligible to benefit constitutes the public, or at least a section of it.

The latter concerns whether or not the trust confers a benefit on the public, or a section of it. It is irrelevant as to whether the opinion of the creator of the trust believed that the public would benefit.⁸

A. *Public Benefit and Blood Tie*

A group or class of beneficiaries under a proposed charitable trust that are linked by blood, contract, family, association membership or employment, does not fulfil the public benefit requirement.⁹

Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd*¹⁰ laid down a public benefit test that approved the approach taken in *Re Compton*.¹¹

In *Oppenheim*, a trust was set up to provide for the education of children of employees or former employees of the British-American Tobacco Co Ltd, and its subsidiaries. The total number of eligible employees was an estimated 110,000. The House of Lords held that this was not charitable for the following reason: 'a group of persons may be numerous, but if the nexus between

5 *D V Bryant Trust Board v Hamilton CC* [1997] 3 NZLR 343, 348 (Hammond J).

6 *Ibid.*

7 Michael Gousemett, 'The Public Benefit Test' [2006] *New Zealand Law Journal*, No.2, March, 15.

8 Gino Dal Pont and DRC Chalmers, *Equity and Trusts in Australia* (4th ed, 2006) 748.

9 *Ibid* 746.

10 [1951] AC 297; [1951] 1 All ER 31, 306.

11 [1945] Ch 123; [1945] 1 All ER 198.

them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes'.¹²

However, this has been subject to criticism: Lord Cross in *Dingle v Turner*¹³ suggested that what constitutes a section of the public is a question of degree in each case, and Tipping J in *Re Twigger*¹⁴ approved Somers J's statement in *NZ Society of Accountants v CIR*:¹⁵ 'it is not possible...to state with confidence how the line is drawn between the two or to say that it is drawn in the same way as between different types of charitable trust'.

It is arguable that this is evidence that the courts are favouring a more flexible approach in order to avoid be hindered by precedent. However, Dal Pont contends that the acceptance of Lord Cross' view merely condones an artificially broad interpretation of 'public benefit', whereas *Oppenheim*, although restrictive, provides certainty in an area of law that is wrought with uncertainties.¹⁶

In recent times, however, there has been a shift in the approach with regard to one aspect of the public benefit test, that of blood tie.

In August 2001, the IRD published its discussion on Taxation of Māori Organisations.¹⁷ The document recommended that the *Oppenheim* principle be overturned.

The recent case of *Latimer v Commissioner of Inland Revenue*¹⁸ emphasised the IRD's approach, and adopted the dissenting voice of Lord McDermott in *Oppenheim*, and found the test was inappropriate in respect of Māori iwi and hapu.¹⁹

The evidence before the Court was that an estimated 300,000 Māori could potentially benefit from the treaty claims, and 70,000 had already benefited. To reflect how inappropriate English law was in determining such matters, Blanchard J stated that the context of tribes or clans of ancient origin was:²⁰

poles away from the kind of connection which the majority of *Oppenheim* must have been thinking...they were more likely thinking of the paradigmatic English approach to family relations...such an approach might be though insufficiently responsive to value emanating from outside of the mainstream of English common law.

Here then is unequivocal evidence that the principle of public benefit may not be subject to overt hindrance by common law principles. Nonetheless, the author submits that *Latimer* responded to a very specific issue, for which there was no clear authority emanating from England, therefore, the Court in *Latimer* took the only realistic approach it could as 'in New Zealand it is impossible not to regard the Māori beneficiaries of a trust as constituting a section of the public for this purpose'.²¹

12 *Oppenheim v Tobacco Securities Trust Co Ltd*, above n 10.

13 [1972] AC 601; [1972] 1 All ER 878.

14 [1989] 3 NZLR 329.

15 [1986] 1 NZLR 147 (CA), 155.

16 Gino Dal Pont and DRC Chalmers, (2006), above n 8, 747.

17 Inland Revenue Policy Advise Division, Tax Simplification No.2 (August 2001).

18 [2002] 3 NZLR 195.

19 David Brown, The Charities Act 2005 and the Definition of Charitable Purposes, (2005) *New Zealand Universities Law Review*, December 21, 619.

20 *Latimer v Commissioner of Inland Revenue*, above n18, 208.

21 Gino Dal Pont and DRC Chalmers, (2006), above n 8, 748.

Specific legislation on this very issue puts the matter beyond any doubt.²² However, the removal of blood tie restrictions does not affect employment or contractual relationships, and these may still be fatal to the charitable status of some trusts.

To discuss the concept of public benefit further, the author proposes to discuss the issues associated with the four heads of *Pemsel* in turn.

B. Trusts for the Relief of Poverty

Relief of poverty is one of the oldest charitable purposes. It has always been classified as relative, so may include those that have fallen on hard times as well as those who have always been poor when measured against objective standards. Further, that which constitutes poverty can change according to economic conditions, as addressed in *D V Bryant v Hamilton City Council*.²³

It is argued that there is no public benefit requirement for the relief of poverty,²⁴ yet some opinions suggest that the public benefit requirement is simply a more generous presumption, as opposed to being void;²⁵ this is on the basis that the relief of poverty has a general public benefit.

Jenkins LJ in *Re Scarisbrick*²⁶ appeared to confirm that the public requirement benefit was not as rigorous as that which has been applied in the other categories.

The only public benefit requirement has been that a trust for relief of poverty of named individuals will not be charitable, although if they are described as a class, then this may be permitted.²⁷

On the other hand, with the removal of the blood tie restriction, this anomaly may be of little consequence, although it will still apply to employment and contractual relationships.²⁸

However, there may yet be further issues associated with the relief of poverty and the public benefit test: the UK has recently enacted the *Charities Act 2006*. This Act created the Charity Commission and gave it wide powers to investigate charity administration and impose sanctions where improprieties arise.

This Act has potentially altered some traditional approaches to the issue of public benefit and the relief of poverty.

S 2(1) of the Act provides that a charitable purpose is a purpose that falls within the list contained in s 2(2), AND which is for the public benefit.

The purposes that can constitute charitable purposes include the customary four heads under *Pemsel*, as well as a further number of heads that may qualify as having charitable status.

Therefore, even if a purpose falls within s 2(2) of the Act, it will only be charitable if it is for the public benefit. This is reiterated in s 3(2), whereby 'In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit'.

The intention therefore appears to be that the relief of poverty will only be considered charitable if it can be demonstrated that it is for the public benefit; any presumptions have been removed.²⁹

22 S 5(2)(a) *The Charities Act 2005*.

23 [1997] 3 NZLR 342 (HC).

24 A Butler, above n 1, 238.

25 D Brown, above n 19, 621.

26 [1951] 1 Ch 622, 649.

27 *Ibid*.

28 D Brown, above n 19, 621.

29 Matthew Conaglen, 'English Charity Reform', (2008) *New Zealand Law Journal*, No.3, April, 115.

It may then be that New Zealand courts will have to exercise caution when considering post-2006 English authorities on the public benefit requirement, and where previously the doctrinal rule of precedent appeared to do anything *but* hinder the relief of poverty, future English authorities may just have the opposite effect.³⁰ Nevertheless, common law may provide an answer should there be judicial uncertainty. Tompkins J, in the case of *Centrepoin Community Growth Trust v CIR*,³¹ notes that ‘public benefit is an essential prerequisite except possibly in respect of Macnaghten’s first category of the relief of poverty’. Tompkins J suggests, by his use ‘except possibly’, that there is only an implied presumption that the relief of poverty is for the public benefit. If that is so, then New Zealand courts could rely on this dicta to assist with the application of post-2006 English authorities when determining the public benefit requirement.

C. *Trusts for the Advancement of Education*

The general principle governing this head is that the trust must show that learning should be imparted, not just that it should be accumulated.³² The establishment and support of schools and colleges,³³ gifts for the establishment of academics,³⁴ and prizes,³⁵ has long been established.

Case law has seen the scope of this head of charity extend far beyond the phrases in the Preamble that talk of ‘the maintenance of schools of learning, free schools and scholars in universities’, to the study and dissemination of ethical principles;³⁶ the appreciation of the music of Delius;³⁷ and the promotion of radio, especially for the young.³⁸

Although the establishment of a diversity of trusts under this head may suggest a judicially-tolerant approach, each one must comply with the requirement that it must satisfy the public benefit test. Therefore, the question of whether purpose is educational will depend on whether its purpose is useful, and the area that has caused most difficulty has been that of the arts and culture.

The problem with the public benefit test with regard to this head is that practical utility has never featured strongly in the arts due to its very nature, therefore, the Courts have made some potentially controversial decisions, reflecting judicial uncertainty.

In the case of *Re Delius*,³⁹ expert opinion assisted the Court in finding that a trust to explore the unpublished works of Delius would have public utility, therefore upholding the trust; although the Court did note that had it been Bach in question, then there would have been no issue. This begs the question, therefore, can only famous artists, or artists of standing, be of benefit to the public?

This question appeared to be answered in the affirmative, when in *Re Pinion*,⁴⁰ a testator gave his studio and contents to enable it to be used as a museum, and Harman LJ proclaimed the contents to be: ‘of no useful object to be served in foisting upon the public this mass of junk’.⁴¹

30 *Ibid.*

31 [1985] 1 NZLR 673. 688.

32 A J Oakley, Parker and Mellows: *The Modern Law of Trusts* (8th ed, 2003) 459.

33 *Porter’s Case* (1592) 1 Co Rep 246.

34 *Yates v UC London* (1875) LR 7 HL.

35 *Chesterman v Federal Commissioners of Taxation* [1926] AC 128 (PC).

36 *Re South Place Ethical Society* [1980] 1 WLR 1565.

37 *Re Delius* [1957] Ch 299.

38 *Clarke v Hill* (High Court, Auckland, CP 68/SD99, 2 February 2001, Priestley J).

39 *Re Delius*. above n 37.

40 [1965] Ch 85; [1963] 2 All ER 1049.

41 *Ibid* 107.

However, such decisions are fraught with difficulties as one only has to consider such artists as Tracey Emin and Damien Hirst to realise that which may be considered 'junk' to one, may be considered valuable to another, and therefore of public benefit. Brown suggests that with the advent of the Charities Commission in New Zealand, it is likely that the Courts will be more tolerant of artistic diversity, and prevent precedent from restricting public benefit.⁴²

There is evidence already however, that cultural purposes in New Zealand are being considered with open-mindedness, as the Working Party acknowledged that cultural purposes should be explicitly recognised,⁴³ and the recent *Latimer* case⁴⁴ considered that the historical function of research into Māori treaty claims was educational.

It is likely therefore that as further cases challenge the concepts of public benefit under the head of education, the Charity Commission will provide guidance as to how this area of law should develop in line with the demands of society.

However, there is one area of education that is raising controversial issues, that of the charitable status of independent (fee paying) schools.

Many are registered as charities and 'are the classic example of charities which charge fees for the provision of services'.⁴⁵ In light of this, the Report from the Strategy Unit suggested that the Charity Commission in the UK should undertake a rolling programme to monitor public benefit, as the vast majority of such schools ensure the continuance of their charitable status by making use of their income to provide free places and allowing the local community to make use of their facilities.⁴⁶

The common law position is that fee-charging in itself does not preclude a school from being charitable, provided that the primary purpose is within one of the four heads of charity; that profit is reinvested; and that poor sections of society are not excluded.⁴⁷

However, this area has been litigated on many occasions, and the *Oppenheim* test, notwithstanding the removal of the blood tie restriction in New Zealand, still applies. Indeed, *Oppenheim* concerned an educational trust for employees. Therefore, there must be a sufficient section of society that is not linked by employment or contractual relations that must be able to benefit.

However, it is argued that in doing so, this gives them an unfair commercial advantage, and Brown notes that these are big businesses involved in perhaps key areas of social provision that have been traditionally 'the concern of the Welfare State'.⁴⁸

Indeed, such concerns have led the British Government to emphasise that such charities must be able to impress upon the Charities Commission that an element of their provision for places is for the poorer children through scholarships and that they must make their facilities available to the community in a variety of ways.⁴⁹ This is especially valid now that the Charities Act 2006 has removed the presumption of public benefit.

42 D Brown, above n 19, 624.

43 Ibid.

44 *Latimer v Commissioner of Inland Revenue*, above n 18.

45 A J Oakley, above n 33, 463.

46 Ibid.

47 *Re Resch* [1969] 1 AC 514.

48 D Brown, above n 19, 625.

49 Home Office, 'Charities and Not-for-Profits: A Modern Legal Framework' (2003) 10.

It is suggested that this raises ethical questions as to whether purposes that relieve the State of its welfare obligations should actually be charitable.⁵⁰

Hammond J in *Bryant v Hamilton City Council*⁵¹ provides a reasoned approach in the face of such controversy, suggesting that a generous approach of relief and public benefit should be taken, given that pressures on the State are increasing continuously. Public benefit therefore may be developing apace with such an equitable judicial attitude.

D. *The Advancement of Religion*

The advancement of religion means the promotion of spiritual teaching in a broad sense, and involves spreading the religious message through taking positive steps such as pastoral activities.⁵² In the case of *United Grand Lodge of Ancient Free or Accepted Masons of England v Holborn Borough Council*,⁵³ Freemasonry failed under this heading.

In *Centrepoint Community Growth Trust*,⁵⁴ the Court approved the definition of religion given by Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,⁵⁵ which stated that: 'the criteria of religion is twofold: first a belief in a supernatural Being... and second, the acceptance of canons of conduct in order to give effect to that belief'.

The advancement of religion is a charitable purpose only if it is of public benefit. Where the purpose is found to be religious, then generally the assumption is that it will have a public benefit, unless that can be rebutted.⁵⁶ The traditional view, however, was that the gift had to be for religious purposes exclusively, although s 61b of the Charitable Trusts Act saves trusts that have mixed purposes.

The public benefit element of the advancement of religion has not been without issue for the courts, as reflected in *Gilmour v Coates*.⁵⁷ This case concerned a declaration of trust to apply income for a community of cloistered Catholic nuns, who devoted their lives to prayer, contemplation, penance and other worshipful acts, all within the confines of their convent. The House of Lords held that this failed the public benefit trust as there was no contact with the outside world.

This appeared to be an anomalous decision as previously courts had been tolerant of religious groups based largely on the fact that they did not feel able to formulate a view on faith based on 'earthly evidential standards',⁵⁸ yet, in this case they were able to make such a judgement, and did not contemplate the possibility that such religious practices could have a public benefit even without an actual contact element.

Dal Pont argues that this would not necessarily be followed in New Zealand and Australian courts,⁵⁹ and finds favour with the opinion of Reynolds JA, who made the following comment on *Gilmour*:⁶⁰

50 D Brown, above n 19, 625.

51 [1997] 3 NZLR 342.

52 A Butler, above n 1, 244.

53 [1957] WLR 1080; [1957] 3 All ER 281.

54 *Centrepoint Community v CIR*, above n 31.

55 (1983) 154 CLR 120; 49 ALR 65, 136.

56 Gino Dal Pont, (2000), above n 2, 166.

57 [1949] AC 426.

58 D Brown, above n 19, 623.

59 Gino Dal Pont, (2000) above n 2, 171.

60 *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744, 750.

This doctrine that religious activities are subject to proof that they are for the public benefit could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of all religious practices.

In the more recent case of *Crowther v Brophy*,⁶¹ Gobbo J doubted whether *Gilmour* would actually represent Australian law and made reference to a case whereby contemplative life has been recognised as having an element of public benefit.⁶²

Australia, at least, has addressed this particular issue: the Extension of Charitable Purposes Act 2004 (Cth), s 5(1)(b), states that so long as cloistered or contemplative order offers intercessory prayer to any public members that seek it, then this will satisfy the public interest.

English case law appears to have taken a similar approach, suggesting a willingness to compromise on such a controversial issue. In the case of *Re Hetherington*,⁶³ a stipend to a priest was held to be a valid charitable trust provided that masses for departed souls were open to the public.

Brown criticises such an approach however.⁶⁴

This still seems to miss the point that those faiths that believe in cloistered contemplation or prayer, believe this as part of their faith, and if the law is indeed tolerant of all religions, the imposition of worldly human contact test seems petty.

He further suggests that the only test that should be applied is: 'whether the community is open to a sufficient section of the public who wish to join'.⁶⁵

Interestingly, this seems to mirror the approach being suggested in the inferior Court in *Gilmour* by Lord Greene MR:⁶⁶

When...the question is whether a particular gift for the advancement of religion satisfies the requirement of public benefit, a question of fact arises which must be answered by the Court in the same manner as any other question of fact, that is, by means of evidence cognisable by the Court.

The author submits that Brown's test above could satisfy the requirements set out by Lord Greene MR.

It seems likely however that, notwithstanding Australian statute, the public benefit element is likely to continue to raise issues as to whether the courts are really able to determine whether religious practices have the required public benefit by simply applying earthly tests to spiritual matters.

E. Trusts for Other Purposes Beneficial to the Community Not Falling Under Any of the Preceding Head.

This fourth head is the residual catch all category that 'recognises charitable purposes that do not fall within the first three heads of charity'.⁶⁷

61 [1992] 2 VR 97, 100.

62 *The Association of Franciscan Order of Friars Minor v City of Kew* [1967] VR 732.

63 [1989] 2 WLR 1094 (EWHC).

64 D Brown, above n 19, 623.

65 *Ibid* 623-4.

66 *Gilmour v Coates*, above n 57, 346.

67 Gino Dal Pont, (2000), above n 2, 172.

Dispositions under this head must satisfy a two stage test: firstly, the court must be satisfied that the purpose is beneficial to the community and secondly, the purpose must fall within the spirit of the Preamble to the Statute of Charitable Uses.⁶⁸

Therefore:⁶⁹

not every object which is beneficial to the community can be regarded as charitable...even if the object were in some senses beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the Statute of Elizabeth.

In other words, the two stage test is cumulative, so only dispositions that satisfy both requirements will be valid trusts.

The following gifts have been upheld under this head, and reflect the diversity of purposes that may be beneficial to the community:⁷⁰

- Gifts for the relief of human distress;⁷¹
- Gifts for the protection of the environment;⁷²
- Gifts for the benefit of animals.⁷³

1. *Beneficial to the Community*

Unlike the other three heads under *Pemsel*, for a disposition to be valid under this fourth head, it must be 'beneficial to the community', which Dal Pont argues is not necessarily the same as having 'public benefit'.⁷⁴

For example, 'benefit to the public' may include benefit in intellectual and artistic fields, as well as material benefits, whereas dispositions under the fourth head that offer intangible benefits will necessarily require substantiated proof of such benefits.

In other words, 'for an intangible benefit to constitute a sufficient benefit to the community, it...must be approved by the common understanding of current enlightened opinion'.⁷⁵

A further example is that the range of purposes that may be beneficial to the community is a 'dynamic concept'.⁷⁶ Therefore, as society develops, and concepts and morals change, so dispositions that may benefit a community in one era, may cease to do so in another.

Dal Pont's final consideration of 'beneficial to the community' is that a court will not uphold a purpose that is detrimental to the community.⁷⁷ In *National Anti-Vivisection Society v Inland Revenue Commissioners*,⁷⁸ the Court denied the Society charitable status, as its objective to abolish animal vivisection would mean that future human medical advancements could fail due to the Society's objectives.

68 Ibid 173.

69 *National Anti-Vivisection Society v Inland Revenue Commissions* [1948] AC 31, 41 per Lord Wright.

70 Gino Dal Pont, DRC Chalmers and JK Maxton, *Equity and Trusts: Commentary and Materials* (4th ed, 2004), 854-855.

71 *Re Darwin Cyclone Tracy Relief Trust Fund* (1979) 39 FLR 260.

72 *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325, above n 31.

73 *Murdoch v Attorney General* (Tas) 1992 1 Tas R 117.

74 Gino Dal Pont, (2000) above n 2, 174.

75 Ibid 175.

76 Ibid 176.

77 Ibid.

78 *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 69.

As Lord Simonds stated: '...however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object'.⁷⁹

A number of contentious issues under this head have arisen over the years, and this paper will now consider two specific areas in order to address the original proposition, firstly: trusts for the protection of animals; and secondly, trusts for political purposes.

2. Trusts for the Protection of Animals

The protection of animals has long been upheld as a charitable purpose, but this is not because the animals themselves provide the charitable element, rather it is the assumption of the benefit to the community from being benevolent towards animals that generates that charitable constituent.⁸⁰

Swinfen Eady LJ in *Re Wedgewood* provided the seminal statement:⁸¹

A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

Such benefits are neither tangible nor direct, which is in contrast with the requirement of the test being beneficial to the community as submitted in the previous page.

Similarly intangible and remote propositions that have no connection with animals have been struck out numerous times by the Courts, including gifts for philanthropic purposes;⁸² gifts for the benefit of humanity;⁸³ and gifts for raising the standard of life.⁸⁴

This therefore creates a paradox: a gift for the protection of animals that indirectly benefits the community will invariably be valid, whereas gifts that benefit the general community morally or spiritually will invariably be invalid.

The author submits that it is the very factor of the animals themselves that creates the tangible element that is required to establish the criteria of the 'benefit to the community' under the fourth head. Whereas, general gifts that merely benefit the general community are missing that very specific element, and therefore cannot qualify as a valid charitable trust.

The case of *Re Grove-Grady*⁸⁵ also suggests that there must be some element of human contact in order to validate the trust, which implies a level of tangibility, as opposed to an ethereal morality. In this case, a trust to provide refuge for animals that was not open to the public, in which the animals were free to prey on each other without human contact, was denied charitable status, as it lacked anything that may raise the standard of human conduct.

The author would argue however, that this may simply be an error in the drafting of the trust instrument, as in today's climate, with the upsurge in Zoological and Conservation Parks and Reserves, it would not be difficult to establish that such places would have many benefits for the community.

79 Ibid 65-66.

80 Gino Dal Pont, (2000), above n 2, 186.

81 [1915] 1 Ch 113 at 122.

82 *Re Macduff* [1896] 2 Ch 451.

83 *Re Bell* [1943] VLR 103.

84 *Re Payne (deceased)* [1968] Qd R 287.

85 [1929] 1 Ch 557.

Indeed, more recent case law suggests that *Re Grove-Grady* may not necessarily represent current law.

The case of *Attorney General v Satwell*⁸⁶ involved a bequest for the preservation of native fauna and flora, either by making donations to one or more organisations concerned with wildlife, or any other way in which the trustees had discretion. Holland J was influenced by the value of preserving native wildlife, stating: ‘the value to the community and the national interest is made up of the uniqueness on earth of Australian native wild life, and the interest here and overseas excited by its many odd and curious species’⁸⁷. Holland J elaborated on the aspect of benefit to the community by noting that preserving native flora and fauna is of such benefit because firstly, there is no substitute for actually observing such things in its natural environment, and secondly, there was a great increase in public interest in such matters, and therefore the demands to access preserves from the public were increased.⁸⁸

Holland J went further by noting that even if the public were restricted in their access to the reserve, then this would not automatically deny the trust charitable status because there would still remain a benefit to the community simply since its very presence would offset any destruction occurring outside the refuge and provide an opportunity ‘to study and observe the beauties and intricacies of nature’.⁸⁹

Holland J concluded by noting that since *Grove-Grady*, ‘there has been a radical change in the recognition throughout the world...of value to mankind of the preservation of wildlife in general’.⁹⁰

It is likely that the New Zealand courts will follow this view, as addressed in *Molloy v Commissioner of Inland Revenue*,⁹¹ where it was suggested that current views on conservation would be considered differently from that which was decided in *Grove-Grady*.

The author suggests, however, that *Satwell* may not necessarily mean that all bequests to set up as refuges for wildlife will automatically be declared as having charitable status; instead it is likely that the courts will assess the intention of such bequests and the overall benefit that may be obtained from such an action.

Indeed, if there were circumstances where there would be little or no benefit to the community, or even contrary to its best interests, as illustrated in *National Anti-Vivisection Society*, then such a gift would fail under the fourth head.

Certain charitable trusts for the protection of animals appear to have been hindered little by the doctrinal rule of precedent. Indeed, far from being hampered, such trusts seem to have developed correspondingly with the global interest in conservation and ecology.

However, precedent may provide a useful counterbalance, as not all gifts to protect animals will necessarily be of benefit to the community, and it is against this well-established test that each new case must be measured.

86 [1978] 2 NSWLR 200.

87 *Ibid* 209.

88 *Ibid* 211-212.

89 *Ibid*.

90 *Ibid* 214.

91 [1981] 1 NZLR 688, 696.

3. Trusts for Political Purposes

At common law, it is a longstanding principle that a voluntary organisation that wishes to acquire or retain charitable status must avoid having political purposes and to avoid engaging in most forms of political activities. This stems principally from the dicta of one judge, that of Lord Parker in *Bowman v Secular Society Ltd*,⁹² where he said:⁹³

a trust for the attainment of political object has always been held invalid, not because it is illegal, but for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that gift to secure the change is a charitable gift.

O'Halloran distinguishes between bodies with political purposes and bodies that engage in political activities: the former are not charitable and the latter will be charitable if the activities are ancillary and subordinate to its non-political activities and purposes.⁹⁴

The rationale for denying charitable status to bodies engaged in political activity has its foundations in the philosophy that a charity has not submitted itself to the electoral system, and therefore is not publically accountable. As such any political activity that a charity undertakes would be seen as subverting the 'established democratic process'.⁹⁵ As a corollary, the value of charities lies in their independence from politics, and such independence would become compromised if they pursued political activities. It is also further suggested that charities may gain and lose support, and this would then undermine the requirement of public benefit, which is crucial in establishing charitable status.⁹⁶

In light of such considerations, it is not surprising that charitable trusts and political activity have raised judicial concerns. Simons LJ expresses this uncertainty succinctly: 'it is not for the court to judge and the court has means of judging'.⁹⁷

The case of *McGovern v Attorney General*⁹⁸ has been greatly influential in underpinning the traditional common law approach to political activities by charities.

In this case, Amnesty International attempted to create a trust in order to have some of its work declared charitable. The purposes of this trust were as follows:

- 1) Looking after the needy e.g. prisoners etc;
- 2) Promoting the abolishment of capital and corporal punishment;
- 3) Researching and disseminating information on human rights;
- 4) Securing the release of political prisoners.

Slade J held that purposes 1 and 3 could be charitable; however, 2 and 4 were political. Slade J determined further that the following matters could be construed as political purposes:⁹⁹

- To further the interests of a particular political party;
- To procure changes in the laws of this country;

92 [1917] AC 406.

93 Ibid 442.

94 Kerry O'Halloran, *Charity Law and Social Inclusion, an International Study*, (2007), 125.

95 Ibid 126.

96 Ibid.

97 *National Anti-Vivisection v Inland Revenue Commissioners*, above n 69, 62.

98 [1982] 1 Ch 321.

99 Ibid 349.

- To bring about changes in the laws of a foreign country;
- To bring about a reversal of government policy or of particular decisions of governmental authorities, in this country;
- To bring about a reversal of government policy or of particular decisions of governmental authorities in a foreign county.

Although prima facie it appears that precedent has firmly quashed any development of charitable trusts and political purposes, there has been substantial criticism of this approach based on the element of public benefit, and indeed some signs that the common law may be offering a more flexible approach.

In his dissenting judgment in *National Anti-Vivisection v Inland Revenue Commissioners*, Lord Porter noted that ‘it is curious how scanty the authority is for the proposition that political objects are not charitable’.¹⁰⁰ The Australian case *Royal North Shore Hospital of Sydney v Attorney General*¹⁰¹ criticised the distinction between charitable purposes and political objectives, stating that it was ‘in an unsatisfactory condition’, and Santow J in *Public Trustee v Attorney General*¹⁰² noted that ‘persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance’. Further, Hammond J in the recent case of *Re Collier (deceased)*¹⁰³ commented:

Is it really inappropriate for a judge to recognise an issue as thoroughly worthy of public debate, even though the outcome of that debate might be to lead to a change in the law? After all, it is common place for judges to make suggestions themselves for changes in the law today....and we do...live in an age which enjoys the supposed benefits of freedom of thought, conscience, religion and expression. Should not the benefits be real in all respects, including the law of charities.

In light of such comments, Del Pont suggests that ‘it would appear that the Bowman theory is fraying around its edges, and perhaps even in substance’.¹⁰⁴

Santow remarks that there is a ‘strong historical tradition of fighting charities, campaigning to remove perceived political obstacles in the way of public welfare. Such charities refuse to accept a role where they deal only with symptoms, not their political causes’¹⁰⁵.

Gousmett concurs, noting that charities have always had a role in society in ‘challenging the dictates of government on social policy’.¹⁰⁶ In light of this historical background, it is perhaps unsurprising then that The Sensible Sentencing Group Trust was incorporated as a charitable trust on the 1st February 2002.

This charity has as its aims the following:

- 1) That within New Zealand and for the benefit of both the local and national communities, provide in respect of sentencing for violent and serious criminal offences education as to relevant issues, options for reforms and the design and or drafting of appropriate mechanisms, procedures, regulations and or

100 *National Anti-Vivisection v Inland Revenue Commissioners*, above n 69, 54.

101 (1938) 60 CLR 396, 426 (Dixon J).

102 (1997) 42 NSWLR 600, 621.

103 [1998] 1 NZLR 81, 89-90.

104 Gino Dal Pont, (2000), above n 2, 212.

105 GFK Santow, ‘Charity in its Political Voice: a Tinkling Cymbal or a Sounding Brass?’ (1999) 52 *Current Legal Problems* 255 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_010799> at 28/07/08.

106 Michael Gousmett, ‘Charities and Political Activity’ (2007) *New Zealand Law Journal*, March, 63.

law for consideration of legislative adoption to help ensure all New Zealanders are adequately insulated and protected from violent and serious criminal offenders.

2) To do any act in furtherance of the charitable objects of the Trust.

It appears obvious that at its heart, this charity has predominately political agendas and activities, and yet any person who wishes to be informed of issues 'relating to the sentencing of criminals for violent and serious offences would find the aims...to be unquestionably of public benefit'¹⁰⁷. The author would argue further that its very aims conflict with the matters that Slade J highlighted as being political in the *Amnesty* case, and one might wonder therefore how such a trust could be declared as charitable, in view of common law dictates.

Santow believes that it is possible for a charity to have a political voice, but that it must be discrete as 'a charity can never be sure that the Charity Commissioners will treat that even muted voice as merely ancillary activity, not prejudicing its status as a charity'¹⁰⁸.

Santow criticises the absolute approaches taken by Lord Parker in *Bowman* and Slade LJ's all encompassing list in *McGovern*, preferring the more implicit language used by Sir Owen Dixon in *Royal North Shore Hospital of Sydney v Attorney General*¹⁰⁹ whereby the latter notes that 'it is difficult for the law to find that necessary tendency to public welfare'.

This implies therefore that there is a margin of appreciation in the discretion available to the courts when judging the public benefit, and although difficult, it is not absolute.

As Santow rightly points out, the Court in *National Anti-Vivisection Society v Inland Revenue Commissioners* 'had no difficulty in making such a judgment negatively – it held that the law change sought was not in the public interest'.¹¹⁰

The author submits that if the Court is able to make such a categorical decision in deciding what is *not* in the public's interest, there can be little difference therefore in deciding what *is* beneficial to the community in the context of political objects. There is no judicial comment on this particular approach, although Dal Pont suggests that the courts should presume that the current law represents that which is beneficial to the community, which could be rebutted where appropriate.¹¹¹

In order to establish whether a charity's political activities are in the public interest, Santow suggests that the courts should apply an objective test, whereby the trust as a whole is scrutinised, and that would include its constitution and its activities. This means that the test of public benefit would fail 'where the political activity is disproportionate that it is not longer merely instrumental in achieving the indubitably charitable objects, but has become an end itself'.^{112F}

In spite of the increasing criticism of the rigidity with regard to the concept of charities and political activities, it seems unlikely that any 'paradigm shift'¹¹³ will take place in the broadening of the approach of the courts. Instead, the author submits that the courts will follow the well established path laid down by Lord Parker in *Bowman v Secular Society Ltd* as there is still, rightly, a

107 Ibid.

108 GFK Santow, above n 105.

109 *Royal North Shore Hospital of Sydney v Attorney General*, above n 101, 426.

110 GFK Santow, above n 105.

111 Gino Dal Pont, (2000), above n 2, 213.

112 GFK Santow, above n 105.

113 K O'Halloran, above n 94, 131.

marked separation of powers, and it is for Parliament to address the purported imbalances between contemporary social need and the constraints of charitable trusts.

III. CONCLUSION

The public benefit test has challenged the common law constraints on many occasions, and on relatively few occasions has there been any substantial shift in the judicial approach. The case of *Latimer v Commissioners of Inland Revenue* suggests that the rule of precedent is not as rigid as once presumed, however, as the author submitted, the case responded to very specific circumstances, and in fact, the more rigid test established in *Oppenheim* is still good law.

The challenge for the courts is how to apply a test in the ever changing social and political modern world. Case law suggests that the courts are able to apply discretion where society brings pressure to do so, however, it is under the *Pemsel's* fourth head, where there is perhaps the most contention. In these situations, the doctrine of precedent may seem unyielding, but perhaps this very rigidity should be cautiously welcomed, as it provides a degree of certainty in an area of law that is dogged with uncertainty. If that is so, then the principle of public benefit is not so much being hindered by precedent, rather it is being protected and providing an element of surety to this branch of law.

MANAGING CONFLICT IN ONLINE TEAMS: A CASE STUDY OF ONLINE TEAM LETTER WRITING IN EQUITY

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The undergraduate law degree at Queensland University of Technology ('QUT') aims to supplement a student's understanding of the substantive law with the development of life-long skills. In the unit 'Principles of Equity' the skills developed include legal letter writing. Given the technological mobility of Generation Y students, and their preference for collaborative learning environments, a model was developed to enable this skill to be learnt and practiced in online teams. However research has shown that, being prone to conflict amongst participants, the benefits of collaborative learning may not be fully realized in virtual teams. Consequently, with reference to relevant literature, this article outlines a strategy adopted to minimize conflict in online teams, its impact on student learning experiences and conflict existence, and its implications for the development of such initiatives in the future.

I. INTRODUCTION

The majority of undergraduate students attending Australian Universities now belong to Generation Y.¹ Commonly defined as being born between 1980 and 2000, they are the first generation of students to have grown up with digital media and information technology in a developed, prolific form. 'As long as they [have] been alive, the world has been a connected place, and more than any preceding generation they have seized on the potential of networked media'.² This digital culture, to which Generation Y has been exposed during their formative years, has led to a shift in learn-

* Queensland University of Technology, Faculty of Law, Brisbane, Australia. Tracey Carver, B Bus(Accy)(Dist) LLB(Hons) *QUT*; LLM *Cantab*, Lecturer in Law. Tina Cockburn, B Com, LLB(Hons) *Qld*; LLM *QUT*; Grad Cert Ed (Higher Ed) *QUT*, Senior Lecturer in Law.

1 Diana Jonas-Dwyer and Romana Pospisil, 'The Millennial Effect: Implications for Academic Development' (Paper presented at the 2004 HERDSA Conference – Transforming Knowledge into Wisdom: Holistic Approaches to Teaching and Learning, Sarawak, 4-7 July 2004) 197. Generation Y are also known as Millennials, Echo Boomers, Digital Natives (Marc Prensky, *Digital Natives, Digital Immigrants* (2001) <<http://www.marcprensky.com/writing/default.asp>> at 5 June 2008) and the Net Generation (Don Tapscott, *Growing Up Digital: The Rise of the Net Generation* (1998); Diana Oblinger and James Oblinger (eds), *Educating the Net Generation* (2005) Educause <<http://www.educause.edu/educatingthenetgen/5989>> at 5 June 2008).

2 Scott Crittenden, 'Silicon Daydreams: Digital Pastimes of the Wired Generation' (2002) VI(2) *Virginia.edu* 1 in Oblinger and Oblinger (eds), above n 1, 2.5. See also, Claire Raines, *Managing Millennials* (2002) <<http://www.generationsatwork.com/articles/millennials.htm>> at 5 June 2008.

ing preferences as compared to prior student generations.³ Whereas prior learning experiences were dominated by texts and lectures, the didactic or ‘lecture tradition of colleges and universities may not meet the expectations of students raised on the Internet and interactive games’.⁴ Instead Oblinger has identified use of technology, experimental activities, and teamwork, amongst the predominant learning styles of Generation Y.⁵

In terms of the use of technology in an educational context, like all students, Generation Y learners engage better with materials that are meaningful or ‘anchored within their own experiences’.⁶ Nevertheless, as illustrated by phrases such as web ‘surfing’ and ‘texting’, Generation Y also value process, rather than content.⁷ Therefore it is the activity or skill enabled, rather than the use of technology per se that makes learning engaging,⁸ by making it more active or student-centred. Consequently, kinaesthetic learning styles are most prevalent in Generation Y learners⁹ – meaning that most prefer learning processes which encourage them to construct their own learning by ‘doing’ rather than simply being told. Such an experimental, discovery, or process over content, approach to learning is advocated as increasing information retention, by facilitating student participation and thus lessening opportunity for boredom.¹⁰ Relevant to teamwork, Generation Y is described as being more likely to make decisions based upon the collective experience of their peers, rather than their teachers.¹¹ They seek a sense of community: ‘to be understood, accepted, respected and included’,¹² and therefore gravitate towards cooperative learning, or group-based

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- 3 Diana Oblinger, ‘Boomers Gen-Xers Millennials, Understanding the New Students’ (2003) 38(4) *Educause Review* 37, 38, 44-5; Barbara Costello, Robert Lenholt and Judson Stryker, ‘Using Blackboard in Library Instruction: Addressing the Learning Styles of Generations X and Y’ (2004) 30(6) *The Journal of Academic Librarianship* 452, 452-3; Diana Oblinger and James Oblinger, ‘Is It Age or IT: First Steps Toward Understanding the Net Generation’ in Oblinger and Oblinger (eds), above n 1, 2.6, 2.15; Gregor Kennedy et al, *First Year Students’ Experiences with Technology: Are They Really Digital Natives?* (2006) The University of Melbourne Biomedical Multimedia Unit 4 <<http://www.bmu.unimelb.edu.au/research/munatives/index.html>> at 5 June 2008; Begoña Gros, *The Impact of Digital Games in Education* (2003) First Monday <http://www.firstmonday.org/issues/issue8_7/xyzgros/> at 5 June 2008; Chris Dede, ‘Planning for Neomillennial Learning Styles’ (2005) 1 *Educause Quarterly* 7, 7.
 - 4 Oblinger, above n 3, 44. See also Mark McCrindle, ‘Understanding Generation Y’ (2003) *Principal Matters* 28, 30; Jason Frand, ‘The Information Age Mindset: Changes in Students and Implications for Higher Education’ (2000) 35(5) *Educause Review* 15, 24.
 - 5 Ibid, 38. Of less relevance to this article, ‘structure’ (in the form of monitoring by instructors and the provision of a supporting learning environment which scaffolds the teaching and learning process), is also identified as a learning preference.
 - 6 Marlene Le Brun and Richard Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (1994) 253; McCrindle, above n 4, 30; Kate Manuel, ‘Teaching Information Literacy to Generation Y’ (2002) 36 (1-2) *Journal of Library Administration* 195, 209.
 - 7 Mark McCrindle, *The ABC of XYZ: Generational Diversity at Work*, McCrindle Research 5 <http://www.quayappointments.com.au/email/040213/images/generational_diversity_at_work.pdf> at 5 June 2008. See also, Costello, Lenholt and Stryker, above n 3, 457 (‘they are not concerned with theoretical, but with the practical’).
 - 8 Oblinger and Oblinger, above n 3, 2.16, 2.10-11; Frand, above n 4, 22-3; Gros, above n 3; Diana Laurillard, ‘Multimedia and the Changing Experience of the Learner’ (1995) 26(3) *British Journal of Educational Technology* 179, 179.
 - 9 Oblinger and Oblinger, above n 3, 2.7, 2.14; Manuel, above n 6, 195, 207.
 - 10 Michael Garry, ‘Training for the Nintendo Generation’ (1996) 75(4) *Progressive Grocer* 87, 88; Oblinger and Oblinger, above n 3, 2.6, 2.13.
 - 11 Manuel, above n 6, 208.
 - 12 McCrindle, above n 4, 29.

approaches to study that emphasise ‘social interaction in the knowledge building process’.¹³ The benefits of such teaching and learning approaches are widely recognised.¹⁴ Not only do they improve student relationships, social skills and psychological development, but they also increase: academic learning and retention; cognitive development; and active engagement.¹⁵

As the proliferation of online gaming communities illustrates, whilst Generation Y exhibits a willingness to work in teams or with peers, their communities and social networks are often virtual.¹⁶ In the real world, globalisation and the physical and temporal separation of workers, has also led to an increased use of virtual teams in business¹⁷ such that in the future one’s ability to effectively use technology to work in teams will be a ‘taken-for-granted skill’.¹⁸ Consequently, given also that the ‘half-life of information is [now] measured in months and years’,¹⁹ the team-work, communication and leadership skills developed through online collaborative learning have been recognised as an important pedagogical goal²⁰ – more relevant to a student’s transition from university to professional practice, than mere knowledge accumulation.²¹ Indeed, related to their preference for ‘process over content’, Generation Y possesses ‘a strictly instrumentalist view of education’ – seeing it as relevant only to providing ‘the skills and knowledge necessary to get a job’.²²

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- 13 Paul Shield, Bill Atweh and Parlo Singh, *Using Synchronous Web-mediated Communications as a Booster to Sense of Community in a Hybrid On-campus/Off-campus Teaching and Learning Environment* (2005) Australasian Society for Computers in Learning in Tertiary Education 609 <www.ascilite.org.au/conferences/brisbane05/blogs/proceedings/70_Shield.pdf> at 5 June 2008.
 - 14 David Johnson and Roger Johnson, ‘Making Cooperative Learning Work’ (1999) 38(2) *Theory Into Practice* 67, 71-3; David Johnson and Roger Johnson, ‘What Makes Cooperative Learning Work’ in David Kluge, Steve McGuire, David Johnson and Roger Johnson (eds), *JALT Applied Materials: Cooperative Learning* (1999) 23, 31-35; David Johnson and Roger Johnson, ‘Learning Groups’ in Susan Wheelan (ed), *The Handbook of Group Research and Practice* (2005) 441, 441-3, 458; Le Brun and Johnstone, above n 6, 291-2.
 - 15 This is achieved through discussion in which conflicting perceptions of the issue under consideration arise that, due to attempts to reconcile or justify them, are subsequently critiqued, resolved, rearticulated and reformulated by exposing and modifying inadequate reasoning and constructing new knowledge.
 - 16 Oblinger and Oblinger, above n 3, 2.11-2.
 - 17 Sooyoung Kim, ‘Team Development of Virtual Teams’ (Paper presented at the Academy of Human Resource Development International Conference (AHRD) Austin, Texas, 3-7 March 2004) 1018; Jessica Lipnack and Jeffrey Stamps, *Virtual Teams: People Working Across Boundaries With Technology* (2nd ed, 2000) 18.
 - 18 Marshall Poole and Huiyan Zhang, ‘Virtual Teams’ in Susan Wheelan (ed), *The Handbook of Group Research and Practice* (2005) 363, 380. See also, Pieter du Toit and Peter van Petegem, ‘Learning Style Flexibility for Effective Virtual Teams’ in Sharmila Ferris and Susan Godar (eds), *Teaching and Learning With Virtual Teams* (2006) 32, 46.
 - 19 Frand, above n 4, 17.
 - 20 Wing Lam et al, *Virtual Teams: Surviving or Thriving?* (2005) Australasian Society for Computers in Learning in Tertiary Education 357 <http://www.ascilite.org.au/conferences/brisbane05/blogs/proceedings/41_Lam.pdf> at 5 June 2008.
 - 21 Frand, above n 4, 17, 24; Donald Hanna, ‘Building a Leadership Vision: Eleven Strategic Challenges for Higher Education’ (2003) 38(4) *Educause* 25, 27, 30; Peter Cuttance, ‘Information and Communication Technologies’ in Peter Cuttance, Max Angus, Frank Crowther, Peter Hill, *School Innovation: Pathway to the Knowledge Society* (2001) Department of Education, Training and Youth Affairs Ch 4 <http://www.dest.gov.au/sectors/school_education/publications_resources/school_innovation/preface.htm> 5 June 2008; Barbara Mccombs and Donna Vakili, ‘A Learner-Centered Framework for E-Learning’ (2005) 107(8) *Teachers College Record* 1582, 1582.
 - 22 Irving Saulwick and Denis Muller, *Fearless and Flexible: Views of Gen Y* (2006) Dusseldorp Skills Forum 7, 34 <<http://www.dsf.org.au/papers/189.htm>> at 5 June 2008.

Given these characteristics and preferred learning styles, current research suggests that, in order to ensure a more effective learning environment for Generation Y students, teaching and learning strategies must also adapt to address these preferences.²³ Consequently, it was considered appropriate to incorporate an innovative teaching and learning model meeting these preferences within the Principles of Equity unit at QUT's Faculty of Law.²⁴ This model enabled external students to form virtual teams to practice and learn the group work and letter writing skills necessary to complete an item of assessment online. Nevertheless, in constructing the model it was recognised that, whilst the learning styles ascribed to Generation Y may also apply to more mature aged students with significant information technology exposure,²⁵ it cannot be assumed that the educational preferences of all undergraduate external students are homogenous.²⁶ However, notwithstanding this, given the general benefits of active and cooperative learning, it was anticipated that the model would still positively influence the understanding and learning outcomes, of such 'other' students, whilst providing them with valuable work-related skills. Given that physically remote students often feel isolated in their learning,²⁷ it would also promote a greater sense of community, by facilitating their engagement both with their online peers and with their wider unit cohort (in the sense, described below,²⁸ that equivalent learning experiences between internal and external students were assured).

However, whilst Oblinger and Oblinger state that 'interactions need not be "in person" to be valuable and personal',²⁹ it has also been stated that even being a member of Generation Y is not 'synonymous with knowing how to employ technology based tools strategically to optimise learning experiences in university settings'.³⁰ Indeed, research has shown that, being prone to conflict amongst participants, the benefits of collaborative learning may not be fully realized in virtual teams (irrespective of its members' generational grouping). Accordingly this article, through an overview of the relevant literature, identifies the impediments to developing effective online communities of learning. In the context of the virtual team model implemented in the Principles of Equity unit at QUT's Faculty of Law, it then outlines the strategy adopted in the unit to minimize conflict in online teams in order to increase team effectiveness and positively influence student learning experience. Finally, student perceptions of the strategy's impact on conflict existence are considered, together with its implications for the development of such initiatives in the future.

23 Frand, above n 4, 24; Manuel, above n 6, 209; Dede, above n 3, 7; Costello, Lenholt and Stryker, above n 3, 452; Jonas-Dwyer and Pospisil, above n 1, 194, 200-1, 203.

24 The effectiveness of this model in addressing the characteristics and educational attitudes and needs of Generation Y learners has previously been considered in: Tracey Carver and Tina Cockburn, 'Making Law More Accessible: Designing Collaborative Learning Environments for Physically Remote Generation Y Students' (Paper presented at the Online Learning and Teaching Conference 2006: Learning on the Move, Brisbane, 26 September 2006).

25 Oblinger and Oblinger, above n 3, 2.9-10; Dede, above n 3, 8.

26 Gregor Kennedy et al, *First Year Students' Experiences With Technology: Are They Really Digital Natives?* (2008) 24(1) *Australian Journal of Educational Technology* 108,109, 117-8; Kennedy et al, above n 3, 4, 8; Oblinger, above n 3, 45; Jonas-Dwyer and Pospisil, above n 1, 194-5. Indeed this may be the case even within generations. For example, socio-economically disadvantaged or rural Generation Y students, who have been comparatively underexposed to technology and computers in the home, may not share the traditional Generation Y characteristics: Raines, above n 2; Kennedy et al, above n 3, 13.

27 Shield, Atweh and Singh, above n 13, 608; McCombs and Vakili, above n 21, 1586.

28 See accompanying text at below n 68.

29 Oblinger and Oblinger, above n 3, 2.12.

30 Kennedy, Judd, Churchward, Gray and Krause, above n 26, 117-8.

II. CONFLICT IN ONLINE TEAMS: A THEORETICAL BACKGROUND

Compared with face-to-face teams, as information is often more difficult (or takes longer) to exchange in virtual teams, such teams tend to adopt a more 'task oriented' focus – emphasising the task when communicating rather than 'socio-emotional' information exchange.³¹ The spatial and temporal distance separating online team members therefore inhibits the development of personal relationships and the building of rapport.³² Technology and team dispersion also make team processing more difficult, particularly in the forming, storming and norming stages of Tuckman's model of group development.³³ Consequently, virtual learning groups 'may not develop strong social network connections because of degraded attachment among study group members'.³⁴ Such barriers to learner interaction and 'sense of group' mean that as trust, cohesion and shared cognition in geographically dispersed groups take longer to develop,³⁵ conflict is more likely to occur.³⁶ Whilst high levels of conflict 'mitigate[s] against educationally productive discourse',³⁷ students

31 Lam et al, above n 20, 358; Kara Orvis and Andrea Lassiter, 'Computer-Supported Collaborative Learning: The Role of the Instructor' in Sharmila Ferris and Susan Godar (eds), *Teaching and Learning With Virtual Teams* (2006) 158, 167; Merrill Warkentin, Lutfus Sayeed and Ross Hightower, 'Virtual Teams versus Face-to-Face Teams: An Exploratory Study of a Web-based Conference System' (1997) 28(4) *Decision Sciences* 975, 979.

32 Harvard, Du and Xu, above n 32, 37-8.

33 Bruce Tuckman, 'Developmental Sequence in Small Groups' (1965) 63 *Psychological Bulletin* 384; (2001) 3 *Group Facilitation: A Research and Applications Journal* 66, 78. Tuckman maintains that the following phases are necessary for effective teamwork: (1) *forming* (team members get to know each other and agree on goals, tasks, roles and standards of group behaviour); (2) *storming* (conflict - resistance to group influence and task requirements - team members confront each other's ideas and perspectives); (3) *norming* (mutually accepted solutions are reached and rules, values and acceptable standards of behaviour are solidified. Team members adjust their behaviour to each other, develop trust and work 'as a team'); (4) *performing* (getting the job done). It is 'generally not possible to achieve high team performance until the group has passed through the first three stages': Rob Straby, *The Joy of Groups* (2007) <<http://www.slideshare.net/rstraby/the-joy-of-groups/>> at 5 June 2008. See also, Nicholas Michinov and Estelle Michinov, 'Face-to-Face Contact at the Midpoint of an Online Collaboration: Its Impact on the Patterns of Participation, Interaction, Affect, and Behaviour Over Time' (2008) 50 *Computers and Education* 1540, 1542; Byron Harvard, Jianxia Du and Jianzhong Xu, 'Online Collaborative Learning and Communication Media' (2008) 19(1) *Journal of Interactive Learning Research* 37, 47-8.

34 Gregory Northcraft, Terri Griffith and Mark Fuller, 'Virtual Study Groups: A Challenging Centrepiece for 'Working Adult' Management Education' in Sharmila Ferris and Susan Godar (eds), *Teaching and Learning With Virtual Teams* (2006) 131, 137.

35 Orvis and Lassiter, above n 31, 159, 161; Warkentin, above n 31, 986; Harvard, Du and Xu, above n 33, 45-7; Poole and Zhang, above n 18, 374; Kim, above n 17, 1019.

36 Poole and Zhang, above n 18, 372, 378-9 (virtual teams are more likely to experience conflict). See also, Harvard, Du and Xu, above n 33, 48; Orvis and Lassiter, above n 31, 168-9; Northcraft, Griffith and Fuller, above n 34, 137. However, whilst online teams are less conducive to maintaining an optimal level of conflict, arguably some form of conflict is required to promote the augmentation and reformulation of ideas necessary to achieve the deeper learning and cognitive development resulting from cooperative learning discussed at above n 15 and accompanying text: Jim Hewitt and Marlene Scardamalia, 'Design Principles for Distributed Knowledge Building Processes' (1998) 10(1) *Educational Psychology Review* 75, 87; Mitzi Montoya-Weiss, Anne Massey and Michael Song, 'Getting It Together: Temporal Coordination and Conflict Management in Global Virtual Teams' (2001) 44(6) *Academy of Management Journal* 1251, 1252, 1259.

37 Hewitt and Scardamalia, above n 36, 86.

in cohesive groups will be more motivated to share information, depend on others, and spend more time engaging in meaningful dialogue and team contributions.³⁸

'The perceived distance between learners and other team members, contributes to fears of contributions ... left unnoticed',³⁹ or 'communication anxiety'. This occurs due to the absence or delay of an immediate response or feedback, upon submission, as to an idea's value to other group members.⁴⁰ Feelings of isolation and vulnerability, when combined with delays in communication, give rise to a greater potential for team members to be, or be perceived to be, anonymous or 'free-riding'.⁴¹ Indeed virtual team members are more likely to draw negative conclusions regarding other members' behaviour. For example, Poole and Zhang⁴² state that a member who does not respond to emails is more likely to be 'assumed to be uncommitted to the team, and the possibility that there [is] a technical problem' is not considered.

Other communication problems, which commonly give rise to conflict in virtual teams, include:

- Poorly co-ordinated work logistics, and difficulties with role allocation and leadership;⁴³
- Unrealistic or unequal expectations;⁴⁴
- Lack of project visibility – which occurs where team members understand their individual tasks, but fail to see how they fit into the whole project;⁴⁵ and
- A failure to share information about team members': contexts, schedules, constraints⁴⁶ and communication preferences.⁴⁷

'Virtual communication may hamper the development of transactive memory' or 'the capacity of group members to know who in a group knows what',⁴⁸ or in which person a particular expertise lies. Consequently, there is often insufficient disclosure of individual skills, knowledge and strengths amongst members.⁴⁹ Differences in the way text and speech are processed, and the common absence of aural and visual cueing to convey subtle meanings,⁵⁰ mean that misunderstanding

38 Rashmi Assudani, 'Learning in a Geographically Dispersed Context: Building a Community of Learning in a Dispersed Space' in Sharmila Ferris and Susan Godar (eds), *Teaching and Learning With Virtual Teams* (2006) 110, 121; Orvis and Lassiter, above n 31, 167.

39 Margaret Bailey and Lara Luetkehans, 'Ten Great Tips for Facilitating Virtual Learning Teams' (Paper presented at the Proceedings of the Annual Conference on Distance Teaching and Learning 1998, Madison, Wisconsin, 5-7 August 1998) 19.

40 Hewitt and Scardamalia, above n 36, 87; Poole and Zhang, above n 18, 367; Shield, Atweh and Singh, above n 13, 609; Kim, above n 17, 1020.

41 Northcraft, Griffith and Fuller, above n 34, 137-8; Lam et al, above n 20, 358.

42 Above n 18, 372. See also, Catherine Cramton, 'The Mutual Knowledge Problem and its Consequences for Dispersed Collaboration' (2001) 12 *Organization Science* 346, 359.

43 Kim, above n 17, 1020; Orvis and Lassiter, above n 31, 165.

44 Kim, above n 17, 1020; Assudani, above n 38, 121.

45 Kim, above n 17, 1019.

46 Diane Boehm and Lilianna Aniola-Jedrzejek, 'Seven Principles of Good Practice for Virtual International Collaboration' in Sharmila Ferris and Susan Godar (eds), *Teaching and Learning With Virtual Teams* (2006) 1, 21; Cramton, above n 42; Kim, above n 17, 1019.

47 Assudani, above n 38, 121.

48 Northcraft, Griffith and Fuller, above n 34, 138.

49 Assudani, above n 38, 114, 121.

50 Warkentin, Sayeed and Hightower, above n 31, 978. Shield, Atweh and Singh, above n 13, 609; Hewitt and Scardamalia, above n 36, 87.

and miscommunication are more likely in online teams, and are often less detectable.⁵¹ In addition to differing communication styles, culturally diverse teams must also deal with differences in cultural values and conflict management styles.⁵²

While in some cases also applying to face-to-face teams, as the above effects are stronger the more virtual the team,⁵³ the literature suggests that the development of social relationships, trust and shared knowledge may be facilitated amongst online team members if periods of face-to-face contact are also established.⁵⁴ In particular, at least an initial face-to-face meeting may foster 'sense of group' by allowing members to literally 'put a face to a name'⁵⁵ and better get to know each other before working on the task.⁵⁶ Additionally, in order to soften the communication and relational problems facing online teams, it is considered necessary to provide dispersed learners with a variety of communication tools from which they might select the mechanism most suited to the circumstances and preferences of the group and the task at hand.⁵⁷

Synchronous tools (such as chat rooms, instant messaging, teleconferencing, web conferencing, skype and telephone) can be alternatives for team members, unable to meet face-to-face, to develop a sense of belonging and facilitate trust-building.⁵⁸ By enabling members to meet and accomplish goals in real time, they are able to develop a greater sense of social presence, or community, than possible with asynchronous forums.⁵⁹ Synchronous tools also allow for some aural and/or visual cueing. Consequently, they are useful for immediate feedback, negotiation and decision making, and the addressing of emotional conflict.⁶⁰ Alternatively, as asynchronous tools (such as threaded discussion forums, email, wikis and file servers) are not time dependant,⁶¹ they provide greater flexibility for people working across time zones.⁶² Whilst synchronous tools allow for more spontaneous discussion, asynchronous communication methods provide for more thoughtful, considered, reflective or deep discussion and learning.⁶³ Asynchronous forms are also more likely to allow a history, or record, of the team's discussions to be kept over a period of time. This facilitates mutual understanding regarding the project, by affording access to previous discussions, and is particularly useful for team members not present at the time the discussions occurred.

51 Harvard, Du and Xu, above n 33, 39; Northcraft, Griffith and Fuller, above n 34, 137; Kim, above n 17, 1019; Poole and Zhang, above n 18, 379; Montoya-Weiss, Massey and Song, above n 36, 1259.

52 Poole and Zhang, above n 18, 366.

53 Ibid, 364, 367.

54 Assudani, above n 38, 124; Michinov and Michinov, above n 33, 1541-2; Harvard, Du and Xu, above n 33, 47; Kim, above n 17, 1021.

55 John Biggs, *Teaching for Quality Learning at University* (2003) 219.

56 Poole and Zhang, above n 18, 369; Warkentin, Sayeed and Hightower, above n 31, 986-7, 990.

57 'Students offered a variety of communication media within a course will choose those they deem necessary based on the needs of the group. The choice of media cannot be forced.' Harvard, Du and Xu, above n 33, 45. See also, 38, 43-4; Bailey and Luetkehans, above n 39, 21; Assudani, above n 38, 123-4; Kim, above n 17, 1020.

58 Michinov and Michinov, above n 33, 1541; Harvard, Du and Xu, above n 33, 47.

59 Harvard, Du and Xu, above n 33, 43.

60 Ibid, 47; Bailey and Luetkehans, above n 39, 21.

61 Harvard, Du and Xu, above n 33, 44.

62 Biggs, above n 55, 219; Lam et al, above n 20, 357.

63 Lam et al, above n 20, 358; Warkentin, Sayeed and Hightower, above n 31, 976-7.

Given the challenges faced by virtual teams, educators need to actively encourage effective interactions between learners.⁶⁴ According to Lam, Chua, Williams and Lee,⁶⁵ 'the performance of a virtual team is not only a function of the intellectual ability of its members, but also the extent to which the members have learnt how to work effectively as part of a virtual team'. Teaching teams also need to monitor their virtual students and be prepared to assist team members in times of conflict or confusion.⁶⁶ 'If they intervene where there are problems between learners, instructors have a chance to reverse the potentially negative effects of computer-supported environments and can better manage barriers to learner-learner interactions'.⁶⁷ Obviously however, teams will work more effectively if strategies are implemented, as part of the teaching and learning structure, to minimise the potential for conflict to occur.

III. THE MODEL AND CONFLICT MINIMISATION STRATEGIES IMPLEMENTED

As the above literature illustrates, in order to minimise conflict in online teams the primary objective for educators must be to create a virtual environment that facilitates team members to learn how to develop the mutual trust, cohesion and common knowledge ultimately necessary for effective work. In the context of the virtual team model implemented in the Principles of Equity unit at QUT's Faculty of Law, this part therefore outlines the strategy adopted in the unit to minimize conflict in order to increase team effectiveness and positively influence student learning experience.

In accordance with University policy, which requires courses to develop employment related skills appropriate to the particular discipline,⁶⁸ teamwork and legal letter writing skills theory and practice is incorporated at various stages in the Equity unit's lecture and tutorial program. As part of this module, for 20 per cent of their total marks, students are required to write, in teams of four, a jointly assessed client focused letter of advice in relation to a specific legal scenario. Students studying the unit internally to the University are provided with the opportunity, during semester weeks two to five, to engage in preliminary teamwork exercises and work on their letter. Therefore, in order to preserve the integrity of the skills program, and to ensure like learning experiences, it was important that external (or off-campus) students be provided with a similar opportunity. Consequently, it was initially compulsory for external students to attend an attendance school in order to engage in this aspect of their skills development. However, given that attendance is not always possible, in 2006 students were offered an optional alternative. For the reasons outlined above,⁶⁹ this was achieved through the development and implementation of a model enabling students to form and, for four weeks, work together, in virtual teams to practice and learn the teamwork and letter writing skills necessary to complete their assignment online.

64 Orvis and Lassiter, above n 31, 162, 170.

65 Above n 20, 359.

66 Elizabeth Stacey, Karin Barty and Peter Smith, *Designing for Online Communities of Learning* (2005) Australasian Society for Computers in Learning in Tertiary Education 634 <http://www.ascilite.org.au/conferences/brisbane05/blogs/proceedings/73_Stacey.pdf> at 5 June 2008; Bailey and Luetkehans, above n 39, 21; Richard Felder and Rebecca Brent, *Groupwork in Distance Learning* (2001) <<http://www4.ncsu.edu/unity/lockers/users/f/felder/public/Columns/FAQs-3.html>> at 5 June 2008.

67 Orvis and Lassiter, above n 31, 163.

68 See eg, *QUT Learning and Teaching Plan 2007-2011* (2007) Queensland University of Technology, Objective 3 <<http://www.frp.qut.edu.au/frp toolkit/corpplan/strategic.jsp>> at 5 June 2008.

69 See above n 23-28 and accompanying text.

In 2007, after the model was successfully trialled, all external students were required to complete their assessment in online teams. Additionally, given that some teams were previously observed to experience problems, or conflict (arising for example from: initial team formation; lack of communication between members and/or consensus in reaching decisions; 'free-riders' (or the perception of a lack of valuable contribution from team members), and differing schedules and preferences as to online communication methods), in 2008 attention was paid to emphasising existing, and incorporating within the model new, procedures and structures to help coordinate and control team member activities, and increase communication, trust and rapport. Assisting students to learn how to develop the skills necessary for effective virtual teamwork is particularly important where, as in this case:

- Students have not been exposed to virtual teams (at least as part of their law degree) before;⁷⁰ and
- Teams are assigned a limited term, single-time, task⁷¹ and are consequently more likely to develop the task focused communication response discussed earlier,⁷² instead of working to share relational information by getting to know each other and thus developing viable team relationships.

A. *Strategies Implemented*

Prior to the commencement of the team letter writing project, in semester week one students allocated themselves to a virtual team on the unit's 'Blackboard', or online teaching, site – choosing from among a numbered list of pre-determined groups, some spanning fixed major geographical regions (for example, Brisbane, Sunshine Coast and Gold Coast). So that students might also form more discrete geographical groupings of their own, they were provided (on the team enrolment page) with a discussion forum on which to post messages identifying their location and nominating a team for similarly located students to join. Like internal teams, virtual team numbers were capped at four given that in 'online environments, larger groups are less productive and have more difficulty arriving at consensus'.⁷³ The option to create teams of geographically proximate members aimed to facilitate their greater integration and socialisation, by allowing for face-to-face meetings.

Once enrolled in a team, members had access to their own private group work area – containing a mixture of synchronous and asynchronous tools (including a chat room, group email link, file exchange and threaded discussion forum) – within which to work, communicate and post documents. Each group also had access to a 'Tasks Area' hosted on the unit's main Blackboard Site, which specified the objectives for each week of the assignment project and stepped students through the tasks (described below) set to help develop a 'sense of group' and complete their assessment. Students were also given access to 'Teamwork Materials', consisting of a talking PowerPoint presentation outlining: the assignment (its criteria and desired outcomes), traits of effective teamwork;⁷⁴ and conflict resolution and prevention strategies (such as: effective and inef-

70 Harvard, Du and Xu, above n 33, 39; Poole and Zhang, above n 18, 380.

71 Poole and Zhang, above n 18, 369. They state that whilst "swift trust" can form in virtual teams faced with pressure to complete their tasks in a relatively short time ... [such trust is] very fragile' and can be easily broken (at 374).

72 See above n 31 and accompanying text.

73 Bailey and Luetkehans, above n 39, 22.

74 Based on the theory outlined in Graham Gibbs, *Learning in Teams: A Student Guide* (revised ed, 1994).

fective ways of disagreeing or criticising; and working with diversity and different learning styles or personality types).

As 'it is not only important to recognize the geographic distance between individuals, but also how these individuals 'feel' the distance between themselves by virtue of their familiarity with each other',⁷⁵ teams were set various tasks to encourage the development of trust, cohesion, common knowledge and consensus. In turn it was desired to reduce online members' feelings of isolation, uncertainty or frustration, which often manifest in conflict.⁷⁶ During week one team members were asked to post personal information, including their contact details, schedules and preferred communication or meeting methods and times, as the first contribution to their team's discussion forum. Subsequent weekly tasks included resources and preliminary exercises to encourage each team to:

- Set ground rules for group communication and behaviour, develop conflict and decision-making strategies; and share information as to the strengths, weaknesses and expectations of individual team members (week two); and
- Allocate tasks, deadlines and group roles and responsibilities (week four).

Additionally, given the project's short-term nature, it was necessary for students to build trust early.⁷⁷ Consequently, in week two students were asked to divide the questions set for that week's tutorial between their group members and work on them in their virtual teams. This not only encouraged students to begin their team interactions early, but also enabled them to informally test the norms, protocols and methods of communication previously agreed upon, in relation to their team, before commencing their assessment.

Teams were monitored by staff in an attempt to ensure all members' contribution, and to enable the provision of online feedback, as necessary via announcements on the main Blackboard site. Staff were also available, if desired, to help students resolve team conflict. Prior to the project's commencement, students were sent an email including a description of the activity and tips for being a successful online team member. Additionally, throughout the project students were periodically emailed regarding the weekly tasks required. The setting of incremental goals and the sending of regular 'reminders' aimed to both: sustain team participation and discourage anonymous, absent or 'free-riding' members;⁷⁸ and advise students of the virtual team skills and processes required to increase team effectiveness.

When an instructor provides learners with:⁷⁹

structure and guidelines for how to work together early in the team's tenure, they are helping group members develop shared cognitive structures of how they should interact with one another. Learners who do not receive this information will be less likely to have a shared understanding of interaction and will take longer to determine how to work together.

The aim therefore, was to make resources and opportunities available to facilitate the implementation of communication and coordination strategies in order to minimise the potential for virtual team conflict.

75 Assudani, above n 38, 124. See also 125.

76 Ibid, 120-2; Orvis and Lassiter, above n 31, 165-6; Poole and Zhang, above n 18, 378.

77 Poole and Zhang, above n 18, 366, 369.

78 Bailey and Luetkehans, above n 39, 21; Lam et al, above n 20, 359; Poole and Zhang, above n 18, 378.

79 Orvis and Lassiter, above n 31, 166.

IV. EVALUATION

In order to measure the effectiveness of the strategies developed and implemented in the Principles of Equity unit at QUT to minimise conflict in online teams, an evaluation was conducted using quantitative and qualitative data collection methods to analyse student perceptions on the impact of the strategies' use on learning experience and conflict minimisation. After engaging in the team letter writing project, students were asked to reflect on their participation and then complete and submit responses to an online survey. One hundred and three responses were received.

Quantitative data was firstly captured through the use of a rating survey question.⁸⁰ Possible responses were: *very useful*; *useful*; *not useful*; and *I did not use this strategy*, and students were asked to rate the usefulness of the following strategies in managing group expectations and preventing conflict in their team:

1. Enrolment in a team of geographically close members.
2. Use of the Online Discussion Board for group selection.
3. The Week 1 Task – Exchanging contact details, preferred communication methods, meeting times and schedules.
4. The Week 2 Task – Setting ground rules, developing conflict and decision-making strategies, sharing strengths and expectations.
5. The Week 2 Task – Completing the week two tutorial questions online in your team.
6. The Week 4 Task – allocating tasks, deadlines and group roles.
7. Access to, and monitoring of teams by, academic staff.

A second question asked students to consider, if there was conflict in their team, at what stage did it arise? Students were asked to select all of the following that applied:⁸¹

1. Allocating to a team and sharing details;
2. Understanding the task;
3. Allocating roles;
4. Making decisions;
5. Solving problems – determining 'the answer' to the assignment set;
6. Completing or finalising the assignment.

In order to generate a rich description of the phenomenon under investigation, students were also asked to provide written comments in relation to:

1. How useful were the 'Teamwork Materials' in assisting you to manage group expectations and conflict in your team?⁸²
2. Was there any conflict in your team? If so what form did this conflict take?⁸³
3. If there was conflict in your team, what other resources would have been helpful in managing it, or assisting in the successful completion of your assessment?⁸⁴
4. What suggestions do you have for future students to minimise conflict in their online teams?⁸⁵

80 See Figure 1 below.

81 See Figure 4 below.

82 See Figure 2 below.

83 See Figure 3 below.

84 See Figure 5 below.

85 See Figure 6 below.

Following a review of student responses to these questions, the following various themes emerged.

A *Analysis of Student Perceptions*

Student perceptions on the usefulness of the strategies implemented in an attempt to minimise virtual team conflict, together with the total proportion of students who actually used each strategy, are captured by Figure 1 below. The strategies implemented were generally widely adopted, with at least 52 per cent of students utilising each strategy suggested. Of these students, between 39 and 95 per cent rated the strategy as either *useful* or *very useful* in managing group expectations and preventing conflict in their team. Indeed the general absence of conflict was a key factor cited by students when considering what they liked most about engaging in the team letter writing project:⁸⁶

- Everyone made input into the final product without a hassle and we were all agreed with the substance of the letter.
- Everyone listened to what the other person had to say. There were debates over issues and in the end it was the majority view that the group went with. I feel everyone was courteous and everyone pulled their weight. We started early and communicated pretty well.

Consistent with the literature which indicates that practical communication problems are a key cause of conflict in online teams,⁸⁷ students considered that the most useful strategy to manage expectations and minimise conflict (with a total positive response rate of 95.1 per cent), was the enabling of efficient and effective communication by sharing information such as: contact details; preferred methods of communication; time constraints; and schedules as to availability.

- As external students, we all had different domestic arrangements and found it difficult for four people to meet at the same time. The coordination of the project was initially difficult, but as we moved through the process we identified better ways we could have coordinated our group.

This was followed (at 69.9 per cent) by strategies relevant to the coordination of work logistics such as: task and role allocation; and the setting of timelines and deadlines, and (at 65.1 per cent) by taking measures to manage expectations by: agreeing on ground rules; developing decision making and conflict resolution strategies; and sharing strengths and weaknesses.

- By identifying each member's strengths and weaknesses, our team was able to allocate roles to each member effectively.
- The information was useful in giving me the ability to manage expectations and realise that if conflict arises to try and resolve it in a mature way, focusing on the assignment rather than our individual opinions.

In relation to students practicing their virtual teamwork by engaging in the week two tutorial questions in their teams, prior to embarking upon the assignment question set,⁸⁸ the total positive student response rate of 51.5 per cent, is again consistent with the literature.⁸⁹ This suggests that starting off early with easy projects, or activities that allow for the development of skills outside the

86 In addition to the questions listed at above n 80-85 and accompanying text, students were also asked to comment upon 'what I liked most about working in my team to complete the letter writing exercise in Equity was ...'.

87 See above n 43-47 and accompanying text.

88 See discussion at above n 77 and accompanying text.

89 Ibid. See also Kim, above n 17, 1020; Bailey and Luetkehans, above n 39, 22; Orvis and Lassiter, above n 31, 169.

actual task set, can be effective in fostering trust and cohesion, and in testing established norms. Indeed this was reflected in student comments:

- I found these resources most valuable in helping our team to establish what we will expect from each other. Even doing the week two tutorial question was a way to see how people work – ie it was clear that one team member in particular like dividing tasks more than others, so she naturally took on more of a leadership role.
- By the end of the second week, everyone was 'on-board' with what needed to be done and how everyone else felt about working together via the 'How I am in Groups' proforma. My feeling is that stating expectations up-front through this proforma was quite critical to the attitude of the group from the start.

According to Figure 1, approximately 48 per cent of students did not employ the strategy of enrolling in geographically close teams and 46 per cent did not use the discussion board for this purpose. Consistently with studies that have shown that student virtual teams *can* be effective without face-to-face meetings,⁹⁰ the fact that students did not seem to appreciate, or take up, the option of working in geographically proximate groups (nor find the discussion forum established for this purpose very useful in preventing conflict), might be due to the fact that for these students technology does sufficiently replace face-to-face communication. Reasons for this perception include:

- External students may have learning preferences which favour flexible working conditions, such that meeting face-to-face may prejudice the 'primacy of convenience' placed upon their chosen mode of university enrolment;⁹¹ and
- Generation Y students and external students generally, as frequent users of synchronous and asynchronous tools, such as chats and discussion forums, may not consider face-to-face meetings necessary to build rapport, trust or 'sense of group'. They may have also developed alternative ways of conveying 'richer' meaning in their online messages – such as using emoticons to replace verbal and aural cueing. Indeed Warkentin, Sayeed and Hightower⁹² found that:
[R]elational links were stronger in groups whose members reported more frequent use of the WWW than other groups. Being familiar with the WWW may allow frequent users to concentrate on their interaction with other group members rather than on the system itself.

Interestingly, however, careful team selection, including the use of the discussion forum to find geographically proximate team members so as to enable the possibility of face-to-face meetings, was suggested by 16.5 per cent of respondents when asked how future students could minimise virtual team conflict.⁹³

The survey results which indicate that 43.6 per cent of students did not access academic staff support, reflect the experience of the unit coordinator in managing the online team letter writing project. Very few students made contact during the exercise and communication received related mostly to issues of substantive law. Relevant to virtual team dynamics, communication from students concerned: requests for assistance to establish initial contact with team members; advice as to whether a missing team member had discontinued their enrolment; and two occasions of reporting of free-riders and miscommunication and overbearing behaviour, respectively. In all

90 Montoya-Weiss, Massey and Song, above n 36. See also, Poole and Zhang, above n 18, 371-2; Michinov and Michinov, above n 33, 1541-2.

91 See eg, Northcraft, Griffith and Fuller, above n 34, 135.

92 Above n 31, 987.

93 See Figure 6 below.

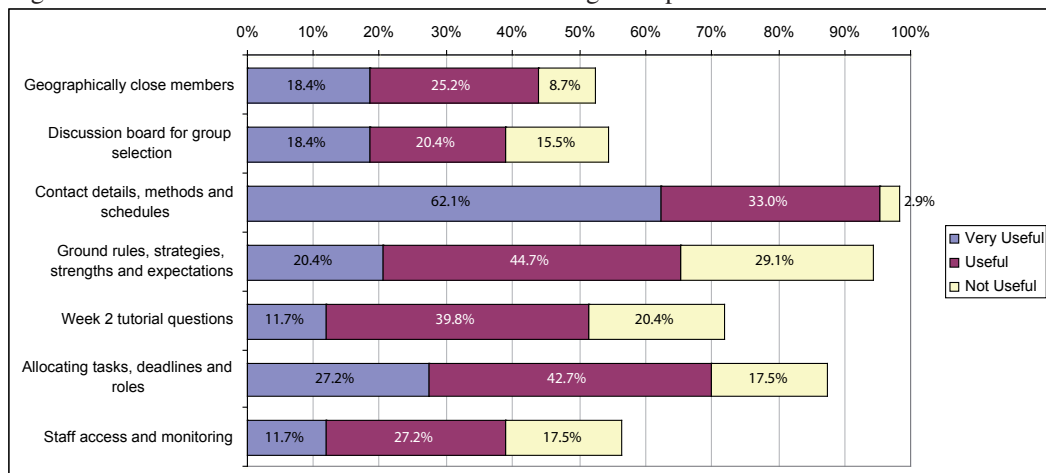
instances, teams subsequently worked together to either resolve or work around these issues and there was no further contact or concern expressed to staff. It may be that a key reason for not seeking the assistance of academic staff was that very few teams experienced conflict that they were unable to resolve quickly themselves. Furthermore, external students may be more accustomed to working independently and taking responsibility for their own learning, without a great deal of individual contact with academic staff:

- It is a matter for each team member taking responsibility not only for their own tasks but for the effectiveness of the team.

Additionally, as the following comment suggests, students may not have expected staff monitoring or realised that each team's private group work area was being monitored:

- There was no discernable staff monitoring.

Figure 1: Students' Perceived Usefulness of the Strategies Implemented



That the 'Teamwork Materials' provided to students were considered to be very useful in managing group expectations and preventing conflict is indicated by Figure 2. This shows that 46.6 per cent of students considered the materials most useful in enabling them to better understand themselves and their team members and therefore work more effectively as a group. Where conflict did arise, 4.7 per cent of students indicated that the materials assisted in conflict resolution:

- Sorry I did not use the materials at first, I thought that I could handle the issues as they came along. However when some team members did not meet deadlines I think [the situation] got out of hand for a short time, so I referred to the material. This provided assistance to understanding the other person's perspective. About this, we got past our difficulties with the help of the material.

Figure 2 also shows that 8.7 per cent of students stated that they did not need the materials because no conflict arose – perhaps due to the other conflict minimisation strategies' effectiveness:

- Well my group actually had no conflict. This was probably because the unit encouraged ... the same strategies and tasks explained in the learning support resources about managing group expectations and team conflict. The most important thing I think was getting together and setting team expectations as early as possible.

Only 14.6 per cent of students accessing the ‘Teamwork Materials’ considered them ‘not useful’ – commonly because others in the team did not engage with the materials:

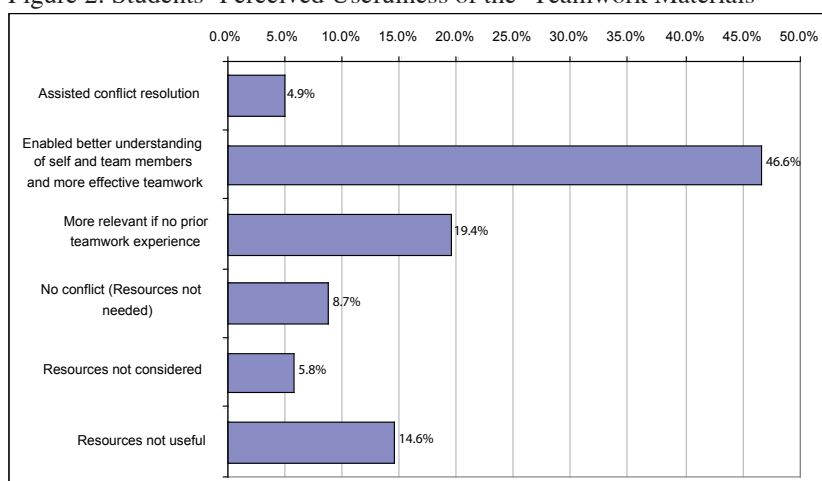
- I think that I may have been the only one in the group to look at the information. So it’s only useful if all members look at it.

An additional 19.4 per cent did not consider the materials relevant to their circumstances, particularly because they had prior teamwork experience:

- I found this information quite useful, however due to working in teams on a number of occasions I was already aware of most of the information provided.

Some students (5.8 per cent), said that they did not consider the resources at all, perhaps again because of their previous team work experience.

Figure 2: Students’ Perceived Usefulness of the ‘Teamwork Materials’



As evidenced by Figure 3 below, although the survey results indicated that approximately 50 per cent of students encountered no conflict within their virtual team, and therefore the strategies implemented may have had a positive impact on student learning experiences in the unit:

- In the end for me it was the great communication, everyone pulled their weight and everyone was agreeable on the topics.

Some students still experienced conflict. As expected, following the literature review,⁹⁴ the most commonly cited form of conflict arose due to communication problems (31.1 per cent): such as a failure to value others’ contributions (21.4 per cent); inappropriate or poor communication (2.9 per cent); and communication breakdown (6.8 per cent). For example, one student reported a:

- Small conflict with one group member taking offence at being called ‘the others’ when two of us were trying to organise things initially and work out what we would use ie: discussion board or email, and in one email one team member said ‘I will email the others and see what they want to do’. This same team member saying in a chat that two of us couldn’t attend (and had given prior notice and had submitted our draft letters), that she and the other team [member would] have to do the assignment alone as two of us had ‘family situations’. I clarified the situation in an email and stated that we only missed

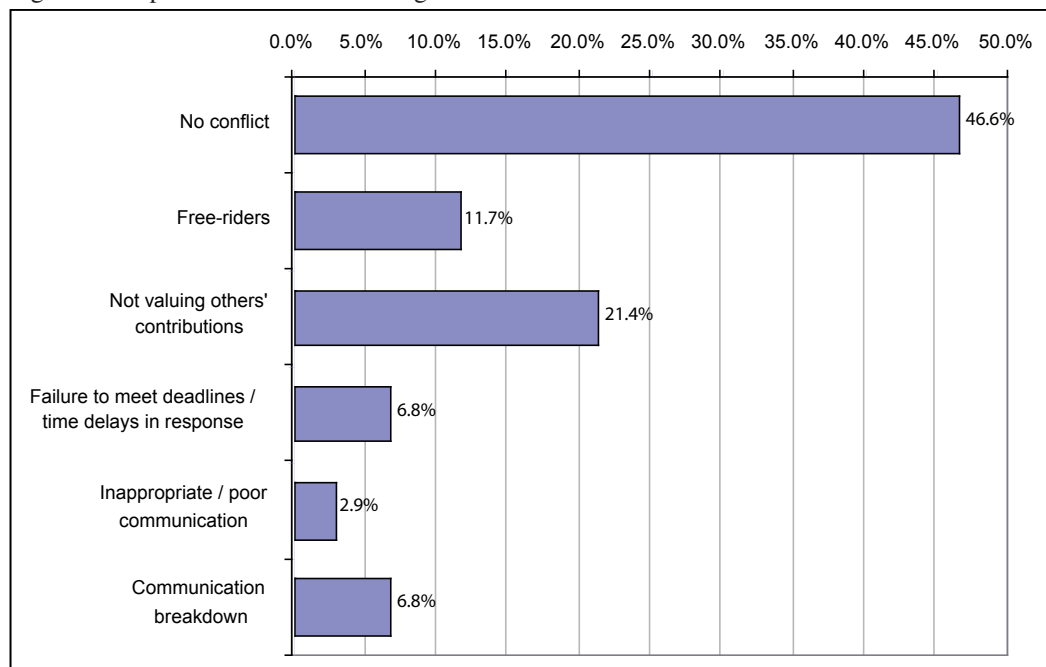
94 See above n 39-51 and accompanying text.

one meeting and were still fully contributing. I thought this was an overreaction as we had trouble initially making contact with one team member and there was no comment made about that.

The other major causes of conflict cited were: perceived free-riders (11.7 per cent);⁹⁵ and failure to meet deadlines and other time related issues such as delays in response to emails (6.8 per cent). As the literature⁹⁶ and the following student report illustrate, delayed communication response is more easily perceived as free-riding in online teams:

- Free riders – The conflict was passive, in that concerns were raised, explanations given ('IT troubles' or 'had cricket') and accepted, adjustments were made to original plans to redistribute work, problems arose again, no awareness of the issue was raised, and by then the assignment period was over, so it wasn't permitted to escalate to out and out conflict.

Figure 3: Proportion of Students Citing Common Forms of Conflict



As to when conflict most commonly arose, consistent with findings by Toribio, Laxton and Forsyth,⁹⁷ Figure 4 below indicates that in most cases (34 per cent), conflict arose when the assignment was nearing completion. Less conflict arose in the earlier stages of the project, although a total of 28.1 per cent of students considered that they experienced conflict early whilst: forming teams and sharing details (6.8 per cent); understanding the task (8.7 per cent); and allocating roles (12.6 per cent). This was to be expected following a consideration of the work of Tuckman,⁹⁸

⁹⁵ This was despite the stated aim of the strategy referred to at above n 78 and accompanying text.

⁹⁶ See above n 41-42 and accompanying text.

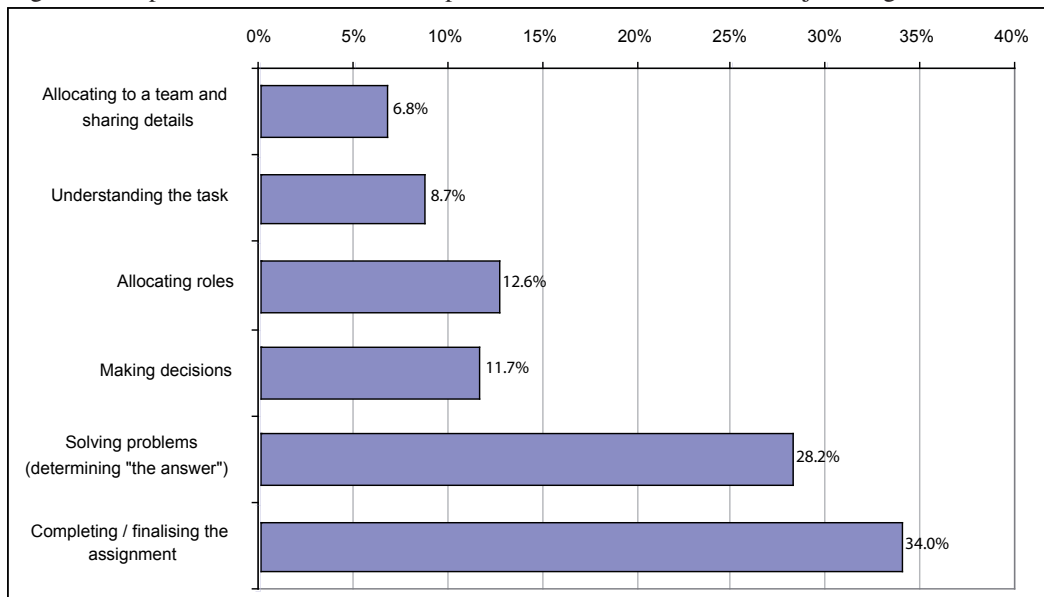
⁹⁷ Jenny-Ann Toribio, Ruth Laxton and Hannah Forsyth, (2005) RL Learning Designs <<http://www.rlld.com.au/pdf/Improving%20student%20experience%20of%20virtual%20teamwork.pdf>> at 5 June 2008.

⁹⁸ Above n 33.

Michinov and Michinov,⁹⁹ and Harvard, Du and Xu,¹⁰⁰ which indicate that technology and team dispersion makes team processing more difficult, particularly in the forming, storming and norming stages of group development. A large number of students indicated that they experienced conflict in making decisions and determining the answer to the problem (39.9 per cent in total). However, this may be explained as being the result of: contributions being perceived as not valued (as indicated by Figure 3 above as accounting for 21.4 per cent of conflict); or the process of expressing different views and coming to a determination, which some students may have considered to be conflict as apposed to being simply part of normal collaborative learning process.¹⁰¹ As aptly stated by one student:

- There was no real conflict that was beyond merely discussing or negotiating a mutually satisfactory response.

Figure 4: Proportion of Students That Experienced Conflict at Various Project Stages



Student responses as to what additional strategies would have been helpful to manage conflict (in Figure 5), indicate that whilst the strategies implemented to facilitate improved communication and coordination in relation to the online team letter writing project were viewed as important tools, perhaps more needs to be done in future years to ensure that students understand why these strategies are implemented and encouraged, so that more teams will access and use the resources already available. As previously noted, the strategies implemented in the Principles of Equity unit at QUT's Faculty of Law to minimise conflict in online teams included: enabling face-to-face meetings by facilitating the formation of teams amongst geographically close students; and providing a mix of synchronous and asynchronous communication tools, yet as shown in Fig-

99 Above n 33, 1542.

100 Above n 33, 47-8.

101 See eg, above n 36.

ure 5, 12.6 per cent of students still considered that additional strategies in this regard should be implemented:

- As communication is so essential to successful team work, but so hard in an external team, our team would have benefited from the ability to have face-to-face interactions via the internet. A program such as Skype would have ensured all members were up to date and on task, by all meeting in a virtual environment.

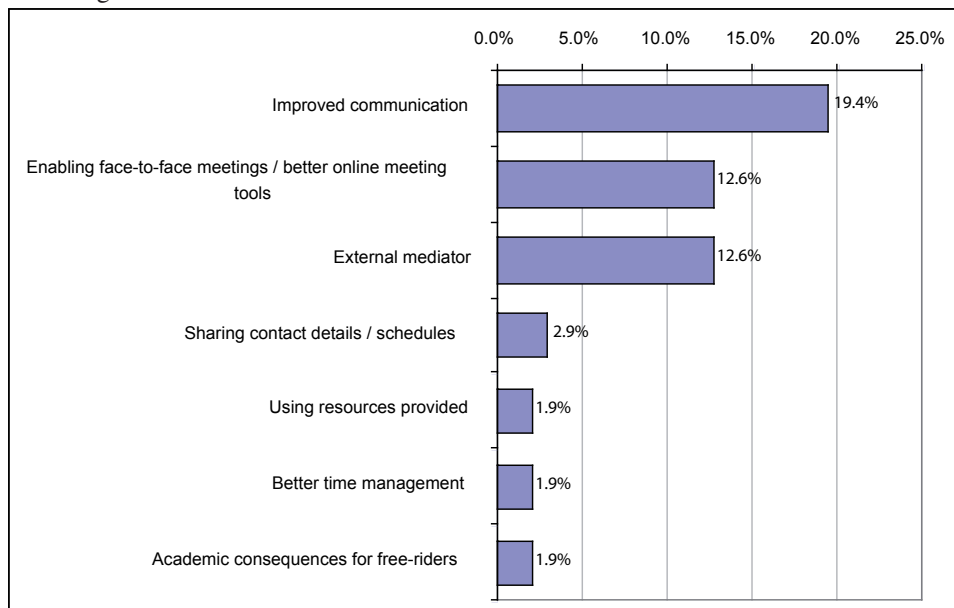
Indeed, the unit coordinator observed, when monitoring online discussion forums, that some student teams opted for alternative communication tools, such as msn messenger and skype for these reasons.

A further 24.2 per cent of students also considered that additional strategies to assist them to improve communication and team formation (sharing contact details and schedules), and better manage their time, would have assisted in minimising conflict. In the future, the 'Teamwork Materials' and week two tasks, which were intended to serve this purpose, will be reviewed and students will be expressly advised why they have been instructed to engage in these activities. Indeed 1.9 per cent of students recognised that they had been provided with resources which would have assisted, had they considered them:

- The only thing resembling conflict came from a failure to use the resources made available, not from the resources themselves.

Similarly, as previously noted, although students did not take up the option of seeking assistance from academic staff monitoring each team's private group work area, a total of 14.5 per cent of students suggested that either: an external mediator, such as academic staff member be appointed to resolve disputes (12.6 per cent); or that there be academic consequences for free-riding, enforced by academic staff (1.9 per cent).

Figure 5: Proportion of Students Identifying Additional Strategies that would have been Helpful to Manage Conflict



V. CONCLUSION

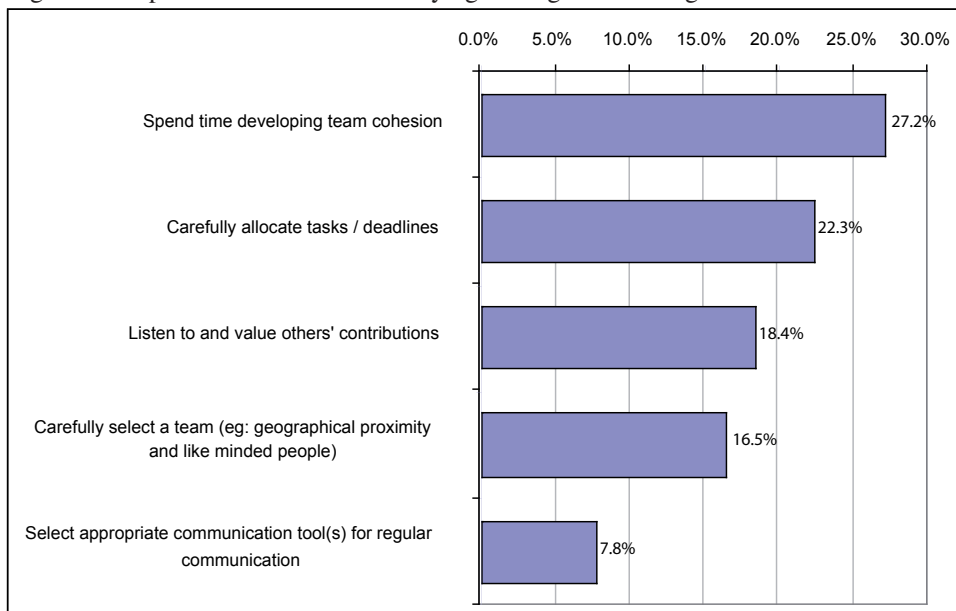
As discussed previously,¹⁰² Generation Y and external students' engagement in teamwork, or communities of learning, has many educational, social and work-related benefits. However, as stated by Assudani: 'the challenge for a team of dispersed learners lies in generating such a community in a virtual space'.¹⁰³ Because trust, cohesion and shared cognition in virtual teams take longer to develop, conflict is more likely to occur. Some level of conflict, as illustrated by the following student comment, is required to promote the argumentation and reformulation of ideas necessary to achieve the deeper learning or cognitive development resulting from cooperative learning:

- The only conflict we had as a team was 'the good kind'. We just gave each other a chance to comment on what we thought should happen and eventually came to conclusions, which were better than what they would have been if only one person had a say as they incorporated all of our individual ideas.

However, too much conflict has the potential to disrupt the information sharing and 'sense of group' necessary to achieve the social, psychological and cognitive benefits of collaboration. Therefore, the use of virtual teams raises special considerations for educators in terms of ensuring that appropriate strategies, such as those discussed in this article, are implemented as part of the teaching and learning structure, to encourage effective virtual communication and interaction amongst learners.

A summary of the strategies which should (as a minimum) be implemented, can be derived from the themes emerging from Figure 6. These themes reflect student perceptions as to how future students can minimise virtual team conflict.

Figure 6: Proportion of Students Identifying Strategies to Manage Conflict in the Future



¹⁰² See above n 6-28 and accompanying text.

¹⁰³ Above n 38, 123.

However, as students become more accustomed to working effectively in virtual teams as part of their study, the integration of such strategies to facilitate team formation and conflict minimisation may become less necessary.¹⁰⁴ Indeed, as previously discussed,¹⁰⁵ this was cited as the reason why some students did not consider the resources provided relevant to their circumstances:

- I did not really use these resources I just used the knowledge that I had gained from previous group tasks throughout my degree to help me in working through the situation. They would have been useful if I hadn't worked in a team environment before this.

104 See above n 70 and accompanying text. See also above n 65 and accompanying text.

105 See discussion of Figure 2 above.

CONTEMPORARY ISSUES IN MĀORI LAW AND SOCIETY
THE TANGLED WEB OF TREATY SETTLEMENTS
EMISSIONS TRADING, CENTRAL NORTH ISLAND FORESTS, AND
THE WAIKATO RIVER

LINDA TE AHO*

Aniwaniwa is the title of an elite art exhibition selected for display at the Venice Biennale in 2007.¹ Central to the work is the theme of submersion, as a metaphor for cultural loss. The name was chosen because it evokes the blackness of deep waters, storm clouds, a state of bewilderment, and a sense of disorientation as one is tossed beneath the waters, and it can also be a rainbow, a symbol of hope. Locally, *Aniwaniwa* refers to rapids at the narrowest point of the Waikato River by the village of Horahora, where artist Brett Graham's father was born and his grandfather worked at the Horahora power station. In 1947 the town and the original dam were flooded to create a new hydro-electric dam downstream. Many historic sites significant to Graham's people of Ngāti Korokī-Kahukura were lost forever, many of which have become the subject of a claim to the Waitangi Tribunal. This year will long be remembered for the flood of activity in the Treaty of Waitangi settlement landscape. This article, the fourth in a series that reviews and comments upon significant recent developments in Māori law and society, focuses upon a range of agreements that the Crown has entered into with Māori claimants who have confronted the Crown citing countless breaches of the Treaty of Waitangi that have been left too long in abeyance. There have been many agreements, at varying levels of finality, and each claimant would consider their grievances, losses, and their ensuing settlement as the most important. Without wanting to detract from that, the greater part of this article appraises two particular settlements notable for their innovation, and their consequences, in the context of a larger web of settlements. The two settlements, involving the Central North Island Forests and the Waikato River respectively, have been concluded following decades of unsuccessful earlier attempts to resolve. That they were concluded this year can be attributed to strong leadership, on the part of both the Crown and Māori. The theme of leadership permeates this article, and it seemed fitting to dedicate this article to a noble leader of great integrity and quiet strength, Monte Ohia,² whose sudden passing this year was heartbreaking for Māori across the nation. Firstly, this article turns to consider Māori responses to the Emissions Trading Scheme which was passed into law this year.

* Linda Te Aho is of Ngāti Korokī Kahukura descent and is the Associate Dean Māori and a Senior Lecturer in Law at Waikato University.

1 At the time of writing, in September 2008, the exhibition had just opened for display at the Waikato Museum in Hamilton. The artists are Brett Graham and Rachael Rakena. The description of the work is taken from promotional material.

2 A descendant of Ngāti Pukenga, Ngāiterangi, Ngāti Ranginui and Te Arawa, Monte was raised in Tauranga and died at the age of 62 years, having dedicated much of his working life to education.

I. MĀORI RESPONSES TO THE EMISSIONS TRADING SCHEME

This is one of the most critical issues facing this country and is at least similar to the Rogernomics policies of the 1980s.³

In order to protect New Zealand's reputation as a country with a clean and green environment, and our markets as global consumers are increasingly concerned about ethical and environmental issues, the Government has embarked upon a comprehensive strategy and action plan in response to climate change. After its first consultative process on climate change the Government settled on the Emissions Trading Scheme (ETS) as its preferred response to climate change issues.⁴ The ETS seeks to reduce, over time, the emission of greenhouse gases into the atmosphere by putting a price on carbon dioxide and other greenhouse gases specified in the Kyoto Protocol.⁵ It is intended that this will, in turn, change investment and consumption patterns. Forestry is the first sector to become subject to the scheme. The Government will devolve credits and liabilities for post-1989 forests back to forest owners. This is intended to create new incentives for planting trees, and flow on benefits for the environment, the forestry industry, and for mitigating emissions which that brings. New Zealand's economy is largely based around agriculture and emissions from agriculture make up nearly half of our annual greenhouse gas emissions. Measures aimed at the agricultural sector will come into effect when it is brought into the scheme in 2013.

In October 2007, the Government conducted a further thirteen consultation meetings specifically with Māori about the ETS.⁶ A further consultation round about the impacts of the ETS on Māori was sponsored by Te Puni Kōkiri, the Ministry of Māori Development. This process comprised eight regional workshops held across the country from late January to early February 2008 at which the findings of a Government commissioned report: *Impact of Emissions Trading Scheme on Māori – High Level Findings*⁷ were presented, and received with both concern and caution. The report found that climate change is one of the most critical issues facing this country and the proposed strategy is so pervasive that it is at least similar to the Rogernomics policies of the 1980s. Whilst the clear focus of the consultation discussions was on forestry, attention also turned to farming, fisheries and the huge social impacts that will weigh heavily on Māori.

Last year's review went into more detail about Māori responses to issues of climate change and contended that Māori support a sustainable approach to tackling issues raised by climate change. That feedback generally was centred in a framework of a Māori worldview which is based on a spiritual connection to this earth.⁸ The relationship that Māori shares with the environment is fundamental to Māori law and society and 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 primal parents, Ranginui and

3 Chris Karamaea Insley, Managing Director, 37 Degrees South *Impact of Emissions Trading Scheme on Māori – High Level Findings*.

4 For details of Māori responses to the first consultative processes see Linda Te Aho, 'Contemporary Issues in Māori Law and Society – Crown Forests, Climate Change and Consultation – Towards More Meaningful Relationships' (2007) *Waikato Law Review* 138; 145-152, and 'Contemporary Issues in Māori Law and Society - Mana Whenua Mana Motuhake' (2006) *Waikato Law Review* 102.

5 Under the Kyoto Protocol New Zealand has committed to reduce greenhouse gas emissions to 1990 levels.

6 For the details of the scheme see the Climate Change (Emissions Trading and Renewable Preference) Act 2008.

7 The report was produced by Chris Karamaea Insley, Managing Director, 37 Degrees South, and Richard Meade of Cognitus.

8 Above n 4.

Papatūānuku.⁹ Feedback also made it clear that it is equally important for the Crown to recognise the growing Māori economy as well as the need for Māori to maximise opportunities that flow from changing policy frameworks. During the most recent consultative process on the ETS, Māori took the opportunity to once again lament that their particular interests were not being reflected in the overall discussion of climate change issues, and lobbied for a specific and distinctive voice at a national level. Recognising the need to be innovative going forward, Māori also reiterated the need for better information to make better choices about land use.

Such responses voiced during these consultation processes arise because, for far too long, the New Zealand Government has entered into international covenants and designed domestic policies that have ignored Māori laws and values and a world view which is holistic and prioritises the ancestors of the environment. It should not have been surprising that the New Zealand's Government's policies on climate change were met with suspicion and caution by Māori, and that Māori strongly asserted their rights to actively participate in shaping their own future in a manner which aligns with those laws, values and that world view. Naturally there were many questions and concerns raised about the impact of the Government's proposed policies on the Māori economy, their land use and property rights, and so on, which have been summarised here. However, it must be remembered that at almost every consultation gathering Māori emphasised that the obvious starting point for any discussion on an issue as significant as climate change has to be Māori knowledge systems, laws, values and ways of viewing the world.

A number of concerns that arose in earlier consultation meetings on climate change and the ETS were raised once again during the ETS Regional workshops.¹⁰ The impacts of the scheme on Treaty settlements were still a concern, and many saw the scheme as an impairment of Māori property rights. Māori have commissioned their own research into the legal implications of the ETS on Treaty and Māori Property Rights and the nature of the right created by the ETS.

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.¹¹ Concern was voiced about the effect that the ETS will have on future Treaty settlements, and in particular, Māori criticised the Crown's position that it would not allocate free credits to Crown Forest Licensed Lands (CFLs). Under such a policy iwi who are yet to settle their Treaty claims would have limited ability to use their settlement lands for anything other than forestry, or they would have to buy deforestation credits which will, in turn, devalue commercial redress for future Treaty settlements. Māori who were yet to settle questioned the integrity of the settlement process going forward. On the other hand, the ETS will reduce land value. Māori will therefore be able to acquire more CFLs and more accumulated rentals.

As had been foreshadowed during the initial consultation process on climate change, concerns were raised once again that the proposed ETS would impact on iwi such as Ngāi Tahu who had

9 According to creation stories, Māori are direct descendants of Ranginui (sky father) and Papatūānuku (earth mother) who, in the beginning, were bound together, their children cocooned in their embrace in a world of darkness and unfulfilled potential. After much debate and deliberation, one of the children, Tāne Mahuta, braced his shoulders against his mother and used his legs to force his father upwards, separating Ranginui from Papatūānuku. Into the world of light emerged the siblings. They included: Tawhirimātea, the revered ancestor of winds; Tangaroa, the revered ancestor of the seas; and Tāne Mahuta, the revered ancestor of the forests and all life within.

10 Feedback from the Consultation Process with Maori on the ETS is contained in a report by Indigenous Corporate Solutions collated by the writer for the Ministry for the Environment and for Te Puni Kōkiri entitled *Key Themes from Emissions Trading Scheme Consultation Hui with Māori* 2008.

11 Waitangi Tribunal, *Motunui-Waitara Report* (1983).

land returned pursuant to a Treaty Settlement with the Crown. When Ngāi Tahu settled its claim over a decade ago part of the redress comprised forest lands that were transferred to the iwi subject to cutting licences. At the time, Ngāi Tahu envisaged that when those licences expired, they could consider converting the land to other uses such as dairying. Insofar as the ETS constrains or penalises such conversion, Ngāi Tahu claims compensation for the loss of value of their settlement. Ngāi Tahu also claims that during the settlement negotiations the government knew that it was preparing to commit to the Kyoto Protocol but did not inform Ngāi Tahu of the potential impacts of that commitment to the value of their settlement. The Honourable Douglas Graham, the Minister responsible for that settlement has publicly refuted this view. The present Government has responded by suggesting that its offer of free carbon units to forest owners under the ETS is compensation for such losses.

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, 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) which explicitly recognises that land is of special significance to Māori people, promotes retention. 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, Māori once again requested information about how the proposed policies would 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. Māori asked, once again, how this situation could be recognised and provided for in law. They also sought information such as a comparative analysis of the options of farming and forestry.

Another key issue discussed during consultation about the ETS was the lack of recognition of the indigenous forest estate in New Zealand. The world is recognising the preservation and non-harvest of indigenous forest, and recognising that there is a value in indigenous forest. Māori urged that such value needs recognition in New Zealand.

As a result of the respected and recognised leadership of Ngāti Porou leader, Dr Apirana Ma-huika, Ngāti Tūwharetoa's Timoti te Heuheu,¹² and Paul Morgan of the Federation of Māori Authorities, the Crown, in response to the issues raised by Māori, substantially increased its offer of free carbon credits to forest owning iwi as a separate process to Treaty settlements following a strong and sustained lobby remarkably supported by most, if not all, iwi in the land.

Another result of the consultation process is that there is a core group of Māori across the country who are far better informed about climate change and the ETS. However, while the process has helped Māori to understand the basic elements of the policies, there remains a lack of analysis of the specific impacts of the policies on Māori, details which Māori have consistently asked for since the first consultation round. Māori clearly seek active, on-going engagement, at a national level, and at a region specific level in order for Māori perspectives to be accorded higher priority in policy and decision making.

12 Brother of Paramount Chief, Tumu te Heuheu, see n 21 below.

II. THE TANGLED WEB OF TREATY SETTLEMENTS

...despite an initial united Maori front against the fiscal envelope policy, iwi Maori are succumbing one by one to the pressure to join the queue of those willing to settle. Perhaps they fear missing out on the ever shrinking envelope, or perhaps they are proceeding on the misapprehension that something is better than nothing.¹³

This year has seen an astounding number of Māori claimants joining the Treaty settlement queue and a correspondingly astounding number of agreements signed at various levels between the Crown and claimants notably since the Deputy Prime Minister and Minister of Finance, Dr Michael Cullen, took on the additional role of Minister in Charge of Treaty of Waitangi Negotiations.¹⁴ Two particular settlements, relating to the Central North Island Forests and the Waikato River respectively, stand out for their innovation, and their consequences, in the context of a larger web of settlements. As regards the settlement of the Central North Island Forests, it seems to me that a driving factor behind the pace in which such a large scale forestry settlement was reached is the pending general elections, and behind the unity demonstrated on the part of Māori was a desire to avoid the legal carnage that followed the nationwide fisheries settlement, otherwise known as the Sealord Deal. Some of the impacts of that deal provide a convenient introduction to the CNI settlement.

A. *Lessons learned from the Sealord Deal*

Under the Sealord Deal of 1992 the Crown provided \$150 million which assisted Māori to buy a half-share of Sealord Products Ltd, one of the largest commercial fisheries operators in the country. Māori received 10 per cent of existing fishing quota and became entitled to 20 per cent of any new quota. The Treaty of Waitangi Fisheries Commission (TOKM) was established and would be accountable to both the Crown and Māori. TOKM was charged with developing an allocation model for the distribution of the fisheries settlement assets to Māori. The process by which the deal was negotiated became the subject of intense criticism, as did the imposition of the settlement, by statute, on all Māori, whether they signed up to it or not. These issues and the various proposed allocation models released for consultation by TOKM became the subject of harrowing litigation over a 15 year period. Ani Mikaere suggests that if there is a single word that encapsulates the effect of the fisheries settlement on Māori, it is division: 'The bitter struggle over allocation has set iwi against iwi, iwi against hapū, and rural Māori against urban Māori'.¹⁵

13 Ani Mikaere, 'Treaty Settlements: Full and Final, or Fatally Flawed?' (1997) 17 *New Zealand Universities Law Review* 425, 455.

14 See the Office of Treaty Settlements website for details: www.ots.govt.nz.

15 Ani Mikaere, above n 13, 447. See also Stephanie Milroy, 'The Māori Fishing Settlement and the Loss of Rangatira-tanga' [2000] 8 *Waikato Law Review* 63.

B. The CNI Settlement

1. Background

Although the landmark settlement concluded in respect of historical claims of Central North Island iwi to the Central North Island Forests Lands (the CNI settlement)¹⁶ appears to have avoided some of the bitterness experienced during the fisheries debacle, its history has been fraught. As a result of the *New Zealand Māori Council v AG (Lands)* case,¹⁷ 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 whereby Crown land could be transferred out of Crown hands, 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.

Then, incredibly, merely two years after the *Lands* case, in 1989, the Government announced its intention to sell the Crown's commercial forestry assets. Māori once again objected that the transfer of Crown forests land out of Crown ownership would jeopardise Treaty of Waitangi claims and would be inconsistent with the principles of the Treaty of Waitangi.¹⁸ In the *New Zealand Māori Council v AG (Forests)* case,¹⁹ the Court of Appeal recommended that negotiations ensue to resolve the dispute in the spirit of partnership and in accordance with the principles of the Treaty of Waitangi. On 20 July 1989, the Crown and the New Zealand Māori Council (NZMC) and Federation of Māori Authorities Incorporated (FOMA) entered into the 1989 Crown Forests Agreement, pursuant to which the Crown Forest Assets Act 1989 was passed and the Crown Forestry Rental Trust was established. The Agreement provided that the Crown could sell its forest assets, but would retain ownership of the land, with protection mechanisms implemented by the Crown Forest Assets Act to safeguard Māori claims to the land. The parties agreed to jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims to Crown Forest Land and to make recommendations for the return of that land within the shortest reasonable period. Early attempts by Māori to reach a collective multi-iwi settlement in respect of the CNI Forests Land did not succeed. In 2006, the Crown entered into a deed of settlement with the Affiliate Te Arawa Iwi/Hapū which included some CNI Forests Land.²⁰

16 See Te Aho, 'Contemporary Issues' (2007), above n 4, for a fuller discussion of events that lead to this landmark settlement which is recorded in the Deed of Settlement dated 25 June 2008 between the CNI Forests Iwi Collective and the Crown (the CNI Deed of Settlement).

17 [1987] 1 NZLR 641.

18 It should be noted that there is opposition to the notion of principles of the Treaty which as Professor Jane Kelsey has long argued were devised to avoid issues of interpretation which might otherwise have been resolved by using established canons of interpreting international treaties such as *contra proferentum*; that is, interpreting against the party who drafted the words, thereby placing the responsibility for accuracy of language upon the drafting party (and in the case of the Treaty the drafters were the agents of the Crown). According to Kelsey the Court of Appeal rewrote the Treaty relationship by fashioning the principles of the Treaty' see Jane Kelsey, *A Question of Honour Labour and the Treaty 1984-1989* (1990) 217.

19 [1989] 2 NZLR 142.

20 Te Aho, 'Contemporary Issues' (2006) above n 4, 106-7; and (2007) above n 4, 144-145.

As is further recorded in the background to the CNI Deed of Settlement, the NZMC, FOMA, and Te Ariki, Dr Tumu te Heuheu, paramount chief of Ngāti Tūwharetoa,²¹ raised concerns through proceedings heard by the High Court in April 2007 that the Crown had, in this settlement, (though not for the first time), departed from the 1989 Crown Forests Agreement, the Crown Forest Assets Act and the terms of the Crown Forestry Rental Trust. The High Court found that the Affiliate Te Arawa Iwi/Hapū interests could not, in justice, be disturbed. It also expressed an opinion that if the Crown were to take for itself accumulated rental funds from certain licensed lands pursuant to the Original Affiliate Te Arawa Iwi/Hapū Deed, then the Crown would be acting inconsistently with its fiduciary duty to Māori.²² On appeal, the Court of Appeal held that the Crown had acted lawfully²³ and disagreed with the High Court judge's obiter statements that fiduciary duties, sourced from the Treaty itself, can form the basis of an action in New Zealand courts.²⁴ In November 2007, the Supreme Court granted leave to appeal.

Debate about the basis and extent of fiduciary duties owed by the Crown to Māori in the Supreme Court would have been of extreme interest in the Māori world at least. However, in the meantime, a deal was struck, forestalling any real possibility of a Supreme Court deliberation of fiduciary duties. In June 2007, the Waitangi Tribunal, following an urgent inquiry into the impacts of the Crown's Treaty settlement policy on Te Arawa Waka and other tribes found that by offering the Crown Forest Land to the Affiliate Te Arawa Iwi/Hapū, the Crown had prejudiced the Crown Forest Land claims of other CNI Iwi. The Crown had breached the principles of the Treaty of Waitangi by failing to act honourably and with the utmost good faith, and by failing to actively protect the interests of all CNI Iwi. The Tribunal further found that the Crown's deeming itself to be a confirmed beneficiary of certain of the accumulated rentals, without consultation and in disregard of its 1989 commitments, was a breach of the principles of the Treaty of Waitangi. Headed by Judge Caren Fox, the Tribunal considered that the Affiliate Te Arawa Iwi/Hapū deserved a settlement, but boldly recommended that the settlement be varied and delayed pending the outcome of a forum of CNI Iwi that would consider, according to tikanga,²⁵ guidelines for the allocation of CNI Forests Land. The Tribunal considered it critical that decisions on allocation of CNI Forests Land were made by CNI Iwi themselves, on their own terms, answerable to one another.²⁶

In response, and led by Dr Tumu te Heuheu, the paramount chief of Ngāti Tūwharetoa, the CNI iwi formed a collective, and proposed engaging in negotiations with the Crown to reach a

21 Ngāti Tūwharetoa is one of the CNI iwi whose tribal domain extends in and around the shores of Lake Taupō in the central North Island and is headed by one of at least two recognised customary leaders, Te Ariki Dr Tumu te Heuheu (the other being King Tuheitia, reigning Māori King).

22 *NZMC v AG* (Unreported) (High Court Wellington, 4 May 2007) CIV 2007 485-95, Gendall J.

23 *NZMC v AG* [2008] 1 NZLR 318.

24 *Ibid.*, paragraph 81.

25 Tikanga, in this context can be interpreted to mean the laws and values of the various CNI iwi. Tangata whenua systems of law and government existed in this country prior to colonisation by the British. Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups, such as iwi and hapū led by rangatira – leaders for their ability to weave people together. Māori societies developed tikanga Māori, the first law of Aotearoa/New Zealand by which Māori governed themselves: Ani Mikaere 'The Treaty of Waitangi and Recognition of Tikanga Māori' in Michael Belgraves, Merata Kawharu and David Williams (eds) *Waitangi Revisited - Perspectives on the Treaty of Waitangi* (2005) 330, 341-342. Tikanga varies from tribe to tribe and is dynamic, so this process will be watched with interest.

26 Waitangi Tribunal, *Final Report on the Impacts of the Crown's Settlement Policies on the Te Arawa Waka and other Tribes* (2007).

more holistic and hopefully enduring settlement of the CNI Forests Land. The Affiliate Te Arawa Iwi/Hapū via the trustees of their representative entity, Te Pūmautanga o Te Arawa Trust (TPT), agreed to work with the newly formed collective (the Collective). The Crown acknowledged the generosity of TPT and its constituent members in agreeing to re-negotiate their settlement, and the significant contribution made by TPT towards the resolution of the historical claims of other CNI Iwi over the CNI Forests Land.

On 21 February 2008, Terms of Agreement were signed that recorded, among other things, the intention of the Collective to design allocation proposals that would result in CNI Iwi determining how to allocate Crown Forest Land on the basis of mana whenua and in accordance with tikanga. The Terms of Agreement also recorded the Crown's promise to preserve the value of the TPT settlement and other settlements of CNI Iwi, such as Ngāti Manawa and Ngāti Whare which would now be renegotiated. An agreement in principle quickly followed and the Deed of Settlement was signed in June 2008. The settlement will be 'on account' with respect to iwi groups who are yet to negotiate their individual comprehensive settlements.²⁷

2. Redress

The redress package involves 176,000 hectares of CNI Crown forest licensed land, and the associated accumulated rentals and ongoing rentals being vested in a Trust Holding Company, CNI Iwi Holdings Ltd. The Collective's proportion of these assets by value will be 86.7 percent, and the Crown's proportion will be 13.3 percent which will be available for meeting other historical claims to the Central North Island forest land. The shareholders of CNI Iwi Holdings Ltd will be the member iwi of the Collective and the Crown, all with equal votes. The Collective's share of the Crown forest land is valued at \$196 million. The Collective's share of the accumulated rentals will be \$223 million. On the basis of that value alone, this is the single biggest settlement ever entered into by the Crown. The accumulated rentals do not form part of the redress package, neither do any New Zealand Units (carbon credits) allocated to forest owners under the ETS.²⁸ It could be that this is an attempt to avoid relativity provisions in the Waikato Tainui and Ngāi Tahu settlements.²⁹

The Collective will also receive ongoing rental streams from the Crown forest licences for the remaining period of the licences, which is about 35 years. Total annual rentals from the Crown licences are currently about \$15 million a year.

Subject to the prior rights of individual iwi, the settlement provides for the Collective to obtain Crown owned properties by way of deferred selection or rights of first refusal. The Deed of Settlement also records the Crown's willingness to discuss the potential availability of other Crown assets and interests (such as dams for example) and its support for the Collective exploring joint ventures with State enterprises in the Central North Island region.

27 The Affiliate Te Arawa Iwi and Hapū have completed this process, but other CNI iwi yet to settle include Ngāi Tūhoe, Ngāti Tūwharetoa, Ngāti Whakaue, Ngāti Whare, Ngāti Manawa, Ngāti Rangitīhi, and Raukawa. Together the CNI iwi groups have more than 100,000 members.

28 The Collective will receive separately an allocation of New Zealand Units (carbon credits) under the Climate Change (Emissions Trading and Renewable Preference) Act as the Central North Island forest land is pre-1990 exotic forest land.

29 As these tribes were the first to risk entering into full and final comprehensive settlements with the Crown, they successfully negotiated relativity clauses by which they are entitled to additional financial redress if the Crown exceeds the unofficial fiscal cap of \$1 billion set aside for Treaty Settlements.

The Collective decided amongst themselves that the percentages of rental proceeds would be distributed as follows:³⁰

Ngāi Tūhoe	27.2987
Ngāti Manawa	6.2378
Ngāti Tuwharetoa	26.8837
Ngāti Whakaue	3.7479
Ngāti Whare	4.8891
Raukawa	14.7452
The Affiliate Te Arawa Iwi/Hapu	16.1976

Interestingly, despite many Māori opposing the notion of a fiscal envelope these percentages are more or less those that the Crown would have come up with according to its own fiscal benchmarks used for settlements and which are usually confidentially disclosed to each iwi once they reach the negotiating table. The Collective decided to allow for the percentages to be disclosed to the other members, and once disclosed, the larger iwi groups in the Collective sacrificed percentage shares to boost the allocation to Ngāti Manawa and Ngāti Whare. In reaching this resolution, the Collective acknowledged the spirit of generosity shown by Tūhoe, Tūwharetoa, TPT, and Raukawa. Rangitīhi did not garner the necessary level of support from its iwi members to join the Collective, but have an opportunity to do so within a specified timeframe.

3. *Custom designing allocation and dispute resolution processes*

Fundamental to the CNI Deed of Settlement and the ensuing draft legislation is the inclusion of processes custom designed by the CNI iwi for the allocation of the Central North Island forests and for resolving disputes according to strict timelines. In essence the process involves three stages: Firstly, exclusive interests and overlapping interests are identified according to tikanga.³¹ Member iwi who have overlapping interests will work under their own agreed process to come to formal agreement on allocation. If the iwi involved cannot reach agreement themselves, then either respected experts from within the Collective's membership, who have the support of interested iwi, will become involved to assist with a mediated solution, or the matter will go directly to adjudication. If the matter goes to mediation but no agreement is reached, then the Collective will appoint an adjudication panel authorized to make a binding decision. Initially it was agreed amongst the Collective's members that no external advisors (such as lawyers or historians) would play a part in the processes, however during the select committee process the Collective decided to allow lawyers to present on behalf of Iwi to the adjudication panel but not to have the right to cross examine. Schedule 2 of the CNI Forests Land Collective Settlement Act 2008 which sets out the tikanga based resolution process in full is attached as an appendix to this article.

4. *Observations*

The leadership of Dr Tumu te Heuheu for the Collective and Dr Cullen for the Crown, together with the generosity and risk taken by TPT was necessary for the successful stitching together of this settlement. It will be interesting to see whether the CNI model will become a trend for multi-tribal collectives who might jointly secure Treaty settlement assets with a plan to sort through issues such as allocation according to their own terms. The effectiveness of the CNI allocation process on the basis of mana whenua and tikanga remains to be seen. Statesman, Monte Ohia, to

³⁰ CNI Forests Land Collective Settlement Act 2008, Schedule 3.

³¹ See above n 25. Tikanga varies from tribe to tribe and is dynamic, so this process will be watched with interest.

whom this article is dedicated, once said that tikanga is easily (and often) manipulated to achieve certain agendas.³² A disquieting question on the minds of TPT beneficiaries will be whether they will ultimately secure the equivalent of land holdings that were relinquished under their original settlement. Positively for TPT, a new Deed of Settlement, with enhancements in recognition of their patience and generosity in the CNI process, was signed in the days prior to the signing of the CNI Deed, and legislation has now been passed to perfect that settlement.³³ The other CNI iwi that have been swept up in the wake of the CNI Settlement have seized the opportunity to secure priority in the queue for comprehensive settlements to be addressed and have this year entered into terms of negotiation, agreements in principle, and Deeds of Agreement with the Crown to settle those claims.³⁴

C. *Waikato River – Ancestral River of Life*

*Tōku awa koiora me ōna pikonga he kura tangihia o te mātāmuri.
The river of life, each curve more beautiful than the last.*

1. *An overarching visionary statement*

These lovely words are taken from a famous lament by the second Māori King, Tāwhiao, in which he recorded his adoration for his ancestral river and the significance of the river as a treasure for all generations. The Kīngitanga (King Movement) involved conscious efforts by a number of tribal groups to unify under strong leadership to deal with the effects of British settlement. It was during Tāwhiao's term as King that the settler Government, seeing the pan tribal King Movement as a threat to its stability, sent its forces across the Mangatawhiri River in July 1863, labelling the Waikato people as rebels and subsequently confiscating Waikato lands and driving people away from their villages alongside their ancestral river.³⁵ This short excerpt from the lament has been embraced as part of the vision for the restoration and protection of the health and wellbeing of the Waikato River pursuant to the Waikato Tainui River Settlement.

To fully appreciate the context of these words, the full text of the lament which illustrates Tāwhiao's reverence for all aspects of his tribal domain; its lands, its mountains, sacred places and, of course, the ancestral river - then pristine and abundant, warrants repeating:³⁶

*Ka matakitaki iho au ki te riu o Waikato
Ano nei he kapo kau ake maaku
Ki te kapu o taku ringa
Ka whakamiri noa i toona aratau
E tia nei he tupu pua hou
Kia hiwa ake te Tihi o Pirongia
Ina he toronga whakaruruhau moona*

32 Presentation to the Ambassadors for Māori Opportunity, Waikawa, 2003.

33 Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008.

34 See the OTS website for details as to progress, above n 14.

35 By Orders in council under the New Zealand Settlements Act 1893, the Crown unjustly confiscated approximately 1.2 million acres of land from Tainui iwi.

36 See *Tāwhiao, King or Prophet* (2000) V as read aloud in Parliament by the Honourable Nanaia Mahuta, MP at the First Reading of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill Thursday 25th September 2008.

*Ki tooku tauawhirotanga
 Ana! Te ngoto o toona ngawhaa i ona uma kiihai i arikarika
 A Maungatautari, a Maungakawa
 Ooku puke maunga, ngaa taonga tuku iho.
 Hoki ake nei au ki tooku awa koiiora me oona pikonga
 He kura tangihia o te mataamuri
 E whakawhiti atu ai i te koopu mania o Kirikiriroa
 Me oona maara kai, te ngawhaa whakatupu ake o te whenua momona
 Hei kawē ki Ngaaruawaahia, te huinga o te tangata
 Araa, te pae haumako hei okiokinga mo taku upoko
 Hei tirohanga atu ma raro i ngaa huuhaa o Taupiri
 Kei reira ra, kei te orokohanganga o te tangata
 Wahia te tuungaroa o te whare, te whakaputanga mo te Kiingi*

The interpretation of translator extraordinaire, the late Ngahina Te Uira, is equally as beautiful:³⁷

*I look down on the valley of Waikato
 As though to hold it in the hollow of my hand
 And caress its beauty
 Like some tender verdant thing
 I reach out from the top of Pirongia
 As though to cover and protect its substance with my own
 See, how it bursts through the full bosoms of Maungatautari and Maungakawa
 Hills of my inheritance
 The river of life, each curve more beautiful than the last
 Across the smooth belly of Kirikiriroa, its gardens bursting with the fullness of good things
 Towards the meeting place at Ngaaruawaahia
 There on the fertile mound I would rest my head and look through the thighs of Taupiri
 There at the place of all creations
 Let the King come forth*

Obviously, any overarching visionary statement for the restoration of the Waikato River had to be in the indigenous language of the land. This excerpt was chosen following a review of the numerous references to the ancestral river in traditional songs and sayings and having reflected upon the various statements of elders in the various collations of oral history. Those responsible for shaping the vision sought assistance from expert wordsmiths such as tribal leader, Tom Roa,³⁸ who proffered the visionary statement, and who explained the appropriateness of the excerpt in the following way:³⁹

The word 'tōku' means 'my' and personalises each person's/group's relationship with the river; 'koiiora' encapsulates the health, wellbeing and life in each of the visions that were suggested in the brainstorm-

³⁷ *Tawhiao King or Prophet*, Ibid, 76.

³⁸ Chairman of Te Kauhanganui (Waikato-Tainui Tribal Parliament) and Senior Lecturer, University of Waikato School of Māori and Pacific Development.

³⁹ This explanation has been paraphrased in minor ways.

ing process ; ‘pikonga’ in its bends – is reminiscent of a most famous tribal saying⁴⁰ and again of those who inhabit and care for its catchment; ‘kura’ emphasises the river as a treasure; ‘tangihia’ can be interpreted as ‘saluted’ and ‘celebrated’; and ‘mātāmuri’ can refer to these ‘latter’ times/generations relative to Tawhiao’s generation... as well as those to come.

2. *A new era of co-management*

Previous reviews have elaborated on the background to the Waikato River claim which arose from the Crown’s invasion and war by land and by the Waikato River, and subsequent confiscation of Waikato lands in the 1860s which denied Waikato-Tainui their rights and interests in the Waikato River.⁴¹ The river claim was excluded from the 1995 land settlement with Waikato-Tainui and was set aside for future negotiation. In another landmark settlement that occurred during the course of the year, the Waikato River settlement was signed on 22 August 2008 between Waikato-Tainui and the Crown in relation to the Waikato River (the Waikato River Settlement). The Crown accepts that it failed to respect, provide for and protect the special relationship Waikato-Tainui have with the River as their ancestor; and accepts responsibility for the degradation of the River that has occurred while the Crown has had authority over the River.

A notable feature of the settlement is that it is not about ownership, but rather the focus is on the notion of co-management across a range of agencies and a unity of commitment to focus on the health and wellbeing of the Waikato River. To this end, the Deed of Settlement and the ensuing legislation centres around a Vision and a Strategy which have been developed following public consultation by the Guardians Establishment Committee (GEC) on which Waikato-Tainui and the Crown, along with other iwi and regional stakeholders, were represented.⁴² The GEC is a forerunner to permanent guardians who will be appointed in time and whose scope will apply to the Waikato River and its catchment from Taheke Hukahuka (the Huka Falls near Lake Taupō) to Te Pūaha o Waikato (the Waikato River mouth which flows into the Pacific Ocean) and its catchments. The make-up of the Guardians is still subject to negotiation but will involve members appointed by Waikato-Tainui and other river iwi, and an equal number of members appointed by the Crown, one of whom will be nominated by regional authority, Environment Waikato. In order to support Waikato-Tainui with their relationship with the Waikato River and the exercise of mana whakahaere (authority and rights of control) from Karāpiro to Te Pūaha o Waikato (the lower catchment) a Waikato River Statutory Board will be established and will have functions aimed at ensuring the Waikato River is managed in a manner that implements the Vision and Strategy. It will be made up of members appointed by Waikato-Tainui and local, district, and regional authorities. When issues affecting the major tributary, the Waipā River, are being discussed a representative of neighbouring iwi, Ngāti Maniapoto, will be involved.

40 *Waikato Taniwharau, He Piko He Taniwha, He Piko He Taniwha! Waikato, of a hundred chiefs! At every bend, a chief.* This well known and oft-cited proverbial saying pays tribute to the strong leadership in the many communities that live along the banks of the Waikato River, and also alludes to the metaphysical nature of the River.

41 Te Aho, ‘Contemporary Issues’ above n 4 (2007), 156-7; and (2006), 108-110.

42 The writer was appointed by Waikato-Tainui as one of its four members on a committee of 16.

3. Resource Management Frameworks

Previous reviews have commented on Māori expectations as to the management of natural resources and the ineffectiveness of the Resource Management Act 1991 from a Maori perspective despite the inclusion of statutory provisions which deal with Māori interests.⁴³ Prue Kapua, experienced practitioner in the resource management field, recently wrote that:⁴⁴

Māori expected to be a key participant in the resource management process when this Act came into force. The reality is quite different...The dealing, particularly by the Environment Court, with the Māori interest in the last fifteen years has generally not been positive for Māori.

It is for this reason, according to Kapua, that resource management issues are an integral part of the process that Māori go through in respect of Treaty settlements. The Waikato River Settlement is no exception. The very resources that are caught by the provisions in the Act form the basis for Article 2 of the Treaty of Waitangi,⁴⁵ so it should come as no surprise that Māori seek a more active role in that process. Under the terms of the settlement the Vision for the Waikato River it is intended to operate at the highest level possible to set the direction for enhancing the health and wellbeing of the river. The Vision and Strategy will be a National Policy Statement for the purposes of the Resource Management Act and a Statement of General Policy for the purposes of conservation legislation and will operate across other statutory frameworks such as fisheries frameworks. This means that local authorities will be required to give effect to the Vision and Strategy when preparing or changing plans and policy statements, to have regard to the Vision and Strategy when considering a resource consent application, and to have particular regard to the Vision and Strategy for designations and heritage orders. The Director-General of Conservation will be required to implement the Vision and Strategy when preparing Conservation Management Strategies and Plans. Other decision-makers under a range of other relevant legislation will also be required to have particular regard to the Vision and Strategy.

4. Other redress

The settlement includes other aspects of co-management such as a 'Kīngitanga Accord' which sets out the joint commitments of the parties to an enhanced relationship, to support integrated co-management and to protect the integrity of the settlement. The Accord includes commitments to:

- develop and agree portfolio-specific accords with the Minister of Conservation, Fisheries, Land Information, Environment, Arts, Culture and Heritage, Local Government, Agriculture, Biosecurity, Energy and with the Commissioner of Crown Lands, and
- explore accords between Waikato-Tainui and other Ministers and agencies after the deed is signed, and to support Waikato-Tainui to establish memoranda of understanding with councils and other relevant agencies.

For marginal strips and river-related Crown-owned land, the settlement provides for the Crown and Waikato-Tainui to discuss:

- the protection or gifting of sites of significance to Waikato-Tainui, and
- provisions for management or co-management of sites with Waikato-Tainui.

In addition to the Statutory Board and the Guardians, the settlement includes provisions for the establishment of a Waikato River Trust to manage a contestable 'cleanup' fund for restoring and

43 Te Aho, 'Contemporary Issues in Māori Law and Society (2005) *Waikato Law Review* 145, 161-166.

44 P Kapua, 'Review of the Role of Māori under the Resource Management Act 1991' [2007] *Resource Management Theory and Practice* 92,106-108.

45 *Ibid.*, 105.

protecting the health and wellbeing of the Waikato River. The Crown's initial contribution to this fund, through the Waikato-Tainui settlement, will be \$7 million per year for 30 years. A further \$50 million will be paid to the Waikato Raupatu River Trust for initiatives for restoring and protecting the relationship of Waikato-Tainui with the Waikato River (including its economic, social, cultural and spiritual relationships) and the protection and enhancement of significant sites, fisheries, flora and fauna (in the lower reaches of the Waikato River). Other financial redress includes an immediate contribution of \$20 million to the Waikato-Tainui endowed college for much needed research initiatives. Once the settlement is finalised the Crown will provide the Waikato Raupatu River Trust \$1 million per year for 30 years to fund the participation of Waikato-Tainui in the co-management processes in the settlement, and will fund a study to identify the operating costs of the Guardians of the Waikato River and Waikato River Statutory Board to inform the finalisation of the Crown's commitment to fund the operation of the two new entities.

Other redress includes a right of first refusal in respect of the Huntly power station and the coal mining permit under the Waikato River. The Crown will also be required to engage with Waikato-Tainui on the disposition of or creation of certain property rights or interests in the Waikato River.

D. Divide and Rule

1. Severing the ancestor - upper and lower catchments

The Crown's Treaty settlement processes are notorious for causing division as Māori become embroiled in turbulent battles over the allocation of settlement assets, boundaries and so on. In 1992 Ani Mikaere forewarned that:⁴⁶

...future generations of Māori who seek justice under the Treaty will face their most trenchant opposition from those Māori for whom the settlement has bought power and prestige. It will be the Māori powerbrokers who will act as buffers between Māori claims for tino rangatiratanga (the right for Māori to govern themselves) and the Crown.

The Waikato-Tainui River Agreement in Principle was initially opposed by the nearby Raukawa Trust Board who lodged an urgent claim to the Waitangi Tribunal citing prejudice to their interests in the river. Tribal relations between Raukawa and Waikato-Tainui became strained. The Crown's response was to enter into joint negotiations with Raukawa and Te Arawa (who raised similar concerns directly with the Crown) in respect of the 'upper catchment' from Karāpiro to Huka Falls.⁴⁷ Those negotiations have culminated in a Deed of Agreement in relation to a Co-Management Framework signed on 4 September 2008 which largely mirrors the provisions of the Waikato-Tainui Deed in terms of co-management, but only in respect of Raukawa and Te Arawa, and for a total of approximately \$30 million in financial redress for each tribal grouping – the bulk of which is to be paid in annual instalments of \$1m.

⁴⁶ Ani Mikaere, above n 13, 447.

⁴⁷ Tūwharetoa is not currently included.

2. *Oppression continues*

The Crown's unbending practice of 'picking favourites' to engage with, in isolation of neighbouring iwi, and choosing when and how it engages, has once again wreaked havoc in the relationships between iwi and hapū.⁴⁸ Hauraki, part of whose tribal domain is included in the Waikato Tainui settlement as part of the wider catchment of the River, and Ngāti Korokī Kahukura, have lodged urgent claims with the Waitangi Tribunal. A previous review has referred to Ngāti Korokī Kahukura,⁴⁹ who claims that their interests are prejudiced by the Crown's current approach of settling the River claims by cutting the ancestral river in half into an upper and a lower catchment and by determining a boundary line that severs the heartland of their tribal domain. That domain spans the confiscation line. North of the confiscation line, Ngāti Korokī Kahukura's interests are represented by Waikato-Tainui. South of the confiscation line is an unsettled area, in more ways than one. To add insult to injury, the Crown, for the sake of convenience is allowing neighbouring iwi to use Ngāti Korokī Kahukura's most significant and sacred site at Karāpiro as their boundary.

In the early 19th century, there was tension between Ngāti Korokī, Ngāti Hauā, and Ngāti Maru who had moved south from Hauraki after Hongi Hika's war parties had arrived there. There were two great rapids in the upper River: Aniwaniwa, 'a rock channel about 30 feet wide, which carried the whole river, boiling and frothing as it fought to free itself from the narrow channel', and Karāpiro, just below Te Tiki o te Ihingarangi, a famous wāhi tapu. Just before the Karāpiro rapids stood a huge rock, 'standing proud above everything else in the vicinity', close to the mouth of the Hauoira Stream. The rock marks the place where, in 1830, at the Battle of Taumatawīwī Te Waharoa, the great warrior chief of Ngāti Hauā, burnt at the base of the rock the bodies of the warriors who had been killed in that battle against Ngāti Maru so they would not fall into enemy hands. It is from the battle that Karāpiro got its name: Karā (rock) piro (smell). This site and the rock remain a wāhi tapu for Ngāti Korokī and Ngāti Hauā⁵⁰

The rock that formed the centrepiece of that major battle was detonated and destroyed in order to create the Karāpiro Dam which lies squarely within the Ngāti Korokī Kahukura tribal area. The same site was further desecrated to facilitate international rowing competitions on Lake Karāpiro. A memorial stands in the Karāpiro Domain acknowledging the site and its historical significance. There has been a recent proposal to re-detonate the rocks in anticipation of the World Rowing Championships to be held at Karāpiro in 2010. It should not be surprising that members of Ngāti Korokī-Kahukura would seek meaningful engagement regarding any further transgressions of sacred sites within their rohe, and to ensure that Ngāti Hauā was a key part of any such engagement in relation to Karāpiro given their shared history.

3. *Recognising iwi*

Against that background, Ngāti Korokī Kahukura initially sought to have its entire tribal rohe included within the Waikato-Tainui Settlement, extending the scope of the Waikato River Statutory Board to Arapuni, which would have included the Karāpiro domain entirely within one statutory body under the umbrella of the Waikato-Tainui confederation in which Ngāti Korokī Kahukura is represented as well. This proposal was raised during the GEC consultation process on the Vision and Strategy for the Waikato River. Despite support from neighbouring iwi, the Crown did not respond to this proposal.

48 Waitangi Tribunal, *Tamaki Makaurau Settlement Process Report* (2007) and Waitangi Tribunal, *Final Report on the Impacts of the Crown's Settlement Policies on the Te Arawa Waka and other Tribes* (2007).

49 Te Aho, above n 43, 166-7.

50 This entire passage is taken from a Statement of Evidence of Te Kaapo Tuwhakaea Clark, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996.

The Crown's current Deed of Agreement with the Raukawa Trust Board and others purports to include Ngāti Korokī Kahukura's tribal domain under the mantle of the Raukawa Trust Board the present representative entity for Raukawa. The Deed does not explicitly recognise the rights and interests of Ngāti Korokī Kahukura, despite their attempts to be proactive in ensuring their separate identity remains intact, and despite agreement from all neighbouring iwi that Ngāti Korokī Kahukura has the dominant interests as tangata whenua in its tribal domain, thus avoiding cross claimant and overlapping issues. The impact of this is that external decision makers and developers could mistakenly (but understandably), or deliberately, seek to rely upon the Deed to determine that the appropriate body to engage with on environmental and resource management issues is the Raukawa Trust Board – a serious undermining of the mana of Ngāti Korokī Kahukura. Unmentioned in the official account of the building of Karāpiro is an effect of the rising lake waters that caused particular distress to Ngāti Korokī Kahukura. Their burials were all along the banks of the Waikato River. As the dam at Karāpiro was completed and the River flooded in 1947, the elders tried to ensure the safety of their wheua (bones), but the authorities did not listen. Having researched the impacts of Hydro-Electric Power: The Waikato River Dams, historian Anne Parsonson wrote of:⁵¹

[T]he sense of helplessness of the elders trying to secure some protection for their tupuna in the face of the monocultural arrogance of a government department in the 1940s.

The Crown's unilateral policy of deciding who it will engage with (recognised river iwi) and who it will not engage with, in relation to the Waikato River has the effect of forcing Ngāti Korokī Kahukura to be subsumed under the umbrella of a tribal entity in which Ngāti Korokī Kahukura has no representation and whose mandate explicitly excludes Ngāti Korokī Kahukura.

Such a policy represents the perpetuation of a long history of superficial observations of Māori tribal structure by Europeans and the rigid and static structural models created by 19th Century ethnologists. Historian Angela Ballara argues that the Māori political and social system was always dynamic, continuously modified like its technology in response to such phenomena as environmental change and population expansion. The greatest of these changes took place in response to the arrival of Europeans. In the changing circumstances of the 19th century Māori adapted their lifestyle and self-conceptualisation as the need arose.⁵² According to Ballara:⁵³

Ngati Koroki of Waikato, though often listed as a 'tribe associated with' the Waikato iwi Ngati Haua, have also been described as a hapu of Ngati Haua, when in fact Koroki was Haua's father. These 'aberrant' assessments, apparently ignoring known whakapapa, derive from the kind of relationships the earlier hapu have been perceived to have developed with later descent groups.

The haste and piecemeal fashion in which the Crown has acted in its Treaty settlement policy in relation to the Waikato River has not allowed tribal groups such as Ngāti Korokī Kahukura to advocate the view that they are a river iwi in their own right and should be engaged directly in relation to addressing their unique concerns, concerns that gave rise to all other neighbouring iwi unanimously supporting their right to engage directly with the Crown. That support was recorded in a Waitangi Tribunal Memorandum-Directions.⁵⁴ This type of support is unprecedented and

51 Ann Parsonson, *Waikato River Claim Report* (A confidential working document to assist the negotiating team following the 1995 Settlement), 329.

52 A Ballara, *Iwi: The dynamics of Māori tribal organisation from c.1769 to c.1945* (1998), 19, 21.

53 *Ibid.*, 133.

54 Waitangi Tribunal, *Memorandum-Directions of the Deputy Chairperson Dated 9 September 2008*.

should allay any concerns of creating difficult precedents. Nevertheless, the discussions with the Crown that followed typified the frustrating experience that Māori must endure when such discussions are conducted by faceless officials who seem to do everything they can to not let Māori get what is rightfully theirs.

In reaching its conclusion and recommendation that the TPT settlement ought to be delayed so that issues of other affected iwi might be addressed, the test adopted by the Waitangi Tribunal was one of relative prejudice.⁵⁵ Ultimately, the generosity of TPT in agreeing to delay its settlement was rewarded and the multi-iwi CNI Settlement was achieved. In a similar vein, Ngāti Korokī Kahukura is urging the Crown to reconsider its position regarding at least the upper catchment to address the impacts of its settlement policies on other iwi.

III. OBSERVATIONS AND CONCLUSIONS

*Oh what a tangled web we weave ...*⁵⁶

Māori responses to the government's preferred Emissions Trading Scheme are generally centred in a framework of a Māori worldview which is based on a spiritual connection to the planet and which recognises the growing Māori economy and the need for Māori to maximise opportunities that flow from changing policy frameworks. Having successfully lobbied for a distinctive voice at a national level, Māori supported the Emissions Trading Scheme in return for a substantially increased offer from the Crown of free carbon credits to forest owning iwi. For some, that is not enough. And, despite widespread support from Māori, the scheme impacts negatively on the value of concluded Treaty settlements that involved the transfer of Crown Forest lands, giving rise to new Treaty grievances and newly lodged claims.

This year is an election year in Aotearoa/New Zealand and it is difficult not to believe that many of the agreements reached between Crown and Māori this year are an attempt to bolster support for the incumbent Labour Government amongst Māori as it embarks on its election campaign proper, given that its performance in eight of the past nine years in the area of Treaty Settlements has been disappointing. Such was the haste in which many of the agreements and final settlements were reached it is inevitable that they will have flow on effects and give rise to new Treaty grievances that will also have to be addressed in time. The plight of Ngāti Korokī Kahukura, for instance, illustrates how, by settling one claim according to its self imposed policies and procedures, the Crown seals the fate of certain tribal groups as irrelevant in the settlement landscape. Those Māori already in the settlement queue will continue to confront the Crown's ongoing habit of taking what is not theirs, but will inevitably surrender to the Crown's fiscal benchmarks on the basis that something is better than nothing. It will be interesting to see how the allocation process embedded in the CNI settlement, said to be sourced in tikanga, will play out, given that tikanga varies across tribes, and can often be manipulated to achieve certain agendas.

Against the dark background of the settlement landscape, there have been some bright moments such as the heralding of a new era of co-management and unity of purpose to restore and protect the health and wellbeing of the ancestral Waikato River, and the multi iwi unity and strong leadership shown in the reclamation of the Central North Island forests.

⁵⁵ Waitangi Tribunal, *Final Report on the Impacts of the Crown's Settlement Policies on the Te Arawa Waka and other Tribes* (2007).

⁵⁶ Sir Walter Scott, *Marmion: A Tale of a Flodden Field*, Canto vi, Stanza 17.

This article began by referring to *Aniwaniwa*, the celebrated art exhibition which draws upon submersion as a metaphor for cultural loss at the hands of the Crown, and ends with the reminder that the most spectacular rainbows seem to happen when half of the sky is still dark with clouds and the observer is at a spot with clear sky in the direction of the Sun. *Aniwaniwa* is a Māori word meaning rainbow, often a sign of better weather to come, a symbol of hope for the future.

*APPENDIX ONE:
SCHEDULE TWO OF THE CNI FOREST LAND
COLLECTIVE SETTLEMENT ACT 2008*

A. Tikanga based resolution process for CNI forests land

- (2) The test of mana whenua is the mana that iwi traditionally held and exercised over the land, determined according to tikanga including, but not limited to, such factors as—
 - (a) take whenua; and
 - (b) demonstration of ahi kaa roa, ahi tahutahu, or ahi maataotao.
 - (3) Evidence of mana whenua may be derived from whatever sources of knowledge that each iwi considers relevant, including—
 - (a) oral korero, including whakapapa, waiata, and tribal history; and
 - (b) written sources, including Native Land Court evidence and decisions, research reports, and other records.
 - (4) The members of the CNI Iwi Collective will be provided with maps depicting the claims of all iwi. The maps will be confidential to the company and the iwi and may not be disclosed to third parties or used for any other purpose.
 - (5) By 30 September 2009, the board of the company will identify—
 - (a) the areas of CNI forests Land in which a particular iwi has exclusive mana whenua interests; and
 - (b) the extent to which there is agreement on allocation of particular areas of CNI forests land to particular iwi. Agreements must be in writing, signed by authorised representatives of the governance entities of each of the iwi that had claimed mana whenua interests; and
 - (c) areas of land for which agreement has not been reached, and the iwi that are claiming that land; and
 - (d) areas of land that the Crown has advised are or may be subject to claims by any other CNI claimant to the Crown agreed proportion.
 - (6) The company will record in its draft allocation agreement the agreed allocations under sub-clause (5)(a) and (b).
 - (7) All land for which allocation is not agreed will be the subject of the Stage 2 process of negotiation between iwi kanohi ki te kanohi, provided that land that may be subject to the Crown agreed proportion cannot be included in the Collective's allocation agreement or proceed through the resolution process unless and until the Crown has confirmed that the land is not part of the Crown agreed proportion.
- 5 *Stage 2: Kanohi ki te kanohi negotiation: 1 October 2009 to 30 June 2010*
- (1) Following Stage 1, iwi will embark on kanohi ki te kanohi negotiations with iwi with whom they have overlapping claims, to reach agreement on allocation of the land in question.

- (2) The process will be *kanohi ki te kanohi* between iwi:
 - (a) the iwi involved will determine the *tikanga* that applies to the process; and
 - (b) the governance entity of each iwi will appoint their representatives to engage in the Stage 2 process; and
 - (c) the expectation is of *korero rangatira* (open principled trustworthy dialogue by rangatira with authority to commit their iwi); and
 - (d) no expert advisors, including lawyers and historians, are permitted to participate directly in the *kanohi ki te kanohi* negotiations.
 - (3) The iwi concerned in each process will endeavour to reach consensus on the allocation of the CNI forests land in question, having regard to the strength of the *mana whenua* interests. Innovative solutions that reflect *tikanga*, *wanaungatanga*, *manaakitanga* and *kotahitanga*, and the complexity of *mana whenua* interest could include, but are not limited to—
 - (a) joint or multiple ownership as tenants in common, either divided in equal shares or proportionally according to the respective interests of the iwi; and
 - (b) subdividing land and allocating the subdivided portions to each iwi; and
 - (c) agreeing to ‘exchange’ interests in more than 1 block, so that exclusive interests can be granted to each of the blocks; and
 - (d) one iwi becoming the owner, but acknowledging the relationship of other iwi with the land in an agreed manner; and
 - (e) agreeing not to transfer title of the land from the company, but acknowledging *mana whenua* interests in a manner agreed by the iwi.
 - (4) Minutes of each hui will be taken and confirmed by the iwi participating.
 - (5) Agreements reached during Stage 2 must be signed in writing by the authorised representatives of each iwi.
 - (6) Throughout Stage 2, the company will obtain regular reports from iwi on the progress of negotiations, and consider whether it can facilitate the resolution of any disputes with the agreement of the iwi concerned.
 - (7) The iwi involved in each *kanohi ki te kanohi* process may request the appointment of mediators to assist in the Stage 2 process, as set out in clause 5(7) to (9).
- 6 *Stage 3: Finalising Allocation Agreement: 1 July 2010 to 30 June 2011*
- (1) On completion of Stage 2, the company will record in its draft allocation agreement—
 - (a) the agreements reached on allocation during Stage 2; and
 - (b) any remaining areas of land for which agreement has not been reached.
 - (2) The board of the company may only alter the agreements reached between iwi with the consent of the iwi concerned.
 - (3) For remaining areas of dispute, the iwi involved in the dispute will decide whether to refer the dispute to—
 - (a) mediation, to endeavour to reach agreement; or
 - (b) adjudication, in order to determine the dispute (whether or not mediation has been attempted first).
 - (4) If the iwi involved in the dispute cannot reach agreement on which process to follow under subclause (3), the board of the company will decide.
 - (5) If agreement is not reached through mediation by 30 November 2010, then the dispute will be determined by adjudication.

- (6) Following determination of the dispute, the decision reached will be recorded in the allocation agreement.

Mediation: to be completed by 30 November 2010

- (7) The company may appoint 1 or more mediators to mediate the dispute between the iwi who—
- (a) should be fluent in te reo Māori, and have knowledge of, and be skilled in, Tikanga based dispute resolution; and
 - (b) must be independent of the dispute; and
 - (c) are nominated by the iwi concerned and are appointed with their consent.
- (8) The mediator will decide, in conjunction with the iwi concerned, the process to be followed in the mediation.
- (9) The mediator will not have power to determine the dispute, but may offer advice of a non-binding nature.

Adjudication: To be completed by 25 June 2011

- (10) If the dispute is referred to adjudication, the company will appoint an adjudication panel that comprises at least 3 members to determine the dispute. The company will have complete discretion to decide who the members of the panel should be, subject to the following requirements:
- (a) the panel members must be fluent in te reo Māori, and be knowledgeable on matters of Tikanga, including in particular how mana whenua is held and exercised by iwi; and
 - (b) panel members must be independent of the dispute, and not be members of the iwi involved in the dispute.
- (11) The adjudication panel may seek legal advice on process, or legal or other expert advice on any other matter.
- (12) The adjudication panel will hear the claims of the iwi to the land at issue.
- (13) The adjudication panel will have complete discretion to determine the process and timetable for the hearing, subject to the following requirements:
- (a) the iwi will provide an agreed joint statement to the adjudication panel outlining the nature of the dispute; and
 - (b) each iwi will have the opportunity to provide a written submission to the adjudication panel stating their mana whenua interests and their position concerning the dispute; and
 - (c) the iwi involved will file written evidence; and
 - (d) each iwi claimant is entitled to a right of reply; and
 - (e) there is a right to question witnesses; and
 - (f) lawyers are not permitted to appear before the adjudication panel unless all parties agree; and
 - (g) a decision will be reached by 25 June 2011.
- (14) The adjudication panel will reach a decision on allocation of the land at issue, in accordance with the mana whenua test set out at clause 4(2). The adjudication panel will have power to—
- (a) allocate the land to 1 iwi; or
 - (b) allocate the land to more than 1 iwi in joint or multiple ownership as tenants in common in a block, either divided in equal shares or proportionally according to the respective interests of the iwi; or

- (c) subdivide the block and allocate the subdivided portions to individual iwi; or
 - (d) allocate the land to 1 iwi, but acknowledge the relationship of the other iwi with the land in a specified manner; or
 - (e) implement any other solutions proposed by 1 or more of the parties, subject to any modifications required by the adjudication panel.
- (15) A decision with reasons will be given. The decision of the adjudication panel will be final and binding on all the parties.

7 Allocation agreement

- (1) The board of the company will complete the allocation agreement by 1 July 2011.
- (2) The allocation agreement will be final and binding.
- (3) After 1 July 2011, on receiving a written request from a governance entity, the company will transfer the CNI forests land to that governance entity or nominee in accordance with the allocation agreement within a reasonable time, provided that—
 - (a) the Crown consents to the transfer, if the transfer is prior to the expiry of the Crown initial period; and
 - (b) the ongoing licence rentals from the land will continue to be paid to the company and distributed according to the agreed proportions until the final allocation date (as defined in the deed of trust). After the final allocation date, they will run with the land.
- (4) If for any reason aspects of the allocation agreement are not finalised, or are subject to litigation, that will not prevent transfer to iwi of CNI forests land for which final agreement has been reached.
- (5) If agreement is reached not to transfer areas of the CNI forests land, or iwi do not request a transfer in writing, then the company will retain title, subject to the vested beneficial entitlement of iwi in accordance with the allocation agreement and the provisions of the deed of trust.

V. GLOSSARY OF MĀORI TERMS

Hapū	subtribe
Hui	meeting, assembly
Iwi	tribe, people
Kanohi ki te kanohi	face to face
Mana	prestige, power, authority
Mana whenua	customary authority and title exercised by a tribe or sub-tribe over land and other taonga within a tribal district
Mana whakahaere	Operational responsibility over land and other taonga within a tribal district
Māori	the indigenous peoples of Aotearoa/New Zealand
Papatūānuku	Earth mother
Rangatira	Chief, leader who has an ability to weave people together
Ranginui	Sky Father
Raupatu	confiscation
Tangata whenua	People of the land (Māori)
Taonga	Treasure
Tāwhiao	Second Māori King

Tikanga Māori	laws, ethics and customs of the Māori. Tangata whenua systems of law and government existed in this country prior to colonisation by the British. Māori society was collectively organised with whakapapa (genealogy) forming the backbone of a framework of kin-based descent groups, such as iwi and hapū led by rangatira – leaders for their ability to weave people together. Tikanga Māori has been described as ‘the first law of Aotearoa/New Zealand’. Tikanga varies from tribe to tribe and is dynamic.
Waahi tapu	sacred site
Whakapapa	genealogy
Whanaungatanga	relationships
Whenua	land

POLICY-ONLY LIABILITY INSURANCE AS ALTERNATIVE TO PRUDENTIAL REGULATION IN THE NEW ZEALAND LIFE ASSURANCE INDUSTRY

ANDY SCHMULOW*

I. THE INSURABLE INTEREST

A. *Setting insurers to monitor one another*

THE ADVANTAGES OF USING INSURERS TO MONITOR THE HEALTH OF OTHER INSURERS INSTEAD OF USING REGULATORS TO ENFORCE REGULATIONS DESIGNED TO ENSURE THE SAME THING.

This paper will argue that even recent history is littered with examples of failures by the financial regulators to prevent bank and insurer failures in the UK, the US, Australia and elsewhere. This paper argues that regulators are inherently incapable of performing the task. The theoretical basis for which is investigated below. Evidence will be drawn from the collapse of HIH and the role of the Australian Prudential Regulator (APRA) in that collapse.

Examples of regulatory failure in the United States includes the collapse of the Savings and Loan industry in the early 1990's; and the insolvency of the State Bank of South Australia; Pyramid and the merchant bank, Tri-Continental in Australia. Benston¹ cites the example of the S&L crisis in the USA, where Savings and Loans companies would attract deposits by offering high interest rates, and would then use those funds to make high-risk loans on the philosophy that the S&L could appropriate any gains, while losses would be passed along to FSLIC (The United States Federal Savings and Loans Insurance Corporation):

Heads, the S&L owner would win; tails, the deposit insurance fund would lose.

The authors continue² to argue that by the late 1980s, numerous studies had identified federal deposit insurance as the primary cause of the banking and thrift crises:

Most of these studies emphasized 'gamble-the-institution' behavior (sic) by depository institutions as the chief culprit...

See also Huertas³ who asserts further that [initially] restrictions on the ability to pay market rates of interest on deposits and charge variable rates of interest on mortgages effectively forced sav-

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1 G J Benston and G G Kaufman, 'FDICIA After Five Years' (1997) *Journal of Economic Perspectives* 11, (3), 141.

2 *Ibid* 142-3.

3 T F Huertas, 'A Market Paradigm,' *IFLRev* Special Supplement, 1993, at 97.

ings and loan associations to assume massive amounts of interest rate risk; and further that government's failure to close insolvent institutions further compounded the problem.

See further Calomiris,⁴ where the author argues that there exists historical evidence, flowing principally from the savings and loan collapse in the United States, that [government] deposit insurance creates perverse incentives when it is not fairly priced. I argue below that only commercial insurance firms can fairly price insurance, and that government insurance agencies cannot. Principally Calomiris points out that insurance removes the discipline of the market. Moreover he argues that insurance has the potential to encourage excess risk-taking by existing banks, especially those banks that have little capital remaining due to past losses. I would argue that this is equally true for insurers as it is for banks. Furthermore such insurance also encourages unscrupulous or inexperienced entrepreneurs to enter banking in order to finance their risky enterprises. Again I would argue the same would hold true of insurance. This is often the case with one-size fits-all government regulation and guarantees, but would not be the case with insurance fairly priced by a commercial enterprise, and tailored to the specific risk profile of the client bank, in the case of Calomiris' example, or in the case of a direct insurer, in respect of the examples used in this paper.

Whilst these examples relate to the United States and Australia, and not to New Zealand, the reasons why the regulators failed are in my view universal. In addition it is argued that government regulators are not capable of monitoring multi-national insurers. This results in insurers operating across multiple jurisdictions with increasingly sophisticated products. In response to which regulators are most often confined to enforcing regulations enacted in response to prior crises – effectively leaving regulators stuck fighting the last war.

'The traditional approach to financial regulation is bankrupt. It sought to assure stability by providing guarantees ... The result was a system of regulation that increased both risk and cost.'⁵

Regulation ... [is] not the problem Government regulation ... [is] the problem.⁶

This aspect is of particular concern when one considers how quickly insurance is changing under the impact of electronic commerce and communication. Rupert Pennant-Rea, the Deputy Governor of the Bank of England, quoted in Petri,⁷ admitted that regulators are always five years behind, and further that that was good, because according to Pennant-Rea, if regulators tried to stay abreast of technology they would stifle innovation. But the time lag results in regulations which are not only inadequate in evaluating new risks, but because of their anachronistic nature will inevitably distort banking, in the example put forward by Pennant-Rea, or equally in the case of insurance, as put forward by this paper. In fact one could argue that the more anachronistic the regulation, the greater the market-distortion in banking; and similarly, insurance. In view of this writer Pennant-Rea does not adequately address the problem of a failure to regulate other than retrospectively.

Furthermore regulators themselves are not at risk if they should fail. The regulator may suffer political damage and a diminution of credibility, as has been the case with the Royal Commission into the collapse of HIH. But the regulator itself will not suffer financial harm. Whereas the

4 C W Calomiris, 'Is Deposit Insurance Necessary? A Historical Perspective,' *The Journal of Economic History*, Vol. L, No. 2, June 1990, at 283.

5 Huertas, above n 3, at 97. See also T Petri and B Ely, 'Cross Guarantees: A Horse of a Different Color,' <<http://www.ely-co.com/horse.htm>>.

6 T Petri and B Ely, 'Cross Guarantees: A Horse of a Different Color,' <<http://www.ely-co.com/horse.htm>>.

7 Petri, above n 6.

greater efficacy of the market as a regulator was confirmed by the US Treasury Department in a report by Litan and Rauch which states:⁸

[m]arkets tend to be less forgiving than regulators, who may be more willing to give a troubled institution time to work through its problems.

This paper will instead propose that an off-shore insurer, undertaking to honour the liabilities on the policies written by a direct insurer would stand to lose considerably if that direct insurer became insolvent, and the premiums charged for that insurance had not been accurately priced.

It is more likely that a large multinational insurer will be able to effectively monitor a domestic insurer than would a regulator, as the former would be better equipped and more experienced when it comes to monitoring and understanding the activities of the domestic insurer. Consequently an insurer would be better able to perform the kind of supervision and risk assessment of the domestic insurer than the regulator would be able to.

Moreover an offshore insurer would operate under a compelling incentive: it will be severely punished if it does not perform the task of insuring the liabilities of the direct insurer efficiently. A failure by the off-shore insurer to properly assess the risk of failure posed by the direct insurer, and a concomitant failure to price the premium correctly, would result in premium income failing to match the amount of the claims levied against the off-shore insurer when the direct insurer covered by the policy failed. This would lead to losses incurred by the offshore insurer.

The buck will stop with the guarantors.⁹

B. What is being insured? the liability on every Policy written by the direct insurer

Under this proposal, instead of a government regulator monitoring domestic insurers in New Zealand with a view to ascertaining the direct insurers compliance with prudential regulations, private off-shore insurers could fulfil the task of monitoring domestic New Zealand insurers. This they would do as a necessary part of assessing the viability of the direct insurer, in a manner similar to a due-diligence, which in turn they would do in order to determine the quantum of the premium they would charge to insure the direct insurer against its own collapse. The insurable interest would be the liabilities outstanding on the policies written by the direct insurer and still in force at the time of its demise.

In order to determine the quantum of the premium the offshore insurer would seek to determine what the likelihood is of the direct insurer collapsing. To do this the full spectrum of the direct insurer's business would be investigated in order to determine the health of the company, and by implication the likelihood of the direct insurer remaining solvent during the currency of the contract.

It is envisaged further that the offshore insurer would undertake to honour only the direct insurer's liabilities under the policies which the direct insurer had written prior to becoming insolvent, and which are still current at the time it becomes insolvent.

In order to avoid moral hazard which might arise if shareholders are protected, it is important that the off-shore insurer insure only the liabilities on policies current at the time of the direct insurers collapse. It is not envisaged that creditors receive any protection under this scheme. Such

8 R E Litan and J Rauch, 'American Finance for the 21st Century,' The United States Department of the Treasury, November 17, 1997, (no page numbers), <<http://www.treas.gov/press/releases/97report.htm>> quoted by Ely, above n 6, 1998 at 5.

9 Petri, above n 6.

protections do not apply to creditors of other firms, and creditors of insurers should not receive special treatment. There are important benefits to be gained from creditors exercising a measure of supervision over their debtors which imperative would be removed by creditor's insurance, and would in turn lead to moral hazard. By insuring creditors' funds creditors will be encouraged to extend excessive amounts of credit to insurers in the belief that either the direct insurer will repay them, or failing which the offshore insurer will repay them in the event that the direct insurer becomes insolvent. Secondly New Zealand is possessed of a substantial insolvency law and corporation law jurisprudence, which, it is argued, is sufficient to protect creditors. Moreover creditors have at their disposal a raft of measures which they can use to ensure repayment, including purchasing their own insurance against their debtors becoming insolvent, or ensuring that they are secured creditors, or for instance by obtaining a charge over the direct insurers assets.

Moral hazard is the creation of a situation, which effectively encourages precisely the types of practices, which the measures are meant to combat, by unintentionally encouraging behaviour, which is directly opposite to those intended. So for example if insurance provided to a direct insurer was extended to shareholders funds, then shareholders would be encouraged to take ever-higher risks in the hope of attaining ever-higher returns. Because their funds would be guaranteed by the off-shore insurer, in the event that the direct insurer, in which they hold shares, were to collapse, the shareholders would be encouraged to 'bet the firm.' Put differently if the offshore insurer were to guarantee shareholders funds it would lead to a case of 'heads the shareholder wins, tails the off-shore insurer loses!' This would result in an almost limitless up side, with no downside. The effect would be to encourage behaviour more likely to cause the direct insurer to collapse, instead of discouraging excessively risky behaviour. See further Calomiris,¹⁰ where the author argues that there exists historical evidence, flowing principally from the savings and loan collapse in the United States, that [government] deposit insurance creates perverse incentives when it is not fairly priced. I argue below that only commercial insurance firms can fairly price insurance, and that government insurance agencies cannot. Principally Calomiris points out that [government] insurance removes the discipline of the market. Moreover he argues that insurance has the potential to encourage excess risk-taking by, in the case of his example, banks, especially those banks which have little capital remaining due to past losses. I would argue that the same can be said of the effects of government insurance on the liabilities of direct insurers. This is the case with one-size fits-all government insurance, but would not be the case with insurance fairly priced by a commercial enterprise, and tailored to the specific risk profile of the client direct insurer. The arguments which Calomiris makes in respect of the creation of moral hazard by insuring banks is in my view analogous to that which would apply to insurers.

By failing to protect shareholder's funds, these would then serve as a deductible in the event of the direct insurer's failure.¹¹ This would have further positive implications in respect of preventing moral hazard.

Policyholders are the least able to protect themselves against the insolvency of their insurer, and the least able to monitor their insurer. Even if they were able to engage in such monitoring their recourse is limited. They are not creditors properly so-called, so creditor's remedies are not available to them. They are not shareholders, and so shareholder's remedies are not available to them. Because of the very nature of insurance, especially life or disability insurance, and unlike

¹⁰ See above n 4, at 283.

¹¹ A 'deductible on the policy' and an 'excess on the policy' are synonymous.

shareholders, the policyholder cannot remove the policy to another insurer should they lose confidence in their direct insurer.¹² United States Senator Tom Petri's argument about depositor's inability to monitor banks is in this writer's view equally valid for the inability of policyholders to monitor an insurer:

For most people, though, and even for many businesses, closely monitoring their bank, and therefore exercising 'depositor discipline' over it, is about as practical as suggesting that people train to perform surgery upon themselves.¹³

C. Why offshore insurers would assume the risk?

Uncertainty and a pooling of risk function are the primary uncertainties with which insurers regularly contend. Every form of insurance includes a measure of uncertainty, including life insurance. Whilst it is a certainty that every person will die, the uncertainty inherent in life insurance is 'when'. The insurer effectively takes a bet that the insured will die later rather than sooner. The insured bets that (s)he will die sooner rather than later. If the insurer is correct the insured will pay a greater amount in premiums for the same death pay benefit. If the insured is correct the insurer will pay out the same amount on death but will have collected fewer premiums. In the case of car insurance the insured bets that the car will be lost, the insurer bets that it will not. If the insurer is correct premiums will be paid and no claim will result. If the insured is correct (s)he will receive a payout far greater than the amount of premiums paid. Insurers make a profit from providing insurance to a pool of people or entities provided that on aggregate more premiums are paid in terms of value than the value of claims lodged against the insurer. It is for this reason that individuals cannot adequately self-insure because there is no spreading of the risk function. For an insurer to remain profitable it must charge an adequate premium to a risk-worthy client, which it may seek in traditional markets; to remain competitive and provide a satisfactory return to shareholders, insurers are compelled to seek out new markets and develop new products.

Whilst providing policy-only liability to New Zealand insurers may involve assessing risks which are difficult to quantify, I would argue such difficulties are no greater than those posed by for example earthquake damage; yet insurers provide such cover regularly.

In order, to provide policy-only liability insurance the off-shore insurer would need to quantify the extent of their liability under the policy, which would in large measure already have been quantified by the direct insurer as part of its normal management function. However that would not preclude the offshore insurer from determining an adjusted level of liability as part of its enquiries into the liability posed by the direct insurer. Determining the value of a direct insurer's policies, which are still in effect, is a routine actuarial function conducted in the insurance industry regularly. Once they have evaluated the extent of their potential liability under the policy they would then want to determine how likely would be a claim under the policy? The off-shore insurer would then be able to charge an accurate premium. The 'policy' referred to here is that provided by the off-shore insurer to the direct insurer, whereby in return for a premium the off-shore insurer would undertake to assume all the liabilities flowing from whatever policies are in force against the direct insurer, at the time when, or if, the direct insurer becomes insolvent. By that it is not

12 There exists in Australia limited scope to call an insurer to account by engaging in alternate dispute resolution, such as having recourse to an ombudsman. However this still does not allow the insured the ability to remove to another company their policy should they lose confidence in their direct insurer.

13 Petri, above n 6.

The theoretical spheres

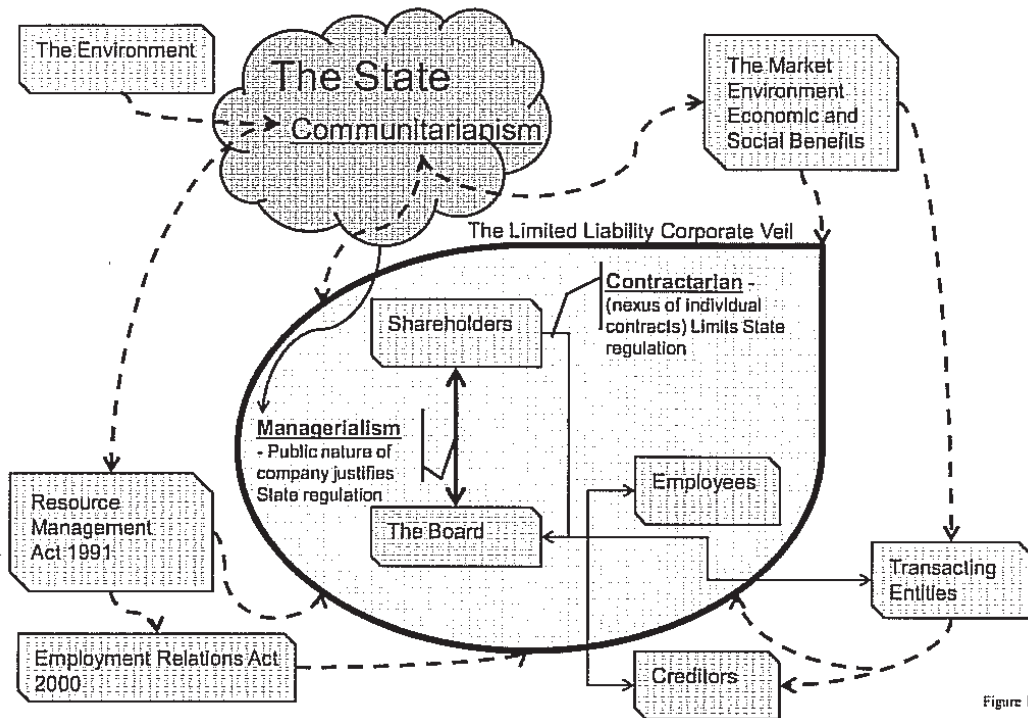


Figure 1

meant that the offshore insurer would assume the liability for whatever policies had been written by the direct insurer and against which the insured had made a claim. Rather what is meant is that ALL policies would be ceded to the offshore insurer – those against which claims had been made, and those still running, but against which claims had not been, and arguably may never be, made.

D. How the premium function would work?

Having determined the extent of their liability under the policy,¹⁴ an offshore insurer would then have to determine how likely it is that the direct insurer will become insolvent within the period of the currency of the policy written by the off-shore insurer.

In other words a two stage process: (1) the likelihood of a claim arising, and (2) if a claim arises how much will it be?

In order to determine the answer to enquiry (1), the off-shore insurer would engage in a due diligence of the direct insurer by examining such factors as the company's capital adequacy ratio,¹⁵ its exposure to foreign currencies, and the extent to which those are hedged,¹⁶ quality of

14 See below, n 19.

15 The extent of the company's paid up share capital relative to liabilities.

16 A hedging contract functions by providing a guarantee from the guarantor that if the guaranteed's foreign exchange liabilities increase beyond a certain level due to exchange rate fluctuations, then the guarantor will make good the difference. This guarantee is provided in exchange for the payment of a premium.

management, asset quality and whether those assets are correctly valued, quality of risk assessment procedures and its ability to accurately price the premiums which it charges its clients for cover on the policies which it sells, extent of retained reserves, extent and adequacy of its re-insurance¹⁷ contracts, growth in its premium income, as an indicator of whether the company itself is growing or shrinking. There would be scope for negotiation between the offshore insurer and the direct insurer in respect of extending or even limiting the scope of which factors should be evaluated. Transparency by the direct insurer in its dealings with the off-shore insurer could be rewarded with a reduction in the premium.

It is envisaged that in order to calculate the premium the insurer would investigate many if not most of the factors which a regulator would investigate as part of its normal oversight function. However whereas the regulator would not stand to lose financially if the insurer it was regulating became insolvent, an off-shore insurer would stand to lose in what could be a substantial claim. This provides a powerful incentive for the off-shore insurer to conduct its enquiries diligently.

Somewhat analogous to what the off-shore insurer would be doing is the due diligence that would be conducted by a sponsoring broker prior to the public listing of an insurer - as happens when a mutual life insurer de-mutualises.

The premium function would act to encourage prudent behaviour by rewarding it with lower premiums, and punish imprudent behaviour with higher premiums. It is envisaged therefore that the premium function will encourage better corporate governance than the present system of criminal sanction. Ultimately it is left to the insurer to decide what degree of risk to assume. And the implications of the direct insurer's choice are monetary – in my view a more effective incentive than criminal sanctions. And secondly, increases in premium are easier to implement than obtaining a criminal conviction for breach of the law, which requires proof beyond reasonable doubt. An offshore insurer need not give reasons for its premium levels. The direct insurer can opt to accept the policy and pay the premium, or look elsewhere, whereas a prosecutor is either able to record a conviction or not. A failure to obtain a conviction may be for reasons which relate to the burden of proof. Not necessarily because the direct insurer is innocent of the charges.

In order to gain compliance with this model, each New Zealand direct insurer¹⁸ would be required to obtain a certificate of direct-policy-only insurance. This would apply to all insurance companies operating in New Zealand as direct insurers, whether New Zealand by nationality or not. It may be necessary to require all insurers, which wish to operate in New Zealand as direct insurers to incorporate their New Zealand operations under domestic laws. This has the effect of levelling the playing field so that all direct insurers in New Zealand operate under the same compulsion to procure policy-only liability insurance. That way foreign direct insurers operating in New Zealand are not advantaged by being exempt from this requirement.

Under this system policy-holders would be reassured that in the event that their insurer failed during the currency of their policy, their rights and obligations would be ceded to the off-shore insurer who would take-over those policies, and assume the role played by the failed insurer, as if it had never collapsed.

Direct domestic insurers would only be permitted to obtain insurance from a pre-approved list of 20 of the world's largest insurers by market capitalisation; with a further proviso that none of

17 An examination of re-insurance will be provided below.

18 Direct insurer differentiates an insurer, which writes policies with the direct insured as distinct from a reinsurer, which writes insurance policies covering the risk of other insurers.

them be a New Zealand insurer. This would hopefully prevent the collapse of a domestic insurer causing contagion, and thereby destabilising the entire domestic insurance industry. Put differently, the safety mechanism of requiring the insurer who assumes the policy-only liabilities of the direct insurer to be an off-shore insurer, is designed to prevent contagion, and a situation seen more often in banking, that of a bank run. I acknowledge however that this may not be as serious a risk in insurance as it may be in banking. Bank runs occur because of panic, and evidence themselves in the form of depositors withdrawing their funds from healthy banks en masse, thereby causing healthy banks to fail. However it is not possible, even in times of panic, to withdraw en masse life insurance policies, or claim, en masse, simply because panic has set in, on, for example, car insurance. Either the car has been lost or it has not. The collapse of a competitor insurer would have no bearing on that factual situation. Moreover if the provider of the policy-only liability insurance were adequately managed, there is no reason in principle why that company could not also be a domestic insurer. Provided it has adequately assessed the risk, priced the premium correctly, and obtained adequate reinsurance, there is no reason in principle why the collapse of a domestic direct insurer should lead to the collapse of a domestic policy-only liability insurer. However what this safety mechanism would prevent is a worst case scenario where the domestic direct insurer is poorly managed and collapses, causing a claim to be made against the secondary insurer, which in a worst case is also poorly managed, is unable to cope with the claim made by the direct insurer, and also collapses, thereby causing a doubling-up of distress to the local economy.

E. Why multi-national insurers are the only entities capable of regulating one another

Government regulators are often ill-equipped and under-resourced when it comes to monitoring direct insurers. This was certainly the case with APRA before the collapse of HIH. It presents particularly intractable challenges to a regulator which seeks to regulate an insurer which operates internationally – the off-shore operations may be difficult to monitor due to jurisdictional issues. Whereas an off-shore insurer that itself operates across multiple jurisdictions would be better placed to monitor and understand the nature of a direct insurers off-shore transactions. An off-shore insurer would also be better placed to understand the at times highly complex and sophisticated insurance products which a direct insurer may offer.

Through the mechanisms of risk pooling and re-insurance it may be argued that multi-national insurers are more likely to possess the capacity to absorb potentially large claims than any other commercial entity.

Because policy-only liability insurance is in some ways analogous to re-insurance, it may be argued that insurance companies which are active in the field of re-insurance will possess many of the tools and skills needed to operate in the field of policy-only liability insurance.

Lastly because of the relatively small size of the New Zealand direct insurance market it is a good candidate for such a system of prudential regulation by way of market mechanisms.

II. POTENTIAL SHORTCOMINGS

A. The cost

This model would represent a potentially sizeable operating expense for direct insurers. This may be mitigated by government recognising the costs to the economy of supervision and the costs to

the economy of an insurer which fails - both economic and social. Having insurers in effect pay the costs of their own supervision, and through policy-only liability insurance in effect insulating the economy from distress in the insurance sector, it may be argued that in return for insurers relieving tax-payers of the risk and cost of insolvency, the government may consider a lower tax rate for insurers, in order to compensate them for assuming the burden and costs of supervision and protection against insolvency. There is an argument, which could be made, that insurers pay taxes, which in turn fund the commons. Maintenance of law and order is a commons, and so in return for paying tax, insurers should be regulated by the state at no additional cost. If this responsibility is then to be sub-contracted to an off-shore insurer at a cost to the direct insurer, then that would constitute a further and indirect tax. If such a further tax is levied only against insurers then it may be argued that that is unfair. This may form the basis of a claim by the insurance industry as a whole to be taxed at a different rate from other commercial entities. A similar argument could be made that a stable insurance industry is a commons – something which we all need, but which only the state can supply by enforcing prudential regulations. Consequently if an insurance company is required to pay tax, then it may reasonably expect the state to provide a regulatory authority. If the state no longer provides such an authority and instead seeks to maintain the commons of a stable insurance sector by shifting the onus – and the costs – for conducting such regulation onto the insurers themselves, then it may be argued that insurers are being taxed twice. Once when they pay tax to the state, and again when they pay for a service, which the state should supply – in this case prudential regulatory enforcement. So the argument could be made that if the state is no longer going to provide for prudential regulation, but is instead going to shift the responsibility – and the costs – for such regulation to the individual participants in the insurance industry itself, that those participants should enjoy a measure of tax relief commensurate with the amount of money the state stands to save by no longer providing a prudential regulator.

For this system of market discipline to work, and in the event of an insurer which cannot afford the premium, it should not receive assistance from the state. It should be compelled to allow itself to be taken over, or alternately forced to cease operating. This forms an important cleansing role, whereby insurers, which are so ill that they are unable to obtain policy-only liability insurance, or cannot afford the premium, must be removed from the economy so that they do not become a contaminant and cause instability if and when they fail.

B. Loss of sovereignty

It is conceded that this system would entail a diminution of sovereignty by the state over the insurance sector.

C. Industrial espionage

It remains a deficiency of this model that it would set competitors to monitor one another. This may make possible industrial espionage.

This may be mitigated in several ways:

Re-insurers typically have close relationships with direct insurers. Secondly the use of Chinese Walls is common practice in accounting, law and stock brokerage firms. Thirdly if the policy-only liability insurance market grew to be of significant size, then the providers of such insurance would wish to protect their reputation as honest and trust-worthy. A reputation as a sneak would not encourage repeat business.

D. Monitoring the policy

The state's involvement would be limited to verifying that a certificate of policy-only liability insurance had been issued in favour of each direct insurer in New Zealand, and that the certificate was current. This is a fairly simple task and could be performed by the registrar of companies.

It is important that each contract of policy-only liability insurance adequately insures the direct insurer's policy-holders and does not contain exclusion clauses which would essentially render the protection under the policy meaningless. The registrar may wish to ascertain that as a minimum, each certificate of policy-only liability insurance provides an obligation by the off-shore insurer to cover whatever obligations lie against the direct insurer if and when the direct insurer collapses.

A standard form contract to which all offshore insurers who agree to provide policy-only liability insurance must adhere, is another alternative. This would still allow room for negotiation between the direct and off-shore insurer which would impact the premium. What would be precluded from becoming a variable would be the nature of the obligation to provide policy-only liability insurance. But the costs of providing insurance under such a standard form contract would provide fertile ground for negotiation and adjustment of errant behaviour by the direct insurer in return for a lower premium.

III. WHY THIS IS NOT RE-INSURANCE

A. What is re-insurance?

Direct insurers as part of their normal business re-insure the risks they have assumed under the policies they have written. This involves an arrangement between the direct insurer and the re-insurer such that in return for a premium the re-insurer will make good part of the direct insurers losses in the event of a claim by the policy holder. The re-insurance is paid to the direct insurer, not the policy holder. In so doing re-insurance becomes the process by which direct insurers mitigate their potential losses by themselves purchasing insurance against the policy, which they have written.

Consequently re-insurance operates in the same manner as insurance: pooling of risk. Stenhouse¹⁹ lists these advantages as follows;

- There is a greater independence in the pool of reinsured risks through risk diversification.
- There is further mitigation of risk through a geographical spread of otherwise similar risks. This risk spreading may take place regionally, nationally and internationally.
- There is inherently greater stability by way of a larger scale risk pool.

Reinsurance not only allows insurance companies to spread the risk, which they assume when writing an insurance policy. It also allows them to write more business, because reinsurance has the function, in practice, of substituting capital. The capital substitution argument relates both to volume of business, ie solvency, and volume of risk, ie capacity.²⁰

An increase in both volume of risk and volume of business has the function of increasing the capacity of the pooling function.

19 R Stenhouse, 'Background Paper – Reinsurance,' Submission to the Insurance Council of Australia, for the HIH Royal Commission, January 2002, 4.

20 See Stenhouse, above n 19, at 5.

B. Types of re-insurance

A list of types of reinsurance of relevance to this paper, but not exhaustive includes:

- Proportional covers, where the insurer and the reinsurer share the loss payments in the same ratio as they shared the premium.
- Non-proportional covers, which is determined on a case-by-case basis, with the reinsurer paying all losses above a set deductible to a certain limit.
- Financial reinsurance, described by Stenhouse²¹ as having been developed as a response to the insurance market's commercial needs and the growing attention to whole of balance sheet risk management. In Stenhouse's²² view as the market in financial derivatives developed, so too has insurance. An example of which are derivative instruments to hedge interest rate and foreign currency exposures. It is noteworthy that these instruments insure against unforeseen but foreseeable risks which may adversely affect profits. Examples include hedging contracts which insure against currency fluctuations. The timing and extent of the appreciation may be unforeseen, but the concept of free-floating currencies appreciating against one another is not.²³

C. Activation is the key

The circumstance under which policy-only liability insurance is activated is the most marked point of difference from re-insurance.

Re-insurance is activated by a claim on the underlying policy between the direct insurer and the consumer. Policy-only liability insurance is activated by the insolvency of the direct insurer.

By way of an example: Air New Zealand hedges against a rise in the fuel price. The insurer who provides the cover is reinsured with Swiss Re on a proportional cover of 25 per cent. The direct insurer itself has 100 per cent policy-only liability insurance with Lloyds of London. Lloyds in turn re-insures 10 per cent of that risk with Munich Re.

If the price of jet fuel rises above a certain level the direct insurer will make good the difference, of which it may in turn claim 25 per cent of the payout from Swiss Re. Alternately a situation may arise where the price of jet fuel has not risen sufficiently for a claim to lie against the direct insurer, but rather the direct insurer becomes insolvent. The liability on the policy is then assumed by Lloyds of London, who will now be entitled to collect the premiums payable under the hedging contract.

If at any stage during what remains of the currency of the hedging contract a claim arises, it will then lie against Lloyds. Lloyds would be entitled to all outstanding premiums under the original hedging contract.

Should a claim arise Lloyds may claim against Swiss Re to be reimbursed for part of their loss under the original hedging contract because its' predecessor in title, the direct insurer, paid reinsurance premiums to Swiss Re. Lloyds would be able to claim re-imburement for part of the loss for which they were responsible from Munich Re, as Lloyds' risk under the policy-only liability contract was in turn re-insured.

21 Above n 19, at 7.

22 Ibid.

23 A so-called 'hedging contract'.

IV. THE ELY-PETRI MODEL

United States Senator Tom Petri and economist Bert Ely propose an analogous system, under which banks guarantee other banks in a cross guarantee model. Banks would then supervise one another, and guarantee one another's depositor's funds.

The proposal for policy-only liability insurance differs from theirs in that I envisage direct insurers being supervised by offshore insurers, not by other direct domestic insurers. This provides my model with two distinct advantages. Firstly mine does not allow a supervisory relationship by direct competitors.

Secondly my model removes the consequences of a bail out to other countries and other economies, by prohibiting the use of a New Zealand insurer as guarantor of policy liability. This insulates New Zealand insurers from one another.

V. CONCLUSION

This proposal would remove the state as prudential regulator of the insurance industry. As a requirement for operation as an insurer in New Zealand each insurance company would have to be able to display in its head office a certificate of policy-only liability insurance, issued by an approved insurer. Approved insurers would be drawn from a list of the world's 20 largest insurers by market capitalisation, and would not be permitted to be New Zealand insurers.

In this manner the task of prudential regulation is in effect sub-contracted to a group of offshore insurers. The state's involvement would be limited to ensuring that each direct New Zealand insurer was covered by policy-only liability insurance. In this way the regulator could enforce compliance with this arrangement, without having to enquire into any of the underlying aspects of the direct insurer's health or its' compliance with prudential regulations. That task is left to the off-shore insurer, on the understanding that the off-shore insurer will need to make these enquiries in order to ascertain the financial viability of the direct insurer which is a candidate for policy-only liability insurance.

The incentive for the direct insurer to co-operate with the off-shore insurer is compelling: failure to co-operate will risk an increase in premiums – or worse, a failure to obtain cover. A failure to obtain cover will preclude the direct insurer from continuing to operate.

For reasons of commercial confidentiality the domestic insurer may wish not to make disclosure about certain aspects of its business. Unlike traditional prudential regulation which allows for very little flexibility or discretion, this proposed model would allow the parties to agree on levels of disclosure and adjust the premium accordingly. So the direct insurer will have to determine whether on any given potential factor of investigation it is a greater priority to save on the costs of the premium, or keep the information private.

In practice it is envisaged that in determining the health of a domestic insurer, the off-shore insurer would probably use many if not all of the measures employed by the prudential regulator.

The Australian Prudential Regulatory Authority failed in respect of HIH, in spite of excellent rule of law conditions in Australia, a highly developed commercial, corporate and insurance jurisprudence, a good skills base, and a market economy. I would argue that in large measure these failings belie systemic shortcomings. For example regulators tend to enforce regulations enacted in response to the most recent corporate collapse. In that sense regulators are often stuck fighting the last war. This is in my view one of the reasons why government enforced prudential regulation

is a story littered with reoccurring failures. Tri-continental, Pyramid and the State Bank of SA being but a few examples from Australia.

I would assert further that by removing the state from the function of prudential regulation there is less prospect for distortions of the market, political interference and 'one-size fits all' regulation.

Instead of ensuring compliance through criminal sanctions, and thereby relying on the criminal justice system with its higher burden of proof, compliance under this model will be encouraged by market mechanisms – specifically lower premiums. Disputes may be resolved by recourse to the jurisdiction of civil courts.

Should an insured direct insurer fail the responsibility to make good on the policies still in force would fall to the off-shore insurer, and not the New Zealand government or its taxpayers. It is important to re-emphasise that shareholders funds would not be protected under this scheme, but would instead act as a deductible, which in turn encourages shareholders to exercise control over management.

Whilst this model is not one of re-insurance it should be stressed that whilst claims could be substantial against the off-shore insurer, the off-shore insurer could take steps to mitigate their losses through re-insurance.

Unlike insurance against natural disasters a claim on a policy-only liability policy would not necessarily result in the off-shore insurer having to pay out large amounts immediately, as they would have to do with for example, an earthquake. Whereas with policy-only liability insurance only claims that would have fallen due against the direct insurer at the time of its demise would be an immediate liability for the off-shore insurer.

Premiums paid by a New Zealand insurer to an off-shore insurer would be a legitimate operating expense and would be tax deductible. There exist tremendous opportunities for ways to reduce the premium through negotiation between the parties. For example the off-shore insurer could stipulate higher levels of re-insurance, improved risk assessment, a seat on the board of directors etc.

Whilst this model contains risks, including the risk of being untested, it is also true that the prevailing model of state directed prudential regulation has failed numerous times. Recent experiences in the United States and Australia bear this out. The advantage for New Zealand is that the direct insurers which operate in New Zealand would, it is argued, not represent an insurance market that would be too large to underwrite with policy-only liability insurance. The advantage to New Zealand of a proposal such as this, is that if it succeeds in creating a very stable insurance sector, New Zealand may be spared an HIH type of collapse, which in an economy the size of New Zealand's may economic distress throughout the domestic economy.

CONSTITUTIONAL NONSENSE? THE ‘UNENFORCEABLE’ FISCAL RESPONSIBILITY ACT 1994, THE FINANCIAL MANAGEMENT REFORM, AND NEW ZEALAND’S DEVELOPING CONSTITUTION

CHYE-CHING HUANG*

‘Once again, in promoting this legislation New Zealand leads the world. This is pioneering legislation. It is distinctly New Zealand – style.’

(22 June 1994) 541 NZPD 2010 (Ruth Richardson)

‘[It] is constitutional nonsense. The notion that this Parliament will somehow bind future Governments on fiscal policy...is constitutional stupidity.’

(26 May 1994) 540 NZPD 1143 (Michael Cullen)

The Fiscal Responsibility Act 1994 (the ‘FRA’) was part of New Zealand’s Financial Management Reform, a reform said to have introduced new values – efficiency, economy, effectiveness and choice – into the law.¹ The FRA is peculiar because the courts may not be able to enforce it. Despite this, the authors of the FRA expected it to impact profoundly on the thinking and behaviour of the executive, Parliament, and the electorate.²

The debate about how the FRA has affected the executive, Parliament, and the electorate continues.³ Yet no one has analyzed thoroughly how the FRA has affected – or might affect – judicial reasoning.⁴ This article attempts that analysis, and concludes that the FRA may have profound legal and even constitutional effects, despite being ‘unenforceable’.

The finding that the FRA may have legal and constitutional effects could be useful for two reasons. First, the FRA’s constitutional effects suggest that judicial reform of the constitution may tend to privilege the neo-liberal values that the Financial Management Reform wrote into law. Parliamentary sovereignty could be said to encourage a free and contestable market place of ideas, but this supposed strength may be paradoxically used to legally entrench values.

Secondly, the FRA’s legal and constitutional effects may explain why proposals for ‘responsibility’ legislation have proliferated. By 1995, the Labour Party had promised to reframe the prin-

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1 Geoffrey Beresford, ‘The Processes of Constitutionalism in New Zealand and the United Kingdom’ (2005) 1 *New Zealand Postgraduate law e-Journal* 2.

2 Ruth Richardson, ‘Opening and Balancing the Books: The New Zealand Experience’ (1994) 75 *Parliamentarian* 244, 246.

3 Roger Kerr, ‘The Fiscal Responsibility Act: A Stocktake’ (Paper presented at CONFERENZ 8th Annual Public Sector Finance Forum, Wellington, 23 September 2004).

4 The author is aware of only one legal academic work published since 1995 that has the FRA as its primary subject: Mark Robinson, ‘Can fiscal responsibility legislation be made to work?’ (1996) 3 (4) *Agenda* 419.

ciples of the FRA to meet 'sound economic and constitutional principles'.⁵ In 1998 the Charter of Budget Honesty Act (Cth), a statute modeled on the FRA,⁶ was enacted in Australia. In 2001, the New Zealand Business Roundtable⁷ published a draft 'Regulatory Responsibility Act'.⁸ In January 2005, the Labour-led Government made front page news by announcing that it intends to propose a 'social reporting law' that will be the 'equivalent of the Fiscal Responsibility Act'.⁹ Less than two months later the ACT party released its policy of introducing a Regulatory Responsibility Act.¹⁰ There have also been calls for a 'Social Responsibility Act',¹¹ a 'Treaty Responsibility Act'¹² and an 'Infrastructure Responsibility Act'.¹³ Some promoters of 'responsibility Acts' may see the potential for such statutes to influence the development of New Zealand's constitution.

The FRA was repealed on 25 January 2005, but its substance was simultaneously re-enacted as part of the Public Finance Act (the 'PFA').¹⁴ This move was characterised as a merely technical and administrative consolidation of the law governing the use of public financial resources.¹⁵ This article refers to the stand-alone FRA rather than to the PFA. Commentary and case law to date generally refers to the FRA. This also follows what appears to be an emerging common practice: even after the FRA was subsumed by the PFA, commentators have continued to refer to the FRA when speaking about the fiscal responsibility provisions of the PFA.¹⁶ The footnotes refer to equivalent sections of the PFA.

Part One of this article describes the FRA, and Part Two tries to establish that the FRA is unenforceable. Part Three suggests that the FRA nevertheless has legal and constitutional effects, and Part Four connects these findings to broader constitutional developments.

5 Jane Kelsey, *The New Zealand Experiment - A World Model for Structural Adjustment?* (1995) 310.

6 *Charter of Budget Honesty Act 1998* (Cth); Robinson, above n 4, 427-428.

7 '[A]n organisation comprising primarily chief executives of major business firms committed to contributing to the development of sound policies that reflect overall national interests. It is founded on the belief that a healthy, dynamic business sector and open and competitive markets are fundamental to the achievement of a prosperous economy and fair society.' New Zealand Business Roundtable, <http://www.nzbr.org.nz/statement_of_purpose.asp> (at 18 March 2006).

8 Bryce Wilkinson, *Constraining Government Regulation* (2001).

9 Ainslie Thomson, 'Govt plan for annual 'social report'', *The New Zealand Herald*, Auckland, New Zealand, 25 January 2005, A1.

10 Rodney Hide, 'ACT's Plan to Cut Red Tape' (Speech delivered at New Zealand Large Herds Association Conference, Christchurch Convention Centre, Christchurch, 19 April 2005).

11 Jonathon Boston, 'The Idea of a Social Responsibility Act for Aotearoa/New Zealand', in Michael O'Brien (ed), *Social Responsibility: Whose Agenda?* Proceedings of Conference (1998) 13.

12 Thomas Bennion and Geoffrey Malvin, 'Assessing Performance', [1994] *The Māori Law Review* 1, <<http://bennion.co.nz/mlr/1994/jul.html>> (at 27 April 2006).

13 Interview by Paul Henry with Chris Olsen, Auckland's Transport Infrastructure', (TVNZ, Breakfast Programme, Auckland, 27 April 2005) <http://tvnz.co.nz/view/video_popup_windows_skin/707148>, (at 27 April 2006): 'I have heard some of the Auckland mayors talk about the possibility of having an Infrastructure Responsibility Act, which would be would be very similar to the Fiscal Responsibility Act'.

14 *Public Finance Amendment Act 2004* s 37(2).

15 *Public Finance Act 1989*, s 1A, inserted by *Public Finance Amendment Act 2004*, s 4. For an examination of this characterisation, see Chye-Ching Huang, 'The Repeal and Resurrection of Responsibility' (2005) 11 *Auckland University Law Review* 230.

16 Olsen, above n 13.

I. FEATURES OF THE FRA 1994

During New Zealand's Financial Management Reform the reformers put selected neo-liberal economic theories¹⁷ into practice in a relatively undiluted form.¹⁸ Also known as the New Zealand Experiment,¹⁹ or 'Rogernomics' and 'Ruthanasia'²⁰ the Financial Management Reform was a radical structural adjustment.²¹ It transformed New Zealand from 'the first welfare state to the first post-welfare state',²² from 'fortress New Zealand to free market',²³ and from a 'politically interventionist economic management to a more market-led type of economic management'.²⁴ The Fourth Labour Government began the transformation, and the succeeding National Government continued it.²⁵

The National Government passed the FRA by majority on 22 June 1994, arguably in order to address the concerns of 'public choice theory'.²⁶ Public choice theory predicts that self-interested government actors tend to pursue fiscal policies that are not in the best interests of the wider community.²⁷ In line with public choice theory, Treasury considered that before the FRA, 'short-term fiscal thinking, driven by influential groups and electoral politics, was biased against sound economic principles'.²⁸ A 2004 Business Roundtable review of the FRA took a similar view:²⁹

The quality of fiscal policy deteriorated during the 1970s and '80s. Government spending mushroomed; the tax system became distorted and inefficient The incoming Labour government did much to improve fiscal policy, especially through sound tax reforms, but it struggled to achieve fiscal discipline.... In response to this haphazard record, the architects of the FRA, notably finance Minister Ruth Richardson, sought to bring a greater focus in annual budgets to issues of fiscal prudence and longer-term strategy.

17 Kelsey, above n 5, 1.

18 Beresford, above n 1, 11. Public choice theory, agency theory and transaction-cost economics, and the new public management were particularly influential: Boston, *Public Management: the New Zealand Model* (1996) 16.

19 Marcia Russell, *Revolution: New Zealand From Fortress to Free Market* (1996) 9.

20 After successive Ministers of Finance Roger Douglas and Ruth Richardson.

21 Kelsey, above n 5.

22 Russell, above n 19.

23 *Ibid.*

24 (26 May 1994) 540 NZPD 1146 (John Robertson).

25 Commonwealth Secretariat, *Current Good Practices and New Zealand Developments in Public Service Management: A Profile of the Public Service of New Zealand* (1995) 2.

26 For a brief overview of the development of public choice theory, see James Buchanan, 'Public Finance and Public Choice', *National Tax Journal* 28 (December 1975), 383.

27 Boston, above n 18.

28 Kelsey, above n 5, 233. Scott explains how such analysis draws on public choice theory; Graham Scott 'New Zealand's Fiscal Responsibility Act' (1995) 2 (1) *Agenda* 3.

29 Kerr, above n 3.

Ruth Richardson, the architect of the FRA, intended it to also boost the public's confidence in government.³⁰ Graham Scott³¹ saw the FRA as '[offering] some comfort to those concerned that one of the effects of MMP³² might be a return to deficits and increasing debt'.³³

Critics of the FRA have alleged that its unstated purpose was 'to bind future Governments to National Party policy'.³⁴ Professor Jane Kelsey, University of Auckland, also considered that the FRA was motivated by political purposes:³⁵

In reality, the [FRA] was designed to embed the current fiscal strategy of budget surpluses, repayment of debt, privatization and low taxation in law.

....

An element of party politicking lay behind the Bill. National was determined to present itself as the natural party of government, especially as the electoral rules were about to change. It had built its credibility on reduced deficits and debt. With this established as the norm, National's opponents would have to endorse its strategy or justify their deviation. According to finance Minister Bill Birch: 'Either way we gain'.

Whatever the FRA's true purpose, it had the following features.

A. 'Principles'

The FRA 1994 requires the executive government of New Zealand³⁶ to 'pursue its policy objectives' in accordance with the 'principles of responsible fiscal management':³⁷

- (a) Reducing total Crown debt to prudent levels so as to provide a buffer against factors that may impact adversely on the level of total Crown debt in the future, by ensuring that, until such levels have been achieved, the total operating expenses of the Crown in each financial year are less than its total operating revenues in the same financial year; and
- (b) Once prudent levels of total Crown debt have been achieved, maintaining these levels by ensuring that, on average, over a reasonable period of time, the total operating expenses of the Crown do not exceed its total operating revenues; and
- (c) Achieving and maintaining levels of Crown net worth that provide a buffer against factors that may impact adversely on the Crown's net worth in the future; and
- (d) Managing prudently the fiscal risks facing the Crown; and
- (e) Pursuing policies that are consistent with a reasonable degree of predictability about the level and stability of tax rates for future years.

30 Richardson, above n 2, 244 and New Zealand Treasury, *The Fiscal Responsibility Act 1994: An Explanation* (1995) <<http://www.treasury.govt.nz/legislation/fra/explanation/intro.asp>> (at 27 January 2005).

31 Secretary to the New Zealand Treasury from 1986-1993, Principal of Graham Scott NZ Ltd.

32 The Mixed Member Proportional voting system that replaced the First Past the Post voting system.

33 Scott, above n 28, 10. For a general analysis of the influence of public choice theory and other economic perspectives on the Financial Management Reform, see J Boston, *Public Management: the New Zealand Model* (1996) 16. At page 27 Boston argues that the Fiscal Responsibility Act 1994 was prompted at least partly by public choice considerations.

34 (22 June 1994) 541 NZPD 2016 (Jim Anderton).

35 Kelsey, above n 5, 237.

36 *Fiscal Responsibility Act 1994*, s 2 and *Public Finance Act 1989*, s 2.

37 *Fiscal Responsibility Act 1994*, s 4 and *Public Finance Act 1989*, s 5.

Because they do not set quantitative targets, the policy outcome that any given principle requires is somewhat indeterminate, some have said to the extent of being ‘totally vague and meaningless’.³⁸

B. Justified Departure

The FRA allows the executive to depart temporarily from the principles, but the executive must give reasons for any departure. The executive must also state how it intends to return to compliance, and how long it expects the return to compliance to take.³⁹

C. No Explicit ‘Manner and Form’ Restrictions

The FRA does not explicitly require Parliament to follow special procedures to amend or repeal it.

D. Reporting Requirements

The FRA legislates for reporting and accountability requirements:

- A responsible minister must publish a ‘policy statement’ setting out the executive’s objectives and intentions with regard to principles in the Acts;⁴⁰
- A ‘strategy report’ must be laid before the House of Representatives on the day on which the first Appropriation Bill relating to the financial year is introduced, which assesses the consistency of the Budget with the policy statements;⁴¹
- ‘Statements of Responsibility’ or ‘Certificates’ must be signed by specified members of the executive, attesting to the accuracy and professionalism of reports prepared under the Acts;⁴²
- ‘Economic and fiscal updates’ and forecasts must be published;⁴³ and
- Crown financial statements must follow ‘Generally Accepted Accounting Practice’.⁴⁴

The net effect of these requirements is that a responsible Minister must report regularly to the House of Representatives on the extent to which government fiscal policy is consistent with the principles of responsible fiscal management, and justify and report any departures from those principles that the government makes.⁴⁵

E. Unique in the international context

In 1994, no other country had enacted legislation with the same features as the FRA. Consequently overseas experiences did not clearly indicate what the impacts of the FRA would be.

The Australian Charter of Budget Honesty Act 1998 (Cth) mimicked the FRA, and Australian scholars look to New Zealand commentary on the FRA for indications on how the Charter of Budget Honesty Act 1998 will work.⁴⁶

38 (22 June 1994) 541 NZPD 2012 (Peter Dunne).

39 *Fiscal Responsibility Act* 1994, s 4(3) and *Public Finance Act* 1989, s 5(2).

40 *Fiscal Responsibility Act* 1994, s 6 and *Public Finance Act* 1989, s 11.

41 *Fiscal Responsibility Act* 1994, s 7 and *Public Finance Act* 1989, s 7.

42 *Fiscal Responsibility Act* 1994, s 12 and *Public Finance Act* 1989 ss 21-22.

43 *Fiscal Responsibility Act* 1994, ss (8)-(10), (13)-(15) and *Public Finance Act* 1989, ss 13-20.

44 *Fiscal Responsibility Act* 1994, s 5 and *Public Finance Act* 1989, s 6.

45 *Fiscal Responsibility Act* 1994, long title cl (a) and *Public Finance Act* 1989, s1A(2)(a).

46 Robinson, above n 4.

The Stability and Growth Pact was adopted by European Union states in 1997, and like the FRA it contains fiscal monitoring provisions. However although it deals with broadly the same subject matter as the FRA – government debt and financial reporting – the Stability and Growth Pact is significantly different from FRA. Unlike the FRA, the Stability and Growth Pact imposes numerical government debt targets on each signatory state, and provides explicitly for (financial) sanctions upon breach. Furthermore, the international law and institutional aspects of the European Union make it difficult to draw parallels with the FRA.

In the United States, 'balanced budget' requirements are a traditional mainstay of state public finance.⁴⁷ By 1998, Vermont was the only state that did not have a balanced budget requirement.⁴⁸ Balanced budget requirements at the state level are designed to address the same problems as the Fiscal Responsibility Act: to 'prevent fiscal irresponsibility on the part of state officials'⁴⁹ and to address predictions by public choice theorists that the political incentives of elected executives will lead government to debt-fund excessive spending on public goods and services, leaving later generations to pay the debt.⁵⁰

However balanced budget requirements differ from the FRA in important ways. Most states entrench these requirements in their constitutions as higher law.⁵¹ Furthermore, balanced budget requirements encapsulate quantitative targets (state expenses must equal receipts in a budget year), but the principles in the FRA do not. United States literature is therefore used cautiously in the following analysis of a unique Act operating in New Zealand's unique⁵² constitutional arrangements.

II. THE ENFORCEABILITY OF THE FRA

A hypothetical litigant claims the executive has pursued policy in violation of the principles of fiscal responsibility, or that the executive has breached the FRA's reporting and accountability requirements.⁵³ The litigant might seek a declaration of inconsistency against the executive. Can the courts decide whether or not the FRA has been breached, and give appropriate remedies?

Marc Robinson, (in the only detailed legal analysis since 1994 of the FRA's effects), seemed to assume that the FRA is unenforceable.⁵⁴ In his view the FRA does not *compel* future executives to be fiscally responsible, even though its mandatory wording makes it appear 'on the surface' to do so.⁵⁵ Instead, Robinson characterized the FRA as a 'fiscal responsibility declaration': a discretionary commitment undertaken by an executive government to fiscal responsibility rules and

47 David Lubecky, 'The Proposed Federal Balanced Budget Amendment: the Lesson From State Experience', (1986) 55 *University of Cincinnati Law Review* 563, 568. See also; Nancy Staudt, 'Constitutional Politics and Balanced Budgets', [1998] *University of Illinois Law Review* 1105.

48 Lior Strahilevitz, 'The Balanced Budget Amendment and Social Security: an Alternative Means of Judicial Enforcement', [1998] 22 *Seton Hall Legislative Journal*. 513.

49 Lubecky, above n 47, 576.

50 Staudt, above n 47.

51 Strahilevitz, above n 48, 568.

52 Philip Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 3-7.

53 For examples of the fact scenarios that might lead to such an action, see Strahilevitz; above n 48 and James Bowen, 'Enforcing the Balanced Budget', (1994) 4 *Seton Hall Constitutional Law Journal* 565.

54 Robinson, above n 4.

55 *Ibid.*

targets.⁵⁶ Robinson's conclusion seems to be based on the assumption that 'no legal sanctions are provided for a failure to comply with [the principles of fiscal responsibility]'.⁵⁷

The FRA does not state explicitly whether or not the courts can enforce it. Although people have suggested that the FRA has been breached,⁵⁸ no one has tried to bring an allegation of breach to the courts, so no precedents settle the issue.⁵⁹ Legal scholarship has largely neglected the enforceability question. This section tests Robinson's assumption. It argues that there are three reasons for thinking that the FRA is not enforceable: (1) justiciability principles; (2) lack of individual standing; and (3) Parliament's intent.

A. *Justiciability Principles*

Justiciability (in its broadest sense) is the 'constitutional concept which recognizes the capabilities of the courts are limited'.⁶⁰ It may be that justiciability principles are not legitimate;⁶¹ nevertheless the courts use them to limit their review powers. Applying justiciability jurisprudence, courts could conclude that the principles of responsible fiscal management are high policy, and that the courts cannot properly enforce them. This is the view that the Crown Law Office took before the FRA was enacted.⁶² 'High policy' involves two ideas.⁶³

The first is the 'institutional competence of the courts to adjudicate upon [a matter]'.⁶⁴ Judges may not have the expertise needed to determine whether policy complies with the FRA principles.⁶⁵ Even if judges have the necessary expertise, they are constrained by the adversarial system and rules of evidence⁶⁶ and counsel may not present judges the information they need to make a good decision.⁶⁷

For example, the first principle of fiscal responsibility uses the modifier 'prudent', which was 'expected to take account of numerous factors: the structure of the economy, its degree of vulnerability, the strength of the Crown's balance sheet, the credit rating of sovereign debt, the financial strength of the country's competitors and demographic factors'.⁶⁸ Judges would need evidence on all these factors, and to be able to evaluate the economic implications of the evidence, in order to decide whether the first principle of fiscal responsibility had been satisfied. If United States fiscal

56 Ibid.

57 Ibid.

58 Rodney Hide, *Economics and Freedom: Why New Zealand is on the Wrong Path* <<http://www.scoop.co.nz/stories/PA0505/S00656>> 25 May 2005 and *Labour is Irresponsible and out of Touch* Scoop; <<http://www.act.org.nz/news-article.aspx?id=233373>> at 24 March 2006.

59 Matthew Palmer 'What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office Holders' (2006) 17 *Public Law Review* 133. The author states that the FRA 'is never litigated', but does not consider whether or not this is possible.

60 B V Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62 *Cambridge Law Journal* 631.

61 Trevor Allan, *Law, Liberty and Justice: the legal foundations of British constitutionalism* (1993) 162-199. Compare Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.

62 Kelsey, above n 5, 236.

63 Finn, above n 61, 240-241.

64 Ibid.

65 For an exposition of what is involved in this idea, see Harris, *Judicial Review*, above n 60, 640-642.

66 Finn, above n 61, 240.

67 Harris, *Judicial Review*, above n 60, 641.

68 Kelsey, above n 5, 236.

legislation – setting out quantifiable balanced budget targets – would require judges to ‘become accountants’ when comparing state revenue and expenditure,⁶⁹ then the FRA – setting out general economic principles instead of targets – might virtually require New Zealand judges to become economists before they could enforce it.

The second element of ‘high policy’ is the idea that Judges should not encroach on functions properly left to Parliament in the constitutional structure.⁷⁰ To decide whether or not a function is properly left to Parliament, the courts should consider what the best accountability mechanism in the situation is:⁷¹

[when deciding justiciability questions] an effect on the wider community would need to be assessed... including ascertaining whether the accountability would be better provided by one of the politically accountable branches of government, the processes of which may allow wider participation in the review of executive action.

The principles of fiscal responsibility were expected to be applied and interpreted by Parliament not the courts, and therefore to be enforced by political rather than legal accountabilities.⁷² Treasury stated:⁷³

The definitions of a ‘prudent’ level of debt, or risk management, a level of Crown net worth that provides a ‘buffer against future events’, or a ‘reasonable’ degree of predictability are not specified in the legislation. *It is left to the Government of the day to interpret the relevant fiscal terms in its Budget Policy Statement and Fiscal Strategy Report, and to justify those interpretations to Parliament and the public.*

The Court of Appeal also considers that judges should not generally be involved in making ‘value judgments’.⁷⁴ Statutory terms such as ‘excessive’ (and presumably its antonym ‘prudent’) are not objective and therefore may be value laden:⁷⁵

If one asks...even in the circumstances of an individual case, whether a local authority’s budgeted expenditure for a year is excessive, it is plain that there can be no objective criterion by which to determine the answer. What is the appropriate level of public expenditure and public taxation is, and has always been, a matter of political opinion.

The sway of ‘high policy’ considerations varies with the subject matter before the court. In New Zealand, courts have readily found the ‘principles of the Treaty of Waitangi’ – protected in statutes such as the State Owned Enterprises Act 1986 – to be justiciable, even though the principles might be considered subjective and value-laden, and even though the principles are not set out in those statutes.⁷⁶ However, common law courts have traditionally been more readily convinced by justiciability principles to defer to executive decision making in areas such as security and defence. Decisions by US courts show that government decisions about fiscal policy are also likely to attract a high degree of deference from the courts. In a system with an entrenched, supreme law Constitution, US courts are used to making decisions that might be considered ‘high policy’

69 Donald Tobin, ‘The Balanced Budget Amendment: Will Judges Become Accountants?’ (1996) 12 *Journal of Law & Politics*. 153.

70 Harris, *Judicial Review*, above n 60, 637-640.

71 *Ibid* 636.

72 Robinson, above n 4. New Zealand Treasury, ‘above n 30.

73 *Ibid*.

74 *Lange v Atkinson* [1998] 3 NZLR 242 (CA), 462 in a section of the judgment entitled ‘Court or legislature?’

75 *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 per Bridge LJ.

76 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (HC and CA).

in Commonwealth courts. However, even US courts appear to take pains to stay out of explicitly dictating fiscal policy.

In the US, the courts may consider it constitutionally inappropriate to adjudicate on a matter, *even if* they consider themselves institutionally competent to do so, and *even if* they are provided with objective criteria to assess action against. The ‘political question doctrine’ allows United States courts to refuse to adjudicate on a matter if the issue is (inter alia) constitutionally committed to a coordinate political department, *or* impossible to decide without an initial policy determination of a kind clearly for non-judicial discretion, *or* cannot be resolved without the courts expressing disrespect for a coordinate political branch, *or* if potential embarrassment may arise from multifarious pronouncements by various departments on one question. Applying the political question doctrine, the Connecticut Supreme Court refused to require the state legislature to adhere to a balanced budget requirement, because to do so would create a conflict with a coequal branch of government.⁷⁷

In line with decisions of some United States courts, New Zealand judges might also consider that the decisions they would have to make in ‘macro-enforcing the [FRA] would be of the type best settled by a body designed to facilitate a consensus, rather than by an institution that aspires to administer impartial justice’⁷⁸ and that that budget issues are ‘political questions to be decided by [Parliament and the executive] and therefore defer decisions regarding budgetary matters to their judgment’.⁷⁹

The same justiciability principles would also apply to any attempt to enforce – through the courts – the reporting and accountability requirements in the FRA. Unlike the principles of fiscal responsibility, the reporting and accountability requirements seem at first glance to give objective criteria that judges could use to decide whether or not the executive is in compliance. It could be said that ‘policy statements’ and ‘strategy reports’ are tabled and published, or they are not, and that certificates are signed by executive, or they are not. Nevertheless, deciding whether these requirements have been met may involve high policy.

For example, the minister responsible for the administration of the FRA must publish fiscal strategy reports stating the executive’s long-term objectives for fiscal policy.⁸⁰ The purpose of this duty is to provide information that will help improve fiscal policy.⁸¹ If judges were to attempt to enforce the requirement at all, they should construe the text of the FRA in light of its purpose,⁸² and therefore would need to decide what constitutes an adequately detailed statement.⁸³ This would involve examining the substance of any fiscal strategy report, rather than merely asking whether or not the minister had published something that he claimed to be a fiscal strategy report. The courts might not think themselves institutionally competent to decide what financial information is sufficient for Parliament, or to determine what information is sufficient to improve fiscal policy.

77 Strahilevitz, above n 48, 524.

78 Ibid.

79 Lubecky, above n 47, 582.

80 And must do so on the day that the first Appropriations Bill to which the report relates is introduced to the House; FRA, s 7 and PFA s 8.

81 See text accompanying above n 28.

82 *Interpretation Act 1999*, s 5(1).

83 Assuming that judges would reject as unprincipled the approach of deciding only ‘easy’ cases (such as where no report had been published at all) and refusing to decide ‘hard’ cases.

B. *Standing*

Some commentators argue that the principles of justiciability are illegitimate, and that a violation of a public law right is all that must be established to render something subject to judicial review.⁸⁴ Even if this were the case, there may be no one who has legal standing to bring an action against a government for breaching the principles of fiscal responsibility or the FRA reporting and accountability requirements.⁸⁵

The FRA imposes duties on the executive to pursue policy in accordance with certain principles, and duties to report to Parliament. However, duties do not imply corresponding individual rights in every statutory context:⁸⁶

Every public authority has the duty of observing the law in the conduct of its activities...but it hardly follows that every official action or decision is appropriately subject to judicial review. Nor will it necessarily involve a question of right. No one has a general *right* that public bodies observe the law, because such an assertion of right is meaningless.

Public welfare rationales drawn from public choice theory featured in the promotion of the FRA.⁸⁷ Perhaps this indicates that the FRA confers a collective right, owed in abstract to the public at large, but which in any event does not give individuals standing. Strahilevitz concluded that standing is a daunting barrier to judicial enforcement of United States balanced budget provisions,⁸⁸ and many of those provisions were, like the FRA, based on public choice theory rationales and designed to protect the public welfare.⁸⁹

C. *Parliament's intent*

Sufficient evidence of legislative intent may override common law considerations of justiciability.⁹⁰ The long title of the FRA set out its purpose '[a]n Act to improve the conduct of fiscal policy by specifying principles of responsible fiscal management and by strengthening the reporting requirements of the Crown...'

The courts are not mentioned, and the omission may show that Parliament did not intend judges to enforce the FRA. The FRA's long title instead highlights its comprehensive reporting and accountability provisions.⁹¹ These requirements are meant to facilitate political oversight of the principles of fiscal responsibility, by providing Parliament and the public access to 'information on which they can judge the government's performance'⁹² as against the principles of fiscal responsibility. The Opposition can be expected to use perceived non-compliance with the principles

84 Finn, above n 61, 261-263.

85 Assuming that the FRA leaves traditional notions of standing intact.

86 Allan, above n 61, 223-224.

87 For example Treasury said of the FRA that it 'should encourage fiscal policy to make a strong positive contribution to the well-being of New Zealanders'; New Zealand Treasury, above n 30.

88 Ibid.

89 Lack of standing would also mean that individuals could not suffer any loss from a breach of public welfare legislation; See Strahilevitz, above n 48, 519.

90 Harris, *Judicial Review*, above n 60, 634.

91 Richardson, above n 2.

92 (26 May 1994) 540 NZPD 1149 (Rob Storey).

to embarrass politically the executive.⁹³ Parliament has empowered a means of political accountability, indicating that it intended the principles to be enforced politically rather than judicially.⁹⁴

Parliament's intent also shows that the appropriate oversight for the reporting and accountability requirements is political rather than legal. There are viable alternatives to judicial enforcement of the FRA: public and parliamentary pressure,⁹⁵ impeachment⁹⁶ and the accountability regime under the State Sector Act 1988.⁹⁷ Judges might find that Parliament intended to rely on those mechanisms to enforce the reporting and accountability requirements rather than judicial oversight.

Most tellingly, Parliament has explicitly empowered the Finance and Expenditure Committee to fulfil the enforcement role. Evidence of this sort that fiscal issues have been committed to a 'co-ordinate political department' has been a 'particularly forbidding barrier' to judicial enforcement of balanced budget requirements in the United States.⁹⁸

Section 16 of the FRA requires 'referral of every report required under the Act to the Parliamentary select committee responsible for the review of financial management (currently the Finance and Expenditure Committee)'.⁹⁹ The Finance and Expenditure Committee then reports its findings to Parliament,¹⁰⁰ so section 16 ensures that the content and adequacy of reports tendered under the FRA will be examined in a forum other than the courts:¹⁰¹

The Committee has the opportunity to examine the Minister of Finance as part of its review, and is free to call in witnesses and expert opinion. The committee may obtain an independent assessment of the reports if it so desires.

This type of review is an important element in determining the credibility of any government's fiscal strategy. In addition, the review and Parliamentary debate of the Budget Policy Statement allow more

93 (22 June 1994) 541 NZPD 2011 (Ruth Richardson).

94 Parliamentary history also shows that Parliament did not intend judicial review to result. For example, Tony Ryall, at the Second Reading of the Fiscal Responsibility Bill explains the principles as a 'guide to the Government', that will 'put real pressure on a Government', and that 'do not bind any successive Government' (7 June 1994) 540 NZPD 1486 (Tony Ryall). In New Zealand, parliamentary history can be used as an aid to statutory interpretation; *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694, 701 (CA).

95 New Zealand Treasury, above n 30. NZPD 2010 (Ruth Richardson).

96 Parliament might constitute itself as a 'court' to impeach executive members who did not comply with reporting and accountability requirements. Impeachment was last used in the United Kingdom in 1906. Recently, also in the United Kingdom, some Members of the House of Commons commissioned a report that concluded that an action of impeachment against Prime Minister Tony Blair was viable. For a general overview of impeachment in the current United Kingdom political context, see House of Commons *What is Impeachment?* <http://www.w4mp.org/html/eni/2004q123/040827_impeachment.asp> (at 27 January 2005). For the report on whether Prime Minister Blair might have been susceptible to impeachment, see Report prepared for Adam Price MP (unknown author) *A Case to Answer: a first report on the potential impeachment of the Prime Minister for High Crimes and Misdemeanors in relation to the invasion of Iraq* (2004) <<http://www.impeachblair.org/>> (at 27 January 2005).

97 The State Sector Act 1988 gives the State Services Commissioner the power to create a regime of accountability in the state sector. The FRA reporting and accountability requirements might be incorporated into that regime. Accountability for non-compliance would ultimately be to the State Services Commissioner, through various provisions in the State Sector Act 1988.

98 Strahilevitz, above n 48, 524.

99 New Zealand Treasury, above n 30.

100 See, for example, Finance and Expenditure Committee, *Report of the Finance and Expenditure Committee: Budget Policy Statement 2006*, (February 2006). <<http://www.clerk.parliament.govt.nz/Content/Select CommitteeReports/BPS%202006.pdf>> (at 15 April 2006).

101 *Ibid.*

open and transparent budget processes and increase the accountability to Parliament of the Government's fiscal management.

Judges might consider that because the Finance and Expenditure Committee can call expert witnesses and engage in explicitly political arguments as it wishes, it gives superior oversight to that which the courts might provide.¹⁰²

D. Other possible barriers to enforcement

United States literature on balanced budget legislation suggests three further reasons that judges might not be able to enforce the FRA. These reasons either do not apply in New Zealand, or are beyond the scope of this article to assess.

United States literature suggests that it may be virtually impossible for a potential plaintiff to make out factual causation of loss.¹⁰³ For example it may be difficult to attribute 'pursuit of policy' to the executive rather than Parliament, given the complex way policy can evolve.¹⁰⁴ However, this is a practical barrier to a plaintiff mounting a successful action for breach of the FRA, rather than a legal barrier to the Courts hearing that action.

Crosthwait has also argued that United States balanced budget requirements are unenforceable because there are no appropriate remedies.¹⁰⁵ She argues that a mere declaratory judgment should not be available where no other remedies are available, and that no remedies (such as injunction or compensation) can be given against an executive or legislature for breaching balanced budget requirements.¹⁰⁶ However, *Moonen v Film & Literature Board of Review (No 2)*¹⁰⁷ makes it clear that even if no other remedies are available, New Zealand courts can declare that the executive has acted inconsistently with statute.¹⁰⁸

Finally, Strahilevitz suggests that '[c]ourts reluctant to delve into the realm of budgetary policy could concoct a number of convincing rationales for refusing to decide such cases on the merits'¹⁰⁹. It is beyond the scope of this article to consider whether New Zealand judges would prefer not to enforce the FRA, and if so, whether they would take the unsavoury approach of deliberately reasoning towards their preferred outcome.

E. Conclusions on Enforceability

The FRA appears to be 'unenforceable' in the sense that a breach of it will not attract legal sanction. Although the FRA imposes legal duties, duties at public law might not confer judicially enforceable rights. Instead, justiciability principles and the purpose and scheme of the FRA indicate that the political arena is the appropriate forum for accountability. Parliament and the public are

102 For an example of the questioning of the Minister Finance on matters of fiscal responsibility and the Treasury and Government Financial Statements, see Collier (ed), *Select Committee News* 3 March 2006 8-10.

103 Ibid.

104 Court interference in legislative processes is limited: see McGee, 'The Legislative Process and the Courts' in P Joseph (ed), *Essays on the Constitution* (1995) 84, 93 citing *Comalco Power (New Zealand) Ltd v Attorney-General* (19 December 1986) unreported, High Court per Heron J.

105 Bowen, above n 53, 608-610.

106 Ibid.

107 [2002] 2 NZLR 754 (CA).

108 It is beyond the scope of this article to consider the possible remedies in detail, given its conclusion that the courts will not attempt to enforce the FRA.

109 Strahilevitz, above n 48.

therefore expected to ‘enforce’ the FRA through political pressure. This may make the FRA peculiar. Part Three considers whether it also makes the FRA legal and constitutional ‘nonsense’.

III. DESPITE BEING ‘UNENFORCEABLE’ THE FRA HAS LEGAL AND CONSTITUTIONAL EFFECTS

It may be tempting to think that because the FRA is unenforceable it has no legal or constitutional significance. Winston Peters said of the Fiscal Responsibility Bill ‘legislation of this type in this country is meaningless unless this Parliament means to keep the faith’,¹¹⁰ and claimed that it signified ‘absolutely totally nothing’.¹¹¹

This section argues that despite being unenforceable the FRA has legal and constitutional impacts because: (1) statutes may have legal functions other than providing recourse to the courts on breach; and (2) the proposition that the FRA cannot affect New Zealand’s constitution supposes a Diceyan parliamentary sovereignty. Taking into account recent constitutional developments, a Diceyan view of New Zealand’s constitution may no longer be accurate.

A. *The Legal Effects of the FRA*

Providing for judicial sanction is not the only function or effect of a statute. The FRA might give signals to citizens and help judges to interpret other laws.

Law not only tells judges what to do after someone breaks it, law also tells citizens what not to do in advance.¹¹² As law the FRA may give the executive two reasons for not breaching it, even to those who see the FRA as ‘nonsense’. Ministers and officials who have an ‘internal point of view’¹¹³ to law may try to avoid breaching the FRA.¹¹⁴ Furthermore, a perceived breach of the FRA, although not attracting judicial sanction, may prompt the Opposition to accuse the executive of ‘fiscal irresponsibility’.¹¹⁵ The label ‘fiscally irresponsible’ might provoke negative reaction from the electorate (lost votes at the next election) and deter breach or repeal of the FRA. The promoters of the FRA intended this to be the case.¹¹⁶

Presumably an Opposition could accuse a government of being fiscally irresponsible, even if the FRA had not been enacted.¹¹⁷

If future Government wants to be fiscally irresponsible, the punishment might come from the operation of the financial markets not from the fact that they have been a bit naughty in the terms of the wording of Parliament. The notion that an Act of Parliament itself will have more weight in the world economy than a reaction of those who actually look at what a Government does, is itself a piece of economic and constitutional nonsense.

110 (7 June 1994) 540 NZPD 1490 (Winston Peters).

111 (26 May 1994) 540 NZPD 1143 (Michael Cullen).

112 Jim Evans, *Statutory Interpretation: Problems of Communication* (1988) 51; in the context of criminal law, see A P Simester and W J Brookbanks, *Principles of Criminal Law* (2nd ed, 2002) 28.

113 In the sense of a mutual acceptance of the law as a standard for assessing conduct, for reasons other than fear of sanction.

114 See generally HLA Hart, *The Concept of Law* (1994).

115 Indeed this label was used during the legislative process: ‘Would the member agree that a vote against the Bill is a vote for fiscal irresponsibility?’ (22 June 1994) 541 NZPD 2024 (Max Bradford).

116 See (26 May 1994) 540 NZPD 1151 (Clem Simich). See also (22 June 1994) 541 NZPD 2029 (Jim Bolger).

117 (26 May 1994) 540 NZPD 1143 (Michael Cullen).

However, with the FRA in force, accusations of fiscal irresponsibility might have extra bite because the Opposition can also say that 'fiscal irresponsibility' is *illegal*. A voter might disapprove of a 'fiscally irresponsible' executive that also *breaks the law* more than she would disapprove of a 'fiscally irresponsible' executive whose actions were lawful. A voter may disapprove of an illegal act even if she thought the law being broken had no merit (or had not formed a view about the merit of the law).¹¹⁸ A voter may also be more likely to think that an idea has merit if it is enshrined in law. The economic concept of signaling explains why.¹¹⁹ Signals communicate information that might otherwise be costly or difficult to access. For a signal to be credible it must be costly to fake. A classic example of signaling is:¹²⁰

One wears a threadbare polyester suit...the other wears an impeccably tailored sharkskin suit and drives a new BMW.... Our simple signalling principles suggest that the latter attorney is a better bet. The reason is that a lawyer's ability level in a competitive market is likely to be mirrored closely by his income, which in turn will be positively related to his consumption.

That the principles in the FRA are 'law' might signal to voters that there is a broad social consensus that behaviour that the statute requires has merit, even though voters might not be able to observe directly the existence of such norms. Many voters may not have the expertise or time to evaluate the economic desirability of the principles in the FRA,¹²¹ and the mere fact that the principles are law may signal to voters that they have been rigorously tested and are sound. Voters may therefore conclude that any breach of the FRA is a breach of principles that society approves of and that are economically sound. Assuming that voters think that economically sound, widely endorsed ideas have merit, they may therefore react negatively to a breach (or repeal) of the FRA.

By employing the signaling function of law, the FRA may indeed be, as Elizabeth Tennant suggested, 'a public relations exercise'.¹²² Indeed its expression indicates that its drafters intended to invoke the signaling function of law. Margaret Clark observed that any Act repealing the FRA 'would immediately be dubbed the 'Fiscal Irresponsibility Act'.¹²³ David Caygill made a similar observation,¹²⁴ 'This Bill should have been...a public finance amendment bill. How it came to be called something so grandiose as the Fiscal Responsibility Bill is a story in itself.'

Characterizing the FRA as a signal may also help explain why political parties other than National have proposed responsibility legislation of their own. If a signal (such as passing principles into law) effectively communicates a desirable quality (such as the merit of those principles) then this will force others to signal whether or not they have that same quality.¹²⁵ Other governments have an incentive to embed their preferred principles of responsibility in law, because otherwise voters might assume that their ideologies are not widely accepted or meritorious.

As well as performing a signaling function, the FRA may also affect judicial thinking and the outcomes of cases, even if judges cannot directly enforce it.

118 See generally Hart, above n 114.

119 Robert Frank, *Microeconomics and Behaviour* (4th ed, 2000) 196.

120 *Ibid.*

121 See (26 May 1994) 540 NZPD 1146 (Peter Dunne).

122 (22 June 1994) 541 NZPD 2022 (Elizabeth Tennet).

123 Margaret Clark, 'Central Government in the Future' in Futures Trust, *Our Country: Our Choices* (1997) <<http://www.futurestrust.org.nz/publications/book/centralgovernment.html>> (at 27 January 2005).

124 (22 June 1994) 541 NZPD 2025 (David Caygill).

125 Frank, above n 119, 191.

‘All Acts of Parliament must fit into the body of the law as a whole’¹²⁶ so when interpreting statutes, judges can consider the FRA. If provisions in two different Acts appear to be inconsistent, courts must strive for an interpretation that best reconciles the inconsistency.¹²⁷ Therefore statutory provisions can be construed so as to reconcile them with the principles in FRA.¹²⁸

*Choudry v Attorney-General*¹²⁹ shows that the FRA can also influence the interpretation of common law terms. In *Choudry v Attorney-General*, the Court surveyed Acts that used the word ‘security’ (including the FRA 1994) in order to decide how to define ‘security’ in the context of public interest immunity.¹³⁰

The lawmaking role of judges might also allow the FRA to have legal effects. Grau observed, ‘as a matter of reality in New Zealand judges are more and more frequently called upon to make political decisions’.¹³¹ Judges legitimately make law when developing the common law.¹³² Parliament can also delegate judges the task of lawmaking, by passing deliberately indeterminate legislation;¹³³ Franks accuses ‘cowardly and cunning politicians’ of passing ‘obscure and ambiguous’ law ‘capable of application only using broad discretion and judicial ingenuity’, and thereby deliberately ‘sending intractable political issues to the Courts for decision’.¹³⁴

When judges make law, they must identify the relevant social and moral principles and public policy.¹³⁵ Perhaps because the lawmaking task requires judges to canvass wide-ranging policy considerations, Sir Ivor Richardson extra-judicially criticized counsel as being:¹³⁶

...somewhat reluctant to explore wide social and economic concerns; to delve into social and legal history; to canvas law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions...and so on.

Judges could use the FRA to explore wide social and economic concerns. The FRA articulates principles that Parliament considers to be ‘sound’.¹³⁷ Courts could strive to develop the law consistently with the principles. Using the FRA in this way could enhance the legitimacy of judicial lawmaking. The courts would be relying on Parliament’s statements to guide their policy choices, and Parliament is arguably the institution in New Zealand’s constitution best suited to formulating policy aims.¹³⁸

126 J S Burrows, *Statute Law in New Zealand* (3rd ed, 2003), 168.

127 *Ibid.*

128 This should be distinguished from section 6 New Zealand Bill of Rights Act (NZBORA) interpretation. The NZBORA arguably allows ‘possible’ interpretations of other Acts to be preferred if they are consistent with the NZBORA, even though such interpretations might not realistically reflect the intent of Parliament.

129 [1999] 2 NZLR 582 (CA).

130 *Ibid* 594.

131 Karen Grau, ‘Parliamentary sovereignty: New Zealand - New Millennium’ (2002) 33 *Victoria University Wellington Law Review* 351, 375.

132 *Lange v Atkinson*, above n 74 441-442.

133 BV Harris, ‘The Law-Making Power of the Judiciary’ in P Joseph (ed), *Essays on the Constitution* (1995) 266, 270-273.

134 Franks, ‘On Tanner’s ‘Confronting the Process of Statute Making’ in R Bigwood (ed), *The Statute: Making and Meaning* (2004).

135 Sir Ivor Richardson, ‘The Role of Judges as Policy Makers’ (1985) 15 *Victoria University Wellington Law Review* 46.

136 *Ibid* 50.

137 *Fiscal Responsibility Act* 1994, s 4 and *Public Finance Act* 1989, s 5.

138 See generally Harris, *Judicial Review*, above n 60, 640-643.

Although judges cannot enforce the FRA, it makes sense to describe the FRA as 'law'; it is a statute and therefore can influence judges' decisions, and it performs the signalling function of law. It might not be a stretch to think that the FRA could also have constitutional effects.

B. *The 'Constitutional' Effects of the FRA*

Over the past two decades, interest in New Zealand's constitution and constitutional change has intensified. Goldsworthy recently argued that 'today, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, aimed at toppling the doctrine of parliamentary sovereignty and replacing it with a new constitutional framework in which Parliament shares ultimate [lawmaking] authority with the courts'.¹³⁹ This section argues that the FRA, despite being in a sense 'unenforceable' may be playing a role in any such revolution.

C. *Diceyan presumptions*

Michael Cullen said of the Fiscal Responsibility Bill '[I]t is a constitutional nonsense...the notion that this Parliament will somehow bind future Governments on fiscal policy...is constitutional stupidity'.¹⁴⁰ This would be an accurate assessment of the FRA, if Diceyan theory were an accurate description of New Zealand's constitution.

Two central tenets of Dicey's theory are that Parliament can make or unmake any law and that all statutes have equal force.¹⁴¹ In a Diceyan parliamentary sovereignty, higher, entrenched law is impossible. Therefore in a Diceyan parliamentary sovereignty the phrase 'constitutional law' can take on a highly restricted and specific meaning: law that creates rights that are enforceable in the courts by the conferment of remedies. This is the interpretation of Dicey that Patmore and Thwaites took. They wrote that in a Diceyan parliamentary sovereignty, 'the law of the constitution is not the source, but the consequence, of the rights of individuals, as defined and enforced by the courts'.¹⁴² Rights are 'based on private law actions',¹⁴³ and so rights are 'the result of the ordinary law of the land'.¹⁴⁴ Under this reading of Dicey, the 'constitution' is changeable because rights can be changed by ordinary statute. Also, 'Dicey emphasized... an 'inseparable connection' between rights and remedies [remedies] give practical effects to rights rather than simply declaring them'.¹⁴⁵

If Patmore and Thwaites are correct, then in a Diceyan parliamentary sovereignty an unenforceable statute does not create rights and cannot be 'constitutional'. Consequently if New Zealand were a Diceyan parliamentary sovereignty, the FRA could be accurately described as 'constitutional nonsense'. Indeed, it is likely that Cullen assumed New Zealand has a Diceyan legal

139 Jeffrey Goldsworthy, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 *New Zealand Journal of Public and International Law* 7.

140 (26 May 1994) 540 NZPD 1143 (Michael Cullen).

141 A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1964) 40; Burrows, above n 126, 15.

142 G Patmore and A Thwaites, 'Fundamental Doctrines for the Protection of Civil Liberties in the United Kingdom: A V Dicey and the Human Rights Act 1998 (UK)' (2002) *Public Law Review* 52, 55.

143 *Ibid.*

144 *Ibid.*

145 *Ibid.* 56.

system when he said as much: Cullen champions Diceyan theory as both an accurate description of New Zealand's constitution and a desirable constitutional structure.¹⁴⁶

D. Recent constitutional developments

If Diceyan theory does not describe New Zealand's legal system well then it might not be ludicrous to claim that the FRA has constitutional importance. Goldsworthy claimed that judges are undermining the Diceyan parliamentary sovereignty:¹⁴⁷

if Diceyan parliamentary sovereignty is faced with a challenge in the near future, it is most likely to arise from further development of the tendency to describe important common law principles – and now statutes – as having ‘constitutional status, which entitles them to special protection....

Four special protections that judges might give ‘constitutional’ statutes are outlined below. Some of these protections might already exist in New Zealand and other Commonwealth jurisdictions.

First, the courts might consider that ‘constitutional’ statutes can affect the development of law more than ‘ordinary’ statutes. *Lange v Atkinson* may be evidence that the Court of Appeal has already taken this view.¹⁴⁸

Secondly, courts refer to parliamentary history, and where there are indications that Parliament enacted a statute under mistake or ignorance they may be unwilling to apply it.¹⁴⁹ Judges may scrutinize more intensely the legislative history of statutes that appear to be inconsistent with ‘constitutional statutes’. Judges may also be more ready to apprehend legislative mistake where Parliament has seemingly ignored statutory principles of a constitutional character. This is one interpretation of the judgments of Elias CJ and Tipping and Thomas JJ in the Court of Appeal case *Pora*. In *Pora*, these judges decided that a non-restrospectivity provision of the Criminal Justice Act 1985 was not impliedly repealed by a seemingly inconsistent amending provision. They seemed to have been influenced by the perception that Parliament made a ‘mistake’ in enacting the amending provision,¹⁵⁰ and that the amending provision seemed to override constitutional rights.¹⁵¹

Thirdly, the Court in *Thoburn v Sunderland City Council*¹⁵² (*Thoburn*) ruled that in the United Kingdom, ‘constitutional’ statutes are not subject to implied repeal:¹⁵³

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental [...] from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes. [...] The special status of constitutional statutes follows the special status of constitutional rights.

146 Michael Cullen ‘Parliament: Supremacy Over Fundamental Norms?’ (2005) 3 *New Zealand Journal of Public and International Law* 1.

147 Goldsworthy, above n 139, 8.

148 See text accompanying below n 180.

149 The Laws of New Zealand vol 7, Constitutional Law, para 1, 1-3.

150 Anita Killeen, Richard Ekins and John Ip, ‘Undermining the Grundnorm?’ [2001] 5 *New Zealand Law Journal* 299, 308.

151 Rebecca Prebble ‘Constitutional Statutes and Implied Repeal: the *Thoburn* Decision and the Consequences for New Zealand’ (2005) 36 *Victoria University Wellington Law Review* 291, 303.

152 [2003] QB 151.

153 *Ibid*, para 62, Laws J.

The Court found that the European Communities Act was a Constitutional Statute and could not be impliedly repealed by the Weights and Measures Act 1985. Prebble has argued that *Pora* was a precursor to *Thoburn*:¹⁵⁴

[I]t is tempting to conclude that the real reason why [Elias CJ and Tipping J] judges rejected implied repeal is that the provision that would have been repealed was one that guaranteed a constitutional right. Elias CJ and Tipping J may have felt that the proposition that constitutional statutes cannot be impliedly repealed was better hedged around than baldly stated.

On this basis, Prebble concluded that it is highly likely that New Zealand courts will soon unequivocally adopt the position that constitutional provisions cannot be impliedly repealed.¹⁵⁵

Finally, judges might eventually declare that Parliament cannot ever override constitutional rules.¹⁵⁶ For example, Elias CJ extra-judicially notes that 'constitutional fundamentals' may give judges a reason to strike down statutes:¹⁵⁷

[T]he possibility that legislation may be struck down by the courts for reasons other than inconsistency only with the Bill of Rights Act is left open. That itself may be of some significance in any case involving constitutional fundamentals and raising questions of the competence of Parliament....

Such a result would cause some reassessment of traditional notions of Parliamentary sovereignty, although the decencies would be preserved if the courts do not purport to disallow legislation directly. Although 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.

Elias CJ suggests that 'constitutional fundamentals' can be found in statute law:¹⁵⁸

Arguably, the Constitution Act 1986 in New Zealand now recognises a separation of function between the legislative, executive and judicial branches which operates as a fetter upon encroachment by Parliament. Although we lack a basic constitutional text, the principles of democratic representation from which our laws gain legitimacy, may be seen as constitutional principles of law.

Assuming Goldsworthy is correct, and New Zealand judges consider (or will consider in the near future) that 'constitutional' statutes are entitled to special protection, what criteria will judges use to decide whether or not the FRA is constitutional?

One possibility is that judges will take a realist approach to the question. According to Palmer, a 'constitutional realist approach' requires that 'a rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, principles, rules, conventions or even culture'¹⁵⁹. This method of isolating 'constitutional' rules from the rest clearly considers more than the subject matter of a statute. It also requires a study of a statute's actual impacts, an analysis that might draw on disciplines such as economics, political science, and sociology to identify and describe how the statute has influenced the de facto exercise of public power. This could involve examining, inter alia, how the expression of the statute's substance came about, how much consensus there was around its enact-

154 Prebble, above n 151.

155 Prebble, above n 151, 316.

156 Goldsworthy, above n 139; see generally Robin Cooke 'Fundamentals' [1988] 41 *New Zealand Law Journal* 158,164; Sian Elias 'Constitutions and Courts' (Speech delivered at the AIJA Oration, Sydney, 16 June 2000).

157 Sian Elias 'Constitutions and Courts' (Speech delivered at the AIJA Oration, Sydney, 16 June 2000) 8-9.

158 *Ibid.*, 11.

159 Palmer, above n 59.

ment,¹⁶⁰ its impact on the ‘everyday lives’ of citizens¹⁶¹ and whether or not it has been complied with.

The possibility of judges adopting a realist approach to identifying constitutional law has been criticized for lacking firm criteria, leading to arbitrary outcomes, and effectively entrusting the matter to judicial discretion.¹⁶² This article does not normatively assess the realist approach; it merely notes that New Zealand judges might use it and outlines some possible consequences of them doing so. Judges in other Commonwealth jurisdictions seem to have already taken a realist approach to identifying constitutional rules.

In *Australian Capital Television*¹⁶³ Brennan J stated that when identifying implied constitutional principles from an entrenched constitution, ‘political conditions’ should be taken into account.¹⁶⁴ By analogy, the social and political history of a statute may therefore influence whether or not it is ‘constitutional’.

Thoburn, as well as being an example of a ‘constitutional’ statute being given special protection, is also an example of a statute being labelled ‘constitutional’ because of its practical impact. In *Thoburn*, Laws LJ said a ‘constitutional statute’ was one that ‘conditioned the legal relationship between citizen and state in some general, overarching manner or enlarged or diminished the scope of what were regarded as fundamental constitutional rights’.¹⁶⁵ When applying his test Laws LJ took into account practical impacts of the European Communities Act stating ‘it may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute’.¹⁶⁶

New Zealand courts may already be heading in the direction of constitutional realism, if (as Prebble argues) *Thoburn* is a natural progression from *Pora*.¹⁶⁷ If New Zealand judges were to adopt explicitly a *Thoburn*-like approach, any practical and historical importance that the FRA has could translate into legal protections. The FRA has been called ‘one of the most important pieces of economic and fiscal legislation in New Zealand since 1840’.¹⁶⁸ On the basis of such observations, the FRA could be considered ‘constitutional’ despite being in a sense ‘unenforceable’.

Commentary on New Zealand’s constitution routinely states that the FRA is a constitutional statute. Harris stated ‘currently operative constitutional statutes enacted by the New Zealand Parliament include the...Fiscal Responsibility Act 1994’.¹⁶⁹ Allan argued that the FRA is one of the statutes that ‘lie at the heart of the constitution understood in a broad sense’.¹⁷⁰ Joseph identified the FRA as being one of the Acts that have effected a transition in New Zealand’s constitution

160 Constitutional Arrangements Committee, ‘Inquiry to review New Zealand’s existing constitutional arrangements: Report of the Constitutional Arrangements Committee I 24A’ (House of Representatives, Wellington, 2005) 26.

161 *Thoburn*, above n 152.

162 Prebble, above n 151, 237.

163 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) CLR 177.

164 *Ibid*, para 16, Brennan J.

165 *Thoburn*, above n 152, [62] Laws LJ.

166 *Ibid*.

167 Prebble, above n 151.

168 Richardson, above n 2, 244.

169 Harris, ‘The Constitutional Future of New Zealand’ [2004] *New Zealand Law Review* 269, 279-280.

170 Allan, ‘Why New Zealand Doesn’t Need a Written Constitution’ (1998) 5 *Agenda* 487, 492.

over the past 20 years.¹⁷¹ *The Laws of New Zealand* used the FRA to support its claim that New Zealand's constitution is changeable.¹⁷²

Some claims that the FRA is constitutional are based (at least in part) on the FRA's practical effects. For example, the Constitutional Arrangements Committee's Inquiry to Review New Zealand's Existing Constitutional Arrangements identified significant constitutional developments by examining the practical significance of events from a historical perspective:¹⁷³

the demarcation between significant constitutional, as opposed to historical events is itself contentious.... Constitutional significance, according to a recently published text on the New Zealand Bill of Rights, 'arises from an amalgam of considerations, including the importance of the enactment to transcending constitutional questions, the consensus of commentators, and public opinion'.

Under this methodology, the FRA made the Committee's list of events that represent significant developments in New Zealand's constitution, under the heading '1986: reform of the public sector to promote efficiency and accountability'.¹⁷⁴ Palmer's realist approach of examining 'structures, processes, culture and conventions that constitute the way that government power is exercised'¹⁷⁵ led him to find that the Fiscal Responsibility Act 1994 is a key constitutional statute.¹⁷⁶

When these commentators say that the FRA is 'constitutional', they do not necessarily suggest that New Zealand is not a Diceyan Parliamentary Sovereignty. They may merely be using the term 'constitutional' in a different way to Patmore and Thwaites: to make an observation about the political impacts and substance of a law rather than to make an observation about whether or not that law creates enforceable rights. Furthermore, Diceyan theory accommodates the idea that laws or customs may in reality constrain Parliament:¹⁷⁷

[I]f a legislature decided that all blue-eyed babies should be murdered, the preservation of all blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law and subjects must be idiotic before they could submit to it.

Therefore, commentators who observe that the FRA is in some socio-political, practical, or realist sense 'constitutional', are not necessarily suggesting that judges should give it *legally* recognised special protection.¹⁷⁸ However judges may decide to take that further step, and formalise the observed *de facto* effects of legislation with *de jure* legal protections. Any widespread view that the FRA is 'constitutional' as a matter of practice may encourage them to do so.¹⁷⁹

Lange v Atkinson arguably shows that some New Zealand judges already consider:

- the FRA has constitutional effects in that it evidences or helped to make basic changes in the constitution;
- whether or not a statute evidences or makes changes to the constitution is determined by the statute's practical effects; and

171 Joseph, above n 52, 4-5.

172 *The Laws of New Zealand* vol 7, Constitutional Law, para 1, 1-3.

173 Constitutional Arrangements Committee, above n 160 30.

174 *Ibid.*, 69-70.

175 Palmer, above n 59.

176 *Ibid.* 17.

177 L Stephen, *Science of Ethics* (1882) 143.

178 For example Allan explicitly rejects this idea; above n 170, 487.

179 Harris, 'Sovereignty and Interim Injunctions' (1992) 15 *New Zealand Universities Law Review* 15 (1992) 55, 64 quoting Cooke, 'Practicalities of a Bill of Rights' (1984) 112 *Council Brief* 4 (F.S. Dethridge Memorial Address).

- statutes that have constitutional effects may have greater influence on judicial decisions than others.

In *Lange v Atkinson*, the Court expanded the defamation defence of qualified privilege in relation to political statements. The Court reached that decision by building a history of New Zealand's constitution, devoting an entire section of its judgment to 'Political Statements in the New Zealand Constitutional Context'. The Court agreed with Stephen that:¹⁸⁰

Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject ... it must necessarily follow that it is wrong to censure him openly.... If on the other hand the ruler is regarded as the agent and servant ... it is obvious that this sentiment must be reversed.

The Court also agreed with Stephen that a constitution can move between these two states, and considered that such a constitutional change had occurred in New Zealand:¹⁸¹

[Stephen's] comment may suggest the relative and contingent character of areas of law like the present. It may better be seen as indicating a movement over the centuries as part and parcel of basic changes in the constitution, including the electoral system, which had led by the late nineteenth century to much greater freedom of political speech....

Stephen's change nevertheless has occurred in substantial measure. We are citizens of New Zealand rather than subjects of the sovereign.

These 'basic changes in the constitution' were evidenced by statutes that had enshrined in law principles such as 'the right of New Zealanders to participate in the process of policy and decision making and to call the government to account' and the corollary principle of the free flow of information (particularly official information).¹⁸² The FRA was a statute that evidenced basic changes in the constitution in this way:¹⁸³

The emphasis on transparency is to be seen as well in legislation regulating the structure of the state sector and the government's spending and fiscal responsibilities, especially the State Sector Act 1988, the Public Finance Act 1989 and the Fiscal Responsibility Act 1994.¹⁸⁴

The 'unenforceability' of the FRA did not prevent the Court from seeing it as evidence of constitutional change. The Court concluded that qualified privilege should be developed in a manner consistent with the principles it had derived from its survey of legislation, and its resulting understanding of New Zealand's constitution.¹⁸⁵

Therefore in *Lange v Atkinson*, the FRA was seen as constitutional in the sense that the Court thought it evidenced constitutional change. The Court may have thought that the FRA was practically important in introducing the principle of transparency into de facto public practice, given the state of the law and of the political relationship between citizens and the government before and after the FRA.

Perhaps any Act with subject matter relevant to defamation would have influenced the Court's decision. However, the Court went to lengths to establish that the relevant statutes considered related to *constitutional* ideas. The importance of a principle being constitutional (reflecting or effecting a 'basic change' in the constitution) could be twofold. Constitutional principles might have

180 *Lange v Atkinson*, above n 74, 461.

181 *Ibid* 462-465.

182 *Ibid* 462-465.

183 *Ibid* 445.

184 *Ibid*, 464.

185 *Ibid*, 464-478.

greater weight than other legal principles when a court is making any legal decision. It could also be that the Court thought that it was developing a constitutionally important area of the common law. When judges develop the constitution at common law, perhaps they will be highly persuaded only by statutory principles that are 'constitutional'.

If this interpretation is correct, it is evidence that the FRA has already been given more legal weight than other statutes because of its constitutional character. Although the Court in *Lange v Atkinson* does not explicitly reject the doctrine that all statutes are equal, it may have been acting on Elias CJ's suggestion of seeking to preserve the 'decencies' by couching its judgment in reassuring terms.

If judges were to examine the social and political impacts of statutes to determine whether or not they are constitutional, then the practical and constitutional effects of the FRA might form a feedback loop. If judges found that the FRA had profound practical impacts on the executive they might consider it constitutional.¹⁸⁶ The label 'constitutional' could act as a signal to voters; just as voters might think that the law enshrines widely accepted and rigorously tested principles, they might think that this is even more likely to be true of 'constitutional' law. Voters might therefore react more adversely to fiscal irresponsibility that breaches 'constitutional' law rather than 'ordinary' law. Knowing this, the executive may be less likely to breach the FRA if the courts were to consider the FRA 'constitutional', so if the courts were to suggest that the FRA is constitutional, this could make its practical effects more profound. This in turn might give the courts more reason to think that the FRA is 'constitutional', and so on.¹⁸⁷

Through this iterative process, a statute like the FRA that was given little academic attention at the time of its enactment could work its way to the centre of New Zealand's constitutional developments.¹⁸⁸ In a legal system where all statutes are not equal and some statutes can limit Parliament's lawmaking power, it is not nonsense to describe the FRA as constitutional or to think that it might be constitutional one day.

IV. THE FRA AND NEW ZEALAND'S CONSTITUTIONAL DEVELOPMENT

The above analysis of the FRA suggests four possible insights into New Zealand's constitutional developments that all deserve further dedicated testing.

A. *Constitutionally Privileging Neo-liberalism?*

The FRA has been considered 'constitutional', based on a historical examination of its social and political impacts. This suggests that other statutes in the Financial Management Reform 'package' – enacted around the same time as the FRA, in order to effect the same economic and political ideology, and in response to the same historical context and motivations – might also be thought of as constitutional.

186 *Thoburn*, above n 152.

187 Judicial views of the constitution may already be influencing the de facto exercise of power. The Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual*, (2001) mirrors the judgment in *Lange* by stating that the 'emphasis on greater transparency in decision making and policy development is also to be seen in the legislation governing the government's spending and fiscal policies (especially the Public Finance Act 1989 and the Fiscal Responsibility Act 1994)'.

188 See generally Palmer's account of constitutional convention as 'iterative and endogenous': Palmer, above n 59, 24.

Even in 1994 it was evident that the FRA and other Financial Management Reform statutes were closely related and historically significant:¹⁸⁹

That is what is so momentous about [the Fiscal Responsibility Bill] today. It is one of the more important moments in modern political economy. This legislation will fit well with the progressive legislation of the members opposite – the Reserve Bank of New Zealand Act and the Public Finance Act.

Lots of legislation passes through this House, but this is one of those key pieces of legislation... In the past few years a number of key pieces of economic legislation have been passed, and I go right back to 1986 and the State-Owned Enterprises Act. I refer... to the Public Finance Act and the Reserve Bank of New Zealand Act, and I add the Employment Contracts Act... This Fiscal Responsibility Bill will add a fifth dimension to those major pieces of economic legislation and, to me, it will complete the jigsaw puzzle and add the last piece that is so critical.

The commentators and judges cited in Part III who have labelled the FRA constitutional have generally said the same thing about other Financial Management Reform statutes, perhaps because the Financial Management Reform statutes have shared practical significance. The Constitutional Arrangements Committee identified the ‘reform of the public sector to promote accountability and efficiency’ as one of New Zealand’s ‘constitutional milestones’,¹⁹⁰ focusing on the historical and political significance of the statutes passed during that reform.¹⁹¹

In 1986 New Zealand initiated reform of the public service in order to promote greater efficiency and greater public accountability. The reforms downsized the core public service. The role of the state was redefined, limiting its involvement to the exercise of constitutional and coercive powers and to where it had a comparative advantage.

Three key statutes led the reforms; the State-Owned Enterprises Act 1986, the State Sector Act 1988, and the Public Finance Act 1989. The reforms continued under the Fiscal Responsibility Act 1994.

The Reforms began with the State-Owned Enterprises Act 1986, which transformed five state-owned corporations into nine new State enterprises.... The State Sector Act 1988 reconfigured the relationship between Ministers and Departments.... The Public Finance Act 1989 transformed the framework for the financial management of the public sector and its reporting to Parliament.... The Fiscal Responsibility Act 1994 imposed a medium and long-term focus on government expenditure and strengthened the reporting requirements of the Crown.

Applying his constitutional realist approach, Palmer found that the State Sector Act 1988, the State Owned Enterprises Act 1986, the Public Finance Act 1989, and the Fiscal Responsibility Act 1994 were all key constitutional statutes. Alongside the FRA, Allan considered the Reserve Bank of New Zealand Act to be one of the most important statutes that lie at the heart of the constitution in a broad sense.¹⁹² The State Services Commission stated that the ‘reform of the state sector, including the enactment of the State Owned Enterprises Act 1986’, and the ‘enactment of the State Sector Act 1988, the Public Finance Act 1989, and the Fiscal Responsibility Act 1994’ were ‘[r]ecent significant changes to the New Zealand Constitution’.¹⁹³ In *Lange v Atkinson*, the

189 (22 June 1994) 541 NZPD 2019 (Tony Ryall).

190 Constitutional Arrangements Committee, above n 160, 69-70.

191 *Ibid.*

192 Allan, above n 170, 492.

193 State Services Commission, *The Constitutional Setting* (1995) 8.

State Sector Act 1988, the Public Finance Act 1989 and the Official Information Act 1982 were all mentioned in the Court's account of constitutional change.¹⁹⁴

It is unsurprising that Financial Management Reform statutes such as the FRA catch the attention of judges and commentators who use a realist approach to identify constitutional statutes. The FMR was a 'breathtaking change in New Zealand and one which would ultimately transform the social, economic and cultural landscape of the nation', and a 'remarkable convulsion' by which the architecture of the public sector was 'reorganised on a scale and at a pace that in earlier times would have been thought impossible'.¹⁹⁵ It instigated 'dramatic changes in the style of public administration as the public sector [was] put through the wringer of efficiency, economy, and effectiveness'.¹⁹⁶ Not before the Financial Management Reform had New Zealand law so explicitly dealt with the structure and functions of government, or reflected one set of norms so clearly and consistently.¹⁹⁷

The Financial Management Reform had 'profound', 'massive', 'revolutionary' and 'dramatic'¹⁹⁸ impacts on the way that law is made, on the way government operates, and therefore on the everyday lives of New Zealanders. Because of this, under a judicial approach that translates historical importance into constitutional protection, the neo-liberal values of the Financial Management Reform statutes might be expected to be 'constitutionalised'. Just as Beresford argues that the neo-liberal economic values of the financial management reform have been assimilated into the administrative law of New Zealand, neo-liberal ideas might form the basis of any new, non-Diceyan constitutional law that will be declared by judges.

Evaluating the merits of judge-led constitutional reform may require evaluating whether or not neo-liberal values form an adequate basis for New Zealand's constitution.¹⁹⁹

B. Democratic Credentials for Judge-Led Constitutional Change?

Part III's analysis of the FRA might also suggest something about the desirability of judge-led constitutional reform. Goldsworthy and Cullen (among others) have argued that any judge-led constitutional reform is undesirable because it is undemocratic.²⁰⁰ It has been said that 'the effect of giving constitutional protection to some core values is to put them out of the reach of ordinary political debate and contest', and that therefore 'substantive values should not receive constitutional protection without broad and enduring social agreement'.²⁰¹ The approach to identifying 'constitutional' law described in Part Three arguably has democratic credentials; judges would be using statutes as the basis of constitutional reform, and statutes reflect the democratic will of the electorate as expressed by Parliament. Financial Management Reform statutes could be taken as evidence of a broad and enduring social agreement, as they consistently reflect one set of values.

194 *Lange v Atkinson*, above n 74, 464.

195 *Boston*, above n 33, 58.

196 *Beresford*, above n 1, 38.

197 See *Commonwealth Secretariat*, above n 25, 1.

198 See for example, *Russell*, above n 19; *Beresford*, above n 1.

199 More specifically, evaluating the desirability of a judicially constitutionalised FRA would require evaluating of the merits of 'fiscal constitutionalism': see Buchanan, 'Constitutional Restrictions on the Power of Government', in Buchanan and Tollison (eds), *The Theory of Public Choice II* (1984); Buchanan and Wagner, 'Democracy in Deficit: the Political Legacy of Lord Keynes' in *The Political Biases of Keynesian Economics*, (1977). Staudt, above n 47.

200 Goldsworthy, above n 139, 35.

201 *Constitutional Arrangements Committee*, above n 160, 7.

However the statutes of the Financial Management Reform may not be able to give a democratic gloss to any judicial 'development of the constitution' or 'revolution'. The neo-liberal reforms of the 1980s may have undermined confidence in democratic processes, and led to voter disillusionment,²⁰² as 'both the Labour government of 1984-90 and the National Governments of 1990-96 were seen by the electorate as implementing policies antithetical to their election manifestos'.²⁰³

For example, there has been concern that the promoters of the FRA rendered ineffective a process designed to ensure that proposed legislation is rigorously scrutinised. Promoters of the Bill were said to have represented a narrow set of ideologies and interests, and to have captured the legislative process.²⁰⁴ Treasury contributed to the development of the FRA, but was thought to have 'adopted an ideological and highly politicized stance in financial and economic matters',²⁰⁵ and to be incapable of giving independent advice.²⁰⁶ Ruth Richardson introduced the Bill, and soon after that was made chair of the select committee that examined it. The Labour Opposition contended that the Bill was 'hijacked in the select committee'²⁰⁷ by groups such as the Business Roundtable. The enacted principles of fiscal responsibility were introduced by Supplementary Order Paper, and replaced the broader legislative guidelines that had been originally introduced to Parliament.

C. *Inherently Unstable Constitutional Arrangements?*

Goldsworthy maintains that recent constitutional developments are not just a reform but a revolutionary break with the Dicey's doctrine of parliamentary sovereignty that was once an accurate description of New Zealand's constitution. Any such revolution may have been instigated in part by the Financial Management Reform; '[i]t is no secret that recent constitutional reform in New Zealand coincided with a period of political controversy inspired by the neo-liberal revolution',²⁰⁸ and possibly the link is causal.

Any judicial reform of the constitution that privileges certain values might involve 'a value judgment by the Courts, based on their view of the will of the people',²⁰⁹ and other factors that Rishworth sees as constituting a 'judicial assessment of the political reality'.²¹⁰ Judges have generally not tried to observe these things directly. Instead they might use statute law as a signal of the will of the people and political reality.²¹¹ Perhaps the explosion of statute law this century, particularly during the Financial Management Reform when statutes began to explicitly and in detail define the role of the State, has made tools with which to assess the 'will of the people' more accessible to any judges inclined to use them.

202 Kelsey, above n 5, 397-322.

203 Palmer, above n 59, 10.

204 (7 June 1994) 540 NZPD 1481-1483 (Paul Swain).

205 (16 September 1993) 538 NZPD 18065 (Jim Anderton).

206 Ibid.

207 (7 June 1994) 540 NZPD 1482 (Paul Swain).

208 Beresford, above n 1, 38.

209 Harris quoting Cooke, above n 179.

210 Rishworth 'Lord Cooke and the Bill of Rights' in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997) 298, 300.

211 *Lange v Atkinson*, above n 74.

If Financial Management Reform statutes such as the FRA are found to have prompted or sustained a constitutional revolution in New Zealand, this will reveal something about Diceyan parliamentary sovereignty. It could be said that Diceyan parliamentary sovereignty provides a relatively value-neutral framework in which ideas can contest for the privilege of becoming law. However if all that is required to motivate a revolutionary move away from a Diceyan parliamentary sovereignty is to enact a package of statutes that consistently reflect one set of values (in this case neo-liberalism) then Diceyan parliamentary sovereignty may be an inherently unstable constitutional arrangement. There may therefore be more at stake in a contest to enact law within a Diceyan parliamentary sovereignty than the mere ability to enact law. If Diceyan parliamentary sovereignty is so easily toppled, the contest to enact law may in reality be a contest to influence the shape of a new constitution.

New Zealanders may soon be asked to explicitly choose a constitutional structure, so this possible characteristic of Diceyan parliamentary sovereignty should be further examined in order to give a clearer picture of the Diceyan option.

D. Hastening judicial constitutional change?

This article's analysis on the enforceability of the FRA assumed that the enactment of the FRA left traditional notions of justiciability, standing, and Parliamentary intent intact. There is another possibility: that the enactment of legislation like the FRA might encourage judges to undertake a 'constitutional revolution' of the type that Goldsworthy has described. Indeed, as this article has noted, judges in *Lange v Atkinson* case saw the FRA as evidencing at least one type of 'constitutional change'.

Under a 'constitutional revolution', traditional notions of justiciability, standing, and the primacy of Parliament's intent may no longer hold, and the conclusion that the FRA is unenforceable may have to be revisited under the revised approaches to such questions.

The possibility that 'responsibility legislation' might accelerate constitutional change is likely to alarm some promoters of responsibility legislation. The proposed Regulatory Responsibility Act is seen by some of its proponents as a way to fetter the lawmaking of government, while stopping short of giving the courts the power to review legislation.²¹² Indeed, the initial drafter of the proposed Regulatory Responsibility Act considered written constitutions as vulnerable to subversion by a 'despotic populist government' or 'activist court of appeal'.²¹³

However, the very enactment of a regulatory responsibility statute requiring Parliament to follow principles such as 'laws and regulations should ... preserve or enhance the rule of law' might be interpreted by judges as evidence of a fundamental constitutional change, a change that invites judges to adjudicate on such duties. In the dynamic environment of possible 'constitutional revolution', proponents of responsibility legislation should not ignore the impact that such Acts might have on the development of judicial thinking in this area.

212 Wilkinson, above n 8.

213 Wilkinson, above n 8, 180.

V. CONCLUSION

Proposals for ‘responsibility’ Acts – social, regulatory or otherwise – have proliferated. The authors of these proposals may hope that such Acts will signal to voters that certain values have merit, and influence the shape of New Zealand’s constitution. This article concludes that any such hopes may not be in vain. Given recent constitutional developments, the FRA does not ‘signify absolutely totally nothing’, and it is not nonsense to think that the FRA can have legal and constitutional effects. Of course, if these constitutional developments are undesirable or unjustifiable, then normatively speaking the FRA may nevertheless be ‘constitutional stupidity’.

SUSTAINABLE SHAREHOLDER VALUE: A PERIOD OF ENLIGHTENMENT FOR NEW ZEALAND?

RICHARD ANNANDALE*

No one would dispute that life in most business organizations was much simpler in years gone by. In reality, it was a less complex period with minimal and clearly understood expectations among the various parties (investors who put up the money to start or finance the business, owners and their employees who needed to get and keep the business running, suppliers to make the raw materials available for production, and customers who purchased the product or services). *Organizations face a much more complex state of affairs in today's society.* The recognition by the public... that today's business organization has evolved to the point where it is no longer the sole property or interest of the founder... or even a group of owner-investors has been the principal driving force behind this societal transformation.¹ (Emphasis added.)

I. INTRODUCTION

When asked about the purposes of a company, traditionally many directors would have provided two responses: it exists to *make pecuniary gain*; and it exists to *serve the interests of its shareholders*.² However, in recent years, a company's *proper* objective has been a moot-point between academics and members of the business and legal communities. This is because the corporate governance approach adopted to achieve a company's objective is *entirely subjective and ethical*. The concept of corporate governance is best seen in terms of a core and series of penumbras; at its core are directors' duties, meetings and shareholders remedies, and on its outskirts are a series of penumbras of hard/soft law, codes of practice and business ethics.³ Corporate governance is best divided into two approaches that both 'hinge on the purpose of the corporation and its associated structure of governance arrangements'.⁴ The narrow shareholding perspective is one of these approaches, and views the company as a legal instrument. In contrast, the other wider approach sees the company 'as a locus in relation to wider external and stakeholders' interests, merely than just

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1 Ronald Sims, *Ethics and Corporate Social Responsibility: Why Giants Fall* (2003) 71.

2 A company may exist to serve the interests of its shareholders, but it is well known that a company has a separate legal existence from its shareholders: *Salomon v Salomon* [1897] AC 22. This principle has been incorporated into modern New Zealand law by s 15 of the *Companies Act 1993*.

3 John Farrar, 'In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance' (2001) 13 *Australian Journal of Corporate Law* 1.

4 Steve Letza, Xiuping Sun, and James Kirkbride, 'Shareholding versus Stakeholding: A Critical Review of Corporate Governance' in *Corporate Governance: An International Review* (2004) 12 (3) 242, 243. The central place of non-shareholder stakeholders has been explicitly recognised by the OECD in the Preamble: see *OECD Principles of Corporate Governance*, 'Preamble' <<http://www.oecd.org/dataoecd/47/50/4347646.pdf>>11.

shareholders' wealth'.⁵ Traditionally companies have been governed so as to achieve fair value for its shareholders at any cost. Yet in recent years there has been a marked shift in the particular governance approach taken. It is now one that is socially responsible to non-shareholder stakeholders, aptly named Corporate Social Responsibility (CSR).

The definitions of corporate governance and CSR are often confused; corporate governance refers to broader issues of company management practices, whereas CSR refers to only 'one aspect of an organization's governance and risk management processes'.⁶ Part of the confusion stems from the fact that CSR is conceptually fluid; it does not have a precise or fixed meaning. Generically, CSR can be described in terms of a company considering, managing and balancing the economic, social and environmental impacts of its activities.⁷ It can also be viewed as a continuing commitment by companies 'to behave ethically and contribute to economic development while improving the quality of life' for non-shareholder stakeholders.⁸ As can be seen, CSR is a part of the wider corporate governance approach of stakeholder theory.

This paper investigates whether New Zealand needs to legislate to require a company to adopt CSR practices by considering its non-shareholder stakeholders' interests. Section 172 of the United Kingdom's Companies Act 2006 (CA 2006 (UK)), which directs company directors to consider its non-shareholder stakeholders, will be analysed as a potential model from which New Zealand can proceed. Its defects will also be accentuated with possible solutions offered as to how New Zealand would address these. Section II of this paper explores the first two of the corporate governance camps; shareholder value theory (SVT). Stakeholder theory and its various constituents are examined in section III. It will also examine the ability of stakeholder theory to achieve sustainable shareholder value. Section IV covers the genesis of the CA 2006 (UK) and the possible interpretations and defects of its s 172. The last section of this paper will examine whether New Zealand should adopt a provision similar to that of the United Kingdom and whether *locus standi* to pursue directors should be given to all the company's stakeholders.

This paper will argue that sustainable shareholder value is best achieved when a company recognises the contribution made by all of its stakeholders and not just its shareholders. It is necessary that the subjective and ethical dimensions are removed from CSR in order to ensure that sustainable shareholder value is achieved. It is only then that the number of large corporate collapses will be reduced. Directors need to be legislatively required to adopt the CSR centered approach of stakeholder theory. It is argued that this will not be a radical change for New Zealand directors, as many already informally follow a stakeholder approach. The change will simply formalise the approach taken by directors. New Zealand needs to adopt a provision similar to s 172 of the CA 2006 (UK) so that shareholder value *and* stakeholder interests are *both* sustained.

5 Ibid.

6 Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth of Australia *Corporate Responsibility: Managing Risk and Creating Value* [2006] <http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/report/> 2.19-2.20.

7 Ibid, xiii.

8 World Business Council for Sustainable Development, *Corporate Social Responsibility* <http://en.wikipedia.org/wiki/Corporate_social_responsibility>.

II. SHAREHOLDER VALUE THEORY

By definition, SVT is an approach that views the primary responsibility of management to be ‘to maximize shareholders return via dividends and increases in the market price of the company’s shares abroad’.⁹ SVT requires a company to be run in a way that maximizes the interests of shareholders ahead of its other stakeholders. The theory was academically popularized in the 1930s by Berle, who argued that directors should not be responsible to any one other than the shareholders of the company.¹⁰ Berle’s view was sourced in the idea that a shareholder’s investment is his own personal property. The practical use of this view in the business world was limited until the late 1970s, but has since occupied a preeminent position, particularly in the United States.¹¹ This section therefore considers how the nature of business changed from the 1930s to the late 1970s so that shareholder value became the preeminent approach followed. The advantages and criticisms of the SVT will also be examined with two case studies used to illustrate the failings of the approach.

A. *The Changing Nature of Business – Background*

SVT’s preeminence as the preferred corporate governance approach resulted from the aggressive tactics of investment bankers, aptly named raiders, seeking to take over vulnerable companies with low share market value. The aim of these raiders was to purchase, restructure and resell vulnerable companies for a healthy profit. This aim had two tenets:¹² poorly managed companies were identified so that a simple change in strategic management would increase share value; and undervalued assets would be identified so that their hidden value could be realised. Directors were therefore pressured to remain ahead of the game because any fall in their company’s share value would directly threaten their own existence.¹³ Hence, SVT was employed to alleviate this threat.

Corporate incentives were also used to entice directors to make and implement decisions that led to share value maximisation. This was an attempt to align managerial interests with shareholders so that both benefited from an increase in share value.¹⁴ Directors were quick to realise that they could make large personal gains if they focused on increasing share value. As a result, directors utilized the methods of the raiders to raise share value and prevent takeover. These methods included¹⁵: the removal of under-performing areas; outsourcing activity; and dismissing long-term employees. For the most part, directors were making decisions in light of whether the outcome could increase share value.

9 A Rappaport, *Creating Shareholder Value: The New Standard for Business Performance* (1986) 1.

10 A Berle, ‘Corporate Powers as Powers in Trust’ (1931) 44 *Harvard Law Review* 1049. Berle’s view was criticised by Merrick Dodd, who viewed companies as economic institutions that have a social service role to play in the broader community as well as making profits for their shareholders: see Merrick Dodd, ‘For Whom are Corporate Managers Trustees’ (1932) 45 *Harvard Law Review* 1145, 1162.

11 However, the preeminence of SVT in the US was attenuated by the corporate constituency statutes that permit directors to consider the various interests of non-shareholder constituencies in the actions they take: Corporations and Markets Advisory Committee *The Social Responsibility of Corporations* [2006] <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf)>18-23.

12 Rappaport, above n 9.

13 A Kennedy, *The End of Shareholder Value: The Real Effects of the Shareholder Value Phenomenon and the Crisis it is Bringing to Business* (2000) xi.

14 This is based on the market economy theory: individuals inherently want to promote their own interests.

15 Kennedy, above n 13 at x.

B. *Arguments in favour of Shareholder Value Theory*

Proponents of SVT view the company as a series of contracts; shareholders, by investing capital, are in a contractual relationship with the company. Directors, who manage this relationship, should therefore act for the benefit of shareholders as they are the owners of the company.¹⁶ Shareholders expect a reasonable return on the capital they contribute as they bear the greatest risk in the company's future. This means that the company should be operated to maximise returns for shareholders. A second argument is sourced in the company's operation for pecuniary gain. It states that profit maximisation is best achieved by satisfying consumer demand,¹⁷ which also enables directors to fulfill their fiduciary duty by ensuring shareholders gain optimal entitlements. Profit maximisation is also used to argue that most shareholders are in favour of directors implementing only SVT because it fosters economic efficiency. If directors only have to consider one group of interests, it will take much less time to make a decision. Agency theory can also be utilised to justify taking a SVT approach. Directors, being employed to run the company on behalf of the shareholders, should do so in a way that best suits shareholders' interests. Lastly, SVT is supported by the following evidence;¹⁸ private property rights and the logic that shareholders are the owners of the company, the purpose of management being to maximise value for the capital providers, shareholder-oriented economies outperforming other economies and that a company has a higher chance of being successful if its key people have targeted outcomes to achieve.

C. *Criticisms of Shareholder Value Theory*

SVT has long been criticised by commentators. The focus of this criticism is largely centered on SVT's two main principles: (1) profit; and (2) risk.¹⁹ Firstly, profit maximisation should not be centered exclusively at shareholders as it does not convey any distribution criterion between different stakeholders.²⁰ It is wrong to assume that just because a company's objective is to make profit that the company should be managed for the shareholders. Secondly, whilst it is acknowledged that shareholders do take some risk in providing capital to a company, they are not the only ones that make company specific investments that create vulnerability.²¹ In fact, shareholders may be in a better position, as their liability is limited to any capital contributions made, and the tradeable nature of shares permits diversification.²² Further, SVT's short-term focus 'mortgages the future of the business and in many cases has seriously damaged business.'²³ This contributes to a company's failure to maximise social wealth. Lastly, SVT's treatment of shareholders as the owners of a company is flawed. It needs to be emphasised that whilst the shareholders own shares in a company, they do not own the company due to its separate legal personality.

16 R Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' in A Borrowdale, D Rowe, and L Taylor, L (eds), *Company Law Writings: A New Zealand Collection* (2002) 113-15.

17 Michael De Bow, and Dwight Lee 'Shareholders, Non-Shareholders and Corporate Law: Communitarianism and Resource Allocation' (1993) 18 *Delaware Journal of Corporate Law* 393, 397-98.

18 J Healy, *Corporate Governance and Wealth Creation in New Zealand* (2003) 54 and 58.

19 (1) That a company exists to make profit and (2) As capital providers, shareholders bear the greatest risk.

20 M Aglietta, and A Reberioux, *Corporate Governance Adrift: A Critique of Shareholder Value* (2005) 34.

21 For example, an employee may embark on specific training that can only be used for that company.

22 Aglietta, above n 20, 35.

23 Healy, above n 18, 53.

D. Corporate Illustrations

It is often stated by advocates of SVT that there is ‘overwhelming evidence to support the view that shareholder value should be the explicit goal of all corporations’.²⁴ This subsection illustrates, by reference to two noted corporate case studies, the failings of attaching undue focus solely to shareholder interests.

1. Enron

The collapse of Enron illustrates that a company can be widely respected as a CSR practitioner and be deficient in allowing breach of fiduciary duties by its directors.²⁵ Enron, with its corporate culture, employee investment schemes and shareholder profits, was perceived by many to be the ideal corporation that was adopting all of ‘the management norms in vogue at the time’.²⁶ Originally a small natural gas company, Enron grew to become involved in the United States’ electricity distribution and the construction of power-plants and pipelines internationally.²⁷ Enron’s peak share price was \$90 with the company assets amounting to over \$63 billion.²⁸ However, Enron was making losses that were covered by the manipulation of its records by auditing company Arthur Anderson. Some of Enron’s top executives knew that the company was making a loss and profited substantially by selling their shares before its share price plummeted.²⁹ Enron was placed under bankruptcy protection, but the loss had already been suffered with its share price falling to 26 cents and 27,000 employees losing their jobs and pension plans.³⁰

Enron executives’ manipulation of corporate financial governance rules ‘in continued pursuit of the rapid growth [policy] for which the company had become noted’ was the major cause of its collapse.³¹ Clearly the rapid growth policy was based on SVT and shows that any form of sustainable trading was of little importance. The focus on share value, by relying upon accounting-based performance measures, led Enron’s executives to make distorted decisions. Enron’s collapse illustrates the major weakness in taking exclusively a shareholder focus; it is only beneficial as a short-term approach. As a response to the failures of Enron’s corporate governance, the United States enacted the Sarbanes Oxley Act 2002. In tandem with the corporate governance rules of the New York Stock Exchange, the Act aims to protect investors by ‘increasing the accuracy and reliability of corporate disclosure and reporting’.³² Critics view the Act as being ineffective and having the potential to mislead the market that regulation can solve its problems.³³

24 J Bughin, and T Copeland, ‘The Virtuous Cycle of Shareholder Value Creation’ (1997) 2 *McKinsey Quarterly Review* 3.

25 D Vogel, *The Market for Virtue: The Potentials and Limits of Corporate Social Responsibility* (2005) 38.

26 Aglietta, above n 20, 224.

27 D Branson, ‘Enron – When all Systems Fail: Creative Destruction or Roadmap to Corporate Governance Reform?’ (2003) 48 *Villanova Law Review* 989, 997-99.

28 Aglietta, above n 20, 224.

29 In the year of Enron’s bankruptcy, its CEO made \$9.6 million and the CFO made \$3 million from stock options: see Aglietta, above n 20, 241.

30 Aglietta, above n 20, 224.

31 D Campbell and S Griffin, ‘Enron and the End of Corporate Governance?’ in Sorcha MacLeod (ed), *Global Governance and the Quest for Justice Vol 2* (2006) 48.

32 *Ibid.*, 51.

33 L Rebstein, ‘Market vs Regulatory Response to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002’ (2002) *Journal of Corporation Law* 1, 61. Rebstein further argues that markets are capable of responding more precisely than regulation to corporate fraud.

2. *James Hardie Limited*

The James Hardie Group put SVT in greater contention with its decision to restructure its affairs to a Netherlands-based company that had the coincidental effect of safeguarding it from a number of Australian asbestosis claims.³⁴ Prima facie, the Group exhibited CSR by establishing the Medical Research and Compensation Foundation with funds to meet all legitimate compensation claims.³⁵ However, the Foundation in 2003 noted the funds of the trust were inadequate to meet claims beyond 2007. The Group had made misleading statements and under-funded the Foundation by \$2 billion. Despite the Group being out of Australian jurisdiction, negotiations occurred to fix the compensation that should be paid to the Foundation. Farrar suggests that the Group, by being enriched from dealing in the asbestos, 'had the capacity and moral obligation to provide funding to compensation current and future asbestos victims'.³⁶ The final compensation amount was approved by 99.6 per cent of the shareholder vote cast.

The Group's conduct illustrates a governance approach grounded in SVT. The statements of David Jackson QC confirm this, where he states that the Group moved jurisdictions for 'international growth and to improve the after tax returns to shareholders'.³⁷ Whilst the Group did exhibit CSR in favour of asbestos victims, its jurisdictional move shows that the directors placed the shareholders' interests first. The directors wanted to reap the benefits of the corporate group structure to increase shareholder value.³⁸ A point of interest is that, whilst the Group's directors adopted an approach based in SVT, its shareholders overwhelming favoured compensation instead of solely pecuniary gain.³⁹

III. STAKEHOLDER THEORY

Deakin is of the view that there is a shift in the idea of SVT so that shareholders exercise their powers not as representatives of the market but as agents of society.⁴⁰ This view clearly embraces the approach of stakeholder theory that focuses upon the relationships that a company has with all of its stakeholders and not just its shareholders.⁴¹ These reciprocal relationships mean that when a decision is made directors should consider its impact upon stakeholders. Stakeholder theory is not entirely distinct from SVT, as both promote the making of pecuniary gain.⁴² SVT has a agency focus, whereas stakeholder theory sees the company as a community in which the directors 'act

34 Law and Bills Digest Section Information and Research Services, 'In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation' (2004) 12 *Research Note* 1.

35 E Dunn, 'James Hardie: No Soul to be Damned and No Body to be Kicked' (2005) 27 *Sydney Law Review* 339.

36 John Farrar, *Corporate Governance: Theories, Principles and Practices* (3rd ed, 2008).

37 D Jackson, Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (2004) 33.

38 Dunn, above n 35, 346-48.

39 Whether this was just as a result of the media attention will remain a moot-point.

40 S Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance: An International Review* 11, 16.

41 J Androif et al, 'Unfolding Stakeholder Thinking: Theory, Responsibility and Engagement' (2002) 19.

42 It is upon the SVT's and stakeholder theory's focus that the distinction between the two is seen.

as trustees [whose] role is to balance the interests of the various stakeholders... to the benefit of all'.⁴³ This section therefore explores the basis of the stakeholder theory.

A. *Stakeholder Classification – An Examination of the Concept*

The notion of stakeholders accentuates the fact that a company's actions can affect more groups than just its shareholders.⁴⁴ The term stakeholder is fluid and it is difficult to formulate a static definition as there is limited consensus on the groups or individuals that should be included. However, a working definition for this paper is essential. Most rudimentarily, the term embraces a wide range of interests covering any individuals or groups that are impacted by the activities of a company.⁴⁵ A more specific definition is:

The stakeholders in a corporation are the individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and that are therefore its potential beneficiaries and/or risk bearers.⁴⁶

Further, the Australian Corporations and Markets Advisory Committee (CAMAC) cites an inclusive definition of a stakeholder as being:

Those groups or individuals that: (a) can reasonably be expected to be affected by the organisation's activities, products and/or services; or (b) whose actions can reasonably be expected to affect the ability of the organisation to successfully implement its strategies and achieve its objectives.⁴⁷

The above definitions allude to the fact that a stakeholder should at least have some interest in the company's performance. Not every stakeholder's interest is of equal value, as this will be determined by how closely connected they are with the company. The CAMAC suggests that the following groups are stakeholders;⁴⁸ shareholders, financiers, creditors and suppliers, employees and consumers, communities and pressure groups and NGO's. The main groupings are considered by the following subsections.

1. *Shareholders*

A shareholder, pursuant to s 96(a) of the Companies Act 1993 (CA 1993 (NZ)), is a person whose name is on the share register for the time being as holding one or more shares in the company. A share is the 'legal interest of shareholders in the company [being a] definite portion of share capital'.⁴⁹ A share is a form of personal property, as it is an asset of the person whose name is on the register.⁵⁰ Connected to the view of a share as an asset, is the idea that shareholders are

43 Healey, above n 18, 61. The stakeholder approach is implemented as follows; identification of particular stakeholders in the company, the establishment of certain procedures to take those stakeholders into account and the achievement of an outcome that satisfies all stakeholders.

44 CAMAC, above n 11, 54.

45 C Mallin, *Corporate Governance* (2004) 43.

46 J Post, L Preston, and S Sachs, *Redefining the Corporation: Stakeholder Management and Organisational Wealth* (2002) 19.

47 CAMAC, above n 11, 55.

48 *Ibid* 55-56.

49 Susan Watson, 'Shareholders' in Susan Watson, et al *The Law of Business Organisations* (4th ed, 2003) 253.

50 G Walker et al, *Commercial Applications of Company Law in New Zealand* (2002) 20.

the ultimate owners of the company.⁵¹ Shares, as assets, give shareholders certain entitlements;⁵² dividends and a proportionate entitlement to surplus assets on solvent liquidation and the right to participate in company meetings. Shareholders can be differentiated from other stakeholders on the basis that they personally provide the company with capital and they have rights protected by statute.⁵³ Not every shareholder is solely concerned with the maximisation of profit. Many shareholders are attracted to socially conscious investing that involves assessing a company's social, environment and ethical conscience before investing.⁵⁴ This shows that shareholders themselves recognise that they are not the only stakeholder in the company.

2. *Employees*

The legal regulation of the employment relationship protects employees' interests in a variety of ways; equal opportunities, health and safety and protection from restructuring. New Zealand employees' interests in a company are protected by the Companies Act 1993, Employment Relations Act 2000 and the Health and Safety in Employment Act 1992. Comparatively, United Kingdom employees were protected by s 309 of the Companies Act 1985 that required company directors to balance the interests of the employees with shareholders.⁵⁵ These legislative protections are not the only source of directors' obligations to employees,⁵⁶ as employees are reliant upon being considered because their livelihood is affected by the making of any adverse decision. An employee also voluntarily contributes to a company's wealth-creating capacity by providing labour and will benefit from its success through job security and pay increases. Not every employee has an equal stake in the company: it is dependent on the position that they hold within the company. However, directors do need to remember that every employee does play some part in its day-to-day operation.⁵⁷ A director's failure to recognise this could cause unnecessary cost to the company, as the typical modern employee is more mobile, less loyal and is not prepared to put up with being ill-treated.⁵⁸ This is in contrast with Japan, where employment in a Japanese company is largely considered to be a lifetime commitment. Japanese employees are therefore akin to an asset for the company and occupy an important position within the company. While employees are not the owners of their company, 'Japanese companies are run for the benefit of employees'.⁵⁹

51 Ibid. However, Grantham suggests that there has been a steady weakening of this position to the extent that the 'ownership model was no longer appropriate': See Grantham, above n 16, 135.

52 Watson, above n 49; Walker, above n 50.

53 In New Zealand, shareholders are protected by the *Companies Act* 1993, the *Securities Act* 1978 and the *Securities Market Act* 1988.

54 C Harrington, 'Socially Responsible Investing: Balancing Financial Needs with a Concern for Others' (2003) 195 *Journal of Accountancy* 1, 52.

55 It has been said that s 309 provided no enforceable benefit to employees as there was no specific remedy available for its breach. This provision is now superseded by s 172 of the Companies Act 2006: Charles Wynn Evans, 'The Companies Act 2006 and the Interests of Employees' (2007) 36 *Industrial Law Journal* 1, 190.

56 Ibid 188.

57 J Du Plessis, J McConville, and M Bagaric, *Principles of Contemporary Corporate Governance* (2005) 21.

58 Mallin, above n 45, 80.

59 H Kanda, 'Comparative Corporate Governance Country Report: Japan' in Klaus Hopt et al, (eds) *Comparative Corporate Governance* (1998) 938. This does not mean that shareholders interests are totally subordinated or disregarded.

3. *Creditors/Suppliers*⁶⁰

Creditors and suppliers, whose primary focus is on making profit, form a vital part of the relationship networks of a company, as they willingly and voluntarily provide credit or supply goods. In exchange, these stakeholders benefit from the success of the company through demand for their products or services. The fact that these stakeholders are voluntary does not mean that directors should not consider their interests. A decision to wind up the company or terminate a creditor's contract may have a detrimental impact, as the supply of goods or services may amount to a significant part of their commercial activity. However, a New Zealand director's consideration of these stakeholders does need to be reconciled with the requirements of ss 135 and 136 of the CA 1993 (NZ).⁶¹

4. *The Community*⁶²

A company has a large impact on the community in which it operates. As a company will usually employ large numbers of the community, its financial failure means that people will have to move away from the area to gain jobs.⁶³ When in financial trouble, a company can be wound up due to financial necessity or it can be restructured. The former necessitates a decision without extensive consultation with the community, but the latter permits a director to consider the community's interests. The community's right to be considered comes from the assistance given to the company in its commercial success.⁶⁴

5. *The Environment*⁶⁵

The environment, as an involuntary stakeholder, is a major contributor to the economic performance of a company by supplying 'corporations with raw materials and [by]... assimilating the wastes that are inevitably produced in economic activity'.⁶⁶ As such directors need to consciously consider the environment because it does not have a voice or cannot generally be given a direct financial stake in the company.⁶⁷ Hence, environmental pressure groups and government regulations that regulate environmental damage are of the utmost importance. The environment as a stakeholder has been emphasised in the Australian Company Codes of Conduct and Ethics that have become a part of its corporate governance arrangements.⁶⁸

60 When describing the place of creditors as stakeholders in a company Mallin identifies two categories; those that supply credit and a company's suppliers: See Mallin, above n 45, 23.

61 Although s 169(3) of the Companies Act 1993 (NZ) states that these duties are owed to the company, they were clearly intended as a protection for creditors' interests.

62 The reference to the community grouping does not refer to the whole of society, rather just the local community surrounding the company.

63 Mallin, above n 45, 25.

64 Examples of directors' decisions to close down companies include Bendon in Te Aroha and Toyota in Thames. The Toyota case is an example of a company being socially responsible of its own volition.

65 The term environment does not only include the natural surroundings but the various domestic and international environmental lobby groups: Mallin, above n 45, 46.

66 M Jacobs, 'The Environment as Stakeholder' (1997) 8 *Business Strategy Review* 25.

67 *Ibid.*, 27.

68 Du Plessis, above n 57, 26.

B. Stakeholder Theory and Sustainable Shareholder Value

Stakeholder theory improves a company's efficiency, profitability, competition, and sustainability. When directors consider every stakeholder, the company will not only be sustainable in general, but it will also achieve sustainable shareholder value (SSV). Whilst corporate sustainability and SSV are distinct,⁶⁹ they are linked by stakeholder theory. Corporate governance is now firmly geared towards stakeholder theory and SSV. This is evidenced by the OECD Principles of Corporate Governance, which state that a company's corporate governance framework should encourage active coordination between corporations and stakeholders in creating wealth, jobs, and sustainability of financially sound enterprises.⁷⁰ These recognise that stakeholder interests enable sustainability to become an essential part of business conduct. Whilst SVT can be justified from an economic perspective, as profits are what inherently drive a company, a company's legitimacy really depends on its ability to meet the expectations of a diverse range of stakeholders.⁷¹ A company should now be regarded as 'an organisation engaged in mobilizing resources... to create wealth and other benefits for its multiple... stakeholders'.⁷² Prima facie, the United Kingdom has gone some way to recognising the prominence of stakeholder theory by enacting s 172 of the CA 2006 (UK) which states the director's duty to promote the success of the company.

IV. THE COMPANIES ACT 2006 (UK)

The CA 2006 (UK), which contains about 1,300 sections, is a comprehensive treatment of United Kingdom company law. The CA 2006 (UK) includes in its statement of directors' duties, what purports to be the objective of a modern company. This objective is found in s 172(1), which gives directors a degree of direction as to the interests they should consider in their business decisions. Section 172 promotes the pursuit of sustainable shareholder value by 'encouraging wider consideration by directors of the context and consequences of their decision making power'.⁷³ This section therefore canvasses the genesis, the policy and the principles of the CA 2006 (UK) in order to understand how the United Kingdom reformed its company law legislation. The possible enforcement, interpretations, and defects of s 172 will also be considered for the purposes of assessing the provisions effectiveness.

A. Background to the Companies Act 2006 (UK)

The enactment of the CA 2006 (UK) was drawn-out with the Company Law Review being established in March 1998.⁷⁴ The review was conducted by a committee, known as the Company Law Review Steering Group (CLRSG), being made up of eminent company lawyers and business people. The CLRSG submitted its final report in July 2001 that sought to identify the principles that

69 Corporate sustainability focuses on contributing to the economic, environmental, and social development of the communities in which a company operates; whereas SSV focuses more on the long-term benefit of maintaining shareholders investments.

70 K Hopt, 'Preface' in OECD, above n 4. Further, the OECD provides the principles that are to be implemented for this to be achieved: OECD, above n 4, 46-48.

71 Post, above n 46, 9.

72 J Garten, *The Mind of the CEO* (2002).

73 Wynn-Evans, above n 55, 193.

74 A Steinfeld et al, *Blackstone's Guide to the Companies Act 2006* (2007) 1.

company legislation should embody.⁷⁵ The CLRSG stated that⁷⁶ directors' duties should be clear and accessible; company legislation had to be enabling rather than prescriptive, operate efficiently and recognise the modern asset mix of companies and enhance international competitiveness. Further, the CLRSG stated that company law needs to be based on the 'enlightened shareholder approach',⁷⁷ as it achieves better wealth generation and competitiveness.⁷⁸ This view, which is the basis for s 172, represents a hybrid between SVT and stakeholder theory.⁷⁹ Hence, the CLRSG made three recommendations:⁸⁰ (1) more focus on the private company; (2) *that corporate governance be improved*; and (3) the need for institutional structures.

In response to the recommendations, the government drafted two White Papers in 2002 and 2005 that included 'much of the Bill that was eventually brought forward'.⁸¹ The 2005 paper contained two proposals based on the CLRSG's report:⁸² the inclusion of other constituencies in the directors' duties and the introduction of corporate constituency reporting. The Company Law Reform Bill was introduced in November 2005 and after protracted debate received the Royal Assent on 8 November 2006. It will come into force in stages: the first was on 1 January 2007. The following objectives underpin the CA 2006 (UK); the enhancement of a long-term investment culture, the need for ensuring better regulation and a Think Small First approach, making it easier to set up and run a company, to provide flexibility for the future and to promote the themes of accessibility, transparency, and deregulation.⁸³

2. *Section 172 of the Companies Act 2006 (UK)*

The enactment of s 172 followed the CSR debate that had been raging in the United Kingdom.⁸⁴ Section 172(1) requires directors to have regard to several matters when considering the promotion of the company's success 'for the benefit of its members as a whole'.⁸⁵ It is noted that a director only has to have regard to the non-exhaustive list of relevant factors, which means that they must give the matters appropriate weight but need not act with the aim of furthering them. In other words, a director's decision need not be dictated by the matters in s 172(1)(a)-(f) if that 'is not, in his [or her] good faith opinion, appropriate for the purpose of promoting the success of the company as a whole'.⁸⁶ A factor of particular interest is in s 172(1)(a): the long-term consequences of any decision. The CA 2006 (UK) does not define what is meant by long term and does not give

75 For present purposes only the guiding principles in relation to directors' duties are relevant.

76 Justice Mary Arden, 'Companies Act 2006 (UK): A New Approach to Directors' Duties' (2007) 81 *Australian Law Journal* 162, 64.

77 This approach is similar to the concept of sustainable shareholder value mentioned above.

78 Arden, above n 76, 165.

79 This view proceeds on the basis that a company's success occurs by maximising relationships with stakeholders and acknowledging the dominance of shareholder interests.

80 Arden, above n 76, 165. The third recommendation was not accepted by the government.

81 Above n 74, 1.

82 A Dignam, 'Lamenting Reform? The Changing Nature of Common Law Corporate Governance Regulation' (2007) 25 *Company & Securities Law Journal* 293, 292.

83 Above n 74, 3-4.

84 With cases of corporate fraud and New Labour's adoption of stakeholder arguments: Farrar, above n 36.

85 Subsection 172(2) of the CA06 deals with the situation where a company exists for purposes other than the benefit of its members, such as a charitable company. In such a situation, the reference in s 172(1) to promoting the success for the benefit of its members as a whole is replaced by achieving those other purposes: see above n 74, 85.

86 Arden, above n 76, 168.

any guidance as to how far into the future a director's consideration must go. It would be very difficult to impugn a director's decision on this ground. Lack of guidance is an inherent weakness of s 172(1), as it sets out factors for directors to regard, but fails to give any guidance as to the form that this regard should take and what they must do in order to comply.⁸⁷

Another factor of interest is that creditors are not explicitly mentioned in s 172(1).⁸⁸ However, the creditor constituency may be covered by the catch-all term 'others' in s 172(1)(c). The reason as to why creditors are not mentioned is that they are protected from situations where they are most vulnerable by s 172(3).⁸⁹ Section 172(3) states that the new duty of loyalty is subject to any enactment or rule requiring directors to 'consider or act in the interests of creditors'.⁹⁰ No guidance is given as to what rule or enactment will limit the application of s 172(1).⁹¹ Therefore, whilst a director owes a fiduciary duty of loyalty to promote the success of the company,⁹² its effect is limited as it may be displaced by the company becoming insolvent.

Prima facie, by enacting s 172 the United Kingdom is moving from SVT to a strict application of stakeholder theory. Section 172 does bear some similarities with the United States constituency statutes that were introduced to prevent SVT's harsh effects.⁹³ However, these statutes authorize the directors to consider the interests of other stakeholders, whereas under s 172(1) they are obliged to have regard to the factors in (a) to (f). Section 172(1) does not amount to a true stakeholder provision, as it does not state how much weight a director should attach to the factors, which means that directors could simply pay lip service to the factors. The United Kingdom government clearly wished to retain a 'shareholders first' interpretation and not elevate the other stakeholders to a position of equality. This is made clear where the Australian CAMAC states that s 172 makes it clear that directors owe fiduciary duties only to shareholders rather than to a range of interests groups.⁹⁴

It is unclear whether there will be an increase in the number of board decisions challenged for failure to have regard to the requisite factors of s 172. It seems unlikely that there will be any significant change, as s 172 implicitly suggests that directors only have to have regard to the relevant factors in (a)-(f).⁹⁵ Section 172 is a subjective provision, for it gives the directors the discretion to decide what factors are to be considered and how much weight to attach to them. This is consistent with the business judgment rule that the Courts will not override the views of commercial actors unless they are satisfied that the particular actor has conducted themselves so unreasonably in comparison to the standards of other *reasonable* actors.⁹⁶ An increase in challenges will be

87 Parliamentary Joint Committee, above n 6, 55.

88 Although one potential category of creditor (suppliers) is mentioned.

89 Another reason is that by giving creditors the right to be considered it would be giving them additional legislative rights on which to rely when proceeding against directors. This could mean that creditors simply rely on the section in order to attach liability to directors.

90 This provision is a clear reference to case law that has developed in the United Kingdom and Australia that provides that if the company is in some form of financial difficulty they must consider its creditors: A Keay, *Company Directors' Responsibilities to Creditors* (2007) 151.

91 Above n 74, 85.

92 Arden, above n 76, 167.

93 Section 172(1) can also be usefully compared with section 2.01 of the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations*, Farrar, above n 36.

94 CAMAC, above n 11, 103-07.

95 Above n 74, 85.

96 The test is objective and remains one of good faith in the context of business judgments.

unlikely because non-shareholder stakeholders are not given a right of enforcement. Shareholders are the only stakeholders that are given *locus standi* to take an action under the CA 2006 (UK). Section 260(1) gives shareholders the right to bring derivative proceedings in ‘respect of a cause of action vested in the company’.⁹⁷ Section 178(2) states that the duties in ss 171-177 are enforceable like any fiduciary duty owed by a director. If directors breach s 172(1), members could seek to take action on behalf of the company.⁹⁸ Section 263 sets out the requirements for applying for leave to commence proceedings.⁹⁹ The requirement that is of most relevance is whether the Court is satisfied that a person acting in accordance with s 172 would not seek to continue the claim.¹⁰⁰ Section 172 is therefore an important provision within the entire scheme of the CA 2006 (UK).

The above interpretation illustrates that directors, under s 172, will be more inclined to consider the interests of shareholders above those of non-shareholder stakeholders. This is because shareholders are the only ones that can pursue them in Court for breach of the duty.¹⁰¹ The approach fostered by s 172 sounds surprisingly similar to the main objective of SVT: shareholder wealth maximization. As non-shareholder stakeholders are not given the *locus standi* to bring proceedings against directors, s 172 is therefore merely an empty and toothless provision that only pays lip service to stakeholder theory. In order to truly embrace stakeholder theory, New Zealand would need to significantly revise and amend s 172 of the CA 2006 (UK).

V. A SIMILAR STAKEHOLDER PROVISION FOR NEW ZEALAND

Two commentators have suggested that the United Kingdom ‘appears to be setting out on a third way that merges elements of the shareholder and stakeholder approaches’.¹⁰² At first glance s 172 does seem to embrace both approaches, but it should not be referred to as an exemplar of convergence in corporate governance theories. In fact, by not giving its non-shareholder stakeholders the *locus standi* to proceed against directors, s 172 is more akin to SVT. However, the United Kingdom is to be praised for enacting a provision that gives the appearance of embracing aspects of stakeholder theory.¹⁰³ A provision like s 172 gives the following benefits; it gives directors legislative permission to look at interests other than short-term shareholder interests, it permits directors to focus on long-term interests, which may be the favoured approach of some investors¹⁰⁴

97 Section 260(3) states that a cause of action vests in the company where there is a breach of duty by the directors of the company.

98 In reality there are only a few situations where a shareholder would bring an action under this provision: where the shareholder invested for the long term and they feel as though the directors are only concentrating on the short term; where shareholders are also members of other stakeholder groups; or where a shareholder has concerns wider than his/her own interests and feels obliged to take proceedings. But even if proceedings were commenced a director could argue that they acted in good faith and believed that what he did promoted the success of the company for the benefit of its members a whole.

99 Leave will be granted where a prima facie case is made out.

100 Similarly under s 262, the Court in weighing its decision will consider the importance a person acting in accordance with s 172 would attach to continuing the claim.

101 However, there is the possible option of other stakeholders buying shares in the company so as to be gain *locus standi* and be entitled. The Court would still need to grant leave for this action.

102 C Williams, and J Conley, ‘An Emerging Third Way? The Erosion of Anglo-American Shareholder Value Construct’ <http://www.papers.ssrn.com/so13/papers.cfm?abstract_id=632347> 4.

103 The appearance comes from the requirement that directors have regard to wide-ranging interests.

104 This is particularly true of the shareholders who now adopt a socially conscious approach to investment: see III.A.1 above.

and it does not require directors to balance the interests of stakeholders.¹⁰⁵ New Zealand needs to consider adopting a similar provision to s 172 to ensure that it ‘sets out on its own unique third way’¹⁰⁶ by giving the impetus to companies to achieve sustainable share value.

Whilst it is argued that New Zealand should adopt a similar provision to s 172, it is interesting to note that Australia, a country with comparable corporate law to New Zealand and the United Kingdom, firmly rejected the idea. Firstly, the Parliamentary Joint Committee on Corporations and Financial Services did adopt the SSV model as its preferred approach to directors’ duties, but rejected the idea of similar legislative amendment. The Committee stated that s 172(2) created uncertainty as the provision gave no guidance to directors, the duty to have regard to the various interests created uncertainty and a tick box mentality to corporate governance would be created rather than a meaningful approach. Secondly, the CAMAC followed suit by stating:

[A] non-exhaustive catalogue of interests to be taken into account serves little purpose for directors and affords them no guidance on how various interests are to be weighed, prioritised and reconciled... The Committee considers that... to require or permit directors to have regard to certain matters or the interests of certain classes of stakeholders, could in fact be counterproductive... In doing so, *could make directors less accountable to shareholders without significantly enhancing the rights of other parties*.¹⁰⁷ (Emphasis added.)

Both of the Australian Committees saw the fact that s 172 provides little guidance on what directors must do to comply as a major defect. The Committees were also of the opinion that the existing Corporations Act 2001 already permitted directors to have regard to the interests of stakeholders.¹⁰⁸ New Zealand’s position is fundamentally distinct from Australia’s. New Zealand’s CA 1993 (NZ) is ‘already looking dated with a number of gaps’¹⁰⁹ whereas Australia’s corporate reform occurred at the turn of the century.

The CA 1993 (NZ) seems like the most appropriate framework for New Zealand’s stakeholder provision.¹¹⁰ It could take the form of an amendment to s 131 or could, following the United Kingdom, be included as a separate directors’ duty. But does the policy of the CA 1993 (NZ) reconcile with what a stakeholder provision is trying to achieve or is separate legislative enactment required? One of the purposes of the CA 1993 (NZ) is to ‘reaffirm the value of the company as a means of achieving economic and social benefits’.¹¹¹ This would appear to suggest that the CA 1993 (NZ) is geared directly in favour of benefiting different stakeholders. However, Farrar suggests that the CA 1993 (NZ) ‘recognises the company as an important social institution yet is based on somewhat conservative ideas about its role in society’.¹¹² It is acknowledged that

105 It is argued that if it was mandatory for directors to balance the interests of those involved in a company, they could use this to mask making decisions to their advantage.

106 Williams, above n 102. This would put New Zealand back into the forefront of corporate governance, as in recent years it has been lagging behind.

107 CAMAC, above n 11, 111-112.

108 Above n 6.

109 Farrar, above n 36.

110 The idea of having a stakeholder requirement in New Zealand legislation is not novel. Section 4 of the *State Owned Enterprises Act* 1986 states that the objective of a State Owned Enterprise is to operate as a successful business by being: as profitable and efficient as comparable businesses that are not owned by the Crown; a good employer; and an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates.

111 *Companies Act* 1993.

112 Farrar, above n 36.

this is true, as the CA 1993 (NZ) did increase shareholder rights and remedies and did not create rights for non-shareholder stakeholders against directors.¹¹³ However, this does not mean that the CA 1993 (NZ) needs to retain its adherence to conservative ideas. The whole point of legislative amendment is to keep abreast of changes that occur in modern society.¹¹⁴ It is only then that New Zealand can keep pace with the rest of the fast-moving corporate governance world.

It is then necessary to consider what form New Zealand's stakeholder provision would take within the CA 1993 (NZ). Three options appear to exist:¹¹⁵ (1) inclusion of the provision within s 131; (2) the expansion of the category of entitled persons; or (3) a separate duty to promote the success of the company. Section 131 is a loose duty that states a director must act in good faith and what the director believes to be in the best interests of the company. The question then becomes just whose interests are caught by the phrase the company's best interests: stakeholders or just shareholders?¹¹⁶ At first glance, stakeholders may be encompassed within the duty. However, the CA 1993 (NZ) gives no guidance as to what interests should be considered by a director whilst acting in the company's best interests,¹¹⁷ as it is an essentially a subjective business decision with which the Courts are reluctant to interfere. This means that it is incredibly difficult for any stakeholder to take an action against a director for failing to act in the company's best interests. If New Zealand were to proceed with the first option it would run into the toothless problem encountered by s 172(1), as s 169 of the CA 1993 (NZ) states that a director's obligations are owed to the company and its shareholders.¹¹⁸ The third option, whilst giving New Zealand a new stakeholder provision, would have the same *locus standi* problem. As seen from the defects highlighted in section IV.2 the provision would need to include;¹¹⁹ legislative guidance as to how directors are to consider the interests of non-shareholder stakeholders, the appropriate weight to be given to each stakeholder, including how to reconcile a conflict of interests, a requirement for consultation where time is not of the essence and, most importantly, a resolution on the issue of *locus standi*.

The *locus standi* problem with the first and third options is similar to that faced by the United Kingdom. New Zealand needs to establish a mechanism that enables non-shareholder stakeholders to take action against a director for failure to consider their interests. This mechanism can be created by expanding the definition of entitled persons in s 2 of the CA 1993 (NZ). Section 2 states that an entitled person is a shareholder; and a person upon whom the constitution confers any rights and powers of a shareholder. This definition is linked to ss 164, 170 and 174, all of which allow the entitled person to initiate an action against the company directors. The definition needs

113 S Watson, 'Nature of a Corporate Entity' in S Watson et al, *The Law of Business Organisations* (4th ed, 2003) 97.

114 Indeed, if any amending stakeholder provision does not fit within the scheme of the Companies Act 1993 (NZ), then it may be that New Zealand needs to revise its entire company law legislation.

115 However, there is the option that separate stakeholder legislation could be enacted, if the changes recommended by this paper are too unworkable. But even then the legislation will have to be drafted so as to make it enforceable, so New Zealand is simply better off working with existing company legislation.

116 See A Butler, 'Fiduciary Law' in Butler et al *Equity and Trusts in New Zealand* (2003) 398-400.

117 The New Zealand position is still too unsettled but Heydon is of the view that 'directors owe duties to the company, even though in fulfilling them it may be proper to take into account the interests of shareholders... employees and persons who have contracted or may contract with the company': D Heydon, 'Director's Duties and the Company's Interest' in P Finn, (ed), *Equity and Commercial Relationships* (1987) 134-35.

118 Therefore non-shareholder stakeholders are not given *locus standi* under the *Companies Act* 1993 (NZ).

119 It needs to be emphasised that this paper recognises the danger of over-legislating so as to create a rigid business environment and therefore advocates only a limited amendment. The provision should give only sufficient principles to guide the Courts; flexibility is to be the key here.

to be extended so as to include people or groups who are affected by the actions of the company. In doing this the reciprocal relationship that exists between a company and its different stakeholders is acknowledged. It is necessary to place qualifications on this extension so as to not impose unreasonable requirements on directors. It would be necessary for the stakeholder, in order to qualify, to show that he has a significant stake in the company.¹²⁰ New Zealand should therefore adopt both the second and third options of having a new stakeholder provision based on s 172 and resolve the *locus standi* issue by expanding the definition of entitled persons.

The disadvantages of having such a provision can be easily refuted. Firstly, one may argue that giving *locus standi* to other stakeholders will create a flurry of litigation against company directors. This disadvantage will not eventuate, as, not only will the Court require a high threshold, but most stakeholders will not be able to satisfy the financial requirements of bringing an action against the directors. Additionally, it is also possible for a company under the CA 1993 (NZ) 'to insure against and agree to indemnify a director for all but criminal liability'.¹²¹ Secondly, the business community would argue that the substitution of a director's business judgment with the view of a judge, who has little or no commercial experience and sits retrospectively, is wrong. This fear is needless, as the Courts will only intervene where it is patently obvious that no reasonable director would have acted in a similar fashion. The aforementioned high threshold would also assist in this regard. Thirdly, there is the issue of how to reconcile the often-conflicting interests of the different stakeholders. As already mentioned, the new provision could be drafted to attach different weight according to the importance of the groups,¹²² or to give the Courts the discretion to decide which group is likely to feel the most impact on the facts of the case. Lastly, it may be argued that the new provision ignores that a company owes a primary duty to the shareholder and that it exists to make pecuniary gain. This is not the case, as the provision would emphasise that a company exists within a matrix where its actions have a much wider impact than simply on its shareholders. It would let the company pursue its own interests in a manner that recognises that it acts within an interdependent society. Such a stakeholder provision is the only way that sustainable shareholder value can be achieved for New Zealand companies.

VI. CONCLUSION

New Zealand company law currently gives no direction to its directors as to what stakeholder groups they should consider when making a decision for the company. It is a decision that is simply left to the director and the outcome will largely depend upon whether he/she takes a SVT or stakeholder theory approach to corporate governance. As a modern company's actions impact upon a variety of groups this is not a satisfactory position for New Zealand. It leaves the non-shareholder groups feeling unsure about how a company's decision may affect them. It is therefore necessary for New Zealand to legislatively require its directors to take a stakeholder theory approach to corporate governance. It is only then that non-shareholder stakeholders can be confident that their interests and the contributions they make will be considered. This will in turn achieve sustainable shareholder value for the company, as the fostering of healthy relationships

120 For example, creditors/suppliers would have to show that the supply of goods or services to a particular company amounts to a significant part, say 40-60%, of their business.

121 Watson, above n 113, 97.

122 But then the issue becomes which groups interests are to be accorded primacy. It is therefore better that this is determined by the Courts on a case-by-case basis.

between the company and stakeholders will not only see loyal employees, satisfied creditors, a prosperous community and an unpolluted environment, but will give shareholders significant returns on their investments.

In New Zealand's search for the form that the stakeholder provision could take, it should look to the United Kingdom's recently enacted s 172. However, New Zealand should utilise this provision only as a basic starting point, as whilst it may appear to move the United Kingdom from SVT and closer to a stakeholder approach, it retains predominantly a shareholder focus by not giving non-shareholder stakeholders the *locus standi* to proceed against directors. The New Zealand stakeholder provision should seek to remedy the defects of s 172 by providing directors with legislative guidance as to how to consider other stakeholder interests, requiring consultation and providing a basis from which non-shareholder stakeholders can proceed against directors. It is proposed that a new stakeholder duty be formulated and the definition of entitled person be expanded so that non-shareholder stakeholders can bring an action for breach of the provision. It will formally recognise that a modern company's objective is no longer grounded exclusively in SVT but exists to benefit all those who be classified as stakeholders. A statement by the Australian Stock Exchange's Corporate Governance Council seems to sum up the underlying basis for New Zealand's need for a stakeholder provision:¹²³

To be successful, *companies need to have regard to their legal obligations and the interests of a range of stakeholders* including shareholders, employees... creditors, the environment and the broader community in which they operate. It is important for companies to demonstrate their commitment to appropriate corporate practices and decision making. (Emphasis added.)

This statement may indeed be prophetic as far as New Zealand's 'setting out on a third way'¹²⁴ to develop an authentic stakeholder provision is concerned.

123 Farrar, above n 36.

124 Williams, above n 102.

THE ROLE OF EMPLOYEES IN GLOBAL CORPORATE GOVERNANCE

ISABEL FLAY*

I. INTRODUCTION

Employees are stakeholders in a corporation and are interested in the outcome of decisions that affect them directly and indirectly. It is important for employees to have a role in corporate governance and the ability to participate in the decision making of the corporation in order for them to protect their interests as unsecured creditors. The purpose of this paper is to determine what influence or control employees have over decision making in regard to the management of the corporation they are employed by. I propose to conduct a comparative analysis of the role of employees in corporate governance in: Germany, Japan, the United Kingdom and New Zealand. I further propose to consider the possibility of global harmonization or convergence of one model of employee participation: by looking at the impact of globalization on corporate governance generally; two attempts that have been made to harmonize company law over multiple nations; as well as the advantages and disadvantages of doing so. I will then conclude that certain models of governance are successful within their respective cultures but may not easily be adopted by other jurisdictions. In theory convergence and harmonization of law may evoke illusions of consistency and certainty; in practice a multitude of barriers would arise to prevent such a system being implemented and succeeding. Firstly, I will introduce this topic by defining corporate governance; introducing the stakeholder theory with a particular emphasis on employees; including the interests employees can protect by participating in corporate governance; and the benefits of undertaking a global comparative analysis.

Corporate governance is an ambiguous term with many variations depending on the historical and cultural background of the country defining it. In its narrow sense corporate governance refers to 'the system by which companies are directed and controlled';¹ and the systems by which those in control are held accountable.² In its wide sense corporate governance refers to the entire corporate sector, as well as the impact on society and everything within.³ Somewhere in between these two extreme definitions is the concept of corporate governance as viewed and shaped in light of the distinctive background of each country.⁴ Despite the different backgrounds, in general, the underlying concept of corporate governance as defined by each country is basically the same: systems of legitimacy of corporate power; accountability of those in control; method of governance

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1 Jonathan Charkham, *Keeping Good Company: A Study of Corporate Governance in Five Countries* (1995) 1.

2 John Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed, 2004) 3.

3 *Ibid* 6.

4 *Ibid*.

and decision making; regulation of the corporation; and the role of the corporation in society.⁵ Corporate governance is the totality of the structure and relationships among the core groups involved in fostering competitive performance and achieving the key objectives of the corporation.⁶

Internal corporate structures are organized differently from country to country; the key difference is the emphasis each company puts on different stakeholders. Corporate governance also concerns the management of a corporation as influenced by its many stakeholders. In particular it refers to the process of decision making, including the resolution of conflicts of interest between various stakeholders, control rights and intervention in order to determine how important decisions are made.⁷ The indirect effect of this is that employees have an important role in corporate governance. The 'stake' employees have in a company is created by their 'input of human capital particularly of long-term employees who have worked to consolidate specialist skills attributable to the company to assist with maintaining a successful business'.⁸ Employees need to participate in governance in order to protect their stake in the corporation (which is largely remuneration in return for labour); this is achieved through their power to influence decision making over certain aspects of the corporation's activities. The success of the corporation therefore effectively protects employee interests and it should be expected that employees have a right to some control and influence over decision making to ensure that their interests are adequately protected.⁹

By participating in corporate decision making employees are able to protect their entitlement to receive remuneration for their services. Employees are unsecured creditors of a company, and therefore they are generally not given the highest priority when a company is put into receivership. A creditor is someone to whom the company owes money; a secured creditor is someone who has a secured interest (such as a mortgage) in the debt owed by the company; an unsecured creditor does not have such protection.¹⁰ Employees are creditors if the company owes them money in return for the services and labour they have provided.¹¹ Except in systems that give priority to employees,¹² they must join the queue with the other unsecured creditors in order to receive any of the insolvent company's assets, after the secured creditors have received their share.¹³ It is not uncommon for employees and other unsecured creditors to miss out or receive a lesser amount than they were entitled to.¹⁴ Employees rely on the company not only for employment and weekly wages,¹⁵ but also for other entitlements such as annual leave, sick leave and redundancy payments. Employees generally have no other recourse and no voice in winding up of the company and

5 Ibid 504.

6 Adrian Davies, *Best Practice in Corporate Governance: Building Reputation and Sustainable Success* (2006) 3.

7 Stefan Prigge, 'A Survey of German Corporate Governance' in Klaus Hopt, et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 945-6.

8 Andrea Corfield, 'The Stakeholder Theory and its Future in Australian Corporate Governance: A Preliminary Analysis' (1998) 10 *Bond Law Review* 213, 214.

9 John Boatright, 'Employee Governance and the Ownership of the Firm' [2004] 14 *Business Ethics Quarterly* 2.

10 Australian Securities & Investment Commission, *Information Sheet 54: Receivership: a guide for creditors* (2008) 1 <<http://www.asic.gov.au>> at 25 February 2008.

11 Ibid.

12 Ibid.

13 Ben Dunstan, *Protecting Employee Entitlements in an Insolvency* (2000) Allens Arthur Robison 'Introduction' <<http://www.aar.com.au/pubs/insol/insolfeb00.htm>> at 25 February 2008.

14 Ibid.

15 Ibid.

possess little bargaining power; yet they stand to lose the most.¹⁶ Employees usually enter into their employment contracts without intentionally assuming any risk that their employer may go into receivership and be unable to remunerate them.¹⁷ By permitting employees to participate in corporate decision making they are able to individually participate in ensuring the success of the company and the protection of their interests.

Comparative law is important because it enables us to gain a better understanding of our own national law so we can work toward improving it; as well as assisting our understanding of other countries and cultures for development of favourable international relations.¹⁸ One can draw upon the experience of all nations and broaden awareness of contemporary world realities and the need for co-existence of nations.¹⁹ ‘Comparative corporate governance involves comparing different national systems of corporate governance’;²⁰ by looking at the significant features in a society which has developed successful law we can improve our own. Global harmonization of employee participation in corporate governance would require the development of a legal framework satisfactory to all countries. Such a development would require a close analysis of the current of laws, cultures, and practices within each society to determine the underlying fundamental aspirations which will be needed to provide the basis of any successful harmonization attempt.²¹

II. GERMANY

Employees have an important role in German corporate governance; they participate in decisions that affect them directly through workers councils, as well as those that affect the corporation through union representation on the supervisory board.²² The German corporate governance system is characterized by the two-tier (management and supervisory) board; with codetermination between employees and shareholders on the supervisory board.²³ This system is concerned with the long-term success of the company, and was developed for reasons of social governance,²⁴ protection of public interest as extending beyond shareholders,²⁵ and to reduce employee alienation.²⁶

16 Gordon Johnson, *Insolvency and Social Protection: Employee Entitlements in the Event of Employer Insolvency* (2006) Organisation for Economic Co-operation and Development 2 <<http://www.oecd.org/dataoecd/42/38184691.pdf>> at 3 February 2008.

17 Ibid.

18 John Brierley and Rene David, *Major Legal Systems in the World Today* (1985) 4-9.

19 Ibid 17.

20 John Farrar, ‘In pursuit of an appropriate theoretical perspective and methodology for comparative corporate governance’ (2001) 13 *Australian Journal of Corporate Law* 1, 2.

21 See generally, Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 498-515.

22 Katharina Pistor, ‘Codetermination: A Sociopolitical Model with Governance Externalities’ in Margaret Blair and Mark Roe (eds), *Employees and Corporate Governance* (1999) 165-6.

23 Marc Goergen, Miguel Manjon, and Luc Renneboog, ‘Corporate Governance in Germany’ in Kevin Keasey, Steve Thompson, and Mike Wright (eds), *Corporate Governance: Accountability, Enterprise and International Comparisons* (2005) 315.

24 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 465.

25 Klaus Hopt, ‘The German Two-Tier Board: Experience, Theories, Reforms’ in Klaus Hopt, et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 230.

26 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2.

Germany has a consensual approach to decision making²⁷ and encourages labour participation by treating employees as stakeholders. By participating directly in corporate decision making,²⁸ employees have some degree of influence and control within the corporation.²⁹ The idea of bringing political democracy into economic life and creating institutional democracy means that employees are given a voice and an important role in the functioning of the corporation.³⁰ A traditional key concept of German corporate culture is the assumption that the corporation exists to benefit the community as a whole, and thus the continuation of the company is of utmost importance, leaving shareholder profit as a secondary, long term, aspiration.³¹ The role of employees in German corporate governance is one of influence and control over corporate decision making in a cooperative and stakeholder maximizing atmosphere.

The modern concept of codetermination goes back to 1919, and the general concept of worker participation goes back to the 1830s.³² The Nazis in 1933 put an end to the work councils and unions that were in place at the time;³³ the current system of employee participation in corporate governance arose out of the aftermath of World War II. Trade unionists and occupational authorities 'vowed that the nation never again would fall into the dictatorial pattern of the Third Reich'.³⁴ After the catastrophic experience the nation faced under the Nazi dictatorship, Germany became even more passionate about democracy.³⁵ Since then Germany 'has been leading a peaceful revolution in industrial relations'.³⁶

Success of the corporation depends on cooperation between two distinct organs in the two-tier board; the Vorstand and Aufsichtsrat.³⁷ It is mandatory for companies with over 500 employees to separate the management and supervisory functions of the board.³⁸ The Vorstand is the management tier and 'is responsible for independently managing the enterprise. In doing so, it is obliged to act in the enterprise's best interests and undertakes to increase the sustainable value of the enterprise'.³⁹ It is also responsible for developing and implementing strategy;⁴⁰ ensuring all laws are complied with⁴¹ and appropriate risk management is in place.⁴² The Aufsichtsrat is the supervisory tier of the board; its role includes not only appointing the management tier but also 'to advise

27 Sigurt Vitols, *German Corporate Governance in Transition: Implications of Bank exit from monitoring and control* (2005) Wissenschaftszentrum Berlin für Sozialforschung 13 <http://www.wzb.eu/gwd/into/pdf/vitols/vitols05_gcg_transition.pdf> at 6 February 2008.

28 James Furlong, *Labor in the Boardroom* (1977) 1.

29 Christel Lane, 'Changes in Corporate Governance of German Corporations: Convergence to the Anglo-American Model?' (Working Paper No 259, ESRC Centre for Business Research, University of Cambridge, 2003), III.3.

30 Furlong, above n 28, 2.

31 Jonathan Charkham, *Keeping Better Company: Corporate Governance Ten Years On* (2nd ed, 2005) 30-32, 94.

32 Furlong, above n 28, 15.

33 *Ibid* 16.

34 *Ibid* 2.

35 *Ibid* 28.

36 *Ibid* 1.

37 Charkham, *Keeping Better Company*, above n 31, 62.

38 *Ibid* 44.

39 *German Corporate Governance Code 2002 – The Cromme Code* (GER) s 4.1.1.

40 *German Corporate Governance Code 2002 – The Cromme Code* (GER) s 4.1.2.

41 *German Corporate Governance Code 2002 – The Cromme Code* (GER) s 4.1.3.

42 *German Corporate Governance Code 2002 – The Cromme Code* (GER) s 4.1.4.

regularly and supervise the Vorstand in the management of the enterprise. It must be involved in decisions of fundamental importance to the enterprise'.⁴³

The supervisory tier is balanced by the codetermination of shareholders and employee representatives.⁴⁴ Under the traditional codetermination model, one-third of the supervisory board was comprised of workers' representatives, and employers were not allowed to be representatives on the management board.⁴⁵ Depending on the size of the company, employee representation can be up to fifty per cent of the supervisory board.⁴⁶ The chairman, who is a shareholder representative, has the casting vote if a deadlock is reached.⁴⁷ 'Since the supervisory board appoints the management board members, workers can indirectly influence the management'.⁴⁸ The ideology of codetermination is that labour and capital have equal importance and therefore should have an equal voice in running the company; in that regard employees are as much a part of the company as shareholders. This model of corporate governance does not prevent companies giving orders to employees, but aspires to ensure 'democratic legitimation' through consent from employees.⁴⁹

The current law regulating governance of listed companies is the German Corporate Governance Code which aims to make the system transparent and understandable.⁵⁰ Non-listed companies are also advised to respect the code. As with any system, German corporate governance has positive and negative aspects evident when it is scrutinized from different perspectives. Employee representation has been criticized as causing weakness in the control function of the supervisory board through fractionalization; the holding of separate meetings;⁵¹ as well as being inefficient in making decision due to the time taken to collaborate and make informed decisions. Nevertheless, the German system of employee representation and concern for long-term interests has been a successful system of corporate governance for more than four decades.⁵² In general, the social consensus is that 'codetermination is a great achievement because it contributed to, if not caused, social peace between labor and capital'.⁵³ The success of the innovations in this system are evident as Germany is rich,⁵⁴ has a successful economy,⁵⁵ as well as 'one of the lowest strike rates among major Western industrialized nations'.⁵⁶ Furthermore, codetermination has proved to be efficient as it is rare for employee representatives to vote against measures which are important to the future of the company.⁵⁷ As well as giving employees the right to participate in decision making, co-

43 *German Corporate Governance Code 2002 – The Cromme Code* (GER) s 5.1.

44 Goergen, Miguel and Renneboog, above n 23, 307.

45 Thomas Conlon, 'Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive' [1975] *International and Comparative Law Quarterly* 348, 352.

46 Davies, above n 6, 22.

47 Goergen, Miguel and Renneboog, above n 23, 303.

48 Takeo Hoshi, 'Japanese Corporate Governance as a System' in Klaus Hopt, et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 855.

49 Furlong, above n 28, 134.

50 *German Corporate Governance Code 2002*, above n 39, para 1.

51 Hopt, above n 25, 247.

52 Diane Denis and John McConnell, 'International Corporate Governance' in Kevin Keasey, Steve Thompson and Mike Wright (eds), *Corporate Governance: Accountability, Enterprise and International Comparisons* (2005) 260.

53 Pistor, above n 22, 188.

54 Furlong, above n 28, 134.

55 Conlon, above n 45, 351.

56 Furlong, above n 28, 134.

57 Hopt, above n 25, 247.

determination also promotes trust, cooperation, and harmony; employers believe that an informed and trusted employee is more likely to have the best interest of the company at heart.⁵⁸ Therefore 'workers can influence the management through other institutional arrangements without formally owning the firm'.⁵⁹

III. JAPAN

Employees play an important role in Japanese corporate governance and informally participate in decision making by virtue of their stakeholder status. The key characteristics of the Japanese model of corporate governance are based on a stakeholder philosophy,⁶⁰ the roots of which can be traced back to German origins.⁶¹ The concepts of 'obligation', 'family' and 'consensus' are the main characteristics that affect Japanese attitudes towards corporate governance.⁶² The corporate ownership structure traditionally involved clusters of companies and cross-shareholdings consisting of developed, longstanding, stable relationships within the group of companies and their main bank.⁶³ The traditional company was a merchant house wherein the relationship between employers and employees was similar to a family situation; and it was thought that employees should stay with one company for life.⁶⁴ Lifetime employment involved long-term commitment and reciprocal obligations from both the corporation and employees.⁶⁵

Technically the shareholders own the corporation, but it is commonly thought that the corporation is owned by the employees and is operated in their best interest.⁶⁶ Profit is recognized as essential for the survival and successful functioning of the company, but is not the primary aspiration.⁶⁷ It is not uncommon for a company, in financial difficulty to cut dividends before firing employees.⁶⁸ The need to appeal to employees is also recognized, as it is common for employees to recruit the employer and not vice versa. 'At the extreme, 'star' employees can hold the company to ransom'.⁶⁹ The Japanese style of management has a collaborative approach to decision making,⁷⁰ which reflects the consensual nature of the company.⁷¹ The pride in this Japanese style of management is reflective of the rising productivity levels, especially between 1964 and 1983.

58 Charkham, *Keeping Better Company*, above n 31, 39.

59 Hoshi, above n 48.

60 Sanford Jacoby, *The Embedded Corporation: Corporate Governance and Employment Relations in Japan and the United States* (2005) 1.

61 Hiroko Kiguchi, 'Japan' in George Dallas (ed), *Governance and Risk: An Analytical Handbook for Investors, Managers, Directors, and Stakeholders* (2004) 414.

62 Charkham, *Keeping Better Company*, above n 31, 108.

63 Kiguchi, above n 61, 411.

64 Rodney Clark, *The Japanese Company* (1979) 17.

65 Charkham, *Keeping Better Company*, above n 31, 108.

66 Hideki Kanda, 'Notes on Corporate Governance in Japan' in Klaus Hopt, et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 892.

67 Charkham, *Keeping Better Company*, above n 31, 111.

68 Kanda, above n 66, 893.

69 Davies, above n 6, 28.

70 James Abegglen and George Stalk, *Kaisha: The Japanese Corporation* (1985) 181.

71 Charkham, *Keeping Better Company*, above n 31, 109.

'[T]he old truth remains: the pace of economic growth depends largely on the growth of each worker's output'.⁷²

The role of employees as important stakeholders in Japanese corporate governance enables them to influence decision making without formal representation on the board.⁷³ The various stakeholders monitor management of the corporation to ensure their 'promises' are kept; as a result management tends to direct the business towards the interests of the stakeholders with the highest bargaining power.⁷⁴ Consideration of employees in this way has allowed them to influence major corporate decisions at critical times. Traditionally, employees were the main controlling group in a corporation.⁷⁵ Employees were able to secure their interest against other stakeholders by being selected as directors and managers of the corporation; wherein they had employee support so long as their actions were generally consistent with the interests of employees.⁷⁶

In the post-war era, practices such as 'flexibility of work organization, employee participation in management, and high levels of investment in working training...'⁷⁷ were supported as complementary to 'lifetime employment, seniority-based pay, and enterprise unions'.⁷⁸ Furthermore, employees were given the capacity to influence by the company investing in firm specific skills and employee training that was said to 'reinforce employee strategies for internal participation in firm's decisions'.⁷⁹ Employees were seen as an important part of the 'family' whereas it was considered that shareholders could be 'here today and gone tomorrow'.⁸⁰ Employees in a Japanese corporation therefore had influence over the decision making in a variety of indirect ways and their needs were seen as being more important than those of other stakeholders.⁸¹

Japan has endured ongoing economic problems over the last decade and was unable to swiftly engineer a sustainable recovery. This was caused by the collapse of the 'bubble economy' in 1989 and 1990. Since then Japanese corporate governance has been placed under scrutiny and changes have been initiated to remodel the Japanese corporate landscape.⁸² The changes implemented by the Japanese Commercial Code offered companies an alternative to the traditional structure:⁸³ the 'three-committee' system, which requires companies to have a nominating, audit and compensation committee in addition to at least one executive officer.⁸⁴ Companies must now opt for the 'three-committee' system or stay with the traditional system and have a corporate auditor; the majority of companies thus far have stayed with the traditional system.⁸⁵ Boards of directors are now

72 Abegglen and Stalk, above n 70.

73 Hoshi, above n 48, 861.

74 Zenichi Shishido, 'Japanese Corporate Governance: the Hidden Problems of Corporate Law and their Solutions' [2000] 25 *Delaware Journal of Corporate Law* 189, 194.

75 Hoshi, above n 48, 861 and 881.

76 *Ibid* 881.

77 Jacoby, above n 60, 5.

78 *Ibid*.

79 Ruth Aguilera and Gregory Jackson, 'The Cross-National Diversity of Corporate Governance: Dimensions and Determinants' [2003] 28 *Academy of Management Review* 447, 457.

80 Charkham, *Keeping Better Company*, above n 31, 114-115.

81 Kiguchi, above n 61, 410.

82 *Ibid* 410.

83 *Commercial Code 2004* (Japan: Nishimura and Partners, 2004) art 12.5.

84 *Ibid*.

85 Charkham, *Keeping Better Company*, above n 31, 137.

smaller and contain directors from outside the company;⁸⁶ ex-employees and ex-directors must have a 5 year cooling off period before they can be considered 'outsiders'.⁸⁷ Stable cooperation between employees and management has been a prominent feature of Japanese corporate governance for many years;⁸⁸ in the traditional model, many of the board members were 'directors-with-employee-functions'. This gave employees another channel to influence corporate decision making. The 'three-committee' system will 'significantly affect the internal promotion system and the acceptance of 'directors-with-employee-functions' practice'.⁸⁹

Other aspects of corporate governance that have changed are, inter alia: less lifetime employment; post-war consensus has weakened; cross-shareholdings have reduced; the role of the banks has decreased; and there is more pressure on companies to improve dividends.⁹⁰ The legislative changes are seen as positive improvements to corporate governance and accountability; reflecting much of the Western world.⁹¹ However, not everything about the traditional system has changed; the fabric of society is still important and the company is still viewed as both a social and economic construct.⁹² The current law governing companies in Japan is the Company Law which was passed in 2005.⁹³ This law integrates the previous complex and scattered laws relating to commercial law: 'corporate restructuring; stock based incentive plans, committee-based management style; and many other rules...' into one succinct code. The new law gives companies a 'variety of ways to reorganize themselves to maximize value by swift decision making'.⁹⁵

IV. UNITED KINGDOM

The United Kingdom model of corporate governance is known as the Anglo-Saxon model,⁹⁶ and is characterised by the separation of ownership and control and an active stock market.⁹⁷ This system of corporate governance has generally prioritized shareholders over other stakeholders.⁹⁸ In an environment where takeovers are feared, directors put the interests of shareholders above those of other stakeholders to get them the high, short-term, returns they desire.⁹⁹ This is often achieved

86 Ibid 131.

87 Ibid 139.

88 Takashi Araki, 'Corporate Governance, Labour, and Employment Relations in Japan: The Future of the Stakeholder Model?' in Howard Gospel and Andrew Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (2005) 274.

89 Ibid 278.

90 Charkham, *Keeping Better Company*, above n 31, 149.

91 Ibid.

92 Ibid 150.

93 *Company Law 2005* (JAP).

94 Charkham, *Keeping Better Company*, above n 31, 152.

95 Ibid.

96 Martin Hopner, Gregory Jackson and Antje Kurdelbusch, 'Corporate Governance and Employees in Germany: Changing Linkages, Complementarities, and Tensions' in Gospel and Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (2005) 86.

97 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 464.

98 Howard Gospel and Andrew Pendleton, 'Markets and Relationships: Finance, Governance, and Labour in the United Kingdom' in Gospel and Pendleton (eds), *Corporate Governance and Labour Management: An International Comparison* (2005) 64.

99 Ibid.

by controlling labour costs through job cuts and laying off employees.¹⁰⁰ Corporate governance is recognized as ‘a system by which companies are directed and controlled...’¹⁰¹ wherein directors should be able to exercise freedom in driving the company forward ‘...within a framework of effective accountability’.¹⁰² The overriding aspiration of a company is ‘the preservation and the greatest practical enhancement over time of their shareholders’ investment’.¹⁰³ Stakeholders, such as employees, are essential to the success of the company and the attitude of companies towards them has recently improved. In Victorian times employees were treated as ‘tangible assets, and companies did not seek to foster their relationships with them’.¹⁰⁴ Modern legislation has improved the relationship between management and employees; which resulted in more of a collaborative approach to running a company.¹⁰⁵ The Companies Act of 1985 provided that:¹⁰⁶

[t]he matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company’s employee in general, as well as the interests of its members.

The United Kingdom has taken a step in the process of improving corporate governance by codifying its first statement of director’s duties in the Companies Act 2006 (UK).¹⁰⁷ The director’s duties, previously existing by virtue of the common law, are now enacted into a statutory form which reflects the enlightened shareholder approach: wherein:¹⁰⁸

the purpose of the company is to create value for the benefit of shareholders but this should be done by taking a long-term view of the company, and thus the relationships which the company has with suppliers, employees, the community and so on have to be fostered.

This model of corporate governance is said to be ‘enlightened’ ‘...when it proceeds on the basis that a company’s potential for success can best be realized through maximizing the relationships which the company enjoys with stakeholder groups’.¹⁰⁹

Section 172 of the Companies Act 2006 (UK) states:¹¹⁰

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to: ... (b) the interests of the company’s employees.

Therefore employees are indirectly able to influence corporate decision making by having their interests considered by the directors (who make the decisions). Despite the fact that directors have a duty to have regard to relevant interests, they unfortunately are not compelled to take any action in furthering those interests. There is no element of enforcement for this section, and thus no way to hold directors accountable. Directors have discretion in deciding appropriate weight to give the

100 Ibid 66.

101 Kevin Keasey, Helen Short and Mike Wright, ‘The Development of Corporate Governance Codes in the UK’ in Kevin Keasey, Steve Thompson, and Mike Wright (eds), *Corporate Governance: Accountability, Enterprise and International Comparisons* (2005) 22.

102 Ibid.

103 Ibid.

104 Justice Mary Arden, ‘Companies Act 2006 (UK): A New Approach to Directors’ Duties’ (2007) 81 *Australian Law Journal* 162, 164.

105 Ibid.

106 Ibid 167.

107 Ibid 163-4.

108 Ibid 165.

109 Ibid.

110 *Companies Act 2006* (UK) s 172.

matter 'for the purpose of promoting the success of the company as a whole'.¹¹¹ As a result this section may not improve the quality of the decision making process because it creates an air of uncertainty from the lack of guidance given to assist determining what to have regard to.¹¹² However, directors are reminded to look at the long term effects of their decisions, and consider any effects it may have on important stakeholders.¹¹³ Therefore, s 172 may have a positive effect on the quality of decision making as companies become conscious of employees and their contribution to the success of the company.¹¹⁴

V. NEW ZEALAND

Corporate governance in New Zealand is an Anglo-American system.¹¹⁵ New Zealand is physically located far from the world capital centres and the implications of globalization have been both beneficial and detrimental to the economy. New Zealand relies on exporting and foreign investments for economic growth;¹¹⁶ but is also exposed to the negative effects of the global stock market, such as 'Black Monday' in 1987.¹¹⁷ Since 1984 New Zealand has been undertaking deregulation and has gone from one of the 'most regulated societies in the free world, to the world's freest market economy'.¹¹⁸ The present relationship employees have with New Zealand companies is of a contractual nature, with some statutory protection. The Employment Relations Act 2000 enables employees to contract with a company; and the Human Rights Act 1993, Injury Prevention, Rehabilitation and Compensation Act 2001 and administration rules pursuant to income tax legislation, govern the obligations employers owe to employees.¹¹⁹ The board of directors, must consist of at least one director,¹²⁰ and is collectively responsible for running the company.¹²¹ Unless an employee is also a shareholder or director of the company they do not generally have any rights to participate in corporate decision making, and are not permitted to attend or vote at meetings.¹²² Section 126 of the Companies Act 1993 states that an employee may, for certain purposes, be held to be a director if they take an active role in running the company; or if they have been delegated any director duties or powers.¹²³ The role of employees in corporate governance in New Zealand is mainly to provide human capital.

The stakeholder theory of corporate governance involves social considerations and recognition that long-term success and maximization of corporate profit is dependant on stakeholders with whom the corporation has created interdependencies.¹²⁴ The stakeholder theory has not been codi-

111 Arden, above n 104, 167-8.

112 Ibid 170-171.

113 Ibid 170.

114 Ibid 173.

115 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 460.

116 Mark Fox and Gordon Walker, 'Globalization: Meanings and Implications' in Brent Fisse, Ian Ramsay, and Gordon Walker (eds), *Securities Regulation in Australia and New Zealand* (2nd ed, 1998) 4.

117 Ibid 16.

118 Ibid 4 and 18.

119 Susan Watson, et al (eds), *The Law of Business Organisations* (4th ed, 2003) 90.

120 *Companies Act 1993* (NZ), s 150.

121 Watson, above n 119, 197.

122 Ibid 90.

123 Ibid 90 and 195.

124 Corfield, above n 8.

fied into law in New Zealand. Directors are instructed to act in good faith and in what they consider to be the best interest of the company and its shareholders.¹²⁵ The Act enables shareholders, former shareholders, or entitled persons to initiate legal action against the directors if they are not performing their duties properly or are not acting in a manner which is in the best interest of the company. Employees are unable to bring an action in support of their stakeholder interest as they are not 'entitled persons'.¹²⁶ In the event a company is put into receivership, employees in New Zealand are currently entitled to a priority amount of up to NZ\$6,000 (New Zealand dollars) as creditors of the company. The priority sum is in respect to arrears of salary or wages, and holiday pay¹²⁷ (but excludes redundancy payments), accrued within the four months prior to insolvency.¹²⁸ This means that although employees may not be able to protect their interest by managing the company, they are given some protection in that their claim ranks ahead of unsecured creditors and certain other preferential creditors.¹²⁹

VI. GLOBAL HARMONIZATION

The modern concept of globalization refers to a global 'perspective which arises from the increased interdependence of national institutions and national economies'.¹³⁰ Although the term 'globalization' is commonly used synonymously with internationalization, technically the two have different meanings. 'The essential distinction is that globalization denotes a process of *denationalization*, whereas internationalization refers to the co-operative activities of *national* actors'.¹³¹

In terms of globalization, national boundaries are eroded and considered irrelevant; whereas internationalization is concerned with the interests of separate nations.¹³² Globalization has motivated countries to observe and consider each other's systems and laws comparatively and constructively.¹³³ In an era of globalization, it becomes increasingly difficult to determine who is to provide regulation when there are no clear boundaries.¹³⁴ While it is important for governments and regulators to focus on the interests of their own nation, the idea of harmonization of relationships and rules with other jurisdictions is an important implication of globalization.¹³⁵ Globalization is making it increasingly easier and more important for countries to conduct comparative analysis of the way other systems operate. For success and competitiveness it is important for a nation to continually review its own system; regardless of how successful they may appear in

125 *Companies Act 1993* (NZ) ss 131, 169.

126 *Ibid* ss 2, 164, 170, 172, 174.

127 See, Ministry of Economic Development Manatu Ohanga, *How does bankruptcy affect a business & employees?* (2007) <<http://www.insolvency.govt.nz>> at 25 February 2008.

128 See, Ministry of Economic Development Manatu Ohanga, *Employee-Related Claims* (2001) [7.1] <http://www.med.govt.nz/templates/MultipageDocumentPage_6137.aspx> at 25 February 2008.

129 MED, *How does bankruptcy affect a business & employees?*, above n 127.

130 Fox and Walker, above n 116, 5.

131 *Ibid* 6.

132 *Ibid*.

133 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 482.

134 Fox and Walker, above n 116, 10.

135 *Ibid* 10-11.

comparison to other nations.¹³⁶ Therefore an important question faces each nation: which model of corporate governance ‘...best serve[s] its interests in an era of globalization’?¹³⁷

There have been attempts to harmonize the law in relation to employee participation in corporate governance globally. Two examples are: the unsuccessful European Economic Community (the ‘EEC’) attempt to implement compulsory establishment of a two-tier board; and the Organization for Economic Co-operation and Development (the ‘OECD’) recommendations for countries to apply to their own diverse cultures. The EEC was established in 1957 by the Treaty of Rome,¹³⁸ which later became the European Community by the Maastricht Treaty signed in 1992.¹³⁹ The EEC has been successful in company law harmonization in regard to finance and accounts; but has not had as much success with corporate governance.¹⁴⁰ The aim of the draft Fifth Directive was to make boards responsive to employees by replacing classic single boards with compulsory two-tier systems;¹⁴¹ ‘a supervisory board responsible for controlling the management board; and a management boards responsible for managing the daily activities of the company’.¹⁴² This was a direct attempt to move towards the German system of supervisory board codetermination,¹⁴³ and would enable employees to participate in running the company.¹⁴⁴ Critics have suggested that ‘the EEC should refrain from formulating a single company structure based on the results in one country’.¹⁴⁵ Unfortunately this system would not have allowed any leeway for countries to adapt the concept so as to best suit the needs of their own nation.¹⁴⁶ The Directive was accordingly dropped after it did not attract the positive resonance as had been hoped.¹⁴⁷

Members of the OECD signed a convention in 1960 wherein member countries agreed to promote policies designed to contribute and help with, inter alia, achieving sound economic expansion; high sustainable economic growth, employment and living standards of member countries.¹⁴⁸ Germany, Japan, the United Kingdom and New Zealand are all members of the OECD. The OECD has developed Principles of Corporate Governance that offer ‘non-binding standards and good practices as well as guidance on implementation’.¹⁴⁹ The OECD recognizes that there are a variety of corporate governance systems, and there is no single framework appropriate for

136 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 498.

137 Ibid 483.

138 Conlon, above n 45, 349.

139 *The Maastricht Treaty*, opened for signature 7 February 1992, OJ C 191 (entered into force 1 November 1993).

140 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 470.

141 Conlon, above n 45, 348-9 and 358; *The Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 3 (entered into force 1 January 1959).

142 Ibid.

143 Charkham, *Keeping Good Company*, above n 1, 271.

144 Conlon, above n 45.

145 Ibid 359.

146 Ibid.

147 Elmar Gerum, and Helmut Wagner, ‘Economics of Labour Co-Determination in View of Corporate Governance’ in Klaus Hopt, et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 352.

148 *Convention on the Organisation for Economic Co-operation and Development*, opened for signature 14 December 1960.

149 OECD, *The OECD Principles of Corporate Governance* (2004) 4.

all countries.¹⁵⁰ The Principles are not binding on member countries, but are recommendations¹⁵¹ the OECD has developed in light of the growing awareness of the need for good corporate governance.¹⁵² The flexibility of the Principles enables countries to use them as a basis which they can develop and apply to the extent appropriate for their traditions and market conditions;¹⁵³ that are reflective of the economic, social, legal and cultural circumstances of the respective countries.¹⁵⁴ The OECD covers five main areas, one of which is the role of employees.¹⁵⁵ The respective Principle recommends that '[p]erformance-enhancing mechanisms for employee participation should be permitted to develop'.¹⁵⁶ Mechanisms suggested for enhancing employee participation may benefit companies directly and indirectly 'though the readiness by employees to invest in firm specific skills'.¹⁵⁷ One of the suggestions given to enhance employee participation is employee representation on boards.¹⁵⁸ The Principles represent a consensual view of '...the most important core elements of a good corporate governance framework'.¹⁵⁹ These Principles look good in theory, but as they are only optional and without any mechanism for enforcement, the benefits of implementing them may not be realized.

The idea of harmonization or convergence of law on a global scale would provide certainty and consistency in an increasingly globalized world where many large companies operate on a multi or trans-national level and are listed on foreign stock exchanges. Each country has developed its respective model of corporate governance slowly over time on the background of its unique history and culture. This makes it difficult to implement a completely new system of governance from a foreign country with a different background. It would be unfair to simply replace one system with another; each country has different values and aspirations in terms of corporate governance and social considerations; and each system has positive and negative aspects; this does not mean a radical change is necessary.

In a stakeholder theory the interests of multiple stakeholder groups may conflict, and will need to be balanced against each other. In a system where the interests of shareholders are paramount; exerting corporate social responsibility toward employee stakeholders will help to serve their financial aspirations. 'Corporate governance does not exist in a vacuum'.¹⁶⁰ Employees who are able to participate in corporate decision making will be able to serve their own interest, in keeping the company solvent, contemporaneously with serving shareholder interests. Corporate governance systems are constantly evolving as conditions change and practices continue to vary

150 OECD, *Improving Business Behaviour: Why we need Corporate Governance* <<http://www.oecd.org>> at 3 February 2008.

151 *Ibid.*

152 William Witherell, *Corporate Governance: A Basic Foundation for the Global Economy* (2000) (Summer) *OECD Observer* 24, 26 <<http://www.oecdobserver.org/news/fullstory.php/aid/317>> at 3 February 2008.

153 OECD, *Improving Business Behaviour: Why we need Corporate Governance*, above n 150.

154 OECD, *The OECD Principles of Corporate Governance*, above n 149, 13.

155 Witherall, above n 152.

156 OECD, *The OECD Principles of Corporate Governance*, above n 149, 47.

157 *Ibid.*

158 *Ibid.*

159 Witherell, above n 152.

160 John Farrar, *Corporate Governance Theories, Principles and Practice* (3rd ed, 2004) 10.

across nations and cultures.¹⁶¹ The idea of harmonization is to have one single model of corporate governance and one law to regulate it.¹⁶²

There is no single universal model of corporate governance. Nor is there a static, final structure in corporate governance that every country or corporation should emulate. Experimentation and variety should be expected and encouraged.

There are many theoretical advantages of harmonizing the role of employees in corporate governance. Global harmonization will enable equal treatment and participation for employees regardless of which company or country they are working in. Providing for employee participation in corporate decision making supports the stakeholder theory and gives employees a voice. Companies will receive all the subsequent benefits associated with the stakeholder theory, as well as an incidental improvement in shareholder returns. Although there is currently no single system of corporate governance that can readily be applied globally, there are certain common elements which provide the basis for good corporate governance.¹⁶³ Many laws may naturally merge together as cultures merge together: as a result of the totality of globalization and internationalization eroding more boundaries and more nations cooperating. With immigration, emigration and the ability to communicate¹⁶⁴ and travel faster each nation is increasingly being exposed to other cultures and governance systems which they can observe and learn from. The community to be considered, in light of the stakeholder theory, is constantly expanding and global harmonization will be looking more attractive as an efficient way to reduce transaction costs and time associated with international dealings.

To implement one model of employee participation for global harmonization, important considerations need to be taken into account. International consensus of every country would need to be attained and any agreement will need to be ratified and enacted into domestic law, with enforceability mechanisms for the model to have any effect. Cultural factors are dominant in corporate governance,¹⁶⁵ and contribute to the ongoing difficulty in establishing one mandatory system of employee participation that satisfies all nations. Regardless of how successful a system is within the culture it was created in, it will not necessarily be easily transferred to another nation to the same effect.¹⁶⁶ For example, codetermination in Germany acted as a remedy to help revive democratic forces after the disastrous war. Furthermore, the system of employee representation in codetermination of the supervisory board was tested in the coal and steel industries for a quarter of a century before application on a national basis.¹⁶⁷ It is unlikely that this background would be matched by many other nations.¹⁶⁸ The German system of codetermination ‘...is part of a broader system of industrial governance...’¹⁶⁹ which may only work in that context alone. A further example is:¹⁷⁰

161 Farrar, *Corporate Governance Theories, Principles and Practice* (2nd ed), above n 2, 498.

162 Ibid.

163 OECD, *The OECD Principles of Corporate Governance*, above n 149, 13.

164 Farrar, *Corporate Governance: Theories, Principles and Practice* (2nd ed), above n 2, 475.

165 Ibid 470.

166 Furlong, above n 28, 135.

167 Ibid 162.

168 Ibid.

169 Paul Davies, ‘A Note on Labour and Corporate Governance in the U.K.’ in Klaus Hopt, et al (eds), *Comparative Corporate Governance: The State of the Art and Emerging Research* (1998) 373.

170 Araki, above n 88, 280.

the Japanese employee-centered stakeholder model [which] relies heavily on a number of customary practices, such as long-term cross-share ownership, internal promotion of management and the existence of 'directors-with-employee-functions', long-term (lifetime) employment, and voluntary joint management-labour consultation.

Considerable modifications may be required in order for one system of employee participation in corporate decision making to be successfully transferred to another nation,¹⁷¹ or harmonized globally.

VII. CONCLUSION

In conclusion the role of employees in corporate governance varies from country to country. As unsecured creditors, it is important for employees to have a role in corporate governance and participate in corporate decision making in order for them to protect their interests. Enabling employees to participate in corporate decision making has been successful in Germany where employees are represented on the supervisory tier of the board, which appoints and effectively controls the management board. Employees therefore have a huge amount of influence over corporate decision making. In Japan employees are seen as important members of the company despite the recent structural changes. The traditional model saw employees stay with one company for the duration of their lifelong career, and the company was basically run in the best interest of the employees. In both German and Japanese corporate governance systems employees are able to protect their interest by participating in running the company. The United Kingdom, which previously did not accommodate any rights of participation for employees, has now voluntarily adopted legislation in that regard. Recently, common law directors' duties were codified into statute, permitting directors to take account of the interests of stakeholder employees. The situation in New Zealand is much the same as the traditional United Kingdom system wherein employees currently have no rights to participate in running the company. However, New Zealand employees are provided with some protection for their entitlements in the event of the company going into receivership or liquidation. New Zealand has the advantage of utilizing comparative analysis techniques and is able to comparatively look at other systems to determine the implications of adopting corporate social responsibility into its corporate governance system.

Employees are important members of a company; the growth and output of a company largely depend on the growth and output of the employees. Although shareholder investments are important to enable the company to operate, the running of the company is then largely left up to the directors and employees. Therefore the company, in many respects depends, on its employees more than its shareholders. Comparative analysis is an important aspect in terms of reviewing a nation's system of corporate governance. It enables one to determine which systems and models of employee participation have been successful in terms of the historical and cultural backgrounds that produced them; and anticipate the possible implications that model may have if it was adopted by other nations. By comparing the backgrounds of the nations of the world and what in particular made them succeed or fail is of utmost importance when considering whether corporate governance can be harmonized globally. It is important for nations to be autonomous and develop their own specific laws which they perceive will meet the interests of their citizens, and not have any foreign laws imposed on them. Globalization is making the ability to undertake comparative analysis more accessible and efficient; thereby enabling nations to undertake a review of their own

171 Furlong, above n 28, 3.

system in light of other systems in the world. Corporate governance systems are evolving over time; as are national cultures as they migrate to other nations and adapt to the cultures within that nation, whilst incidentally spreading their own cultural values. In that regard, both corporate governance systems and cultures may evolve in sync, and merge together in due course as each nation adapts and adopts the successful aspects of other systems. The result would effectively be multiple similar systems throughout the world with the same underlying goals and principles. Only when global corporate governance is at that stage will harmonization be possible.

ACADEMIC FREEDOM AND THE LAW

JEREMY UPSON*

I. INTRODUCTION

Academic freedom in an ideal typical sense encompasses ‘academic’ immunity and the privilege of freedom of expression. It is fundamental to the university’s purpose: pursuing knowledge. It is also a self-limiting concept – the immunity and privilege it entails balanced by specific duties. In the legal context, the Education Act 1989 declares parliament’s intention to preserve academic freedom,¹ but in effect provides that its preservation is subject to the national interest.² One judicial interpretation describes these provisions as ‘a parliamentary admonition to ministers and others on the importance of academic freedom and the need for public tertiary institutions to have autonomy’.³ Yet, the provisions also ‘tell institutions how they are to act’.⁴ Introducing the relevant Bill to the House, the Minister acknowledged a balance between academic autonomy and accountability was difficult to find.⁵ It is precisely the threat of imbalance resulting from the weight of renewed government intervention in the operations of tertiary institutions through the Education (Tertiary Reforms) Amendment Act 2007 that has renewed focus on the legal extent of academic freedom.

While the provisions of the Education Act and the 2007 reforms strongly reflect the state’s view of its role in university education in New Zealand, they also provide an internally inconsistent conceptualisation of academic freedom by introducing legal powers that are absent in its ideal sense. In turn, this demonstrates the problem of legislating for fundamental principle as accounted for by Weber’s theory of legal-rationality.

II. THE CONCEPT OF ACADEMIC FREEDOM

A. *Preface: Weber’s ideal types*

First, it is appropriate to establish the concept of academic freedom. Academic freedom is presented here firstly as an ideal type, Weber’s methodological device used to objectively analyse human action.⁶ They are conceptual models representing an exaggerated picture of reality – emphasising

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1 *Education Act* 1989 s 161(1).

2 *Education Act* 1989 s 160 and s 161(3) respectively provide the qualifiers of ‘national interest’ and ‘proper use of resources’. See below Part IV(D).

3 *Attorney-General v Unitec Institute of Technology* [2007] 1 NZLR 750, 765 (Court of Appeal).

4 *Ibid.*

5 New Zealand, *Parliamentary Debates*, House of Representatives, 29 March 1990, 1167 (Phil Goff, Minister of Education).

6 Donald McIntosh ‘The Objective Bases of Max Weber’s Ideal Types’ (1997) 16 *History & Theory* 265.

certain aspects to be used in comparison with observed reality.⁷ Here the ideal typical account of academic freedom is constructed from the literature, in order to compare it with the observed reality of government policy on university education.

A. *The Literature*

Menand dismisses from the outset ‘that there exists some unproblematic conception of academic freedom that is philosophically coherent and that will conduce to outcomes in particular cases which all parties will feel to be just and equitable’.⁸ However, he seeks to define it by identifying its purpose.⁹ It operates both as negative liberty – ‘freedom *from* interference in one’s pursuits’,¹⁰ and as positive liberty – ‘freedom *for* a predefined end’.¹¹ Problematic in this account however, is agreement on what those pursuits are, and what the predefined end might be.

Rorty is more specific, describing academic freedom as the ‘customs and traditions [that] insulate colleges and universities from politics and from public opinion’¹² and which ‘insulate teachers from pressure from the public bodies or private boards who pay their wages’.¹³ Similarly, Dworkin counts ‘two levels of insulation’¹⁴ (internal and external to institutions) and notes that financial pressure is a feature of both. But both of these views taken at this point fail to define anything other than a description of what academic freedom is, and don’t approach a view of the predefined end for which it is employed. In other words they provide the what, not the why.

Going towards identifying that purpose, these customs and traditions, in Golding’s account of the ‘Mill-Holmes thesis’,¹⁵ are the conditions for the ‘marketplace of ideas’ or - in the context of the university - the ‘advancement and dissemination of knowledge’.¹⁶ However, Golding acknowledges problems in accessing this marketplace, and the forces that prevent truly free discourse (notably academic orthodoxy), accepting the element of truth that such a marketplace is a myth.¹⁷ Rorty, himself a pragmatist, also recognises these practical limits to academic freedom’s efficacy, and doubts the possibility of truly objective truth.¹⁸ Nonetheless, Rorty still asserts the value of ‘muddling-through’ to ‘reasonable [...] compromise’¹⁹ that academic freedom enables. If it is not to be the truth, then something approaching it will have to do. In these accounts, academic

7 See generally Tore Lindbeck ‘The Weberian Ideal Type: Development and Continuities’ (1992) 35 *Acta Sociologica* 285 and Stephen Turner and Regis Factor *Max Weber. The Lawyer as Social Thinker* (1994) 153.

8 Louis Menand ‘The Limits of Academic Freedom’ in Louis Menand (ed), *The Future of Academic Freedom* (1996), 5.

9 Ibid.

10 Ibid.

11 Ibid (original emphases).

12 Richard Rorty ‘Does Academic Freedom Have Philosophical Presuppositions?’ in Louis Menand (ed), *The Future of Academic Freedom* (1996) 21.

13 Ibid.

14 Ronald Dworkin ‘We need a new interpretation of academic freedom’ in Louis Menand (ed), *The Future of Academic Freedom* (1996) 183.

15 Derived from John Stuart Mill’s *On Liberty*, and its application by Justice Holmes in the case of *United States v Schwimmer* 279 US 644 (1929). Discussed in Martin P Golding *Free Speech on Campus* (2000) 16-17.

16 Golding, *ibid* 17.

17 Ibid 26-27.

18 Rorty, above n 12.

19 Ibid 38.

freedom is treated primarily as instrumental to academe, but Dworkin also ascribes intrinsic worth to it.²⁰

He begins by noting the change over time of the thoughts one associates with the concept of academic freedom.²¹ He describes its hey-day where '[w]e thought [...] about leftist teachers and McCarthyite legislators and loyalty oaths and courageous and cowardly university presidents'.²² In the context of American universities, the main controversy in which academic freedom is implicated is the issue of institutional speech codes.²³ Recognising such changes in context, Dworkin argues that the meaning given to academic freedom must also change.²⁴

Describing academic freedom as a political value (in agreement with Rorty's denial of any presuppositional value in the concept),²⁵ Dworkin suggests that a new definition must fulfil two criteria:²⁶

First, it must fit well enough with general understandings of what academic freedom does and does not require so that it can provide a new interpretation of an established value, not a new value altogether. Second, it must justify those general understandings as well as they can be justified; it must show why academic freedom is a value, so that we can judge how important it is, and whether and when it should yield to other, competing values.

In other words, it must explain both its instrumental and normative worth. Although the marketplace of ideas is generally a sufficient defence of the instrumental value of academic freedom, Dworkin argues that it doesn't fully explain the absoluteness of academics' use of it.²⁷ For example, limited resources might justify a decision not to hire someone whose views are clearly untrue (for instance Holocaust deniers) – it would be a waste of the university's resources to fund their research and teaching on that view.²⁸ However, if a tenured faculty member took that same view, they would be protected by academic freedom.²⁹

Dworkin proposes an 'ethical ground' and a 'culture of independence' to explain our 'emotional' response to issues of academic freedom.³⁰ The ethical ground is liberal in one sense, and existentialist in another: that we each have a responsibility to make the most of our lives, and that in academics this manifests as a specific responsibility to 'discover and teach what they find to be true'.³¹ Justice Hammond similarly recognised this as a 'calling' – quoting Bellah et al – 'constitut[ing] a practical ideal of activity and character that makes a person's work morally inseparable from his or her lifestyle'.³² Anything that interferes with this 'undiluted responsibility

20 Dworkin, above n 14, 181.

21 Ibid.

22 Ibid.

23 Ibid 182. The relevance to New Zealand of the regulation of 'speech codes' as a curb on academic freedom is highlighted by two controversies at the Universities of Canterbury and Waikato regarding the publication of theses on the Holocaust.

24 Ibid.

25 See Rorty, above n 12.

26 Dworkin, above n 14, 182 (original emphasis).

27 Ibid 186.

28 Ibid.

29 Ibid.

30 Ibid 187-191.

31 The discussion of the ethic takes place at 187-189, the quoted text is at 189.

32 Robert Bellah et al, *Habits of the Heart: individualism and commitment in American life* (1985) 66.

to the truth' is a therefore a fetter on personal responsibility and a denial of self-actualisation³³ – a kind of externally imposed 'bad-faith'.

Dworkin argues that a culture of independence is pre-requisite to the flourishing of the ethic of individualism.³⁴ Its opposite is a culture of conformity, the perfect realisation of which is the totalitarian state. Academic institutions are important in staving off the culture of conformity as they can easily themselves become 'engines of conformity'; but also because they can help others to fulfil their own personal responsibility.³⁵ Finally, academic institutions are also symbolically important, as truth-seeking is an end in itself, and such institutions are perhaps the only ones devoted to that end.³⁶

In the New Zealand context, it could be argued that the universities' legislated role as 'critic and conscience of society'³⁷ reinforces such symbolic importance. Signalling academic freedom's importance in achieving this, a paper published by the New Zealand Universities Academic Audit Unit (AAU) says that '[a]cademic freedom is inseparable from a university's role as critic and conscience of New Zealand society'.³⁸ Kelsey argues further that not only is this role important symbolically, but that without the plurality and 'rigorous contest of ideas' that academic freedom entails, 'our communities, society and economy will stultify'.³⁹ Differing from Dworkin, Kelsey argues that the concept of academic freedom 'should transcend the specifics of the time':⁴⁰

[I]t is about training the minds of students to analyse, critique and rethink the current orthodoxy[...] . It is about moving with and ahead of the times in ways that make a country internationally competitive, and at times a world leader, and empowers its peoples, to play an active part in a rapidly changing, non-linear world.

In this way, '[a] strong commitment to academic freedom is therefore an investment for the future'.

In this last respect, Kelsey (seemingly inadvertently) foreshadows the ends to which current government policy is oriented; she sees academic freedom as instrumental to that end, just as Government policy sees a coordinated, systematic approach to tertiary provision as the key instrument.⁴¹ The discord between this view and Dworkin's is highlighted by the Minister's denial of the relevance of academic freedom to Government's policy aims:⁴² 'Academic freedom is not about the freedom to teach whatever one likes for whatever cost; it is the freedom to express views about the areas that one is responsible for [...]'.⁴²

33 Dworkin, above n 14, 189.

34 Ibid 189-191.

35 Ibid.

36 Ibid.

37 *Education Act* 1989 s 162(4)(a)(v).

38 New Zealand Universities Academic Audit Unit, 'Universities as Critic and Conscience of Society: The Role of Academic Freedom' (2000) March, AAU Series on Quality 6, 1.

39 Jane Kelsey 'Academic Freedom: Needed now more than ever' in R Crozier (ed), *Troubled Times: Academic Freedom in New Zealand* (2000) 227, 230.

40 Ibid 228.

41 The Government's present tertiary education policy is discussed further below Part VI.

42 New Zealand, *Parliamentary Debates*, House of Representatives, 25 July 2007, 10686 (Dr Michael Cullen, Minister for Tertiary Education).

Moreover, the Minister's argument is simplistic if not incoherent: it presupposes that one can completely isolate operational efficiency from the protection and advancement of freedom (of speech) in principle.

Other critics see academic freedom as an exercise in self-justification without any meaningful moderating norms:⁴³

Academic freedom is the name of a way of thought that confuses eccentricity with genius and elevates pettiness, boorishness, and irresponsibility to the status of virtue; evacuates morality by making all assertions equivalent and, because equivalent, inconsequential; empties history of its meaning so that actions proceeding from entirely different motives and agendas become indistinguishable as instances of individual preference and free choice; and promotes a regime of relativism by refusing to make judgments, on the reasoning that one man's meat is another man's poison.

Fish's polemic sets out the standard argument against academic freedom as inevitably engendering moral relativism, and decries the worst characteristics of those in the ivory tower whose privilege derives from the patch protected by their academic discipline. Admittedly, Fish's criticism is limited to the internal logic of academic freedom, that is that the privilege afforded academics defeats, by making academic views 'untouchable', the very marketplace of ideas it seeks to advance. However, a powerful response is that this ignores the real advances in knowledge made by those in universities.

Illustrating this last point, and also Menand's initial observation, Calhoun⁴⁴ agrees with Fish's analysis that the academic discipline is central to academic freedom, and that it is indeed self-regulatory, with its own 'standards of behaviour and [...] role obligations',⁴⁵ but argues the point to a different conclusion: that it is effective in 'continuing conversation and disputation, which is how knowledge is developed and truth is established'.⁴⁶ Calhoun theorises that academic freedom might usefully be viewed as a set of associational rights accruing to academics who conform to the norms of the discipline.⁴⁷ These norms operate as a limiting duty of responsibility attaching to the exercise of academic freedom.

The case of *Rigg v University of Waikato*⁴⁸ was decided prior to the Education Act 1989, and further develops the idea of academic responsibility. It concerned the dismissal of a senior lecturer in German for his co-authorship of an article in student magazine *Nexus* alleging that inadequate supervision of the University's biology isotope laboratory had probably resulted in students dying of cancer and that the University [...] had concealed this matter to safeguard the University's 'good' reputation. The article stated: 'students are evidently dispensable'.⁴⁹

In his evidence before the Visitor, the petitioner argued that 'academic freedom [...] include[s] all the activities which a member of the university community involves in [sic] outside of the sphere of teaching and research'.⁵⁰ The issue of whether his conduct was consistent with his posi-

43 Stanley Fish 'What's Sauce for One Goose: The Logic of Academic Freedom' in Kahn, S (ed), *Academic Freedom and the Inclusive University* (2001), 3.

44 Emily Calhoun 'Academic Freedom: Disciplinary Lessons from Hogwarts' (2006) 77 *University of Colorado Law Review* 843.

45 *Ibid* 849.

46 *Ibid*.

47 *Ibid* 844.

48 [1984] 1 NZLR 149 (*Rigg*).

49 *Ibid* 149.

50 *Ibid* 203.

tion at the University fell to be decided on the extent of academic freedom's concomitant responsibilities. The Visitor was unimpressed with the petitioner's attempts to justify a broad scope for academic freedom, and instead favoured an opinion given by Professor FW Marshall, Head of the French Department. Marshall outlined three obligations imposing themselves on those exercising academic freedom.⁵¹ First was truth, and the pursuit of it (although acknowledging that in itself the notion of truth is problematic); secondly, the academic must act with sincerity, or good faith, in that they must make an effort to 'discover the truth, commensurate with the likely effect of the statement';⁵² and thirdly, 'humanity', which requires that consideration be given to the 'emotional and material'⁵³ impact made on people by the exercise of academic freedom. Although the Professor was more narrowly concerned with issues of freedom of speech, and how this applied in the context of academic freedom, the obligations of truth-seeking and good faith resonate with Dworkin's account of the special nature of academic freedom. Furthermore, the Professor's reference to 'material impact' might usefully apply where the free speech aspect of academic freedom is not at issue – for instance in arguments of the cost of giving effect to academic freedom.

B. Conclusion

It is clear that academic freedom is commonly understood to encompass both freedom of speech and the autonomy of academic units (including whole institutions) from governing entities. There is general agreement that something approaching a 'market-place of ideas' is critical to academic pursuits. There are also multiple references to the public good that comes as a result of academic freedom. Perhaps, though, Dworkin's account is to be preferred for the way that it explains the moral conviction academic freedom inspires, and for the way it describes the interdependent relationship between free speech and institutional autonomy. The duties and responsibilities relating to academic freedom might be broadly described as responsibilities of 'good faith'. Therefore the general argument goes that pursuing knowledge in accordance with the best traditions of academic freedom in good faith will result in the desired public outcomes. Viewed in its ideal typical sense, academic freedom is a self-contained concept of both rights and responsibilities, suggesting that external moderating factors are unnecessary additions if its purpose is to be served.

III. THEORISING THE ROLE OF THE STATE IN UNIVERSITY EDUCATION

Having seen that an ideal typical account of academic freedom is in large part about autonomy, it is now useful to consider the role of the state in university education, especially which aspects of that role might infringe on that autonomy.

A. Theorising the role of the state in university education

Braun and Merrien describe a shift in emphasis from universities as '*cultural institutions* contributing in general and without concrete purpose to the social cohesion and economic development

51 Ibid 204.

52 Ibid.

53 Ibid.

of societies'⁵⁴ to a 'new belief system which regards universities as *public service institutions* subject to concrete social, political and economic goals'.⁵⁵ (Original emphases.) However, criticism of inefficiencies and a lack of accountability in the functioning of universities has led to the latter approach, where the state contracts universities to deliver to certain defined objectives.⁵⁶ Generally, this approach to the provision of public services politicises the decision as to how much of the public good is to be provided, and on what conditions⁵⁷ – the 'good' becomes subject to the rationalism of the state.

The authors propose 'a three-dimensional cube on governance' as a comparative tool to evaluate governance models in universities from country to country.⁵⁸ The cube distinguishes substantive autonomy (autonomy in what the university does) and procedural autonomy (how it gets it done), with the third dimension representing the belief system of the state as to the purpose of the university. The authors suggest New Zealand's tertiary education policy is 'new managerialist', with tight substantial control over what is done by the university, loose procedural control, and a belief system oriented towards that of public service.⁵⁹

On this analysis, it can be argued that the purpose of the university in New Zealand is viewed by the state as instrumental to its own goals. Applying Braun and Merrien's schema, diminishing institutional autonomy corresponds with a greater interest in university performance by the state, and trends against a view of the university as a cultural institution (which places a greater emphasis on education as an intrinsically valuable thing.) This is a pivotal observation when one considers the quantum of the New Zealand Government's interest in university education relative to other sources of funding. Statistics published in *Education Review* show that in 2006 universities relied on Government grants for between 20 per cent and 43 per cent of their total income (excluding additional Government-provided funding for research). Of the eight universities, five relied on Government grants for 40 per cent or more of their total income.⁶⁰ In other words, the state's interest can be measured in monetary terms, with increases in funding coupled to increases in substantive controls.

Moreover, what qualifies for 'loose procedural control' has been considerably tightened by the government's 2007 tertiary reforms, specifically the reforms' increased reporting requirements.⁶¹ In respect of the importance of academic freedom, this represents a progressive consolidation of the state's power to encroach on academic freedom where it perceives it is in its own interest to do so. This represents a transformation of the fundamental principle of academic freedom into one compatible with the tools of, and complicit with respect to, the bureaucratic state management of university education – a process aptly described by Weber's theory of legal-rationality.

54 Dietmar Braun and Francois-Xavier Merrien 'Governance of Universities and Modernisation of the State' in Dietmar Braun and Francois-Xavier Merrien, *Towards a new model of governance for universities. A comparative view* (1999) 9, 11.

55 Ibid.

56 Ibid 14-15.

57 Ibid, and G Brennan 'The Economic Concept of Contract' in Glyn Davis, Barbara Sullivan, & Anna Yeatman (Eds), *The New Contractualism* (1997) 27-38.

58 Braun and Merrien, above n 21, 23.

59 Ibid.

60 John Gerritsen 'Sources of uni income' (2007) 12 *Education Review* 7. These figures exclude additional government funding based on institutional research performance.

61 See below Part VII.

In furtherance of this argument, it is contended that by legislating for academic freedom, the state has placed potentially extensive limits on the operation of the ideal concept, arguably to the extent that the legislation may undermine the very principle it seeks to protect.

B. *Rational-legality*

The process of incorporating principle into law is central to Weber's account of 'rational-legality',⁶² by which he means 'the progressive secularization and disenchantment of the worldviews from which norms derive their justification'.⁶³ Weber views the modern state as a bureaucracy built to achieve societal projects; the bureaucratic form being 'the most effective large-scale social technology ever devised by human beings'.⁶⁴ The origins of a bureaucracy lie in the perceived solution to a substantive 'determinate human purpose'⁶⁵ where in the absence of the bureaucracy competing interests would otherwise pursue divergent means, resulting in society's failure to achieve that purpose. However, the managerialist characteristics inherent in a bureaucracy may eventually come to embody a rational efficiency and zealous compliance with systems and rules that are counter-productive to that purpose.⁶⁶ In short, when a concept is monopolised by the state bureaucracy through legislation, there is the potential that it is eventually modified in a manner that subverts the initial purpose for which it gained legal recognition.

Weber's description of the process resembles a criticism traditionally levelled at utilitarian political philosophy: that even with the best intentions, principle gives way to pragmatism when put under enough pressure – the ends justify the means.⁶⁷ Often the law seeks to balance competing principles, for instance the limited protection afforded the rights affirmed by the New Zealand Bill of Rights Act 1990 as balanced against the combined effect of ss4-6 of that Act. But there is a danger where the balancing principle (competing against the one protected) is as vague and potentially wide-reaching as the 'national interest'. This is especially so where such a balancing principle is realised by conferring discretions of a political nature on an agent of the state, thereby distancing the agent from the scrutiny of the courts.⁶⁸ It is contended later that the 2007 tertiary reforms do just that, and that the legitimacy of the legislative process by which this is enabled owes much to the incorporation of the concept of academic freedom into statutory law in 1989.

IV. ACADEMIC FREEDOM IN LEGAL TERMS

From an ideal typical account of academic freedom, to a descriptive theorisation of the role of the state in university education, and then to a theory on the process by which principles lose their flavour upon their enactment as law, we proceed to the enactment of academic freedom itself. In introducing academic freedom in legal terms, we first consider the context of the university as a legal institution in New Zealand.

62 James Ketchen 'Revisiting Fuller's critique of Hart – Managerial control and the pathology of legal systems: The Hart-Weber nexus' (2003) 53 *University of Toronto Law Journal* 1.

63 *Ibid* 16.

64 *Ibid* 12.

65 *Ibid* 13.

66 *Ibid*.

67 See for a popular example Peter Singer, *Practical Ethics* (1993) 100 on killing human beings.

68 See *Wellington CC v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537; *Anns v Merton London Borough Council* [1978] AC 728. See also Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (1980).

A. *The establishment of the University of New Zealand*

In keeping with experience elsewhere in the New World, the establishment of the University of New Zealand in 1870⁶⁹ ‘sought to domesticate [the university] while retaining its essential features’.⁷⁰ The University was a federal one, ‘responsible for teaching, examining, and the granting of degrees’;⁷¹ although in reality teaching was carried out by its constituent colleges,⁷² and initially the examinations were conducted in Great Britain.⁷³ When the University was formally reduced to an examining and degree-granting body,⁷⁴ one consequence was⁷⁵ ‘that it had no responsibility to play the role it should have played in seeking adequate support from the government for the financial needs of university teaching’.

The Colleges were left to do the ‘real university work’,⁷⁶ suiting the colleges who demanded no interference by the university in their administration.⁷⁷

B. *The contemporary university as a legal institution*

In 1961 the New Zealand University was disestablished and its constituent colleges themselves were constituted as individual universities. The enactments establishing these universities, and also the 1963 enactments establishing Massey University and the University of Waikato, conceive of the university’s purpose as ‘[f]or the advancement of knowledge and the dissemination and maintenance thereof by teaching and research’.⁷⁸

Legally, each university is comprised of its council, academic staff (the classes of which are expanded on in the acts in some detail) and students, and of the librarian and the registrar.⁷⁹ There is an emphasis on the academic staff of a university, yet legally council heads the hierarchy.⁸⁰ These two features have led to power struggles between councils and academics throughout the history of the university in New Zealand, as each seeks to assert competing interests.⁸¹

69 *New Zealand University Act 1870*.

70 Nicholas Tarling and Ruth Butterworth, *A Shakeup Anyway. Government and the Universities in New Zealand in a Decade of Reform* (1994) 16.

71 Hugh Parton, *The University of New Zealand* (1979) 16.

72 The Colleges came to include Canterbury University College (established 1873); Auckland University College (established 1883); Victoria University College (established 1899); and Otago University (which although established before the University in 1869 became an affiliated college in 1874).

73 Parton, above n 71, 18.

74 *University Act 1874*.

75 Parton, above n 71, 18.

76 *Ibid* 19.

77 *Ibid* 18.

78 Section 3(1) respectively in the *University of Auckland Act 1961*; the *Victoria University of Wellington Act 1961*; the *University of Canterbury Act 1961*; the *Lincoln University Act 1961*; the *University of Waikato Act 1963*; the *Massey University Act 1963*. The *University of Otago Amendment Act 1961* confirmed the continuance of the university as established under the principal Ordinance of 1869.

79 Section 3(2) of the 1961 and 1963 Acts noted above n 33. Provisions to this effect are put more succinctly in the *Auckland University of Technology (Establishment) Order 1999*, SR1999/332.

80 *Education Act 1989* s 165(1)(a) provides that an institution’s governing body is its council.

81 See generally Keith Sinclair *A History of the University of Auckland 1883-1893* (1983).

As to the current legislated purpose of universities, the Education Act 1989 is perhaps paramount, and sets out the following characteristics of universities:⁸²

- (a) [...]
 - (i) They are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence:
 - (ii) Their research and teaching are closely interdependent and most of their teaching is done by people who are active in advancing knowledge:
 - (iii) They meet international standards of research and teaching:
 - (iv) They are a repository of knowledge and expertise:
 - (v) They accept a role as critic and conscience of society; and
- (b) That –
 - [...]
 - iii) A university is characterised by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence, and promotes community learning[...]

These characteristics are to be taken into account by the Minister in making a recommendation to the Governor-General on whether to make an order for the establishment of an institution as a university, and although they are set out for this express purpose they have also been held to express by ‘necessary implication’ the purpose of the university.⁸³

C. *Policy culminating in the Education Act 1989*

The academic freedom provisions in the Education Act 1989 formed part of what the Minister claimed was ‘the most significant reform ever carried out in the history of the New Zealand system of tertiary education and training’.⁸⁴ Bulk-funding of tertiary institutions and the distancing of central government from their management were the dual thrusts of that reform.⁸⁵ Although prima facie this policy was consistent with notions of academic freedom, providing for academic freedom in the Act itself was an afterthought.⁸⁶ Overall, tertiary education policy in the tertiary education sector was merely one component of the radical reform of public service provision as a whole.⁸⁷ Competition among providers (in this case, universities and other tertiary institutions) was a feature of the neo-liberal theory of state services this reform implemented.⁸⁸ In the education ‘quasi-market’⁸⁹ competition was created through government’s funding of institutions ac-

82 *Education Act 1989* s 162(4).

83 See *Association of University Staff of New Zealand Inc v University of Waikato* [2002] NZAR 817, 821.

84 New Zealand, *Parliamentary Debate*, House of Representatives, 29 March 1990, 1166 (Phil Goff, Minister of Education).

85 *Ibid.* See also Gary Hawke, ‘Report of the Working Group on Post Compulsory Education and Training’ (1988). (The Hawke Report)

86 Having been inserted after the fact by the *Education Amendment Act 1990*. The original policy document for reform: Department of Education, ‘Learning for Life. Education and Training Beyond the Age of Fifteen’, (1989) contained no express discussion of academic freedom. Its sequel Department of Education Learning for Life Two (1989) resolved this anomaly.

87 Tarling and Butterworth above n 70, 67. The overall reform agenda was set by Treasury, (1984); Government Management (1987).

88 Christine Cheyne, Mike O’Brien, and Michael Belgrave *Social Policy in New Zealand. A critical introduction* (2005) 81. See also the Hawke Report, above n 127, 24 for advocacy of the place of competition in education provision.

89 *Ibid.*

ording to the number of equivalent full-time students (EFTS) enrolled, and university provision became demand-led.

D. Education Act 1989: The academic freedom provisions

Academic freedom of and within universities is protected thus by s160 of the Education Act 1989:

The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.

Section 160 contains both the statement of principle and its limitations, and s161 elaborates:

- (1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced.
- (2) For the purposes of this section, academic freedom, in relation to an institution, means—
 - (a) The freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions:
 - (b) The freedom of academic staff and students to engage in research:
 - (c) The freedom of the institution and its staff to regulate the subject-matter of courses taught at the institution:
 - (d) The freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning:
 - (e) The freedom of the institution through its chief executive to appoint its own staff.
- (3) In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with—
 - (a) The need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
 - (b) The need for accountability by institutions and the proper use by institutions of resources allocated to them.

Section 161 is explicit as to the precise meaning of academic freedom, and the meaning it provides accords well with the ideal concepts of academic freedom provided above in part II of this paper. The limitations are spelt out in two parts through both sections. In some ways the limitations mirror those attaching to the ideal concept of academic freedom. For example, s161 (3)(a) provides that academic freedom must be exercised consistently with the maintenance of ‘the highest ethical standards’. The Professor’s opinion given in evidence in Rigg that academics had ‘duties’ of truth-seeking, acting in good faith, and towards humanity are invoked by this rider, as is Dworkin’s account of responsibility. Similarly, the demands of accountability in an academic sense are critical to the academic pursuit itself - recall the transparency of debate in the ‘marketplace of ideas’.

However, conditions that academic freedom be exercised consistently with ‘the efficient use of national resources’ and the ‘national interest’ are not in themselves a feature of the ideal concept. Rather, they are a consequence of the fact that universities are highly dependent on public funds for their operation.⁹⁰ Coupled with this understanding, the ‘demands of accountability’ take on a different meaning – a meaning also reflected in the Public Finance Act 1989: to account for expenditure of public funds. This does not read as a startling insight, because it is a welcome and

⁹⁰ Gerritsen, above n 60.

expected feature of modern government generally, but it brings into focus Weber's account of legal-rationalism above.

E. The Courts' Interpretation of the Academic Freedom Provisions

Case law demonstrates the variety of contexts within which academic freedom is contested, emphasising the centrality of the provisions to academic life. For example, s161: was a mandatory relevant consideration for the minister in determining funding levels for the University of Otago's dentistry programme;⁹¹ and supported both the limitation of the International Education Appeal Authority's (IEAA) scope of inquiry into breaches of the code of practice for the pastoral care of international students to the matters complained of, and the prevention of the IEAA from applying standards of best practice in their review function.⁹²

The following accounts of the major New Zealand cases relating to academic freedom (post-Education Act 1989) further demonstrate the real limitations applying to academic freedom notwithstanding the concept's incorporation into statute law. Cumulatively – although they don't all refer to considerations of the national interest specifically – they do suggest that parliament's declaration in support of academic freedom is further from absolute than it first appears.

*1. Attorney-General v Unitec Institute of Technology*⁹³

This case concerned the application by the institution to the Minister for redesignation as a university.⁹⁴ Unitec had been successful in High Court proceedings for judicial review challenging the Minister's decision to decline its application.⁹⁵ Much of the case centred on a government policy to limit the number of universities to those already established.⁹⁶ The High Court held that the 'national resources, the national interest, and the demands of accountability'⁹⁷ were merely a 'qualification to the object of the relevant provisions of the Act,'⁹⁸ and therefore did not alone provide the Minister with sufficient grounds to decline the application in support of the aforementioned Government policy.⁹⁹ On that basis Miller J held:¹⁰⁰

That a decision that a body is to be denied university status, regardless of its academic qualities, on the ground that the minister is opposed to any increase in the number of universities would be contrary to the text and the purpose of the Act.

Implicit in his reasoning was the underlying notion that academic freedom, as provided for in the Act, enabled institutions to develop and change their own profile, even if by doing so, they de

91 *Anning v Minister of Education*, noted [2002] BCL 518.

92 *University of Auckland v International Education Appeal Authority*, noted [2007] BCL 234. The Code of Practice for the Pastoral Care of International Students was introduced in 2002 in response to high profile incidents involving international students in New Zealand, including the collapse of several private English Language schools, and the resulting poor publicity for the export education market. The Code must be complied with by all education institutions enrolling international students, and is established pursuant to the Education Act 1989 s 238F.

93 [2007] 1 NZLR 750 (Court of Appeal).

94 The process for the establishment of a university is set out in the *Education Act* 1989 s 162.

95 Reported at *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (High Court).

96 A policy represented by the Education (Limiting Number of Universities Amendment) Bill, which never received the Royal Assent.

97 *Education Act* 1989 s 160.

98 *Unitec Institute of Technology v Attorney-General*, above n 95, 81.

99 *Ibid.*

100 *Ibid.*

facto displayed the characteristics of another class of institution. The Court's disposition seems to undermine the Act itself by blurring the distinction between the characteristics of different types of tertiary institutions as set out elsewhere in the Act. It also appears to imply a power possessed by institutions to force the Minister's hand.

The Court of Appeal allowed the Crown's appeal in all respects.¹⁰¹ In reaching this decision, the Court effectively held that Unitec's autonomy as an institution did not in any way compel the minister to accede to its request to change its status.¹⁰² The Court further speculated obiter that s160's 'references to 'efficient use of national resources' and the 'national interest' implied the minister was 'entitled' to consider them given the 'policy issues' inherent in the process of establishing universities.¹⁰³

One can infer from these reasons that the legislation contemplates real political limits on institutions' (including universities') autonomy, and that where the legislation confers discretion on the minister, she or he is entitled to invoke them in exercising that discretion – without breaching academic freedom (as legislated). While the Unitec decisions were not conducive to a full exposition of the political limitations on academic freedom, they hint at their possible extent.

2. *The Association of University Staff of New Zealand Inc v The University of Waikato & Gould*.¹⁰⁴

As in *Unitec*, the issue of academic freedom was peripheral to the core issues in *University of Waikato*. Nonetheless, Justice Hammond's judgment canvassed the policy and conceptual contexts of the matter before him and included further hints as to the legal meaning of academic freedom, and the distinction between this and its ideal meaning. The central issue in the case was whether the Vice Chancellor's proposal to restructure academic units within the University required consultation with the University's Academic Board. Resolving that question turned on the meaning and scope of 'academic matters' for the purposes of s 182(4) of the Education Act 1989, which requires Council to request and consider advice from academic board on such matters.

Justice Hammond approved of the common notion that 'academic' refers both to the place or unit where something is taught, and the instruction which goes on within its walls'.¹⁰⁵ More importantly for present purposes, he noted that ss161 and 162(4), 'expressly or by necessary implication [... give] very distinct indications as to which matters are academic'.¹⁰⁶ On that reading, it is arguable that s161(2) is an express direction that strictly delimits the scope of academic freedom to those matters specified: to question received wisdom; to engage in research; to regulate the subject-matter of taught content; freedom in methods of assessment; and staff recruitment. Furthermore, the characteristics of a university as set out in s162(4) are Hammond J's necessary implication that the purpose of the university is fundamentally academic.

However, extending this interpretation, if academic matters are so clearly delineated by these provisions, then so are the limits placed on their protection. It is possible even, if the characteristics of the university are 'academic matters' as Hammond J suggests, that the limits on academic freedom apply also to those characteristics, so that the limits may prevail notwithstanding

101 *Attorney-General v Unitec Institute of Technology*, above n 93.

102 *Ibid* 765.

103 *Ibid*.

104 [2002] NZAR 817.

105 *Ibid* 825.

106 *Ibid*.

that they undermine the characteristics of the university itself. One would then be faced with the (hypothetical) position where it is in the national interest to deny a university to demonstrate its legislated characteristics by impinging on academic freedom. Although in principle it would be strongly arguable that this situation never arises, pragmatic political considerations might find otherwise. It is doubtful that Hammond J considered this possibility, and it certainly wasn't a consideration in deciding the case. Nonetheless, it illustrates the pervasiveness that such limitations can potentially assume.

In the result, the Court held that Council was required to consult with Academic Board on this matter.

3. *Grant v Victoria University of Wellington*¹⁰⁷

Contrary to the previous two cases, the issue of academic freedom was central here. The plaintiffs claimed that the University had breached implied contractual terms relating to their enrolment in a masters degree, and had misrepresented the degree's quality. The defendant University agreed that the issue was one of course quality, but argued that the Court was prevented by ss160-161 of the Act from inquiring into such matters. They further argued that 'the need for accountability by institutions'¹⁰⁸ was satisfied by their internal complaints process – involving no less than seven steps terminating at council.

Elias J, approving *Norrie v Senate of the University of Auckland*¹⁰⁹ (which concerned the respective jurisdictions of the office of the Visitor and the Courts in disputes internal to universities) held that the Courts retained inherent jurisdiction on certain matters. In the instant case, this included actions in tort and contract, the latter being the basis – in conjunction with the Act – for the students' relationship with the university. Drawing a parallel with the policy/operational distinction in determining the justiciability of actions in negligence against public bodies,¹¹⁰ and noting that some actions may be determinable without 'enter[ing] the classroom',¹¹¹ Elias J nevertheless maintained that the Courts were ousted where to adjudicate would impinge on academic freedom.¹¹² Whether a certain case was justiciable was dependant on the facts, and the instant case was one which would 'test the boundaries'.¹¹³ The University's claim to strike out the students' action was denied accordingly.

V. COMPARING THE CONCEPT OF ACADEMIC FREEDOM WITH ITS LEGAL MEANING

What the foregoing passage on academic freedom in legal terms means is considered below using a Hohfeldian analysis comparing it with the ideal typical concept of academic freedom.

107 [2003] NZAR 185 (*Grant*).

108 Section 161(3)(b).

109 [1984] 1 NZLR 129.

110 See *Anns v Merton London Borough Council* [1978] AC 728.

111 *Grant*, above n 107, 191.

112 *Ibid* 192.

113 *Ibid*.

A. Hohfeld

Essentially this paper is concerned with the respective claims of parties in a legal relationship. The relationship can be characterised as a sphere, with one party on the inside defending the sphere's shape and size, and from time to time acting so as to stretch the boundaries; and the other party most often tacitly accepting the state of affairs, both in terms of the size and shape of the sphere, but at other times trying to assert interests that are incompatible with the existence of the sphere as it is. The party occupying the former position might at different times be individual academic staff or students, academic departments, associations of academic staff, institutions, or associations of institutions. Corresponding to these respective classes, the latter position might be occupied by academic institutions, individual managers, governing bodies, professional bodies, governments, or commercial interests. Both positions may have recourse to legal remedies to protect or advance their position, but the nature of the concept engendering the relationship is such that its definition is unlikely to ever be clear, and is likely to depend almost entirely on the specific context, that is, on the facts. However, by classifying the relationship between the various actors, clues may be gained as to the general nature of the obligations between them. It is through this process that the analytical differences between academic freedom conceptually and legally may be revealed.

Hohfeld's theory of jural correlatives describes the impact on others of the state 'confer[ing] an advantage on some citizen'.¹¹⁴ As in the situation described above, '[c]orrelatives express a single legal relation from the point of view of the two parties'¹¹⁵ and so Hohfeld's theory is ideally suited to the task. Hohfeld identified the following correlatives:¹¹⁶

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Conferring a right on a person necessarily imposes a duty on another to observe that right and therefore not to interfere with its exercise. If they do, the right-holder has an action against the person in breach of the duty. A privilege is a permission: the privileged person 'has no duty not to'¹¹⁷ do a thing – and the other person is 'vulnerable to the effects'¹¹⁸ of the privileged person's actions. If someone has a power, then they are able to positively (in an analytical rather than normative sense) change the legal affairs of others.¹¹⁹ Conversely, an immunity protects one from another's intrusion on a sphere of influence – the other has a disability, the opposite of a power.

B. Analysis of academic freedom as an ideal type in Hohfeldian terms

Academic freedom entails the privilege of free speech – within certain limits, and immunity against external interference in academic operations. Free speech in the academic context is a privilege *prima facie* afforded less protection than is provided by the New Zealand Bill of Rights Act 1990. This observation owes to the comparison between limitations that can be 'justified in a

114 J Singer 'The Legal Rights Debate in analytical jurisprudence from Bentham to Hohfeld' (1982) *Wisconsin Law Review* 975, 987.

115 *Ibid.*

116 *Ibid* 986.

117 Andrew Halpin, 'The Concept of a Legal Power' (Spring 1996) *Oxford Journal of Legal Studies* 129, 137.

118 Singer, above n 114.

119 Halpin, above n 117, 139.

free and democratic society'¹²⁰ and that are consistent with the 'national interest'.¹²¹ However, in other respects, for instance in defence against actions in defamation, academic freedom exercised in good faith might give greater protection than that otherwise available to the general public.¹²² The limits of this aspect of academic freedom, that is, its concomitant duties, were recounted in *Rigg*,¹²³ where they were effectively described as specie of good faith.

Schauer calls the immunity of academic freedom a freedom from 'supervisory obligations'.¹²⁴ It is reflected for example in Oxford and Cambridge's eventually successful struggle freeing them from the interference of the ecclesiastics.¹²⁵ Supervisory obligations are also inherent in the university in New Zealand. As Sinclair notes, the Auckland University College (as all Colleges and Universities in New Zealand history) was 'state-created and state-funded' and 'ultimately under parliamentary legislative control'.¹²⁶ Although Sinclair also notes that Government intervention was rare,¹²⁷ its latent potential is constant. The doctrine of parliamentary sovereignty means in strict terms that universities enjoy no absolute immunity against supervisory obligations. However, by convention, and in the ideal of academic freedom, the immunity does exist, and this engenders an expectation of its observance notwithstanding its legal status.

But academic institutions are far from free of external obligations. For example, conditions on funding create obligations of financial accountability '[a]s long as universities retain legal autonomy, the available sanctions to be used to ensure compliance with the wishes of government or society remain chiefly financial'.¹²⁸

There is also concern in academia, most keenly felt in the sciences, about an increased reliance on private funding of research, and the potential for commercial imperatives to dictate the focus of inquiry.¹²⁹ Are these accountabilities matched by duties in an ideal typical account of academic freedom? Arguably yes in respect of public funds, as the pragmatic characteristics of liberal democratic governments are in theory directed towards fostering a good life for its constituents, a component of which is surely knowledge and education.

This line of argument appears to suggest the legal requirement that academic freedom is exercised consistently with the national interest is compatible with an ideal typical account of academic freedom. However, it is submitted instead that in specific situations, the requirement may

120 *New Zealand Bill of Rights Act* 1990 s 5.

121 *Education Act* 1989 s 160.

122 See for instance the defences of honest opinion respectively provided by the Defamation Act 1992 ss 9-12 and qualified privilege Defamation Act 1992 ss 16-19. At common law, 'A privileged occasion is...an occasion where the person who makes a communication has an interest or a duty, legal social, or moral, to make it to the person to whom it is made[...]: *Adam v Ward* [1917] AC 309, 334 per Lord Atkinson (HL) cited in Todd, S (Ed), *The Law of Torts in New Zealand* (2005) 706. A hypothetical academic defending an allegation of defamation would, in the right circumstances (hopefully self-evident), have a compelling argument that they were acting as critic and conscience of society as the law protects a person who has a duty to speak.

123 *Rigg*, above n 48.

124 Frederick Schauer 'Academic Freedom: Rights as Privileges and Immunities' in Sharon Kahn (ed) *Academic Freedom and the Inclusive University* (2001) 13-19, 19.

125 Both finally won their independence from Episcopal interference by Papal Bull in in 1479 and 1433 respectively: Alan Cobban, *English University life in the Middle Ages* (1999) 214.

126 Sinclair, above n 86, 41.

127 *Ibid*.

128 Gillian Evans, *Calling Academia to Account. Rights and Responsibilities* (1999) 47.

129 *Ibid* 44.

confer powers on the Minister and TEC over and above the duties of accountability owed by universities in the self-limiting privilege and immunity of academic freedom. An example is the recent Education (Tertiary Reforms) Act 2007, of which a case study follows below.

VI. CASE STUDY: 2007 TERTIARY REFORMS

A. *The Policy Behind the Reform*

Current Government policy represents a pendulum swing from the excesses, largely in the poly-technic sector, of high growth in low quality courses, to ‘a more streamlined system for planning, funding, and monitoring the tertiary education system’.¹³⁰ Such growth had been incentivised by the ‘bums-on-seats’ approach to funding according to the numbers of equivalent full-time students (EFTS) enrolled at an institution. Opposition Education Spokesman Bill English’s success in bringing these courses to the public’s attention was critical in forcing the Government’s hand to implement its reform programme, and perhaps encouraged it to go further than it might otherwise have.

Government’s current policy is to ‘maximise tertiary education’s contribution to our national goals and priorities’¹³¹ which are ‘national development in all dimensions – social, economic, cultural and environmental’.¹³² Articulating this policy, the Tertiary Education Strategy (TES) expects of tertiary education that it provides ‘success for all New Zealanders through lifelong learning’; that it is instrumental in ‘creating and applying knowledge to drive innovation’; and that institutions build ‘strong connections...[with] the communities they serve’.¹³³ Universities’ distinctive contribution to the strategy is expressed in broad terms. They are to:¹³⁴

1. [P]rovide a wide range of research-led degree and postgraduate education that is of international quality[; and]
2. [U]ndertake excellent research in a broad range of fields[; and]
3. [E]ngage with external stakeholders [...] in the dissemination and application of knowledge and in promoting learning.

Although generally the policy represents an express emphasis on the university education as a public service. Quantitative measures of the characteristics of a university such as those used to assess Unitec’s application to become a university,¹³⁵ and of the outputs of a university in relation to national goals under the TES, provide further evidence of this emphasis. However, regardless of

130 Explanatory note, Education (Tertiary Reforms) Amendment Bill 114-1.

131 Hon Dr Michael Cullen, ‘New Tertiary Strategy to drive economic transformation’ (Press Release, 14 December 2006) <www.beehive.govt.nz/ViewDocument.aspx?DocumentID=28075> at 27 November 2007.

132 *Ibid.*

133 Office of the Minister for Tertiary Education ‘Tertiary Education Strategy 2007-2012 incorporating Statement of Tertiary Education Priorities 2008-2010’ Ministry of Education <www.minedu.govt.nz/web/downloadable/dl11727_v1/tes-2007-12-incorp-step-2008-10.pdf> at 27 November 2007, 7.

134 *Ibid.* 14.

135 See for example the requirement that 50% of enrolments be at degree level or above: Letter from K Gibson to Trevor Mallard, Minister of Education, 24 June 2005 <www.minedu.govt.nz/web/downloadable/dl10653_v1/nzqa-24-june-2005.pdf> at 27 November 2007.

this change in emphasis, the fundamental legal characteristics of the university remain unchanged as a result of the reform.

B. *Education (Tertiary Reforms) Amendment Act 2007.*

The Education (Tertiary Reforms) Amendment Act 2007 gave legal effect to the policy reform by amending the Act (the principal Act). Parts 13 ‘General provisions related to tertiary education’ and 13A ‘Tertiary Education Commission’ in particular were heavily amended. Under the reforms Government funding policy is driven by the tertiary education strategy. The strategy is issued by the Minister and sets out the long term strategic direction and the short and medium term priorities.¹³⁶ Section 159AA further requires that the strategic direction takes account of economic, social, and environmental goals, and the ‘development aspirations of Maori and other population groups’,¹³⁷ and provides that the Minister must consult stakeholders in developing the strategy.¹³⁸ In effect, these sections provide the mechanism for the Minister to determine the national interest with respect to tertiary education. The TEC’s role on the other hand, through its function in making funding decisions, is to ensure the efficient use of national resources and to provide accountability.

Section 159ABA provides an overall description of how funding decisions are made and is worth setting out in full:¹³⁹

- (a) the Minister determines the design of funding mechanisms and whether funding under those mechanisms is via plans:
- (b) the Commission develops the details of how to implement funding mechanisms:
- (c) the Commission issues guidance on what must be contained in proposed plans:
- (d) the Commission identifies criteria for assessing proposed plans:
- (e) an organisation prepares a proposed plan—
 - (i) in consultation with the stakeholders the organisation considers ought to be consulted and any other persons specified by the Commission; and
 - (ii) in a manner consistent with the Commission’s guidance:
- (f) the organisation submits its proposed plan to the Commission:
- (g) the Commission applies assessment criteria to the proposed plan and decides whether or not to give funding approval:
- (h) if the proposed plan is given funding approval, the Commission determines the amount of funding payable to the organisation by applying the appropriate funding mechanism:
- (i) if an organisation’s proposed plan receives funding approval, the Commission monitors the organisation’s performance to determine if it is achieving, or has achieved, the outcomes it has specified in its plan.

136 *Education Act 1989*, S 159AA(1).

137 Subsection 2.

138 Subsection 3. The Minister may also change or replace the strategy, but must consult before doing so (s159AC). Note that without express statutory requirements to the contrary, consultation requires considerably less than to agree with stakeholders: *Wellington Airport Ltd v Air New Zealand* 1 NZLR 671 (CA).

139 Note that section contains an express direction that the description is by way of explanation only.

The TEC's functions are set out in section 159F of the Act, and include prescribing the format and content to be included in institutional plans, and the criteria by which funding decisions will be made on the basis of submitted plans.

The Minister determines how funding is to be distributed through 'funding mechanisms'.¹⁴⁰ Currently for universities these mechanisms include the 'Tertiary Education Organisation (TEO) Component' which itself includes for example funding based on institutional research performance, and the 'Student Achievement Component', which carries over elements of the old EFTS-based funding system.¹⁴¹

For institutions to receive funding they must submit an 'investment plan' to the TEC and have it approved. The plan must, inter alia, demonstrate the institution's alignment with Government strategies and priorities; describe its full portfolio of programmes; and set outcomes and performance indicators.¹⁴² The TEC may decline funding if the plan does not meet the criteria, and may revoke funding previously granted if, for instance, the performance criteria specified in the plan are not met.¹⁴³

VII. ANALYSIS AND CONCLUSION: GOVERNMENT POLICY AND ACADEMIC FREEDOM

In general, the reform emphasises a systematised approach to reaching funding decisions, and reflects Government's view of Universities 'as public service institutions subject to concrete social, political and economic goals'.¹⁴⁴ In line with this conclusion, the NZVCC highlights the use of 'goals' to describe the desired outcomes of the TES:¹⁴⁵

'Goals' suggest a narrow focus, on the achievement of a specific outcome or product. In contrast, 'context' suggests a wider and more balanced focus, which recognises the value of the process itself.

It is submitted that such a systematic approach is inconsistent with universities' role as critic and conscience of society, as it provides for the ascendancy of national interest considerations to the detriment of the concept of academic freedom – academic freedom being a necessary condition for universities' proper fulfilment of that purpose.

Establishing the Minister's role in determining the strategic focus of and funding mechanisms for tertiary education, and requiring universities to demonstrate their compliance with these (via a heavily prescribed procedure) gives flesh to a Hohfeldian power in the hands of the state. The 'supervisory obligations' inherent in such a system, and the following risk that universities become 'engines of conformity' show its incompatibility with an ideal notion of academic freedom. Moreover, the system has a potentially significant impact on the academic, operational and management freedoms of universities as set out in s160, as all must effectively be justified and approved in the plan. The supervisory obligations can only be justified legally therefore by an appeal to the national interest and the efficient use of national resources, given that s160 (Parliament's

140 *Education Act* 1989 s 159L.

141 Tertiary Education Commission '2008 Funding Information' <<http://www.tec.govt.nz/templates/standard.aspx?id=2513>> at 21 January 2008.

142 *Education Act* 1989 s 159P.

143 *Education Act* 1989 s 159YG.

144 Braun and Merrien, above n 54, 11.

145 New Zealand Vice Chancellors' Committee, Submission on Education (Tertiary Reforms) Amendment Bill to the Science and Education Select Committee (2007) at 5.

declaration of intent regarding academic freedom) is declared to be the purpose of the relevant parts of the Act.

Chen and Walker¹⁴⁶ argued during the parliamentary process that the reform ‘appears to erode the academic, operational and management freedoms’ provided in ss160-161 of the Education Act 1989. Their argument was based on a reading of those sections that institutional autonomy ‘can be constrained *only* where such independence and freedom is inconsistent with the efficient use of national resources’.¹⁴⁷ However, this assertion relies on semantics for its force. An equivalent proposition – ‘that institutional autonomy can be constrained wherever and whenever its exercise is inconsistent...etc’ – reveals the true nature of the latent power residing in those conferred discretions and who assert the national interest. The risk, as Chen and Walker put it, is implied repeal of the protections afforded by ss160-161. However it is clear that the reforms are entirely compatible with those sections, if it can be shown that the basis that for the policy direction is in the national interest. What ought to be the object of criticism is the ‘national interest’ qualification itself.

Similarly, the New Zealand Vice Chancellors’ Committee (NZVCC) argued that ‘direct control, over-regulation or implicit claims to Crown ownership rights’¹⁴⁸ threatened institutional autonomy. However, the reforms are a step removed from the activities the Act includes within its meaning of academic freedom (appointment of staff; regulation of subject matter and so on) – any impact on those is likely to be only indirect.

These arguments, while consistent with an ideal typical account of academic freedom, do not take into account the breadth of the qualifications to academic freedom contemplated by the Act, and specifically, the premise of the reform itself: that it aligns with the national interest. Considerations of the national interest are only legitimated in any discussion of academic freedom by their inclusion in s160 of the Education Act 1989.

By legislating for academic freedom, and specifically through including qualifying statements narrowing the extent of academic freedom, parliament has subverted the ideal principle of academic freedom by incorporating broad potential for its derogation. Aside from the actual effects this may have, it reveals an internal inconsistency with the requirement that universities act as critic and conscience of society – external interference in academic affairs is antithetical and indeed incompatible with the pursuit of knowledge.

These conclusions in themselves illustrate the *quid pro quo* of the legislative process where fundamental principle is politicised and brought securely within the executive branch of Government’s domain, ultimately undermining Weber’s ‘determinate human purpose’ for which the principle was initially recognised.

146 Mai Chen and Sarah Walker ‘The Education (Tertiary Reforms) Amendment Bill – reforming the sector or eroding academic freedom’ *NZ Lawyer* (2007) 6 July (original emphasis).

147 *Ibid.*

148 New Zealand Vice Chancellors’ Committee above n 145, 1.