

# WAIKATO LAW REVIEW

## TAUMAURI



VOLUME 3

1995

### CONTENTS

<i>Public Interest Litigation</i>	Rt Hon Sir Ivor Richardson	1
<i>Purpose and Principle in the Resource Management Act</i>	Hon S D Upton	17
<i>Judicial Legislation in New Zealand and the Privy Council's Role</i>	Aimee Wilkins	57
<i>The Law of Evidence relating to Child Victims of Sexual Abuse</i>	Wendy Ball	63
<i>Narrative Mediation</i>	Richard Cohen and John Winslade	83
<i>Enforcement of Insider Trading Laws by Shareholders in New Zealand</i>	Peter Fitzsimons	101
<i>The Contradiction between Comparative Advantage in International Trade and Environmental Protection</i>	Al Gillespie	127
<i>"Law in Context" - Taking Context Seriously</i>	Paul Havemann	137
<i>Drafting: Plain English versus Legalese</i>	Stephen Hunt	163
<i>A Little Something about Writing</i>	Peter Jones	181
<i>Doing away with unemployment benefit?</i>	Ken Mackinnon	185
<i>Book Review</i>	Margaret Wilson	207

*Editor:* Professor Peter Spiller

*Editorial Committee:* Peter Spiller, Catherine Iorns and Ruth Wilson.

The *Waikato Law Review* is published annually by the Waikato University School of Law. Subscription to the *Review* costs \$20 per year; and advertising space is available at a cost of \$200 for a full page or \$100 for a half page. Back numbers are available. Communications should be addressed to:

The Editor  
*Waikato Law Review*  
School of Law  
Waikato University  
Private Bag 3105  
Hamilton  
New Zealand

North American readers should obtain subscriptions direct from the North American agents:

Wm W Gaunt & Sons Inc  
3011 Gulf Drive  
Holmes Beach  
Florida 34217-2199  
U S A

This issue may be cited as (1995) 3 *Waikato Law Review*.

All rights reserved. No part of this publication may be produced or transmitted in any form or by any means electronic or mechanical, including photocopying, recording or any retrieval system, without permission from the editor.

ISSN 1172-9597.

## EDITOR'S INTRODUCTION

I am pleased to present the third edition of the *Waikato Law Review*. The *Review* is now well established in legal circles and has been cited in government and academic forums.

The *Review* is proud to publish the Harkness Henry Lecture of Sir Ivor Richardson and the Stace Hammond Grace Lecture of the Hon Simon Upton. The Law School is grateful to the two Hamilton firms that sponsor these Lectures and their publication to a wider audience. The *Review* is also pleased to publish the winning argument in the annual student advocacy contest kindly sponsored by another Hamilton firm, McCaw Lewis Chapman.

The *Review* continues to publish work which is on the cutting edge of New Zealand jurisprudence, covering sensitive areas of criminal evidence, creative approaches to dispute resolution and legal education, reform in the commercial and social welfare sectors, environmental and public law issues, and effective legal writing. The last-named topic formed the subject of an article by Stephen Hunt, a graduate of the Waikato Law School and who is now in legal practice.

I am grateful for the work of the editorial committee in producing this edition, and for the continued support of our advertisers and subscribers. I have relished the chance to launch and oversee the early development of the *Review*. In 1996 the *Review* will be under the editorship of Ms Catherine Iorns.

Professor Peter Spiller,  
Editor, *Waikato Law Review*.

# Harkness Henry & Co.

## Barristers & Solicitors

### *Partners*

Warren Scotter  
Barry Gunson  
Paul Middlemiss  
Simon Menzies  
Lynden Earl  
Christine Grice  
Simon Ellis  
Jenny Screech  
Mark Thomson

### *Associates*

Chris Marr  
Mark MacLennan  
Tony Steindle  
David Gould

### *Address*

Peat Marwick Tower  
85 Alexandra Street  
Hamilton  
New Zealand

Telephone: 07-838 2399  
Intl: (0064-7-838 2399)  
Fax: 07-839 4043  
Intl: (0064-7-839 4043)

### *Postal Communications*

Private Bag 3077  
Hamilton  
New Zealand  
DX 4014



• B E T T E R L A W •

AN ASSOCIATION OF INDEPENDENT LEGAL PRACTICES NATIONWIDE

## **THE HARKNESS HENRY LECTURE:**

### **PUBLIC INTEREST LITIGATION**

BY RT HON SIR IVOR RICHARDSON\*

#### **I. INTRODUCTION**

Public interest litigation is an inevitable feature of modern democracies but it continues to give rise to questions as to the proper role of the courts in determining public policy issues.

Judges make law and are expected to make law and in doing so necessarily weigh public policy considerations. The oracular or declaratory theory of decision-making has long been discredited. In the great majority of cases at the trial and first appellate level, once the facts are determined and assessed the legal answer is clear-cut. However, in some cases there is room for divergent answers. This is true both at common law and under statutes.

The direction of development of the common law depends on what analogies are used and on an assessment of the values involved. The notion that the common law is a seamless web is as unrealistic as the view that on their appointment judges obtain the password to the correct common law answer. Thus duties of care are based on public policy values, and in the development of the modern law of negligence the New Zealand courts openly seek to identify and weigh the various public policy considerations at stake.

Again, in exploring the interpretation and application of legislation the courts are required to consider the public policies which the legislation serves. Section 5(j) of the Acts Interpretation Act 1924 mandates a purposive approach by the courts to all legislation. And judicial review of the exercise of statutory power and public law generally requires the identification and weighing of relevant public policies by the courts.

In all such cases the approach taken depends on the material and arguments before the court and on the perception judges have of community values and attitudes in their own societies. It is at this point that questions arise as to the proper role of the courts in determining where the public interest lies. There are two broad considerations which underlie the questioning. The first is that there are limits to the democratic acceptability of judicial prescription. That reflects concerns for the

---

\* LLB, LLD (hc) (Canterbury), LLM SJD (Michigan), LLD (hc) (Victoria), Judge of the New Zealand Court of Appeal.

constitutional and democratic implications of judicial involvement in wide issues of public policy. The second is that the techniques and procedures of the courts are not always well suited to the consideration of public interest issues. This stems from concerns about the appropriateness of adversarial proceedings in seeking to resolve complex matters; from doubts about the competence of judges and lawyers in assessing specialised material; and from fear of protracted litigation and consequential uncertainty and delays for the parties and the wider community.

I propose exploring these questions under four headings: (1) Justiciability: whether it is appropriate for the court to decide the issue; (2) Information gathering: how the court can be adequately informed of the issues; (3) Representation: who should be heard in the particular dispute; and (4) Remedies: what kinds of relief and remedy are appropriate. But before turning to justiciability I should explain why I am deliberately using the wider expression public interest litigation rather than confining the discussion to public law.

## II. PUBLIC INTEREST - PUBLIC LAW

A great deal of legal learning and energy has been devoted to explaining, developing and applying the dichotomy between private law and public law. At one end of the spectrum a law suit is a vehicle for settling disputes about private rights. At the other end of the spectrum a law suit may settle disputes over the distribution and exercise of public power. But it is not easy to draw a sharp dividing line.

For example, a dispute between two private parties over their private rights may require consideration of public policies underlying the existing or contemplated legal rule. In that way it may impinge on the public interest and in its application inevitably have effects beyond the immediate parties.

Consider contract law which is the paradigm black letter private law. Underlying it is a set of public policy assumptions. Thus courts tend to view standard form contracts and exclusion clauses with suspicion as the products of inequality of bargaining power and imperfect information available to the weaker parties.<sup>1</sup> That public policy approach may or may not be justified. Empirical analysis may not warrant such a critical approach on the part of the courts. No one complains that prices for goods and services are generally set on a take it or leave it basis. Constant haggling over price necessarily involves high transaction costs. For the

---

<sup>1</sup> See *Macaulay v A Schroeder Music Publishing Co Ltd* [1974] 1 WLR 1308, 1316 and *Livingstone v Roskilly* [1992] 3 NZLR 230, 238.

same reason standard form contracts may in many contexts also permit a dramatic reduction in transaction costs and so in prices.

The reality is that intrusion by the courts on the operating of markets tends to add to the cost of the goods or services. Where resources are scarce, as they always are, trade-offs are always involved - here between greater protection for consumers and higher retail prices. That may involve balancing considerations of efficiency and fairness. And fairness values should recognise that the contractual price might well have been higher had the impugned exclusion clause or standard terms not been included in the contract. One only needs to consider the different sale prices attaching to different warranties or other terms of contract to appreciate that reality.

I mention this not to go off into a discussion of the economic analysis of legal rules but rather to emphasise that much of the law making of the courts in determining private rights of private parties involves the identification, assessment and application of public policy values in that society. Reconsideration of existing legal rules to reflect contemporary conceptions of relevant public policies and contemplated policy developments becomes much more difficult in the traditional two party private dispute defined by past events where the fact inquiry is party driven and mainly historical rather than also policy oriented and predictive.

Numerous other examples come to mind. *Green v Matheson*,<sup>2</sup> which arose from the cervical cancer inquiry, was an action against a medical practitioner and a hospital for exemplary damages for personal injury. In form it was a private law matter but it affected a large number of people and raised public interest considerations. Next, questions relating to charities and charitable gifts often raise public interest considerations in private litigation, so much so that the Attorney-General as the guardian of charities often has a special role in the litigation. Again, dig into any equity case including modern developments in unconscionability, fiduciary duties and de facto couple property sharing, and the underlying public policy bases for the particular rule or doctrine will become apparent.

Clearly, then, ostensibly private disputes may involve weighing public policy considerations. By contrast, public law bodies have the capacity to perform private activities. The carrying on of any public or commercial activity carries the risk on a day to day basis of disputes which, if not resolved, may lead to ordinary civil litigation. It should make no difference to the assessment of liability if your car is hit by a local authority vehicle or a private vehicle.

---

<sup>2</sup> [1989] 3 NZLR 564.

Public law is concerned with the exercise of public power. In drawing the private law/public law divide the focus is on the nature of the function which is being performed. Even there the line is fuzzy. On one side of the divide control of the exercise of power has not been confined to bodies performing functions conferred or imposed by law. One obvious example is *Finnigan v New Zealand Rugby Football Union*,<sup>3</sup> where the High Court issued an injunction stopping the All Black tour of South Africa. The rationale was that rugby is a national sport and, while it is technically a private and voluntary sporting organisation, the Rugby Union in the New Zealand context is in a position of major national importance. On the other side of the private/public divide the Court in *NZ Stock Exchange v Listed Companies Association Inc*<sup>4</sup> held that the relationship between the Stock Exchange and a listed company was contractual and the decision by the Stock Exchange to suspend listing a company was exercised under that contract and was not the exercise of a statutory power of decision within section 4 of the Judicature Amendment Act 1972. Inherent in that approach was the view that Parliament could never have intended that every corporate body recognised by statute or owing its existence to a specific or general statute could have its commercial operations subject to judicial review.

To sum up the preceding discussion, there are two reasons why I prefer to focus on the wider expression public interest litigation rather than on public law litigation. The first is that public policy considerations affect decision-making in private law litigation and public bodies have private law rights and obligations. The second is that the dividing line between private law and public law is not easy to draw and apply. Accordingly it seems sensible to concentrate on the wider expression public interest litigation and on the four issues of justiciability, information gathering, representation and remedies.

### III. JUSTICIABILITY

The notion of justiciability poses the question of whether the particular question is appropriate for judicial resolution. Judges must be conscious of the respective roles of the three branches of government reflected in the Constitution Act 1986: Parliament, the Executive and the Courts. They must respect the constitutional and democratic implications of judicial intrusion into wide public policy issues. There comes a point where public policies are so significant that the courts should defer to the executive decision-maker. The larger the policy content and the more the decision-making is within the customary sphere of those entrusted with the

---

<sup>3</sup> [1985] 2 NZLR 159 and [1985] 2 NZLR 190.

<sup>4</sup> [1984] 1 NZLR 699.



decision, the less well-equipped the courts are to weigh the considerations involved and the less inclined they must be to intervene.

For example, in *Petrocorp Exploration Ltd v Minister of Energy*,<sup>5</sup> I took the view, which was upheld by the Privy Council, that the identification and determination of the national interest under the statute in that case was for the Minister alone. As the statutory authority under the Petroleum Act 1937, the Minister was empowered to refuse applications and to grant licences to himself or herself even though the Minister also had commercial functions under a joint venture agreement which held the licence for an adjoining area.

Ten years earlier, in *Ashby v Minister of Immigration*,<sup>6</sup> I took the view that the content of the national interest in relation to immigration policy and the granting or refusing of temporary visas, and in particular the isolation of specific aspects of foreign and domestic policies and their elevation into obligatory considerations which must be weighed by the Minister, was not a proper subject for determination by the Court.

Again, in *Council of Civil Service Unions v Minister for the Civil Service*,<sup>7</sup> Lord Roskill itemised such prerogative powers as those relating to the making of treaties, the defence of the nation, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers as not being “susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process”.

More recently, in *Waters v Acting Administrator of the Northern Territory*,<sup>8</sup> the Federal Court of Australia held that the decision of the Administrator to refuse to appoint a barrister as a Queen's Counsel was not justiciable.

A court may also refuse to act as requested by a party where the unforeseeable consequences reach far beyond the limits of the case. Thus, in *Steadman v Steadman*,<sup>9</sup> a part performance case, Lord Reid said that the decision in question was so embedded in the law that he would not depart from it even if he thought it wrong. He stated that “it would be impracticable to foresee all the consequences of tampering with it”.<sup>10</sup>

---

<sup>5</sup> [1991] 1 NZLR 1 and [1991] 1 NZLR 641 (PC).

<sup>6</sup> [1981] 1 NZLR 222.

<sup>7</sup> [1985] AC 374, 418.

<sup>8</sup> (1993) 119 ALR 557.

<sup>9</sup> [1976] AC 536.

<sup>10</sup> At 542.

That case did not involve a basic policy decision of the executive or of the legislature. Nor was it an attempt to assert the need for public accountability for private power. These latter cases are intrinsically difficult. As David Feldman observes,<sup>11</sup> if everyone is permitted to raise public interest issues, litigation becomes an alternative or a supplement to orthodox political processes, taking the courts beyond their core function of adjudicating on individuals' rights and duties. When assessing where public interest issues should most appropriately be addressed, the differences between the political and judicial forums should be kept in mind. The limitations of the role of the courts as agents of change have long been recognised. As G Edward White has observed, in twentieth century jurisprudential theories:

Some limitations have been intellectual (an obligation to give adequate reasons for results), some institutional (an obligation to defer to the power of another branch of government), some political (a need to avoid involvement in hotly partisan issues), some psychological (a need to recognise the role of individual bias in judicial decision-making).<sup>12</sup>

The constitutional functions, democratic legitimacy and consultative processes of the legislature and executive may render those branches of government better able to address the multifarious considerations typically thrown up by public interest litigation.

The court must remain conscious of this when deciding where, in terms of the constitutional and social ethic, to end the judicial role.

Westminster style constitutions are committed to representative democracy and responsible government. Those features of our constitutional arrangements do not provide the touchstone of justiciability. They do not define a no-go area for the courts. The legal answer may be affected by the judge's perspective of the role of the State and of each branch of government. It may also be affected by the judge's perspective of the balance in the particular society and at the particular time between individual, group and community rights, responsibilities and interests.

Let me give three quotations from judges in other jurisdictions. The first is Lord Devlin. He noted that in the past judges looked for the philosophy behind the statute and what they found was a Victorian bill of rights favouring the liberty of the individual, the freedom of contract, the sacredness of property and a high suspicion of taxation. He went on to say

---

<sup>11</sup> "Public Interest Litigation & Constitutional Theory in Comparative Perspective" (1992) 55 MLR 44, 48.

<sup>12</sup> *The American Judicial Tradition* (1976) 371-372.

that it is silly to invite the judges to make free with Acts of Parliament and then abuse them if the results are unpleasant to advanced thinkers.<sup>13</sup>

Next is Sir Anthony Mason, the recently retired Chief Justice of Australia. Writing in 1989, he described administrative law as a body of public law having as its premise the need to control the exercise of power in a welfare state with a largely regulated economy.<sup>14</sup> As Sir Anthony Mason put it, and I summarise: administrative review owes its place in a modern democracy to a vast expansion of the administrative decision-making process; the increasing complexity of social and economic life has called for more sophisticated and flexible regulatory control in which administrative discretions have played an ever-increasing part; these techniques of regulatory control have been supplemented by social welfare and other legislative programmes administered by government departments or statutory authorities; and in the result the material welfare of the individual has come to depend even more on one's rights against the executive and its agencies than on one's rights against one's fellow citizens.

Finally, Lord Woolf, delivering the F A Mann lecture in November 1994,<sup>15</sup> appeared to go further than Sir Anthony Mason. Noting that increasingly services which at one time were regarded as an essential part of government are being performed by private bodies, he said:

I can see no justification for the law allowing privatised bodies to adopt lower standards than those they were previously required to maintain.<sup>16</sup>

If there were to be an overriding test, he would wish it to have two primary requirements: an issue is subject to public law if (a) it is one about which the public has a legitimate concern as to its outcome; and (b) it is not an issue which is already satisfactorily protected by private law. He went on to say that over the years the attitudes of the judiciary have changed but fortunately they have kept broadly in step with the attitudes of the public.

Which, if any, of these sets of assumptions is in tune with the New Zealand society of 1995? That could be a matter for endless debate. One obvious point is that we are all influenced and limited by our backgrounds, as were Lord Devlin, Sir Anthony Mason and Lord Woolf. And as Professor Jaffe has emphasised:

---

<sup>13</sup> *The Judge* (1979) 15.

<sup>14</sup> "Administrative Review: The Experience of the First 12 Years" 18 Fed LR 122, 128.

<sup>15</sup> "Droit Public - English Style" [1995] Public Law 57.

<sup>16</sup> *Ibid*, 63.

The judicial function is not a single, unchanging, universal concept. In any one habitat it differs from era to era... The powers of the executive and the legislature wax and wane at the expense of each other... The conditions which act upon the executive and the legislature to determine the character of their powers act upon the judiciary.<sup>17</sup>

Any survey of democracies shows that different societies give different emphases to different values and the emphases may change over time. Particularly over the last 10 years the economic, social and political landscape has changed markedly. Apart from structural changes affecting the economy and the nature and degree of governmental involvement, there have been many changes in attitudes, in the way of looking at the economy, at the functioning of government and at society. In his trenchant fashion Sir Geoffrey Palmer has recently spoken of the yawning chasm between the way Ministers look at decisions and the way courts look at them and of his doubts that many of the judges know a great deal about administrative reality.<sup>18</sup> And complicating the assessment of often diverse community values are the differing speeds at which different segments of society are responding or adjusting to the change process.

How should these changes, which have affected other institutions of our society, rub off on the courts? Should justiciability questions and the philosophical approach underpinning large areas of public law now be modified to reflect the less expansive role of government in the more market-oriented State?

Major economic, social and political change inevitably calls in question public policies underlying legal rules. Where there has been so much economic and social change, it becomes all the more important to take stock of our laws; to enquire whether they truly reflect the values of today's society; to assess their economic and social implications. In that stocktaking the allocation of scarce resources necessarily involves weighing egalitarian and community values along with efficiency concerns.

In reflecting the scheme and purpose of legislation those engaged in statutory interpretation can be expected to approach new or amending legislation conscious of those changes. Likewise common law and public law rules may need to be reappraised through a contemporary lens. It does not follow that there will be less public interest litigation. There may well be more if the community perspective is that the public policies underlying particular legal rules have themselves changed. Again, if as has been

---

<sup>17</sup> *English and American Judges as Lawmakers* (1969) 10.

<sup>18</sup> "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1, 2-3.

suggested, agreement on legislative change will be more difficult to achieve under MMP, more policy issues may reach the courts.

#### IV. INFORMATION GATHERING

The two major problems for the courts in deciding public interest litigation are obtaining relevant information and then assessing it.

There are obvious constraints. First, litigation under the adversary processes of the courts is not an ideal vehicle for conducting an extensive social inquiry. Traditionally the courts have been dependent on the evidence and arguments which the parties elect to put before the court. The parties are primarily concerned with the resolution of their particular dispute. They may not have any interest in exploring external wider issues. They may lack resources or may be unwilling to commit more resources to the case. In the result there may be serious gaps in the material furnished to the court.

At the other extreme is the problem of information overload. We have had many cases on appeal where, in addition to the pleadings, the transcript of the evidence, and the judgment in the court below, we have been inundated with thousands of pages of legal, historical and other such material. An expenditure by one party, for example on the provision of the material for the hearing, may affect the expenditure decisions of the other and the overall length and costs of the litigation processes.

In recent times courts have taken over from counsel some of the responsibility for controlling the course of litigation. Judges have a proper public responsibility for case management but it is never easy to strike the right balance between court intervention and party autonomy. This is particularly true in public interest litigation where the costs are borne by the immediate parties and the courts but the decision has wider ramifications extending beyond the immediate parties.

The acceptable resolution of disputes involves reaching a satisfactory substantive answer in a fair and cost efficient way. Both the substantive decision and the process by which it is arrived at must balance community values (moral, social and political), fairness considerations, and resource constraints. In economic cost terms the object is to minimise the sum of the three types of costs. In other areas of public policy the costs are conventionally referred to as administration costs, compliance costs and economic or deadweight costs. In the justice system the administration costs are the net costs to government after deducting court fees and other receipts. The compliance costs are the costs borne by those involved in the litigation. The economic costs are the risks and costs of erroneous and

inefficient decision-making. The substantive decision also carries costs and benefits. The point is that in both the decision-making process itself and in the ultimate decision on the public policy rule the court should take account of all the costs involved.

There are various steps which the court can take to ensure that it is adequately informed. It may seek or encourage the parties to provide further material. For example, Cabinet Minutes were received on the argument of the appeals in *CREEDNZ Inc v Governor-General*<sup>19</sup> and *Petrocorp*;<sup>20</sup> affidavits from the Ministers concerned were received in numerous cases, including *Ashby v Minister of Immigration*;<sup>21</sup> and the actual contract of employment was tendered on the appeal in *Governor of Pitcairn v Sutton*.<sup>22</sup> Where it can be conveniently done, it is desirable that we have a clear picture of the facts.

An interesting approach to this problem was taken in the Australian case of *Mabo v Queensland*.<sup>23</sup> The case commenced in the High Court, but the issues of fact were remitted to the Supreme Court of Queensland for determination. This arrangement, made under the Australian Judiciary Act 1903, saved the High Court an enormous amount of sitting time, for the hearing of factual matters alone took nearly 70 sitting days, and the findings ran to three volumes. Creative application of case management under our High Court Rules could assist fact-finding in public interest litigation here.

Next, there are numerous cases where factual material bearing on the public policy assessment, which was not available to the lower court, was received on appeal. Bill of Rights cases are a fertile example of this. Thus, in *Police v Smith and Herewini*,<sup>24</sup> which dealt with taking of blood samples in hospitals or doctors' surgeries under the Transport Act 1962, affidavits were received from New Zealand and Canada on the practicability of affording access to a lawyer under section 23(1) of the Bill of Rights. Again, we have benefited in sentencing appeals from receiving a range of sociological and statistical material to assist in sentencing guidelines. Thus, in *R v Accused (CA406/92)*,<sup>25</sup> the Court sought and received a mass of data from Australia, England, Canada and the United States, as well as New Zealand material on incest offending.

---

<sup>19</sup> [1981] 1 NZLR 192.

<sup>20</sup> *Supra* note 5.

<sup>21</sup> *Supra* note 6.

<sup>22</sup> [1995] 1 NZLR 426.

<sup>23</sup> (1986) 64 ALR 1.

<sup>24</sup> [1994] 2 NZLR 306.

<sup>25</sup> [1994] 3 NZLR 157.

Judges may also properly take judicial notice of a range of factual material. Thus the first New Zealand Māori Council case under the State-Owned Enterprises Act<sup>26</sup> stressed the great value to the courts of the opinions of the Waitangi Tribunal. Section 42 of the Evidence Act 1908 expressly allows generous reference to such published works as we consider to be of authority on the subjects to which they relate. We have treated section 42 as allowing reference to the widest range of statistical, economic and social data, analyses and discussion. At the same time we must be cautious in the weight we give to material of that kind, particular where it has not been subject to scrutiny or testing at trial or on the argument of the appeal. The trenchant criticisms which have been made of the use by Canadian courts of limited quantitative social science data in the leading Charter cases dealing with delays in criminal proceedings are a powerful reminder of the need for caution.<sup>27</sup> A do-it-yourself approach may be little better than a purely intuitive judicial assessment if it allows untested and possibly flawed material to be influential in decision-making. We need to guard against the easy assumption that without assistance we are competent to assess specialised social policy data.

The real problem, however, is that the court processes do not allow public policy to be developed in the systematic way that is regarded as desirable elsewhere in government. Public policy development conventionally requires the identification and consideration of key policy elements; appropriate consultation and assessment throughout the processes; and cost benefit analyses during the various phases of the policy development program. Those analyses should assess all the costs and benefits, including the contribution of the particular policy to the achievement of community goals, and should recognise implementation constraints.

The Brandeis brief, named after the well known United States judge, follows that course but without external consultation and assessment throughout the process. In his briefs as counsel and in his judicial opinions Justice Brandeis would set out the factual basis of his inquiry, undertake an extensive empirical examination (complete with technical references), make a cost benefit analysis of the effect of various policy choices and choose the most efficient solution.<sup>28</sup> That technique was utilised in the great school desegregation case, *Brown v Board of Education*,<sup>29</sup> where a Social Science Statement, signed by 32 social scientists and appended to the brief of counsel for the appellants, summarised the general fund of

---

<sup>26</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 661.

<sup>27</sup> See eg Baar, "Criminal Court Delay and the Charter: the Use and Misuse of Social Facts in Judicial Policy Making" (1993) 72 Can BR 305.

<sup>28</sup> White, *The American Judicial Tradition* (1976) 164.

<sup>29</sup> 347 US 483 (1954).

psychological and social knowledge of the effects of the segregation of the black and white races.

Coming closer to home, the manner in which the New Zealand Law Commission works by publishing discussion papers and then presenting final reports with draft bills attached, produces carefully thought-out policy with ample public participation.<sup>30</sup> By contrast, courts cannot circulate draft judgments for public comment before committing themselves finally.

While public interest litigation does not lend itself to standard processes of public policy development, the courts must ensure so far as they reasonably can that the identification, assessment and judicial acceptance of relevant public policies as the basis for legal rules is appropriately founded on the material and arguments before the court.

#### V. REPRESENTATION

There are two aspects of representation in public interest litigation. One is the application of rules of standing designed to limit appearance to those with a genuine interest in the issues. The other is to ensure that relevant perspectives, which the parties themselves do not necessarily bring to the litigation, may be considered by the court.

In some jurisdictions arguments over standing can occupy much time of the courts and are a feature of its administrative law. There is an understandable concern that the court processes should not be used for the proliferation or expansion of litigation by organisations and individuals who, though well meaning, have only a marginal interest in an issue. The New Zealand courts have tended to take a broad if not relaxed view of standing and have never felt oppressed by a busybody problem. For example, in *Finnigan v NZ Rugby Football Union*,<sup>31</sup> we accepted that two members of local clubs had standing to challenge the decision of the Rugby Union to tour South Africa. Again, in *Environmental Defence Society (Inc) v South Pacific Aluminium Ltd (No 3)*,<sup>32</sup> concerning the proposed aluminium smelter at Aramoana, we said that had it been necessary for the decision we would have found that the Environmental Defence Society and the Royal Forest and Bird Protection Society, as public groups concerned with environmental issues, had standing to challenge the validity of the order of the Governor-General in Council under the National Development Act 1979.

---

<sup>30</sup> Palmer, "The New Public Law: Its Province and Function" (1992) 22 VUWLR 1, 9.

<sup>31</sup> *Supra* note 3.

<sup>32</sup> [1981] 1 NZLR 216.



In practice, the more important question is how can the court ensure that all relevant public interest considerations are advanced and tested? The techniques of requiring *amicus curiae* briefs from government and affected industries and citizen groups have not been comprehensively developed outside the United States. Rather, wider representation has been arranged on an *ad hoc* basis as and where we consider it appropriate. Thus, in *Gazley v Attorney-General*,<sup>33</sup> which concerned the jurisdiction of the court to restrain counsel from acting in a matter, the court was assisted by submissions from the New Zealand Law Society, the New Zealand Bar Association and also Dr Barton as *amicus curiae*.

The Attorney-General, acting in the public interest, will always be heard by the court. As Professor Edwards puts it,<sup>34</sup> the Attorney-General has a leading role, but no monopoly, as guardian of the public interest. And the Attorney may appear either in that capacity or as *amicus curiae* to assist the court. *Television NZ Limited v Prebble*<sup>35</sup> is a recent case where the Attorney-General and Crown Counsel appeared as *amici curiae*. There have also been some cases where at our request the Solicitor-General has presented submissions.

Further, the High Court Rules specifically contemplate wider representation before the court. Rule 81 enables the court to ensure that the interests of those who may be affected by a proceeding can be represented. The court may make a representation order on the application of any party or on its own motion. The Rules specifically allow for service on the Attorney-General or Solicitor-General (paragraph (d)), for the head of a government department or other officer to “represent the public interest” (paragraph (e)), and for a “local authority, public body or other representative body of persons” to represent “the inhabitants of any locality or any class of persons” (paragraphs (f) and (g)).

Nevertheless, in the adversarial system we are largely reliant on counsel for the immediate parties for the adducing of evidence and the development of argument.

In relation to justiciability, this situation must be contrasted with the representation available in the political and legislative processes. The nature of the political process enables (and requires) the participation of a wide variety of interested groups in policy making. With the increased political value of individual and party votes under MMP, this level of consultation can only be expected to intensify. Inevitably the court must compare its ability to hear the necessary range of voices on a public

---

<sup>33</sup> CA 52/94, judgment 17 March 1995.

<sup>34</sup> *The Attorney-General, Politics and the Public Interest* (1984) 138.

<sup>35</sup> [1993] 3 NZLR 513.

interest issue with the broadly consultative approach which the political process would bring to the matter. Striking the appropriate balance between the different forums is again a question of assessing the relative costs and quality of representation provided by each, as well as recognising their respective constitutional roles. It is ironic that the enhanced consultation predicted under MMP may make legislative change more difficult to achieve, resulting in more policy issues reaching the courts.

Finally, while wider representation would help the courts reach decisions balancing all the public interests involved, there is the question of who should pay for that wider representation and for the additional costs to the immediate litigants and the courts.

## VI. REMEDIES

In some categories of public interest litigation the courts have considerable flexibility in determining the appropriate remedy. Thus, under the Judicature Amendment Act 1972, where the court has found process failure in the exercise of a statutory power, the court still has a discretion as to whether to grant or refuse a declaration or other specific remedy. In making its decision the court will weigh all the implications of the alternatives for the agency and individuals concerned.

Again, in various New Zealand Māori Council cases the court was able to express a conclusion then leave it to the parties to work out the appropriate implications of the ruling, reserving leave to apply to the court for further decision. In Bill of Rights cases the court has flexibility to determine what, if any, remedy is appropriate to vindicate the particular right found to have been breached. In some cases, too, the court may through its orders preserve past transactions and only operate prospectively. In *Coburn v Human Rights Commission*,<sup>36</sup> the use of marital status as the basis for determining benefits in a pension plan was held to be contrary to the Human Rights Act 1993. Thorp J concluded that under the Declaratory Judgments Act 1908 he had jurisdiction to limit the operation of any orders so as to achieve a just result; that to apply his ruling to past contributions to the plan would impose harsh results on existing members and beneficiaries; and that the appropriate course was to make a prospective determination only.

In short, in public interest litigation remedies will be tailored so far as possible to meet the justice of the case.

---

<sup>36</sup> [1994] 3 NZLR 323.

## VII. CONCLUSION

To sum up the discussion: courts, lawyers and commentators are increasingly conscious of the difficulties and complexities of public interest litigation. They may have to determine justiciability, whether the particular question is appropriate for judicial resolution. If it is, they need to consider the information-gathering process and ensure, through appropriate representation techniques, that all relevant perspectives are advanced and tested. In deciding public interest cases, and in fact wherever policy choices are required of them, the courts can no longer afford to rely on instinct and intuition. They must ensure that they are well informed of the societal background to the case. Equally, there must be limits to the amount of evidence with which they are provided. As I stated earlier, mountains of information are not conducive to good decisions. A balance must be struck. This is a major challenge facing the courts, the judiciary, and indeed the whole of the legal profession, over the coming decades: to adduce and test sufficient cogent evidence for policy decisions without swamping the court with extraneous data. Only by meeting this challenge will our courts fulfil their role in this area of adjudication.

# Stace Hammond Grace

AND PARTNERS

## professionals at law

We handle all types of legal requirements:

- Business & Company Law
- Property (Rural, Commercial, Residential)
- Commercial Litigations and Insolvency
- Civil Litigation
- Estate Planning Resource Management
- Wills & Trusts
- Family Law & Matrimonial Property

### **BARRISTERS SOLICITORS & NOTARY PUBLIC**

Stace Hammond House, 3 Caro Street, Hamilton, New Zealand.  
PO Box 19-101, Hamilton. DX GP 20026.  
Telephone: 0-7-838 0299, Fax 0-7-838 2052.

# THE STACE HAMMOND GRACE LECTURE:

## PURPOSE AND PRINCIPLE IN THE RESOURCE MANAGEMENT ACT

BY HON S D UPTON\*

This is the very first occasion on which I have set foot in the Waikato University Law School. As some of you will be aware, I was one of the most outspoken opponents of the establishment of the School. In the circumstances, it was only reasonable that the Law School should avoid beating a path to my door! But since my objections were no match for the University's persistence, it was inevitable that I should have to come, some day, and do penance. You can imagine, then, my pleasure at receiving the call to confession from my old employers, Stace, Hammond, Grace & Partners; and being granted the indulgence of preaching on a topic of my choosing - the one condition being that I should talk about something of practical value to the profession. In seizing the opportunity so provided, to expatiate again on the meaning of section 5 of the Resource Management Act, I hope I will discharge the burden of my local heresy without asking you to endure statutory purgatory.

### I. PURPOSE OR PRINCIPLE?

Part II of the Resource Management Act (hereafter the RMA) is entitled "Purpose and Principles". But there is no further mention of principles anywhere in the part. All we have, in section 5, is a purpose clause. And, in simple terms, the purpose of the RMA is said to be the promotion of the sustainable management of natural and physical resources.

What is a purpose clause? The Renton Committee stated that purpose clauses were designed "for the better understanding of the legislative intention and for the resolution of doubts and ambiguities". It recommended that they should be used "when they are the most convenient method of delimiting or otherwise clarifying the scope and effect of legislation".<sup>1</sup>

I am not sure how useful a guide this is. What legislative intention, and about what are we concerned? As G C Thornton has warned:

---

\* BA, LLB (Hons) (Auck), M Litt (Oxon); Minister for the Environment, Minister of Research, Science and Technology, and Minister for Crown Research Institutes.

<sup>1</sup> The Renton Committee, *The Preparation of Legislation* (1975 Cmnd 6053) para 11.8.

It is very easy to produce a string of rather grand phrases of the kind that would fit well into a party policy document. It is not so easy to compress into few words a summation of the problems sought to be addressed by legislation and the remedy prescribed.

And then, as if to soften the blow, he adds:

It is nevertheless often worth a careful attempt.<sup>2</sup>

Sir William Dale has suggested that a purpose clause is concerned with the reason for legislation - why we have it.<sup>3</sup> A provision of this type will tell us something about the issue that the statute seeks to address and possibly the outcome that is sought.

Burrows has characterised purpose clauses of this type as being "little more than a summary of what the Act expressly says: it may be called the effect of the Act as much as its purpose".<sup>4</sup>

But as Burrows notes, some purpose clauses go beyond summarising what the Act does and address, instead, "the social, economic or other end which Parliament was hoping to achieve by the Act".<sup>5</sup>

The distinction between these two types of purpose clauses can be illustrated by reference to section 4 of the Ozone Layer Protection Act 1990 and section 4 of the Museum of New Zealand Act 1992.

#### **Ozone Layer Protection Act 1990**

4. Purpose of Act - (1) The purpose of this Act is to help protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer -

(a) By providing for the phasing out by the year 2000 of all but essential uses of controlled substances and for the restriction of the use of other ozone depleting substances; and

(b) By giving further effect to New Zealand's obligations under the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer (copies of the English texts of which are set out in the Fifth and Sixth Schedules to this Act).

(2) Every person exercising any power or discretion conferred by this Act shall have regard to that purpose.

---

<sup>2</sup> Thornton G C, *Legislative Drafting* (3 ed, 1987) 180.

<sup>3</sup> Dale, Principles, "Purposes and Rules" (Spring 1988) *Statute Law Review* 15, 24-25.

<sup>4</sup> Burrows, J F *Statute Law in New Zealand* (1992) 108.

<sup>5</sup> *Ibid.*

### Museum of New Zealand Act 1992

4. Purpose of Act - The purpose of this Act is to establish a National Museum that, under the name Museum of New Zealand Te Papa Tongarewa, shall provide a forum in which the nation may present, explore, and preserve both the heritage of its cultures and knowledge of the natural environment in order better -

- (a) To understand and treasure the past; and
- (b) To enrich the present; and
- (c) To meet the challenges of the future.

Section 5 of the RMA is clearly the second type of purpose clause. In describing the Act's purpose as the promotion of the sustainable management of natural and physical resources, section 5 spells out the end that is sought. The use of the word "promote" is significant in this regard. The section does not describe a particular, defined outcome in the sense that the Ozone Layer Protection Act can state, quite definitively, that it is about "protecting human health and the environment against the adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer". Rather, it describes a goal which may or may not be achieved (and even then that will be in the eye of the beholder) but the promotion of which will be encouraged through the application of the Act's provisions.

If Clause 5 had stopped there, without further elaboration, it might well have fallen foul of the Renton Committee's injunction against statements of purpose that amount to little more than a "mere manifesto"<sup>6</sup> or Professor Dickerson's "pious incantation".<sup>7</sup> But section 5(2) then proceeds to a detailed definition of just what sustainable management entails. In doing so, it illuminates the professed purpose of the Act in a way that goes even further than spelling out a desired "end" of the legislation: it erects sustainable management as a principle.

Dale describes a principle as "a statement in general terms, showing on its face, so far as may be, the moral, social, or economic basis on which the statement itself, and the particular provisions which follow it, rest, and which is itself law making".<sup>8</sup> Or as Bentham, whom Dale cites, put it, "a principle is a first idea, which is made the beginning or basis of a system of reasoning .... a fixed point to which the first link of a chain is attached".<sup>9</sup>

---

<sup>6</sup> The Renton Committee, *op cit*, para 11.8.

<sup>7</sup> Cited in Turnbull, "Problems of Legislative Drafting" (October 1983) *Queensland Law Society Journal* 225, 228.

<sup>8</sup> Dale, *op cit*, 24.

<sup>9</sup> Bentham, J *The Theory of Legislation*, cited in Dale, *ibid*, 18.

Attention to principles in legal drafting is sometimes said to invoke a “continental” approach. In preparing for this lecture, I dipped liberally into the extensive literature, with which statute law experts amongst you will be familiar, on the difference between common law and continental traditions. One of the most engaging and provocative accounts I came across was a piece by Nigel Jamieson from Otago University.<sup>10</sup> His description of the continental approach reveals the RMA as a quintessential example of the type: simple rather than complex, general rather than particular, abstract rather than concrete, academic rather than experiential, principled rather than elemental, conceptual rather than textual, substantive rather than procedural, politically motivated rather than legally addressed.<sup>11</sup>

As one who was intensely involved with the drafting of section 5 of the RMA, I am in little doubt that we saw ourselves grappling with an abstract, conceptual, substantive and politically motivated principle that had to be given a meaningful legal expression. Our deliberations were the culmination of a huge expenditure of intellectual effort in seeking to pin down this principle of sustainability. Few legislative initiatives in our history can have generated the amount of paper than did the Resource Management Law Reform process (or RMLR as it came to be known). Working Paper number 24 contains a series of essays on *Sustainability, Intrinsic Values and the Needs of Future Generations*<sup>12</sup> that illuminate the debate over whether some conception of sustainability should provide an over-arching principle governing the legal framework within which air, land, water and minerals were allocated and regulated. Karen Cronin of the Ministry for the Environment summarised the reasons for and against making sustainability the primary objective of resource management. Of objectives she had this to say:

Objectives are a statement of intention and direction established to guide behaviour and action. They provide an indication of purpose, allow for the reconciliation of subsidiary issues, and can be used to set criteria for monitoring the outcomes of the system and its performance against what was intended.<sup>13</sup>

A key problem with previous legislative formulae governing resource management was felt to be the mixed and sometimes conflicting objectives

---

<sup>10</sup> Jamieson, “The New Look Legislation” (1991) NZLJ 24.

<sup>11</sup> *Ibid*, 25.

<sup>12</sup> Resource Management Law Reform Core Group, *Sustainability, Intrinsic Values and the Needs of Future Generations*, Working Paper No 24 (Wellington, Ministry for the Environment, July 1989).

<sup>13</sup> Cronin, “The Relationship Between sustainability and Other Objectives for Resource Management”, *ibid*, Part A paper 4, 1.



that governed resource allocation. Section 4 of the old Town and Country Planning Act was typical of this approach, enjoining those empowered under it to adopt as their general purpose “the wise use and management of the resources, and the direction and control of the development of .. [land] .. in such a way as will most effectively promote and safeguard the health, safety, convenience and economic, cultural, social and general welfare of the people, and the amenities” in question.

Such a general and all-embracing description of the purpose of planning arguably provided no guidance at all. It would have been truly remarkable if those empowered under the Act could have conceived of themselves as presiding over the unwise use of resources so as to promote ill-health, danger, inconvenience and a negation of the welfare of people! The meaning of such an expression of purpose could only be discovered in practice, and defined in terms of the facts of each case. Inevitably, that would involve a pragmatic attempt to balance competing claims that might not be easily reconcilable. In the absence of some guiding principle, almost any outcome could be argued to have met the Act’s purpose.

By prioritising the objectives governing resource management and giving pre-eminence to one of them - sustainability - the RMLR process changed all that. Only sustainable outcomes were to be acceptable - in other words, whatever the trade-offs in the circumstances of the case, a highest level trade-off in favour of sustainability had already been made in legislation in advance. Whether sustainability should be the pre-eminent objective was fiercely debated. Cronin recorded the arguments for and against. These, for our purposes, are less interesting than the reasons she gave for having a pre-eminent objective. In abbreviated form, they were as follows:

- certainty of legislative direction and intent;
- clarity of overall philosophy;
- provision of a bottom line against which to judge resource management decisions;
- provision of a framework and clear parameters for decision making;
- a reference point for resolving conflicts;
- avoidance of judicial policy making in respect of questions which involve making choices about values that are essentially political in nature;
- provision of an overall national policy to guide regional and local decision makers;
- a clear yardstick against which the effectiveness of the legislation could be assessed;

and, most revealingly of all,

- making a fundamental value judgement to avoid the obscure and uncertain business of weighing competing objectives.<sup>14</sup>

Or in Cronin's own words:

Without priority, perpetuation of resource disputes is likely; it would be better to say where we stand once and for all.<sup>15</sup>

It is the value-laden nature of the idea of sustainability that is unavoidable. And the decision to give it pre-eminence - however it was finally defined - inevitably involved erecting a governing principle that carried far more ethical weight and direction than a simple statement of purpose. One of the simplest, and, I think, most telling contributions came from the DSIR who, in an appendix to Cronin's paper, had this to say:

Sustainability is a general concept and should be applied in law in much the same way as other general concepts such as liberty, equality and justice.<sup>16</sup>

In other words, sustainability involves an ethical dimension over and above anything that it says about outcomes. In my view, section 5 is then somewhat misleadingly labelled a purpose clause. By giving sustainable management pre-eminence over resource management objectives, the Act's authors sought, in Dale's terms, to set it up as a fundamental truth, a fixed (and value-laden) point from which all subsequent reasoning should proceed.

A tidier approach might have been to adopt the formula used in the Fiscal Responsibility Act 1994, a similarly value-laden piece of legislation. In that case there was no recourse to a purpose clause. Rather, the long title of the Fiscal Responsibility Act describes "an act to improve the conduct of fiscal policy by specifying principles of responsible fiscal management and by strengthening the reporting requirements of the Crown". Detailed principles are then specified in section 4 which revolves around reducing Crown debt to prudent levels, managing fiscal risks prudently and ensuring that over time expenditure does not exceed revenue. The principles flow from a particular view about what constitutes prudent financial management. As such, they erect a standard against which the actions of governments can be assessed in much the same way that the decisions of resource managers can be assessed against section 5 of the RMA.

---

<sup>14</sup> *Ibid*, 4-5.

<sup>15</sup> *Ibid*, 4.

<sup>16</sup> DSIR comments, Appendix to Cronin, *ibid*, 9.

Sustainable management is, then, enshrined not so much as the purpose of the RMA but its guiding principle. And to be able to build a confident line of reasoning from this fixed point, it is necessary to know just what value judgments are contained within the definition of sustainable management provided in section 5(2). I shall turn to that question presently. But it is appropriate first, to consider the implications of characterising section 5 as a “principles” clause (for which the heading of Part II provides at least limited sanction).

If we are to adopt the Renton Committee’s view that a purpose clause should be used when it is “the most convenient method of delimiting or otherwise clarifying the scope and effect of legislation”,<sup>17</sup> it will become clear that a statutory statement of principle goes much further. To delimit or otherwise clarify the “scope” of legislation is to undertake an exercise of definition at the margin. In other words, there is assumed to be a self-evident statutory mission that will at the margin require clarification.

By contrast, a statement of principle is concerned not with delimiting the outer margins of the statutory instrument but spelling out its motivating core. As such, it goes to the heart of the way in which the Act speaks. Or, as Dale puts it:

A statutory principle should be a general formulation - a ‘first position’ - but it must have a law-making content; it must not merely state a policy, or a philosophy, or an ideal.<sup>18</sup>

If this is the case, it is important that the principle of sustainable management can be clearly stated. The fact that Parliament felt the need to define sustainable management at some length suggests that it is not a principle or concept whose meaning is immediately self-evident. And there is a danger that definitions of this kind invoke all sorts of ingenious semantic dissection. Many in the profession, I expect, are rather hoping that the judiciary will settle the matter. One academic, Martin Philipson of Victoria University, has already urged the Planning Tribunal to be “adventurous and attempt to tackle the clearly difficult task of finding meaning for, and then developing, the philosophical heart of the Act”.<sup>19</sup> Rather, what is required is careful attention to the language of section 5 and Parliament’s intention in choosing the formula that it did.

---

<sup>17</sup> The Renton Committee, *op cit*.

<sup>18</sup> Dale, *op cit*, 19.

<sup>19</sup> Philipson, “Judicial Decision Making under the Resource Management Act 1991: a Critical Assessment” (1994) 24 (2) VUWLR 163, 165.

While I sympathise with Mr Philipson's enthusiasm to see the philosophical heart of the Act exposed, I don't believe that it is judicial adventurousness that is required. Section 5 was crafted with great care. And, it was with that effort fresh in my mind, that I spelt out in my third reading speech precisely what we were trying to achieve through section 4. I should like to quote the relevant passage from that speech in its entirety:

Unlike the current law, the Bill was not designed or intended to be a comprehensive social planning statute. It has only one purpose - to promote the sustainable management of natural and physical resources, and it does that in two ways: first, through the allocation of resources in public ownership such as the coast and geothermal energy; and second, through limiting the adverse environmental effects of the use of natural and physical resources. For the most part, decision makers operating under the Bill's provisions will be controlling adverse effects - especially in the use of private land.

The Bill should be seen as legitimising intervention only to achieve its purpose. To limit the reasons for and the focus of intervention is intended, not only to achieve sustainability of natural resources, but also to facilitate matters for those who seek consents. Benefits will flow from there being fewer but more targeted interventions. Better environmental quality will be achieved with fewer restrictions on the use and development of resources, but higher standards in relation to their use.

The current law allows - indeed encourages - almost limitless intervention for a host of environmental and socio-economic reasons. That has resulted in a plethora of rules and other ad hoc interventions that are intended to achieve multiple and often conflicting objectives. In many instances they achieve few clear objectives, but they impose enormous costs on developments of any kind.

In addition, there was a multiplicity of legislative acts and control authorities relevant to any proposal. The duplications, overlaps, delays, and costs resulted in the call for an integrated streamlined statute with a clear purpose and focus. It was the ability of Sir Geoffrey Palmer to tackle that question and to bring together this panoply of various legislative interventions and mechanisms that will I believe go down as his single biggest contribution to this Parliament.

The Bill has developed during four years of consultation and debate under two governments. I believe that today we have the clear focus of purpose that is needed - and, of course, the purpose is found in Clause 4 which promotes the sustainable management of our natural and physical resources. This clause has been the subject of intense debate by competing parties that have argued alternatively that it is weighted too far in favour of development or too far in favour of the environment. Critics have been pre-occupied with whether an appropriate balance is struck in this clause.

To my mind, that is to miss the point of the clause and, indeed, of the Bill as a whole. Given that the purpose clause of a major code such as this will inevitably invite judicial consideration - probably sooner than later - it is important that certainty is quickly established on this point. To the extent that judicial notice is taken of *Hansard* - and I hope that it will be taken in this case - I should like to take the trouble to make a carefully considered assessment of the intention of Parliament on this occasion.

It is useful to compare Clause 4 with the language of two predecessor statutes subsumed within this measure - the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967. Both Acts make reference to a mode of economic management that has all but vanished in this country. Clause 4 of the Town and Country Planning Act deals with the wise use and management of resources - of the direction and control of the development of a region, district, or area - in order to effectively promote and safeguard health, safety, convenience, and economic, cultural, and social welfare.

The Water and Soil Conservation Act deals with the promotion and control of the multiple uses of natural water and the drainage of land, and with ensuring that adequate account is taken of the needs of primary and secondary industry. There was a strongly dirigiste flavour about the statutes that saw those who exercised powers under them actively directing economic activity and making trade-offs in the interests of wise uses. When the Bill came back to the House before the election it still had a strong flavour of that about it, despite the consolidation that had been achieved.

Sustainable management still included "the use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and opportunities of people and communities". The problem with such a prescription is that it requires the kind of directive and controlling approach to economic and social activity that must inevitably focus on trade-offs reached in a judicative euphoria. Many still feel comfortable with that approach, usually on the grounds that their view of needs and opportunities will win out on the day. In truth, it is an approach to resource use that is fraught with uncertainties for developers and environmentalists alike.

In adopting the present formulation of Clause 4 the Government has moved to underscore the shift in focus from planning for activities to regulating their effects of which I have spoken. We run a much more liberal market economy these days. Economic and social outcomes are in the hands of citizens to a much greater extent than they have previously been. The Government's focus is now on externalities - the effects of those activities on the receiving environment - and those effects have too often been ignored.

Clause 4 enables people and communities to provide for their social, economic, and cultural well-being. Significantly, it is not for those exercising powers under the Bill to promote, to control, or to direct. With respect to human activities it is a much more passive formulation. People are assumed to know best what it is that they are after in pursuing their well-being. Rather, those who exercise powers under the legislation are referred to a purpose clause that is about sustaining, safeguarding, avoiding, remedying, and mitigating the effects of activities on the environment. It is not a question of trading off those responsibilities against the pursuit of well-being. Well-being is mentioned because the Bill is, of course, about the effects of human agency on the environment. The Bill would be quite unnecessary if there were no human activity.

The Bill provides us with a framework to establish objectives with a biophysical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. As such, the Bill provides a more liberal regime for developers. On the other hand, activities will have to be compatible with hard environmental standards and society will set those standards. Clause 4 sets out the biophysical bottom line. Clauses 5 and 6 set out further specific matters that expand on the issues. The Bill has a clear and rigorous procedure for the setting of environmental standards - and the debate will be concentrating on just where we set those standards.<sup>20</sup>

My reference to future judicial assessments was a deliberate indication of the political, value-laden significance of clause 4 (section 5 as it became).

Traditionally, of course, the courts have declined to refer to Hansard as a source of enlightenment. Lord Scarman, in *Davis v Johnson*, summarised the reluctance in these terms:

... such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressure of executive responsibility, the essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of parliamentary and ministerial utterances can confuse by its very size.<sup>21</sup>

For which, read (unless I am very much mistaken): “Don’t take too much notice of politicians - they haven’t much idea what they’re rabbiting on about!” This made the decision in *Pepper v Hart* very welcome in its extensive review and relaxation of the exclusionary rule with the result that Hansard could thenceforth be used “as an aid to the construction of

---

<sup>20</sup> (July 1991) 51b Hansard, Resource Management Bill Third Reading, 3018-3020.

<sup>21</sup> [1978] 1 All ER 1132, 1157.

legislation which is ambiguous or obscure”.<sup>22</sup> The Court noted that recourse to Hansard was only likely to be useful where the “promoter of the legislation has made a clear statement directed to that very issue”.<sup>23</sup>

Whilst I would not admit to ambiguity or obscurity in the phrasing of section 5, I am acutely aware that abstract principles, of the kind that section 5 seeks to enshrine, raise drafting nightmares given their roots in political and philosophical debates. For that reason, I hope my third reading speech provides the sort of “really useful background” that the New Zealand Court of Appeal was referring to in signalling its willingness to refer to Hansard in *Devonport Borough Council v Local Government Commission*.<sup>24</sup>

Having said that, third reading speeches have their limitations. One is brevity. Each speaker is allowed just 10 minutes to report on the deliberations of the House in its committee stages. Given the party political game-playing that goes on one has, in truth, to observe that many such 10 minute contributions are far too long. But in the case of the RMA we were reporting not just on the committee stages but on a very significant rewriting that had been inserted by supplementary order paper as a result of an extensive review of the Act conducted in mid-stream following the change of government in late 1990. As a result, and despite my best endeavours at that final reading stage, debates recorded in Hansard do not fully illustrate the metamorphosis through which the RMA passed. Whereas bills are usually settled following their report back from the Select Committee, and the second reading debate can then range over the policy reasons for the legislation, the RMA (or at least key parts of it including section 5) straddles two governments, and two terms through the Select Committee. As a result, Hansard is, notwithstanding my attempt to redress the balance in the third reading, less revealing than it might normally be.

With that in mind, it seems to me worth tracing the evolution of section 5 from the Bill’s inception in 1988 through to its passage in 1991. It is a fascinating gestation reflecting, in microcosm, some of the larger political debates being played out during a time of unprecedented institutional upheaval. Naturally, my account of the period 1988 to 1990 is a documentary history since my first hand involvement in the shaping of the Act did not commence until November 1990. But even for the period after then I shall rely principally on the clauses as they were drafted, since any objective assessment of the final shape of Part II can only be made by

---

<sup>22</sup> [1993] 1 All ER 42, 164 (per Lord Browne-Wilkinson).

<sup>23</sup> At 79 (per Lord Bridge of Harwich).

<sup>24</sup> [1989] 2 NZLR 203, 208.

reference to alternative wordings that were proposed and then discarded or modified. I hope that what follows will provide a useful background for policy-makers, decision-making authorities and legal historians interested in the policy convictions set out in my third reading speech.

## II. THE EVOLUTION OF SECTION 5

The development of Part II of the RMA can be broken down into at least four identifiable stages. They are:

1. Policy development leading up to the publication of a government discussion paper *People, Environment & Decision Making: The Government's Proposals for RMLR 1988*.<sup>25</sup>
2. The Bill as introduced in 1989 and then reported back to the House by the Select Committee in 1990.
3. The work of the Review Group on the Resource Management Bill, December 1990 to February 1991, leading to the Supplementary Order Paper of 7 May 1991.<sup>26</sup>
4. Further changes contained in the Supplementary Order Paper of 2 July 1991.<sup>27</sup>

I shall traverse each stage in turn. The texts marked A -I are set out in full in the appendix attached to this article.

### 1. Initial Stages

The first formal public indication of the Palmer Government's view of the purpose and objectives of the RMA appeared in the 1988 publication *People, Environment & Decision Making: The Government's Proposals for RMLR*.<sup>28</sup> The Cabinet papers that preceded the publication of that consultation document reveal a division of views about how the general purpose and objectives of the Bill should be conceived - a decision that will be familiar to any student of the late 1980s and can, not unfairly I

---

<sup>25</sup> RMLR, *People, Environment and Decision Making: The Government's Proposals for RMLR 1988 Discussion Document* (Wellington, Ministry for the Environment, December 1988).

<sup>26</sup> Review Group, *Report of the Review Group on the Resource Management Bill* (Wellington, Ministry for the Environment, February 1991).

<sup>27</sup> Resource Management Bill, *Supplementary Order Paper No 40*, 2 July 1991.

<sup>28</sup> RMLR, *supra* note 25.



think, be described as a contest between the Treasury and non-Treasury world view.

The non-Treasury view (Text A)<sup>29</sup> was somewhat vague, proposing a list of “matters and values” such as balancing individual rights and public welfare, eliminating or minimising conflicts between users, environmental quality, ecosystems’ values, the needs of future generations and economic and social factors. It was the familiar smorgasbord approach of the Town and Country Planning Act, tweaked to reflect a more contemporary view of environmental concerns but still looking like the basis of a balancing exercise requiring the wisdom of Solomon. Consistent with this, the majority view was opposed to any one value being accorded an overriding or pre-eminent status.

The Treasury view (Text B)<sup>30</sup> proposed, unsurprisingly, a formula for the Act’s general purpose and objectives rooted in a subjective, individualist view of value: “the overall goal of this Act is to ensure that resources (or rights to resources) are allocated to wherever they are most highly valued to society”. It proposed a clear account of the Government’s role, both as owner of resources and as regulator. The general thrust is one that leaves the assessment of value to the market place and reduces the Government’s role to one of regulating the negative externalities that flow from resource use. But even the Treasury view seems to admit the difficulties of a purely individualistic, market-based assessment of value since intervention is justified to ensure that people “in maximising their own welfare also maximise that of society”. The calculus required to determine society’s view is not described but even at this early stage a role for public agencies was implied by the notion that the costs of regulatory control should have “a net benefit to society” compared with the option of not regulating.

Importantly, though, the idea of some sort of cost/benefit analysis to determine the case for regulation was consistent with the majority view that no one value should be overriding. In other words, both sides subscribed to the traditional view that the outcome of resource management conflicts should involve an appraisal of the facts of the particular case. The only difference was one of how that balancing of costs and benefits should be carried out - consciously by wise planners or indirectly by market participants constrained by the rights of other players and, when appropriate, regulations. Neither approach tried to erect some sort of non-negotiable bottom line against which particular resource management conflicts could be assessed.

---

<sup>29</sup> ALG (88) 46 *Resource Management Law Reform: Phase 2 Report* 27 November 1988, 3.

<sup>30</sup> *Ibid.*, 4.

Sustainable management had not yet even appeared on the horizon. Rather, the majority view proposed that the list of matters and values should include a reference to sustainable “development”, the Brundtland Commission’s touchstone. One assumes that the minority view opposition to its inclusion was rooted in concerns about the uncertainty of the concept and its application.

In the end, the Government of the day ran with the majority view and announced it in *People, Environment & Decision Making*. The explanatory text following this section provides a detailed insight into the thinking that formed the case for a purpose clause. It was argued that the proposed approach “suggests that the new Resource Management Law must be specific as to purposes and criteria”.<sup>31</sup> And, notwithstanding the traditional, unprioritised approach of the Government’s proposal, it was explained that “this law reform is dealing with resource management laws whose primary function is to limit the adverse spillover effects of people’s activities, and to allocate Crown resources”.<sup>32</sup> It might be doubted that a purpose clause that assigned no priority as between social, economic or environmental factors would lead inexorably to social and economic planning in the name of resource management. But it is clear that the Government saw itself, even at this stage, focusing on outcomes consistent with good environmental management that represented an important shift away from the thrust of the Town and Country Planning Act.

The debate from here on would revolve, to a greater or lesser degree, around how far that concentration on environmental effects would be carried. At this stage there was a heavy emphasis on taking “full and balanced” account of a multiplicity of factors and seeing good resource management as being a means to “enhancing the social, economic and cultural welfare of the community” as well as securing a better environment. The material under consideration for inclusion in a purpose clause is set out as Text C. Many phrases contained in the present Part II of the Act make their debut here - along with a number of concerns that were shared along the way.

## *2. The Bill as Originally Introduced and Modified Prior to the 1990 Election*

Feedback on the Government’s discussion paper and further work by officials led to a Cabinet paper of 10 March 1989<sup>33</sup> that contained an

---

<sup>31</sup> Ibid, 19.

<sup>32</sup> Idem.

<sup>33</sup> ALG (89)11 Resource Management Law Reform: Report on “Objectives and Purposes”, 10 March 1989, Department Paper.

important elaboration of the debate foreshadowed in the earlier Cabinet paper (Texts A and B). The Act was still, at this stage, entitled the Resource Management Planning Act. The decision had been taken to avoid recourse to the long title for interpretative purposes (as had been the fate of the Water and Soil Conservation Act) by spelling out the broad philosophy of the Act through a general purpose section and a section on “fundamental principles” (overall objectives).

The Treasury/non-Treasury division focused on the content of the general purpose clause and whether, in respect of the fundamental principles, the notion of sustainable development should be accorded some overriding status. The alternative approaches to the purpose clause are reproduced as Text D.<sup>34</sup> The majority view wanted to enshrine the idea of “good environmental management” and stressed the importance of focusing on the outcome sought rather than the process by which outcomes should be achieved. The scope of “good environmental management” could not have been broader, being explained as “ensuring environmental (including ecological, social, cultural and economic) well-being”.

Treasury, in sharp contrast, wanted to focus on what it was that the Act would have to deal with - resolving conflicts over the use of resources. Treasury’s objections to the majority view of the core group were threefold. First, it objected to the word “good” as injecting normative value. The objection appeared to be founded on the premise that statements of value, other than by individuals expressing preferences, have no place in public policy. Secondly, it believed that the Act was about resolving conflict between resource users, not environmental management. Thirdly, it objected to the elevation of good environmental management at the expense of efficiency and fairness.

This last concern was reiterated in respect of the debate over a “fundamental principles” clause. Submissions on the Government’s discussion document had been strongly supportive of setting out the principles with a clear indication of the priority to be accorded to them. The majority view urged the Government to reconsider its decision not to accord priority to any particular principle and in particular to look very carefully at the relationship of the sustainable development principle with the others noting that the concept of sustainable development “implicitly involved ecological, economic, social and cultural factors”. The Treasury was clearly sceptical of this analysis and argued that the overall goal of resource management law was seeing that “resources are allocated to the most highly valued alternative”.<sup>35</sup> On this basis they argued that all values

---

<sup>34</sup> Ibid. Cabinet Top.

<sup>35</sup> Ibid, 6.

needed to be weighed against one another - something one suspects they believed could only sensibly occur in the market place and would certainly not be achieved by according priority to sustainable development.

The contest between legislating for an holistic statement of value and a process for reconciling individually held values was resolved by subsuming all values within the concept of sustainable management (stated as a purpose) rather than "good environmental management". Text E shows the Bill as introduced and amended by the Select Committee in 1990.<sup>36</sup> By transferring sustainable development as a fundamental principle into sustainable management as a purpose, the problem of an overriding principle was neatly side-stepped (or obfuscated depending on your view). As I have already indicated, I consider that sustainable management is a principle despite the title of the clause. But whether, as initially conceived, it constituted a clear, fixed point is another matter. The thrust of clause 4(2) - managing resource use "in a way, or at a rate, which enables people to meet their needs without unduly compromising the ability of future generations to meet their own needs" - seems to be one formulation of the so-called precautionary principle (although the insertion of "unduly" by the Select Committee left considerable room for manoeuvre). But the "considerations" that followed and were deemed to be "included" in the definition indicated a balancing process that would have left the likely outcome of the legislation less than certain. Providing for the "social, economic and cultural needs and opportunities of people and communities" alongside maintaining and enhancing the quality of the environment "including the life supporting capacity of the environment and its intrinsic values" set up a contest that would have seen intense debate over the nature of undue compromise.

The "fundamental principles" found their way into a simple principles clause, clause 5, with the injunction that they were matters to whose importance regard should be had. Here the all-embracing (and potentially conflicting) consequences of the holistic "good environmental management" approach were clearly apparent: the effects of activities were assessed in terms, not just of ecosystems, but "economic, cultural, social and general well-being". The maintenance and enhancement of the natural environment sat alongside the potential of the use, development and protection of resources to contribute to the well-being of communities. Even the Treasury's desire to inject cost/benefit analysis into the process was included (although the Select Committee opted for the softer "advantages and disadvantages" formula). And for good measure it was provided that the priority and weight to be given to the principles was "to

---

<sup>36</sup> Resource Management Bill, 14 August 1990.

be determined by the decision maker depending on the issue before him ... and the nature of the decision required”.<sup>37</sup>

In short, despite erecting sustainable management as a species of precautionary principle under cover of a purpose clause, the process of making judgments about what amounted to avoiding the undue compromise of future generations involved considerations so mixed that the consequences of any particular application of the principle were likely to be highly unpredictable. For all that, the move from “good environmental management” as a means of securing well-being to “sustainable management” as a means of securing the interests of future generations marked a major shift of emphasis. Curiously, the explanatory notes to the Bill, despite being unusually discursive, make nothing of this, blandly noting that “sustainable management is a broad concept which reflects aspects of use, development and protection. It is also related to resource management processes which are fair, sufficient and practical”. It is almost as if the draftsman was unclear which view had prevailed.

### *3. The Work of the Review Group*

A change of government in late 1990 led to the appointment of a review group chaired by Tony Randerson whose task it was to examine a range of issues and concerns that, in the view of the newly-elected Government, had not been adequately finessed by the Select Committee. Included in the Review Group’s brief was a reassessment of the purpose and principles clauses.

In the discussion document which the Review Group published in December 1990, it noted that the sustainable management of resources was essentially about safeguarding the options of future generations in making use of our natural and physical resources.<sup>38</sup> This focus was contrasted with the Brundtland Commission’s adoption of “sustainable development” as something much wider, embracing such things as the global redistribution of wealth.

The Review Group then set about redrafting clause 4 with two aims in mind. The first was to propose an amended definition of sustainable management with the aim of

- (1) increasing certainty and workability, (2) striking a reasonable balance between present and future requirements for the use, development and protection of natural

---

<sup>37</sup> Ibid.

<sup>38</sup> Review Group, *Discussion Paper on the Resource Management Bill* (Wellington, Ministry for the Environment, December 1990) 7.

and physical resources and (3) defining the relationship between biophysical and socio-economic considerations.<sup>39</sup>

Secondly, the Review Group sought to give greater emphasis to the fact that the Bill signalled a shift away from the direction and control of development to the control of effects noting that, “despite the significant and pervasive” thrust of the Bill, it had not been reflected in the purpose clause. The redrafting of clauses 4 and 5 proposed by the Group is set out as Text F.<sup>40</sup>

Redefined, sustainable management was retained as the primary purpose of the Bill. A second main purpose of avoiding, remedying or mitigating the adverse effects of activities on the environment was made subject to the first “so the avoidance of adverse effects could not preclude the proper application of the first principle”. Significantly (in view of future debate about the meaning of the word “while”) the Review Group believed that its formula made resource use by the present generation “subject to the safeguarding of the interests of future generations”.<sup>41</sup> The words “without unduly compromising” the interests of future generations were discarded on the ground that “this would clearly involve decision makers indulging in predictions as to the future which would be difficult or impossible to apply in practice”. They chose instead the more familiar legal test of reasonable foreseeability.<sup>42</sup>

The Review Group decided *not* to define sustainable management. Rather, it chose to rely on the clause 5 principles as explanatory of the sorts of matters to be taken into account in achieving the purposes of the Act. The refashioned clause 5 was an amalgam of the “considerations” set out in the original purpose clause and some of the old principles clause. In line with the Group’s quest to focus the Bill on effects, the Select Committee’s reference to assessing the potential advantages and disadvantages of any objective, policy or proposal was changed to “the likely positive and negative consequences”. Whilst not going back to a cost/benefit approach, the change ensured a focus on the effects of resource management initiatives rather than a discussion of their merits which would, inevitably, be rooted in the prejudices of their authors rather than the views of those affected by them.

The more familiar and tangible elements of traditional resource management which had previously been lumped in with the other clause 5

---

<sup>39</sup> Ibid, 4.

<sup>40</sup> Ibid, Appendix 2.

<sup>41</sup> Ibid, 6.

<sup>42</sup> Idem.

principles were then separated out as matters to be recognised and provided for in a new clause 5A modelled on section 3 of the old Town and Country Planning Act.

Finally, the Review Group decided that its spring cleaning had made the priorities of the purpose and principles clauses sufficiently clear to do away with the original clause 5(3) that decision-makers should give the principles priority and weight as they saw fit in the circumstances. The Review Group subsequently described the clauses it had inherited as being influenced by

various interest groups [seeking] to change the balance of the Bill according to their preferences” with the result that “there had emerged a growing list of matters to be taken into account but with no clear guidance for decision makers as to the relative weight and priority to be given to the various factors.<sup>43</sup>

Commenting on its own efforts, the Group concluded that

it is considered that much of the inherent conflict in the ‘shopping list’ approach has been removed or clarified by the creation of the new section 5A and by the redrawn Clause 4(1) which better defines the balance between socio-economic and biophysical concerns.<sup>44</sup>

The Review Group then sought submissions on its handiwork before presenting a final report to the Government in February 1991. The Group reported that there was no real argument on the part of submitters that high environmental outcomes should be secured but it recorded a frequently expressed wish for certainty in environmental standards to improve investment certainty.<sup>45</sup> As a result, it offered a further redrafting of the purpose and principles provisions in the interests of greater certainty and workability (Text G). Without adding any new material, clause 4 was recast to provide a single, simple purpose - sustainable management - which was then “defined” using the balance of the material previously found in clause 4(a) and the second purpose contained in clause 4(b). The Review Group made it clear that in doing so it had discarded the balancing of socio-economic and biophysical aspects proposed by the Select Committee’s version of clause 4 and replaced it with a version that “conceive[d] of the biophysical characteristics of resources as a constraint on resource use”.<sup>46</sup> This preference for measurable, biophysical bottom lines was the Review Group’s most significant contribution reflecting, no

---

<sup>43</sup> Review Group, *supra* note 26, 5.

<sup>44</sup> Review Group, *supra* note 38, 7.

<sup>45</sup> *Idem*.

<sup>46</sup> *Ibid*, 8.

doubt, the arguments in favour of certainty and workability advanced by resource users.

The Review Group made important observations about the test of reasonable foreseeability which it had introduced into clause 4's protection of future generations. The test had attracted some criticism on the basis that it would not protect against unforeseen factors and therefore allow a less risk-averse approach, potentially at the expense of future generations. The Review Group commented that it saw no reason why reasonable foreseeability should undermine the importance of retaining options for future generations. Importantly for the future interpretation of this provision, it distinguished reasonable foreseeability in this context from its use as a standard in cases of negligence. The latter, it noted, involved the application of the test in hindsight; by contrast, the test proposed by clause 4 involved a prospective or forward-looking assessment of risks in anticipating the options open to future generations. It should, they concluded, "enable a reasonable and balanced assessment of intergenerational needs without imposing serious evidentiary difficulties in the conduct of litigation".<sup>47</sup>

Having restructured clause 4, the Review Group then proposed a reordering of clauses 5 and 5A. Clause 5A was retitled "Matters of National Importance". But, whereas its provisions had previously applied "notwithstanding anything to the contrary in sections 4 and 5", the Group came to the conclusion that everything in the Bill should be subject to the sustainable management requirements of clause 4. To reconfirm the importance of the matters referred to, however, it was placed immediately after clause 4 and prior to the principles clause following it. The Review Group explained, however, that the importance of the principle should not be underestimated, emphasising and explaining "the concept of sustainability and its biophysical dimension".

The Review Group's conclusions were then handed back to the Government and it is at this point that I had to take responsibility for the precise words that would end up in an amending supplementary order paper. I proposed two significant changes to clause 4.<sup>48</sup> The first was a softening of the reference to future generations in clause 4(2)(a). The paper in which I took my recommendations to the Cabinet records my view that the Review Group's formulation

somewhat overstates our present day responsibilities to future generations. There should not be any implied responsibility to positively redistribute resources in

---

<sup>47</sup> Ibid, 8-9.

<sup>48</sup> ENV (91) M4/3 *Resource Management Bill: Purpose and Other Matters* 9 April 1991.



favour of future generations. Rather, the responsibility of present generations should be to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.<sup>49</sup>

The Cabinet accepted this view.

The second change I proposed was to move up from clause 5 reference to “safeguarding the life-supporting capacity of air, water, soil and ecosystems”. Even though the Review Group had emphasised the biophysical nature of resources, it had not made explicit reference to them in its drafting of clause 4. I held the view, along with some members of the Review Group, that reference to the biophysical limits of natural and physical resources was necessary if some reasonable basis for taking account of the needs of future generations was to be established. Again, the Cabinet endorsed my view.

My insertions evidenced an increasing interest on the part of officials, and myself, in carrying the Review Group’s emphasis on environmental effects even further. This also lay behind the new clause 5(2) which sought to introduce the idea that those responsible for adverse environmental effects should not only have to mitigate them (as provided for in clause 4) but should also have to provide compensating benefits. The idea of net compensation benefit was in our minds, but the further we went the more we realised that an effects-based view of the statute made an internalisation principle the logical approach to resource management. If we were to discard once and for all the planning for and control of activities, our only concern should be with the internalisation of any adverse environmental effects. Our view had moved inexorably in the direction of the Treasury’s market-driven world in which the Government’s proper statutory concern was with the externalities of market outcomes and, to minimise the dead weight costs of regulation, seeking to create incentives to internalise those externalities wherever possible.

There was, however, concern that clause 5(2) as we had proposed it fell somewhat short of its goal and further feverish drafting by officials and Review Group members was requested. The result (Text H)<sup>50</sup> saw the prohibition on taking account of trade competition, formerly attached to clause 4, become clause 5(2) and the refined internalisation provision as clause 5(3). Persons permitted to impose adverse effects on the environment were required to provide offsetting environmental benefits to the extent that it was practicable in the circumstances. This in turn led to

---

<sup>49</sup> ENV (91) 15.

<sup>50</sup> ENV (91) M6/4 *Resource Management Bill: Purpose and Other Matters* 9 April 1991.

extensive new definitions of “adverse environmental effects” and “offsetting environmental benefits” in a new clause 5(4). It was the high tide mark of an intensive push towards a new, tradeable approach to environmental externalities that had gathered momentum over the preceding months. Confident that the focus of the Act had been delimited to exclude social, economic and cultural externalities, the Treasury officials were much less reserved about having resource users internalise the costs their activities might otherwise impose on the environment, or at least provide compensation for them.

The Cabinet Committee’s agreement was, however, conditional upon criteria being drafted to provide guidance on the application of the words “external” and “circumstances” in clause 5(3) or, in their absence, the development of a more discretionary clause. Neither was achieved. The agreement to the clauses set out in Text H was rescinded a week later “pending further consideration of the issue covered in the clauses by ministers concerned”.<sup>51</sup> And here the paper trail ends. The pressing need to bring a supplementary order paper back into the House and a growing realisation that the supporting policy work had not been done to introduce a fully fledged internalisation principle saw a return to where we had started. With only minor changes, the SOP finally introduced on 7 May 1991 reverted to the formula previously agreed by the Cabinet (Text H) shorn of any reference to compensating benefits.

#### *4. Final Changes*

The Supplementary Order Paper of 7 May was something of a high watermark as far as stretching the biophysical bottom line and sustainable management goes - in tone if not in substance. The amended SOP of 2 July (Text I) that followed on from the Select Committee’s scrutiny of the earlier SOP reflected subtle changes of language to accommodate resource user sensitivities though not, in my view, any change in substance. Predictably, perhaps, large resource users felt that the new clarity of focus on environmental effects would be at the expense of economic development. The Natural Resource Users Group, commenting on clause 4, stated that the nation could not afford “a form of environmental elitism whereby the establishment of a ‘biophysical bottom line’ prevails over communities”.<sup>52</sup> One suspects that they had resource users rather than communities in mind.

---

<sup>51</sup> CAB (91) M14/6b.

<sup>52</sup> *Departmental Report on Supplementary Order Paper No. 22 to the Planning and Development Select Committee*, June 1991.

In the end, the language of ensuring that, in providing for current needs, the needs of future generations were sustained was transmuted into enabling people to meet their current needs while sustaining the needs of future generations. The final formula was in fact very close to that initially recommended by the Review Group but which we had temporarily moved away from in our quest for an austere biophysical approach. A concerted last minute attempt by the Chairman of the Select Committee to have me reintroduce into clause 6 a provision balancing public interest in achieving the purpose of the Act with any private interests in the "reasonable use of private or public property" was resisted. Such a move would have inevitably destabilised the notion of an environmental bottom line and replaced it with an indeterminate balancing exercise. But as a concession to anxious resource users "the efficient use of development of natural and physical resources" was reinstated in the principles clause. To have suggested that any resource use compatible with the purpose of the Act should be anything other than efficient would have been surprising. The concession was, to my mind, harmless in terms of the bottom line. In practice, as we shall see, the use to which this phrase has been put is proving to be not without its problems.

### III. THE PURPOSEFUL PRINCIPLE IN PRACTICE

Only Ministers and their officials, exhausted after piloting complex legislation through the House, feel a brief sense of finality at the point of enactment. For those fated to administer the statute and interpret it, enactment is only the beginning. Having picked the legislation up halfway through and been responsible for putting considerable effort into refining Part II, I left the Environment Portfolio not long after its enactment, aware that there was considerable speculation about just how far the pendulum had swung away from the old world of balancing uses in favour of controlling adverse effects. Returning to the portfolio two years later I was surprised to find the issue still unresolved in the minds of many commentators and to this day there remains a degree of doubt about where section 5 draws the line.

In view of the fact that the Act did not come into effect until mid 1992 and the fact that operative documents under the Act are still being put in place, it is perhaps not surprising that the available case law on Part II remains thin. But, in any case, most applicants for resource consents under the Act can find ways of shaping their applications to fit within operative plans and rules. Situations that challenge the boundaries of the Act or seek to query its purpose are likely to be the exception.

It is important, none the less, for practitioners and administrators alike to internalise (if you will forgive the term) a clear understanding of the

purpose and principles of the RMA. Without that, we will not see a coherent implementation of its very significant objectives.

I have made my own contribution to that process by way of a detailed analysis of section 5 in a speech last year to the Resource Management Law Association. I expressed the view then that, whatever section 5(2) has to say about economic or social activities, the matters set out in sub-paragraphs (a) (b) and (c) must be secured. They cannot be traded off. They constitute a non-negotiable bottom line. Unless it is a bottom line, sustainable management ceases to be a fixed point or pre-eminent principle and sinks back into being a mealy-mouthed manifesto whose meaning is whatever decision-makers on the day want it to be. I hope that my description of the gestation of section 5 reinforces my contention that this all-important purpose clause does in fact set up a principle to guide the entire Act.

I also suggested that the Act's purpose was not one that involved inquiring into what constitutes people's social, economic and cultural well-being or how they should achieve it. Rather, it was about managing natural and physical resources. Sustainable management will amount to managing the use of those resources in a way that secures the matters in sub paragraphs (a) (b) and (c). But they are not being managed or used in a vacuum. They are being used by people and our view of resource use must inevitably be an anthropocentric one. But whilst it goes without saying that people have to be able to provide for their well-being, they must do so in a way that is consistent with sustaining the potential of resources to meet the needs of future generations, safeguarding the biosphere's life support systems and avoiding, remedying or mitigating adverse effects on the environment. The Act makes no judgments about the well-being of people or communities - it does not provide guidance on that matter, nor does it invite administrators or judges to pronounce on it.

I cannot deny that it is a philosophically liberal position that endorses the value pluralism of contemporary society. We deliberately avoided a definition that sought to define sustainable management as a state of social, cultural, economic and environmental well-being. To have done so, would, of course, have allowed decision-makers to enquire into the social, cultural and economic effects of resource use on people, thereby returning us to a world of resource allocation by wise planners rather than market participants. That has not stopped one geographer arguing for just that interpretation on the basis that people and communities can provide for their social, economic and cultural well-being only by ensuring that the matters in sub paragraphs (a) (b) and (c) are provided for. Attractive though the argument may be for those who support a philosophical view in tune with Deep Ecology or something similar, it is not the philosophical

premise to which the Bill's authors were attached. People and their communities were assumed to know more about their many different conceptions of well-being than planners could ever hope to.

It follows from this that the Act is, likewise, not concerned with the "need" for any particular resource use. A statute concerned with the effects of resource use is not concerned with adjudicating between competing needs for resources which will, by definition, depend on the extent to which people and communities are prepared to pay for them. Distributional questions are the province of the tax system not the resource management system. Certainly, the notion of planning for the allocation of resources according to some centrally determined view of need has no place in the sort of market economy on which we rely today.

Notwithstanding that, attempts continue to be made to use the Resource Management Act to sanction particular uses of resources regardless of their environmental effects. One particular focus for this sort of activity is section 7(b) which, as I have noted, was reinstated by the Select Committee at the last minute. Section 7(b) requires those exercising powers and functions under the Act to have particular regard for "the efficient use and development of natural and physical resources". This has emboldened some councils to argue, and the Planning Tribunal to concur, that they are thereby empowered to control uses in the interests of efficient resource use. As a result, section 7(b) is in danger of becoming a catch-all which enables consents to be turned down. Some interpretations of "efficient use and development" are very broad indeed. For instance, with respect to controls on land use, the phrase has been taken to provide justification for dictating the "best use" for a site. In other words, some wise person will choose the land use they consider to be the most appropriate. Not surprisingly, that will tend to match that wise person's particular prejudices rather than the preferred uses that market signals are reporting. Where the Tribunal has determined that land has a high potential value for primary production, subdivision for residential use has been ruled to be in conflict with sustainable management as it is not an "efficient" use of land.

One decision I am aware of went so far as to refuse consent even though the lot proposed for residential use was conceded to be presently unsuitable for agricultural purposes. But the judge went on to muse that economic conditions might change in the future and, given the lot's high quality soils, it had sufficient potential value for primary production for him to disallow residential use.

In another instance not far from here a proposed commercial use of rural land, already used for lifestyle purposes, was turned down because it would have made its reversion to an agricultural use even less likely.

It was never the intention of Parliament that councils and tribunals should sit in judgement on what is and is not efficient. Efficient resource allocation is best achieved through price signals - price signals which include the costs of remedying environmental impacts - not some third party view of what the world should look like.

In my view section 7(b) is concerned with the same issues that are dealt with in much greater detail in section 32. Parliament intended to pass an Act that would improve environmental outcomes without causing the inefficient use and development of resources where that use is consistent with sustainable resource management. In my view, having particular regard for the efficient use and development of resources should involve councils and planners asking whether their approach to sustainability is one that will allow price signals to communicate information about scarcity and demand so that investment decisions are made prudently. It goes without saying that section 7 is subject to section 5 and, as I hope I have made exhaustively clear, section 5 is not a charter for the central planning of investment decisions.

The issue of "need" reared its head in a rather different way in the recent report of the Board of Inquiry into the Stratford Power Station. There, need for a new thermal power station was considered at some length, the Board concluding that

the RMA contemplates positive and adverse effects being balanced. The social and economic benefits of the power station may be one such positive effect if a need for additional power is demonstrated.<sup>53</sup>

Although the Board's reasoning is not entirely clear on this point, it seemed to spring from the view that, since it would have been possible to avoid the adverse effects of carbon dioxide discharges by not building the power station (in other words by avoiding the discharge altogether in terms of section 5(2)(c)), an inquiry into the need for the power station was therefore relevant. The positive social and economic effects of meeting that need could then be weighed against the adverse effects of the discharge.

---

<sup>53</sup> Report of the Board of Inquiry, *Proposed Taranaki Power Station - Air Discharge Effects* (February 1995) 28.

In my decision, I made it clear that I did not consider that “avoidance” enjoyed some preferred status as the means of addressing adverse effects and that disproving the need for the station to construct an argument for avoidance was not legitimate. I summed up the position thus:

The Act’s purpose is to allow people and communities to provide for their well being however they may view that, while ensuring that certain environmental bottom lines or constraints spelt out in section 5(2)(a)(b)(c) are observed. The appropriate test to apply is whether the discharge permit sought meets the tests of sustainable management. This will allow a weighing of the positive and negative environmental effects if mitigation (as against avoidance or remediation) is considered to be appropriate.<sup>54</sup>

In other words, the fact that someone proposes to use natural and physical resources is *prima facie* evidence of need. Whether or not the use will occur, of course, will depend on whether the resource user is prepared to pay the costs associated with sustainable use - “in a way or at a rate” which secures the substance of section 5(2).

The rules in regional and district plans and any standards promulgated under the Act that, for the time being, give expression to what sustainable practices are, will of course be arrived at through political processes that reflect prevailing values in the community. There is a bottom line provided by the statute, but the fact that the Act is about promoting sustainable management makes it clear that how far we advance towards that goal will depend on attitudes and values over time.

The attitudes and values that coalesced behind the RMLR initiative included a realisation that the environment was not a dispensable and infinitely absorptive sump for the unwanted and unintended consequences of resource use. That realisation holds profound consequences for consumer society as we presently experience it. In the same way that the notion of “development” dominated our thinking for over a century, the notion of sustainability has come to dominate the thinking of many people. The RMA was undoubtedly ahead of its time in institutionalising this way of thinking. But it remains backward-looking in other respects. I do not for one moment believe that we have yet developed allocation mechanisms to match the progressive policy thrust of the Act. We are still stuck with planning mechanisms that better fit a world of direction and control.

---

<sup>54</sup> Decision of Hon Simon Upton, Minister for the Environment, *Air Discharge Permit Taranaki Combined Cycle Power Station* (Wellington, Ministry for the Environment, March 1995) para 66.

The next great phase of reforms must be the development of resource allocation instruments that are more compatible with an economy that leaves individual resource users to get on with their own businesses provided they meet the requisite standards. That will leave politicians and administrators focusing on the things that are properly the concern of public decision-making processes: deciding how fast we move in promoting the Act's goal and how we measure our progress. Those are the political and ethical issues that will be imposed on any regime for environmental protection. It is my concern that frustration with inadequate processes and mechanisms may yet undermine confidence in the goal of sustainable management. If that were to happen we would be in danger of being urged to shoot a worthy mission rather than defective mechanisms.

## APPENDIX

### TEXT A

Extract from ALG (88) 46, "Resource Management Law Reform: Phase 2 Report", 22 November 1988.

(a) agree that the general purpose and objectives of the Environment and Planning Act must recognise:

- (i) the Treaty of Waitangi;
- (ii) costs as well as benefits;
- (iii) that no one value should be overriding; and

agree that the general purpose and objectives should be based on the general format as suggested in the Majority Core Group report and cover matters and values such as:

- (i) balancing individual rights and public welfare;
- (ii) eliminating or minimising conflicts between uses;
- (iii) environmental quality;
- (iv) ecosystem values;
- (v) needs of future generations;
- (vi) economic and social factors;



## TEXT B

Extract from ALG (88) 46, "Resource Management Law Reform: Phase 2 Report", 22 November 1988.

" The overall goal of this Act is to ensure that resources (or rights to resources) are allocated to wherever they are most highly valued to society.

The Government's role should be to:

- (i) Allocate Crown resources so as to provide the highest possible expected present value from the possible streams of future benefits;
  - (ii) To intervene in people's rights and resources when:
    - it is necessary to avoid or mitigate a nuisance which is or could have adverse effects on others;
    - it is necessary to ensure that people in maximising their own welfare also maximise that of society;
    - the costs of regulatory control have a net benefit to society compared with the option of not intervening".
- (Minority View)

## TEXT C

Extract from "People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform", Ministry for the Environment, December 1988.

- 1 To acknowledge that good environmental management is essential to the well-being of New Zealand;
- 2 To ensure that, in the management of natural and physical resources, full and balanced account is taken of all relevant factors, including:
  - a the intrinsic values of ecosystems;
  - b all values which are placed by individuals and groups on the quality of the environment;
  - c the sustainability of natural and physical resources;
  - d the needs of future generations;
  - e the principles of the Treaty of Waitangi;
  - f economic and social factors.
- 3 To encourage the proper management, development and conservation of natural and physical resources for the purpose of enhancing the social, economic and cultural welfare of the community and a better environment.

4 In respect of the management, use or development, and conservation of New Zealand's resources the provisions of this Act shall be administered for the purposes of:

- a ensuring their management in a manner which provides sustainable benefits to present and future generations of New Zealanders;
- b lessening and minimising adverse social, physical, economic and environmental impacts of their use or development;
- c ensuring effective and objective evaluation of plans or proposals for their use or development;
- d eliminating or minimising conflicts between uses or activities;
- e managing the development of regions, districts and areas in ways that will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social and general welfare of the people and the amenities of those regions, districts and areas;
- f ensuring an effective balance between individual rights and public interests;
- g providing opportunities for effective public participation in planning decisions;
- h enabling the best approach to be adopted for resource management decision making;
- i empowering the Minister, regional or territorial government to take such action as necessary to deal with the effects of the use of resources without infringing the rights of individuals except to the extent that there is some demonstrable public benefit;
- j protecting rare and/or representative samples of the flora and fauna, natural communities, habitats, ecosystems, and the genetic diversity, landscapes and historic places which give New Zealand its recognisable character and values;
- k minimising or preventing the adverse effects of natural or human-made hazards.

#### TEXT D

Extract from ALG (89) 11, "Resource Management Law Reform: Report on "Objectives and Purposes", 14 March 1989.

#### 1 *Objectives and Purposes*

- a note that alternative wordings to "Resource Management Planning Act" as the Short Title may need to be considered, in view of the submissions and depending on meaning of terms "resource management " and "planning" and the scope of the Act;
- b agree that the Long Title should be a mechanical clause not intended to have any interpretive effect, and that the broad philosophy of the Act could be embodied in a General Purpose section and a section on Fundamental Principles (overall objectives);
- c agree that the General Purpose of the Act should include the ideas that:
  - i the Act should be based on a set of Fundamental Principles for Resource Management;

- ii the Act should make reference to the Treaty of Waitangi;

AND THAT

EITHER

- iii good environmental management, that is ensuring environmental (including ecological, social, cultural and economic) wellbeing, and a fair and efficient process of decision making is essential to the wellbeing of New Zealand and its inhabitants;

- iv the Act is aimed at encouraging/promoting good environmental management based on a set of Fundamental Principles;

OR

- v that the purpose of this Act is to encourage the resolution (before and after the fact) of conflicts over protecting or using the environment in a way that maximises the wellbeing of the community as a whole (Treasury recommendation);

2 *Fundamental Principles*

- a agree that the Fundamental Principles (overall objectives) for resource management should include both outcome and process principles;

- b note that many submissions have called for a priority amongst the Principles and have indicated a preference for sustainable development to be the basic principle for the law; and

EITHER

- c confirm that no principle be overriding and that the notion of sustainable development be included alongside the other Fundamental Principles (*Treasury recommendation*);

OR

- d agree that the Core Group carry out a detailed analysis of submissions and report further on the exact wording of the law with respect to the relationship between a sustainable development objective and other statements of General Purpose or Fundamental Principles, presented in the form of draft sections;

## TEXT E

Extract from the Resource Management Bill, as reported from the Committee on the Resource Management Bill, 14 August 1990.

PART II  
PURPOSE AND PRINCIPLES

4. Purpose - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people to meet their needs (*now without*) without unduly compromising the ability of future generations to meet their own needs, and includes the following considerations:

[Struck Out]

- 
- (a) The efficient management of natural and physical resources:
  - (b) The maintenance and enhancement of the life-supporting capacity of the environment:
- 

[New]

---

(a) The maintenance and enhancement of the quality of the environment, including the life-supporting capacity of the environment and its intrinsic values:

---

(c) The use, development, or protection of natural and physical resources in a way which provides for the social, economic, and cultural needs and (*opportunities of the present and future inhabitants of a community*) opportunities of people and communities:

(d) Where the environment is modified by human action, the adverse effects of irreversible change are fully recognised and avoided or mitigated to the extent practicable:

(e) The use, development, or protection of renewable natural and physical resources so that their ability to yield long term benefits is not endangered:

(f) The use or development of non-renewable natural and physical resources in a way that sees an orderly and practical transition to adequate substitutes including renewable resources:

(g) The exercise of kaitiakitanga which includes an ethic of stewardship.

[Struck Out]

---

(3) For the purposes of Part IX, the meaning of sustainable management does not include paragraphs (b), (c), (d) or (g) of subsection (2).

---

5. Principles - (1) To achieve the purpose of this Act, all persons who exercise functions and powers under this Act shall have regard to the importance of -

[New]

- 
- (i) The preservation of the natural character of the coastal environment, wetlands, and lakes and rivers and their margins; and
  - (ii) The retention of natural landscapes, landforms, and indigenous vegetation; and
  - (iii) The protection of heritage values, including historic places and waahi tapu:
- 

- (f) The relationship of Māori and their culture and traditions with their ancestral lands, waters, sites, and other taonga:
- (g) The potential of the (*development, use*) use, development, and protection of natural and physical resources to contribute to the wellbeing of (*the community*) communities:

[New]

- 
- (h) The maintenance and enhancement of public access to and along the public estate, including the coastal marine area, lakes and rivers.
- 

(2) Without limiting subsection (1) or precluding the use or development of coastal marine areas where appropriate, all persons who exercise functions and powers under this Act in relation to coastal marine areas shall have particular regard to the importance of the (*maintenance*) preservation of the natural character of the coastal environment.

[Struck Out]

---

(3) Subsections (1) and (2) do not limit the matters to which persons may have regard when exercising functions or powers under this Act in order to achieve the purpose of this Act.

(4) This section does not apply in respect of functions or powers under Part IX.

---

[Struck Out]

---

(a) The maintenance and enhancement of the quality of the environment:

---

(b) The actual or potential effect of an activity or natural process on the whole of the environment, including its actual or potential effect on -

- (i) The health and safety, and the economic, cultural, social, and general wellbeing of people and communities:

- (ii) Ecosystems, ecological processes, physical processes, and natural biological diversity:

- (iii) The ability of future generations to meet their needs:

- (c) An appropriate balance between the public interest in achieving the purpose of this Act and any private interests in the reasonable use of private or public property:

[New]

---

(ca) The efficient and effective management of natural and physical resources:

---

(d) The potential (*costs and benefits*) advantages and disadvantages of any objective, policy, or proposal to the environment:

(e) The maintenance and enhancement of the natural, physical, and cultural features which give New Zealand its character, and the protection of them from (*inappropriate*) unnecessary subdivision, use, and development including -

[Struck Out]

---

(i) The maintenance of the natural character of the coastal environment and the margins of lakes and rivers; and

(ii) The retention of natural landforms and vegetation; and

(iii) The recognition and protection of heritage values including historic places and waahi tapu:

## TEXT F

Extract from "Discussion Paper on the Resource Management Bill", prepared by the Review Group, December 1990.

### APPENDIX 2

#### PURPOSE AND PRINCIPLES

##### *Clause 4 Purposes*

The purposes of this Act shall be:

(a) To promote the sustainable management of natural and physical resources by managing their use, development or protection in a way, or at a rate which provides for the social, economic and cultural wellbeing of people and communities while safeguarding, to the extent reasonably foreseeable, the ability of future generations to meet their needs in relation to natural and physical resources; and

(b) Subject to paragraph (a), to provide and promote effective methods to avoid, remedy or mitigate the adverse effects of activities on the environment.

##### *Clause 5 Principles*

(1) To achieve the purposes of this Act, all persons who exercise functions and powers under this Act shall have regard to the following considerations:

- (a) The use, development and protection of renewable natural and physical resources so their ability to yield long term benefits is not endangered;
  - (b) [The use or development of non-renewable natural and physical resources in a way which sees an orderly and practical transition to adequate substitutes including renewable resources];
  - (c) The maintenance and enhancement of the life-supporting capacity of the environment [and its intrinsic values];
  - (d) The exercise of kaitiakitanga which includes an ethic of stewardship;
  - (e) Where the environment is modified by human action, to avoid, remedy or mitigate to the fullest extent practicable of the adverse effects of irreversible change;
  - (f) The actual or potential effect of an activity or natural process on the whole of the environment, including its actual or potential effect on -
    - (i) The health and safety, and the economic, cultural, social and general wellbeing of people and communities;
    - (ii) Ecosystems, ecological processes, physical processes, and natural biological diversity;
    - (iii) The ability of future generations to meet their needs.
  - (g) An appropriate balance between the public interest in achieving the purpose of this Act and any private interests in the reasonable use of private or public property.
- (2) Subsection (1) does not limit the matters to which persons may have regard when exercising powers and functions under this Act in order to achieve its purposes.
- (3) To achieve the purposes of this Act, all persons who exercise functions and powers under this Act shall in considering an objective, policy, method or proposal assess the likely positive and negative consequences.

5A *Matters to be Recognised and Provided for:*

- (1) Notwithstanding anything to the contrary in sections 4 and 5, all persons who exercise powers and functions under this Act shall particularly recognise and provide for:
- (a) The maintenance and enhancement of the natural, physical and cultural features which give New Zealand its character and the protection of them from unnecessary subdivision, use and development including:
    - (i) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands and lakes and rivers and their margins; and

- (ii) the retention of natural landscapes, landforms and indigenous vegetation;
- and
- (iii) the protection of heritage values, including historic places and waahi tapu;
- (b) The maintenance and enhancement of public access to and along the public estate, including the coastal marine area, lakes and rivers;
- (c) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites and other taonga.

## TEXT G

Extract from ENV (91) M 4/3, "Resource Management Bill: Review Group's Recommendations", 26 March 1991.

4 *Purpose* - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, "sustainable management" means managing the use, development and protection of natural and physical resources in a way or at a rate which ensures that, in providing for the social, economic and cultural well-being of people and communities, -

- (a) the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations is sustained; and
- (b) the life-supporting capacity of air, water, soil and ecosystems is safeguarded; and
- (c) the adverse effects of activities on the environment are avoided, remedied or mitigated.

(3) This Act shall not be used for the purpose of restricting competition or trade practices.

5A *Matters of national importance* - In managing the use, development and protection of natural and physical resources, all persons exercising functions and powers under this Act shall recognise and provide for the following as matters of national importance:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands and lakes and rivers and their margins and the protection of them from unnecessary subdivision, use and development:

(b) The protection of outstanding natural landscapes from unnecessary subdivision, use and development:

(c) The retention of significant areas of indigenous vegetation and the protection of the habitat of fish and indigenous fauna:

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers:

(e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga:



(f) The maintenance and enhancement of the natural quality of the environment:

5 *Other Matters* - (1) In managing the use, development and protection of natural and physical resources, all persons exercising functions and powers under this Bill shall have particular regard to:

(a) The maintenance and enhancement of amenity values:  
 (b) The recognition and protection of the heritage value of sites, buildings, places and areas:

(c) Any finite characteristics of natural and physical resources:  
 (d) The exercise of kaitiakitanga.  
 (2) With respect of any remaining adverse effects under clause 4 (2) (c) of this Bill, these shall, to the fullest extent practicable in the circumstances, be compensated for by environmental benefits to those aspects of the environment adversely affected, by the person causing the effects.

#### TEXT H

Extracts from ENV (91) M 6/4, "Resource Management Bill: Purpose and Other Matters", 9 April 1991.

f agreed that clause 4(3) as described in ENV (91) M 4/3 (a)(ii) be replaced by a new clause 5 (2) below:

5(2) All persons exercising functions and powers under this Act, in relation to managing the use, development and protection of natural and physical resources shall not take account of the adverse effects of trade competition on the social and economic well-being of any person.

g agreed that the wording of clause 5(3) be as follows:

(3) To achieve the purpose of this Act all persons exercising functions and powers under this Act in relation to managing the use, development and protection of natural and physical resources shall -

(a) In accordance with this part; and  
 (b) In accordance with applicable regulations, policy statements and plans, if any; and  
 (c) To the extent that it is practicable in the circumstances -  
 ensure that any person permitted to impose an adverse environmental effect [within the meaning of subsection (4)], shall provide offsetting environmental benefits.

subject to officials from the Ministry for the Environment, Treasury and the Department of Conservation drafting criteria for inclusion in the Bill which

provide guidance on the application of the words “extent” and “circumstances” in clause 5(3);

k agreed that the wording of clause 5(4) be as follows:

(4) For the purposes of subsection (3), -

(a) The phrase “adverse environmental effect” means a material adverse effect on -

- (i) All natural and physical resources; or
- (ii) Ecosystems (excluding people and human communities); or
- (iii) Public health and safety; or
- (iv) People’s appreciation of amenity values; or
- (v) Persons, to the extent that their economic wellbeing-

(A) Directly derives from natural and physical resources which are adversely affected; and

(B) Suffers directly from those adverse effects on such resources; or

(vi) Persons, to the extent that they suffer directly from adverse effects on ecosystems (excluding people and human communities) -

but does not include any effect on any person to which that person has consent in writing.

(B) The phrase “offsetting environmental benefits” means benefits to any one or more of the matters specified in subparagraphs (i) to (v) of paragraph (a) (which wherever practicable shall be to that aspect of the environment where the adverse environmental effect is imposed) but does not include any payment of cash other than a financial contribution within the meaning of section 93(6) or regulations.

## TEXT I

Supplementary Order Paper No. 40, 2 July 1991.

## PART II

### PURPOSE AND PRINCIPLES

*Clauses 4, 5, and 6:* To omit these clauses, and substitute the following clauses:

4. *Purpose* - (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables

people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while -

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

*5. Matters of national importance* - In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
- (e) The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

*6. Other matters* - In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to -

- (a) Kaitiakitanga:
- (b) The efficient use and development of natural and physical resources:
- (c) The maintenance and enhancement of amenity values:
- (d) Intrinsic values of ecosystems:
- (e) Recognition and protection of the heritage values of sites, buildings, places, or areas:
- (f) Maintenance and enhancement of the quality of the environment:
- (g) Any finite characteristics of natural and physical resources:
- (h) The protection of the habitat of trout and salmon.



## **McCaw Lewis Chapman**

---

We are a leading Waikato law firm with offices in Hamilton, Cambridge and Tokoroa. Our wide range of services include:

- urban & rural conveyancing
- commercial & company law
- taxation
- criminal & civil litigation
- arbitration
- family law
- estate planning
- wills & trusts
- sports law
- environmental law
- employment law

In keeping with our strong support of the Waikato School of Law, our professional staff employment programme centres around Waikato Law School graduates.

---

Hamilton: MacCaw Lewis Centre, 312 Victoria Street, Phone (07) 838-2079  
Cambridge: 77-79 Duke Street, Phone (07) 827-5147  
Tokoroa: cnr Bridge & Mannering Streets, Phone (07) 886-0769

**THE McCAW LEWIS CHAPMAN ADVOCACY CONTEST:**  
**JUDICIAL LEGISLATION IN NEW ZEALAND AND THE PRIVY**  
**COUNCIL'S ROLE**

BY AIMÉE WILKINS\*

I. INTRODUCTION

The separation of powers is a cornerstone of democratic society, requiring that the executive, legislative, and judicial branches of government occupy distinct roles. The executive decides upon policies to be implemented by the legislature, which drafts law to be applied and interpreted by the judiciary. In undertaking their role as interpreters of the law, New Zealand judges have moved from the formal legalism which has been a hallmark of colonial legal systems towards a policy-based approach. I argue that this approach has brought with it the danger of courts usurping the role of the legislature by making “judicial legislation” rather than applying existing law to the facts before them. This danger was highlighted by Lord Reid in *Myers v DPP*:

A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed judges will be tempted to encroach on the proper field of the legislature ...<sup>1</sup>

Recent decisions of the New Zealand Court of Appeal and appeals to the Judicial Committee of the Privy Council illustrate the difficulty the Court of Appeal has had in remaining within its powers. These decisions affirm the crucial checking role of the Privy Council in ensuring that the policy approach remains just that, interpretation of the law with policy considerations, rather than the consideration of how policy would best be implemented (which is the legislature’s role).

II. RECENT EXAMPLES FROM CASE LAW

*1. New Zealand Apple and Pear Marketing Board v Apple Fields Limited<sup>2</sup>*

This case arose when the New Zealand Apple and Pear Marketing Board sought to raise differential levies on producers of apples and pears, according to the use that they had made of the Board. One producer

---

\* Final year LLB student, University of Waikato.

<sup>1</sup> [1965] AC 1001, 1022.

<sup>2</sup> [1989] 3 NZLR 158 and [1991] 1 NZLR 257.

claimed that this was an anti-competitive practice prohibited by section 27 of the Commerce Act 1986.<sup>3</sup>

The Board sought to rely upon a proviso to section 27 which allows anti-competitive practices when they are permitted by specific statutory authority.<sup>4</sup> While this argument was rejected by the Court of Appeal, it was held that on policy grounds the anti-competitive provisions of the Commerce Act should not apply to producer boards at all. In a policy-based decision Cooke P stated:

... it is right in my view to have regard to the major and special position that producer boards have occupied in the New Zealand economy. The Commerce Act represents a new philosophy of promoting unrestricted market-forces. Its provisions are very general. The special statutory provisions about the raising of capital by the Apple and Pear Marketing Board antedate the new statutory philosophy. *It is impossible to be confident that in 1986 Parliament meant to override them.* [emphasis added]<sup>5</sup>

Casey J reiterated these views:

I incline to the view that the relationship between [the Board] and the growers is so close to a producer marketing co-operative and differs so much from an ordinary marketing situation, that *it may be questionable whether the Commerce Act was ever intended to apply to that relationship.* [emphasis added]<sup>6</sup>

The Court used its interpretation of Parliament's intention to allow producer boards to escape the reaches of the Commerce Act. Not only did the Court consider the major and special position of the boards, it held that Parliament had meant to exclude them from the ambit of the Act but that the legislature had somehow failed to do so.

As their Lordships noted in the appeal judgment, if Parliament had intended Producer Boards to escape the ambit of the Commerce Act a provision to that effect would be found in the New Zealand Act, as in the

---

<sup>3</sup> Section 27(1) states that "[n]o person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or is likely to have the effect, of substantially lessening competition in a market".

<sup>4</sup> The specific authority cited was section 31 of the Apple and Pear Marketing Act 1971 which allowed the board to impose levies upon producers. Section 43(1) of the Commerce Act 1986 provides that nothing in the relevant part of the Act applied in respect of matters specifically authorised by any Act.

<sup>5</sup> [1989] 3 NZLR 158, 165.

<sup>6</sup> At 176.

equivalent Australian legislation.<sup>7</sup> The Privy Council found that, because there was no “specific authority” for the Board to contravene section 27, its levy was unlawful.<sup>8</sup>

With respect, it is apparent that, in attempting to produce a just result, the Court of Appeal overstepped its role and supplanted that of the legislature. As Lord Bridge pointed out, “when an issue is wholly governed by statute, its resolution must be purely a matter of interpretation”.<sup>9</sup>

This case has been cited as “another example of the growing divergence between the Privy Council and the New Zealand Court of Appeal”.<sup>10</sup> However, it is perhaps more aptly described as another example of the growing divergence between the words of the statute and the law applied by the New Zealand Court of Appeal.

## 2. *Simpson v Attorney-General [Baigent’s Case]*<sup>11</sup>

This case provides a very recent demonstration of the need for an external and objective tribunal to clarify the law of New Zealand. The action arose when police seeking a drug offender obtained a search warrant for what was believed to be his address but was in fact that of a Mrs Baigent, an unrelated party. When the police arrived and presented the warrant, Mrs Baigent and her son protested that the police had the wrong address, and produced evidence of their identity. When Baigent’s daughter, a lawyer, spoke with one of the police officers, he said: “We often get it wrong, but while we are here we will look around anyway”. Mrs Baigent pleaded various causes of action, including negligence, trespass, misfeasance in public office and violation of section 21 of the Bill of Rights Act 1990 (“Bill of Rights”).<sup>12</sup>

The most significant aspect of the Court of Appeal decision was its finding on the Bill of Rights issue. The Court recognised (or, from some perspectives, created) a cause of action under the Bill of Rights despite the absence of any provision in the Act for such remedies. In doing so, the

---

<sup>7</sup> [1991] 1 NZLR 257, 262-3 (s 172(2) of the Commerce Act (Aust) excludes the application of the Act to Producer Boards).

<sup>8</sup> At 266.

<sup>9</sup> At 262.

<sup>10</sup> Culey, “A Case Note” (1991) Auckland University Law Review 618.

<sup>11</sup> [1994] 3 NZLR 667.

<sup>12</sup> [1994] 3 NZLR 667, 672-5. Section 21 provides that “[e]veryone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise”.

Court sought to circumvent the statutory immunity afforded to the Crown by section 6(5) of the Crown Proceedings Act 1950 which provides that:

No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

The Court of Appeal held that the lack of an express provision granting remedies, if the rights guaranteed were abused, was surmountable, and that the remedy of public law compensation or damages is available under the Bill of Rights.<sup>13</sup>

The reasoning underlying the majority decision of the Court of Appeal was the view that the 1990 Act could not be considered credible without a meaningful corresponding remedy. Cooke P noted that “we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed”.<sup>14</sup>

Concern has been voiced at high levels at the absence of express provision for remedies in the New Zealand Bill of Rights.<sup>15</sup> It would appear that this is a matter which the legislature may need to address. However, I argue that this did not justify the Court in creating access to remedies by taking a policy approach unwarranted by the legislation. As Dr James Allan points out,<sup>16</sup> the New Zealand Bill of Rights is not entrenched, and so it does not charge the judiciary as sole protectors of people’s rights. The ordinary status of the statute in fact leaves the role of delineating and protecting rights to the legislature. The contentious aspect of the judgment was summarised when Allan said:

In my view it is just not credible to assert that Parliament intended the Bill of Rights to take on a de facto entrenched status when the entrenched version itself was clearly rejected.<sup>17</sup>

The decision of the Court of Appeal to impose, without mandate, a public law remedy seriously undermines the clear intention of the legislature to create an unentrenched Bill of Rights. As Allan concluded:

---

<sup>13</sup> See headnote at 669 (per Cooke P, McKay J, Casey J and Hardie Boys J, Gault J dissenting).

<sup>14</sup> At 676.

<sup>15</sup> Human Rights in New Zealand, *MFAT Information Bulletin*, No 54, June 1995.

<sup>16</sup> Allan “Speaking with the Tongues of Angels: The Bill of Rights, *Simpson* and the Court of Appeal” [1994] *Bill of Rights Bulletin* 6.

<sup>17</sup> *Idem*.



No one, not even the Judges of our Court of appeal, speaks with the tongues of angels. Let us hope the appeal to the Privy Council is successful and New Zealand's experiment with an unentrenched Bill of Rights put back on a proper course.<sup>18</sup>

Unfortunately this prophecy has not come true because the Government has not appealed this decision to the Privy Council. The more cynical observer may argue that this is motivated by the New Zealand Government's current drive to abolish links with the Privy Council<sup>19</sup> - the very body which could revert the Bill of Rights to its correct status of an ordinary statute.

### *3. Downsvie Nominees Ltd v First City Corporation Ltd*<sup>20</sup>

In this case the Court of Appeal was required to consider whether the receiver of a company, appointed by a first debenture holder, owed a duty of care in tort to a second debenture holder. The Court of Appeal found that the receiver did owe such a duty.<sup>21</sup> Richardson J found that there was sufficient proximity between the parties concerned and that policy reasons supported such a duty.<sup>22</sup>

The Privy Council took issue with the Court of Appeal's finding. So concerned were their Lordships at this "opening of the floodgates" by the New Zealand Court that they took the unusual step of allowing the respondents leave to argue new issues, and urged both parties to reconsider the "foundation and extent" of the duties owed.<sup>23</sup> Their Lordships held that the duty owed by receivers conducting the general business of a company was, not a tortious duty, but an equitable duty to act "in good faith and for proper purposes".<sup>24</sup> Lord Templeman stated pointedly:

The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss; ... If the defined equitable duties attaching to mortgagees and to receivers and managers appointed by debenture holders are replaced or

---

<sup>18</sup> *Ibid*, 7.

<sup>19</sup> Hodder 28 (1994) *The Capital Letter* 10.

<sup>20</sup> [1990] 3 NZLR 265, and [1993] 1 NZLR 513; [1993] AC 295.

<sup>21</sup> [1990] 3 NZLR 265.

<sup>22</sup> At 275-278.

<sup>23</sup> [1993] 1 NZLR 513, 514.

<sup>24</sup> At 524.

supplemented by a liability in negligence the result will be confusion and injustice.<sup>25</sup>

Again, in a branch of law with distinctly English origins, the Privy Council had reason to disagree with, and redirect, the New Zealand judiciary.

### III. CONCLUSION

Although a policy-based approach by courts arguably allows for law to develop with flexibility and in context, the overriding need for certainty in the legal system is clearly threatened by the Court of Appeal's approach. It is imperative that the law not become subjective and whimsical by being contained solely in the minds of judges. This point was emphasised by Lord Scarman in *Duport Steel Ltd v Sirs*:

For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application.<sup>26</sup>

As Roger Kerr noted recently: "by comparison with some overseas jurisdictions judicial accountability in New Zealand is weak".<sup>27</sup>

It is my argument that, in permitting a policy-based approach by the courts, New Zealand has introduced, and experienced, the danger of judicial legislation and the uncertainty it tends to import to a legal system. As the three cases discussed illustrate, the Privy Council provides an essential check on this usurpation of the legislature's role, and, until some other equally adequate check within New Zealand is formulated, the Privy Council should remain New Zealand's ultimate appellate tribunal.

---

<sup>25</sup> At 525.

<sup>26</sup> [1980] 1 All ER 529, 551.

<sup>27</sup> Executive Director, New Zealand Business Round Table, quoted in *Sunday Star Times*, 23 July 1995.

# THE LAW OF EVIDENCE RELATING TO CHILD VICTIMS OF SEXUAL ABUSE

BY WENDY BALL\*

## I. INTRODUCTION

When you were abused, your boundaries, your right to say no, your sense of control in the world, were violated. You were powerless. The abuse humiliated you, gave you the message that you were of little value. Nothing you did could stop it. If you told someone about what was happening to you, they probably ignored you, said you made it up, or told you to forget it. They may have blamed you. Your reality was denied or twisted and you felt crazy.<sup>1</sup>

Prior to the enactment of the Evidence Amendment Act 1989, successfully prosecuted cases of child sexual abuse were comparatively rare. One of the main reasons for this rarity was the law's stringent evidential requirements of children. These were based on society's adherence to the myth which is spelt out in the above quote, that children are prone to invention, fantasy and a distortion of reality. Following some of the recommendations of the Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children in 1988, the law was changed to assist child complainants to give evidence.

The Evidence Amendment Act 1989 stipulates how a child's evidence can be heard, where it is to be heard and if it is to be heard by the courts. The amendment was put in place both to assist the courts and police in their prosecution of child abusers and to support the basic tenet of criminal law in protecting the rights of an accused - that everyone is presumed innocent until proven guilty.

Section 3 of the Evidence Amendment Act 1989 added to the principal Act new sections 23C - 23I, designed to facilitate the giving of evidence by child complainants and to do away with some discredited notions concerning the quality of their evidence.<sup>2</sup>

This Act and the Regulations affect issues such as legal competency of child witnesses within both the formal videotaped interview and courtroom appearances, the provision of different modes by which children may present evidence and be cross examined in cases, and the provision and rules for the evidence of expert witnesses to be received by the Court.

---

\* LLB (New South Wales), LLM (Canterbury), Lecturer in Law, University of Waikato.

<sup>1</sup> Bass, E and Davis, L *The Courage to Heal* (1988) 34-35.

<sup>2</sup> *R v S* [1993] 2 NZLR 142, 144 (per Hardie Boys J).

This article examines two of the contentious legal issues that have been highlighted and widely debated as a consequence of these changes to the law: the competency of a child to act as a witness and their credibility when they do. These issues are central to the giving back of “power” and a “sense of control” to child victims of sexual assault. This article concludes that the reforms do not go far enough. Certainly these reforms are revolutionary in this area of child sexual abuse, when one compares them to previous statutory and common law protections and also overseas jurisdictions; however, not all the stumbling blocks, or hurdles that have been placed in the path of child victims have been removed.

## II. COMPETENCY OF CHILD WITNESSES

### 1. Introduction

With regard to child witnesses, competency is about the essential issue of children being permitted to give evidence, given their tender years. The basic question is whether they have sufficient intellectual development to give a rational account, and at the same time understand the obligation to tell the truth.

Historically, children were deemed deficient in these abilities and automatically were excluded from giving testimony in any court hearing. In 1779 in *R v Brasier* the court determined that

there is no precise or fixed rule as to the time within which infants are excluded from giving evidence ... the court must pose questions to determine if the child understands the danger and impiety of falsehood.<sup>3</sup>

This ruling paved the way for an important shift. Instead of relying primarily on a determination of the competence (or incompetence) of the child witness, courts began to place more emphasis on the role of the trier of fact in assessing the credibility of the witness. The judge or jury was given more latitude in assessing the child witness's capacity and intelligence, his or her understanding of the difference between truth and lies, and his or her comprehension of the obligation to speak the truth.

New Zealand followed the decision in *Brasier*<sup>4</sup> and the then section 4 Criminal Law Amendment Act 1885 (UK) permitting children to give unsworn testimony. However, in 1894, the Oaths Amendment Act section 3<sup>5</sup> differentiated the way that New Zealand accepted the oral unsworn

---

<sup>3</sup> *R v Brasier* (1779) East PC 443.

<sup>4</sup> *Ibid.*

<sup>5</sup> This now appears as s 13 Oaths and Declarations Act 1957.

testimony of children in both civil and criminal cases from the practices and law in the United Kingdom.

Prior to the advent of the Evidence Amendment Act 1989, the competency test in cases involving child sexual abuse centred on the child's ability to fulfil the requirements of section 13 of the Oaths and Declarations Act before giving oral evidence in a Court. This still applies to child witnesses in cases involving sexual assault as these are not covered by the new reforming evidence amendment.

For example, in a 1989 case under the old rules involving an 11-year-old girl, the child gave a declaration under section 13 of the Oaths and Declarations Act after the judge had established that she understood the declaration.<sup>6</sup> On appeal against conviction and sentence one of the main grounds advanced was that the trial judge had failed to warn the jury as to the need to scrutinise with special care the evidence of young children.

In a 1991 case involving a 4-year-old child, an appeal against conviction was filed based mainly on the tender age of the complainant and her competence to give evidence.<sup>7</sup> In contrast to the 1989 case, the judge dispensed entirely with the oath and proceeded gently to question the child in the jury's presence to ascertain whether she understood the necessity to tell the truth. This unsuccessful appeal was argued on the basis that the judge did not draw to the child's attention the importance or solemnity of the occasion, nor did he fully test the child's comprehension of truth, lies and promises.

The Evidence Amendment Act 1989 introduced a new aspect to the competency test, while at the same time maintaining the test itself. This competency test is applied to situations where sexual abuse cases involve child witnesses who give their evidence-in-chief by way of videotape recording and not orally before the court. In this respect it appears to codify the test laid down and traditionally applied by judges, as in the 1991 case described above,<sup>8</sup> rather than the actual statutory provisions applying to witnesses giving oral evidence. Children thus now undertake the prescribed competency test with a trained child interviewer on videotape which later can be admitted into court as evidence-in-chief.

There is however continuing debate about the need (or otherwise) to retain the test of competence, now embodied within the Evidence (Videotaping

---

<sup>6</sup> *R v Accused* [1989] 2 NZLR 699.

<sup>7</sup> *R v Accused* [1991] 2 NZLR 649.

<sup>8</sup> *Idem*.

of Child Complainants) Regulations 1990 of the Evidence Amendment Act 1989.

The interviewer is bound by Regulation 5(1) in conducting an interview which shows a disclosure of child abuse. The process must follow the required regulatory form for presentation as evidence to a court. The Evidence (Videotaping of Child Complainants) Regulations 1990 provides:

Regulation 5. Matters to be Recorded -

(1) The videotape shall show the following matters:

- (a) The interviewer stating the date, and the time at which the recording starts:
- (b) Each person present (including the complainant) identifying himself or herself:
- (c) The interviewer -
  - (i) Determining that the complainant understands the necessity to tell the truth; and
  - (ii) Obtaining from the complainant a promise to tell the truth, where the interviewer is satisfied that the complainant is capable of giving, and willing to give, a promise to that effect: ...

The fundamental purpose of the Evidence Amendment Act 1989 is to provide for ways to assist child complainants in sexual abuse cases to give their evidence-in-chief and mitigate the stress of recounting of the substance of the complaint in repeated interviews and court appearances. This is done through the use of pre-recorded video tape interviews, closed circuit television and screening devices. These measures have become the Achilles heel targeted by the defence. Regulation 5(1)(c) appears to be the initial focus of potential defence counsel attack.

These new provisions, together with relevant provisions in the Crimes Act 1961 and Summary Proceedings Act 1957, allow both prosecution and defence to apply for directions and orders prior to the trial to enable the proceedings to be conducted in a manner appropriate to the interests of child complainants and justice generally.

## *2. Truth, Lies and Promise*

The requirement of Regulation 5(1)(c)(i) and (ii), that an interviewer is in effect put into the shoes of the judge by the interviewer having to obtain from the child a promise to tell the truth (showing legal competency as a substitute for section 13 of the Oaths and Declarations Act 1957), has been attacked by many defence lawyers.

In *R v Accused*<sup>9</sup> the Court of Appeal did not address any need for the trial judge to examine the child complainant as to competence before admitting the videotaped evidence. In that case the court compared Regulation 5(1)(c) with section 13 of the Oaths and Declarations Act 1957 and appeared to imply that the court now took the view that the interviewer assumed the role formerly taken by the judge in determining a child capable of and/or willing to give a promise to tell the truth. The Court of Appeal adopted the view that the approach to the interpretation of Regulation (1)(c)(i) and (ii) should not be "over-refined and pedantic".<sup>10</sup>

Regulation 5(1)(c)(i) provides that the interviewer must be shown on the videotape whilst determining whether a child understands the need to tell the truth. The Court in *R v Accused* stated its view of the purpose of the Regulation as being to ensure the satisfaction of the common law requirement of competence.<sup>11</sup> The Court also noted that the Regulations do not specify how the child's understanding of the necessity to tell the truth is to be demonstrated, nor the form that the promise to tell the truth will take.

In *R v MEF*<sup>12</sup> Wylie J viewed any breach of Regulation 5(1)(c) as rendering the evidence inadmissible as the interviewer was standing in the stead of the Judge. He reiterated the belief that Regulation 5(1)(c) substitutes for section 13 of the Oaths and Declarations Act 1957.

In *R v S*<sup>13</sup> the admissibility of the evidence of a five-year-old child complainant was at issue, on the basis of the interviewer having failed to meet the requirements of Regulation 5 (1)(c). Hardie Boys J made it clear that he agreed with Wylie J's statement in the case *R v MEF*;<sup>14</sup> however he went on to state that, notwithstanding the fact that the interviewer on the videotape follows the requirements of the Regulations, *the Judge must then also qualify the witness prior to the videotape being shown.*

The Judge must in the usual way satisfy himself that the child understands the obligation to tell the truth, and the child must so promise.<sup>15</sup>

Further:

---

<sup>9</sup> *R v Accused* [1992] 2 NZLR 673.

<sup>10</sup> *Ibid*, 676.

<sup>11</sup> *Idem*.

<sup>12</sup> *R v MEF* [1992] 2 NZLR 372.

<sup>13</sup> *R v S* [1993] 2 NZLR 142.

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Ibid*, 150.

It is to be remembered that the videotape is simply the means by which the child gives evidence. Therefore, as we have explained, before she gives her evidence the Judge must obtain from her the requisite promise to tell the truth. If his questioning demonstrates to him that she is not capable of making that promise and so is not a competent witness, her evidence, including her videotape evidence cannot be received.<sup>16</sup>

It is difficult to follow the reasoning of the Court. Despite the fact that the Court acknowledged that Regulation 5(1)(c) was enacted as in lieu of section 13 of the Oaths and Declarations Act 1957, it expressed the view that, in similar cases at the trial stage, the requirements of section 13 must be met again. A similar view does not appear to have been expressed in other cases appealed prior to *R v S*.<sup>17</sup> It is submitted that the appropriate (purposive) view is that of Wylie J in *R v MEF*.<sup>18</sup>

Thus a child complainant in a sexual abuse case gives primary evidence or evidence-in-chief recorded on videotape, with the interviewer ensuring the requirements of Regulation 5(1)(c)(i) and (ii) have been met, namely, that the child understands the difference between truth and lies and can promise appropriately to tell the truth. Those requirements having been met, the child is then liable to cross-examination and re-examination at the trial. On a pre-trial application the judge can view these tapes to satisfy himself or herself that the requirements are met, and can excise any portions of the videotape that in his or her opinion do not meet required evidential standards.

*R v Accused*<sup>19</sup> involved an appeal against a pre-trial ruling that videotaped evidence of an eight-year-old child complainant be admitted as evidence. During its consideration of Regulation 5(1)(c), the Court examined the following dialogue to assess the competency of the child witness:

*Interviewer*: "Okay, before we go on any further, I'd just like to ask you if you know what the difference is between truth and lies. Do you know what the difference is?"

*Child*: "Um, a bit".

*Interviewer*: "Bit, how would you explain it?"

*Child*: "That the truth is, you'd tell, you're not, you're telling them the truth, what, um, what really happened".

*Interviewer*: "What really happened?"

*Child*: "Yeah".

---

<sup>16</sup> *Ibid*, 152.

<sup>17</sup> *Supra* note 13.

<sup>18</sup> *Supra* note 12.

<sup>19</sup> *Supra* note 9.



*Interviewer:* "And will you tell the truth today?"

*Child:* "Yes".<sup>20</sup>

The Court of Appeal accepted this interchange as meeting the requirements. There was no need for the exact words of the Regulation to be used. This liberal approach has continued and was expanded in *R v Neho*<sup>21</sup> in which the child complainant had indicated her awareness of the difference between truth and lies by nodding her head to a series of questions and this was treated as measuring competence within the regulations.

This agreement to assent to telling the truth by nodding the head was also accepted by the Court of Appeal in *R v Crime Appeal*<sup>22</sup> and in *R v Campbell*<sup>23</sup>, where the Court held that a promise to tell the truth, obtained from a child sexual abuse complainant in a videotaped interview in the form of "*vigorous and unmistakable nodding of her head in assent*," complied with Regulation 5(1)(c).<sup>24</sup> However the Court went on to note that the Regulations do not specify how the child's understanding of the necessity to tell the truth is to be demonstrated, nor the form that the promise to tell the truth will take.<sup>25</sup>

The Court accepted that in this case the test of competency was fulfilled by the interviewer under the requirements of Regulation 5(1)(c)(ii) by the complainant's promise to tell the truth. The Court expressly rejected the argument that there was a clear distinction between determining the witness's understanding of the necessity to tell the truth and the interviewer obtaining a promise from the complainant to tell the truth.<sup>26</sup> It appears that the Court took the view that when a child complainant promised to tell the truth, then logically the child complainant has understood the necessity to tell the truth.

If this is so, then the requirements of (ii) presuppose that the requirements of (i) have been met and there appears to be no need for Regulation 5(1)(c)(i). An interviewer is to obtain a promise only "*where the interviewer is satisfied that the complainant is capable of giving... a promise*" but an interviewer can be satisfied (as outlined) only if they

---

<sup>20</sup> *Ibid*, 675.

<sup>21</sup> *R v Neho*, Court of Appeal, 27 November 1992 (per Casey, McKay and Thomas JJ).

<sup>22</sup> *R v Crime Appeal*, Court of Appeal, 29 March 1993 (CA 400/92: 404/92).

<sup>23</sup> *R v Campbell*, Court of Appeal, 17th November 1993 (per Henry J).

<sup>24</sup> At 4.

<sup>25</sup> *Idem*.

<sup>26</sup> At 5.

have, *inter alia*, already determined that the complainant has understood the necessity of telling the truth.

Hardie Boys J in *R v S*<sup>27</sup> appeared to grapple with the same difficulty. He stated that “[s]ub clause (c) of the Regulation is most unhappily worded”.<sup>28</sup> The Court of Appeal in this case, having come to this understanding in questioning the relevance of the Regulation 5(1)(c)(i), went on to find further support for its discussion in examining the position under section 13 of the Oaths and Declarations Act 1957. The Court noted that, when applying this Act, the judge does not have to establish that the child complainant has a discrete understanding of the necessity to tell the truth.

The Court of Appeal had also considered section 13 in detail in *R v Accused*.<sup>29</sup> The judge at first instance had asked the child complainant a series of questions which were specific as to the issue of truth, lies and promise. Such questions were included as: "Do you promise to tell the truth?" The child always responded to the questions asked with the positive "yeah" or negative "nah" and always appropriately to the questions. The defence argued that, by dealing with section 13 in this manner, the judge had overlooked the relevant statutory directions in Regulation 5(1)(c)(ii). In considering this point, the Court of Appeal judgment, delivered by Jeffries J, stated that it believed the substance was what mattered, rather than strict adherence to the wording contained in section 13.

The defence in this case also argued that the judge, in asking the questions, did not even approach the issue of testing the comprehension of the child witness, as he did not seek definitions of truth, lies and promise in the detail that was the required threshold of competency. The Court of Appeal was adamant on this issue. Jeffries J stated:

people of all ages use words correctly to convey meaning in ordinary speech but at the time, if pressed, sometimes cannot give very precise, or even adequate, linguistic definitions.<sup>30</sup>

This observation could be construed as an acknowledgment by the Court that more accurate measures of competency are based in the cognitive approach to child witnesses. In other words, a child may well fail an abstract evaluation of his or her understanding of truth, lies and promise,

---

<sup>27</sup> *R v S* [1993] 2 NZLR 142.

<sup>28</sup> At 149.

<sup>29</sup> *R v Accused* [1991] 2 NZLR 646 (6 CRNZ 345).

<sup>30</sup> At 652.

but excel at demonstrating these concepts at a practical level. Recent research data shows that children as young as four years understand the difference between truth and lies in that they believe that it is “bad” to tell a lie and that it is “good” to tell the truth.<sup>31</sup>

*R v S*<sup>32</sup> dealt with an appeal as to whether the procedure for determination of competence of a child to tell the truth on videotape was to occur for each and every videotape. This case dealt with the evidence of a child aged four years and eleven months. Hardie Boys J commented on the provisions of section 23C of the Evidence Act and Regulation 5(1)(c) of that Act:

...the words "a promise to tell the truth" are to be understood in the light of subclause (2): the overall "effect" of the promise is what matters.<sup>33</sup>

Further:

It is next necessary to determine whether the videotapes show the obtaining of a promise to tell the truth. In this connection it is important, in the light of some of the evidence, to emphasise that the promise is not to be obtained unless and until the interviewer is satisfied that the child is capable of giving a promise to tell the truth, or a promise to that effect. This requirement, clearly stated in *R v Accused* (CA 449/91), is *fundamental and is not to be watered down. It is not a question of capability relative to age. Either the child is capable or he or she is not.*<sup>34</sup>

### 3. Criticism of the Competency Test

There have been two areas within the present testing of competence that have drawn criticism. The first of these, used in many defences, is that too much power is given to the interviewers and they may well usurp the role of the judge in establishing competency. The second is that the test of intelligence alone is not appropriate in the taking of evidence of very young children and should be abolished altogether.

Warner stated:

Both the oath test for sworn evidence and the intelligence and understanding test for unsworn evidence have been criticised because they are inconsistent with modern psychological knowledge and practical experience. The ability of children

---

<sup>31</sup> Bussey, "Lying and truthfulness: Children's definitions, standards and evaluative reactions" (1992) 63 *Child Development*, 129-137.

<sup>32</sup> *Supra* note 13.

<sup>33</sup> *Ibid*, 150.

<sup>34</sup> *Ibid*, at 151 (my italics).

to give sound evidence depends, not upon the moral and religious understanding of the child (the oath test) nor upon the vague concept of intelligence (the understanding and intelligence test for unsworn evidence), but upon the cognitive development that a particular child has reached.<sup>35</sup>

As progressive and modern as the reforms to the Evidence Act 1908 have been, particularly when contrasted with earlier ways courts viewed the testimony of children (requiring that they understand and believe in "hell fire and brimstone"), there are still many protagonists who maintain that these reforms should have gone further in terms of the competency test for child witnesses. They maintain that the test itself is outdated and needs to be completely ousted.

Warner reviewed the Report of the Geddis Committee in New Zealand:

The report of the Geddis Committee has criticised this position, and recommended that as the competency test serves no useful function it should be abandoned leaving the weight placed on the child's testimony to be determined by the trier of fact. It is argued that an exploration of the child's understanding of the truth is not relevant to competency, and there is no basis for an assumption that a child who is unable to understand the duty to speak the truth is unlikely to recount accurately past events. The question of competency does arise with respect to the issue of whether the child's evidence can be conveyed to the court in a manner that can be understood, but here the issue which must also be addressed is the ability of the court to elicit the information the child does possess.<sup>36</sup>

The antagonists of this suggestion to remove the competency test base much of their argument on the premise that children have faulty memories and are prone to lying. Studies have now been concluded which are aimed at scientifically proving the reliability of children's memory and therefore, in effect, their ability to give competent testimony.

Birch stated:

The conclusion must therefore be that the court's time would be better taken up in sifting the testimony of all witnesses in the light of what is now known about

---

<sup>35</sup> Warner, "Child Witnesses: Developments in Australia and New Zealand" Paper published in *Children's Evidence in Legal Proceedings* (Sydney University, 1988) 162.

<sup>36</sup> *Ibid*, 167. The Geddis Committee was an advisory committee on the investigation, detection and prosecution of offences against children. Its report was entitled *A Private or Public Nightmare?* (Department of Social Welfare, 1988).

mendacity, faulty memory and suggestibility, rather than in removing young witnesses from the court room altogether.<sup>37</sup>

Giving background to this premise are the authors Taylor, Geddis, and Henaghan:

When an adult takes an oath or an affirmation there is no exploration of their understanding of 'truth', nor their real acceptance of the duty of speaking that 'truth'. We are not aware of any evidence that demonstrates a correlation between age and honesty. . . . It is our view that the competency test serves no useful function and should be abandoned. The weight to place on the child's testimony would be determined by the trier of fact. . . . Thus we would contend that an exploration of the child's understanding of truth is not pertinent to the issue of the child's ability to separate fact from fantasy. This is not an issue of competency, it is an issue of reliability.<sup>38</sup>

#### 4. Recent Studies

Test studies to date regarding competency begin with Goodman's study of 1987<sup>39</sup> where three and six-year-old children were asked four questions which mimicked the questions commonly used by judges and police interviewers to assess children's understanding of the differences between truth and lies. The children were also interviewed about a medical visit during which they had received an injection to inoculate them against chicken pox. Children's responses to the truth and lies questions were not significantly related to the accuracy of their accounts of the medical visit. The study concluded that "*the legal questions proved to be poor predictors of children's performance*".<sup>40</sup>

Otago University psychologists Pipe, Gee and Wilson<sup>41</sup> reproduced Goodman's findings and also stated that they found that the ability to articulate an understanding of truth and lies did not predict whether or not children made what they might consider an intentional error. Further, this study's final evaluation found no relation between children's responses to

<sup>37</sup> Birch "Children's Evidence" [1992] Crim LR 262, 264-5.

<sup>38</sup> Taylor, Geddis and Henaghan, "Obtaining Accurate Testimony from Child Victims" (1990) NZLJ 388.

<sup>39</sup> Goodman, Aman and Hirschman, "Child Sexual Abuse: Children's Testimony" in Ceci, S J Togliia, M and Ross, D (eds) *Children's Eyewitness Memory* (1987).

<sup>40</sup> *Ibid*, 17.

<sup>41</sup> Pipe, Gee and Wilson, "Cues, Propos and Context: Do They Facilitate Children's Events Reports" in Goodman, G and Bottoms, B (eds) *Child Victims, Child Witnesses* (1989).

legal questions and their willingness to omit from their reports information that they were asked to keep secret.

Bussey concluded in another study that:

Other than to provide additional information to the jury about a child witness' cognitive capabilities that might help in their assessment of the child's credibility as a witness it is difficult to justify the use of the *voir dire* examination.<sup>42</sup>

It appears that the requirements placed upon the interviewers under the Evidence Act 1908 sections 23A-23I and in particular Regulation 5(1) at least partially replicate the courtroom *voir dire*. The burden is thus placed first on the interviewer in demonstrating that the child witness has the competency; and second on the judge who by remote control has the final say.

Pipe summed up the psychological developmental viewpoint stating:

The cognitive abilities required to differentiate and define abstract notions about the truth and about lies do not seem to be strongly related to those which ensure reliability in recounting an event. It remains possible, of course, that securing a promise to tell the truth from a young child will increase the probability that they will give an accurate account of what has happened. There is, however, no evidence to date to support such an expectation.<sup>43</sup>

## 5. Summary

The test of competency in relation to child witnesses has a long history, with arguments as to its validity continuing throughout. Issues such as children's ability to tell the truth, and the validity of their promise to do so, also continue to be debated, with especial emphasis on whether or not the test should remain at all. Those interviewers who are required to demonstrate that a child understands these issues and the judges who then have to decide if this understanding has been adequately demonstrated, or indeed who determine it for themselves, are not given *how* they are to ascertain this, just *why*. Regulation 5(1)(c) was enacted to make it easier for child witnesses to give evidence, but in effect it creates a new burden for both interviewer and judge in demonstrating and determining its requirements.

---

<sup>42</sup> Bussey "Children's Lying and Truthfulness: Implications for Children's Testimony" in Ceci, S J, Leichtman, M D and Putnik, M (eds), *Cognitive and Social Factors In Early Deception* (1992), 104-5.

<sup>43</sup> Pipe, "Children's Testimony: Current Issues and Research" Paper presented at the *Child as a Witness Seminar*, University of Otago (1993)11-12.

### III. CREDIBILITY OF CHILD WITNESSES

#### 1. Introduction

Children's apparent lack of credibility has as much to do with the competence of adults to relate to and communicate with children as it does with children's abilities to remember and relate their experiences accurately.<sup>44</sup>

There are two approaches commonly taken in defending cases of child assault and abuse. The first attacks the validity of the competency test in the videotaped interview with the child complainant as required under Regulation 5(1)(c) and section 23E(2) as previously discussed. The second attacks the manner in which that interview was conducted and the interviewing practices of those in charge.

The interviewing of a child complainant needs to be examined for it affects the overall credibility of the charge of which they are the centre. The interview deals with the child complainant in a setting other than the traditional courtroom venue, and as such is open to rigorous checks, cross-examination, and criticism. Interviewing practices therefore are a major linchpin of both prosecution and defence cases.

Interviewers are now those persons trained and employed by the New Zealand Children and Young Persons Service, Specialists Services Division. These persons have been accepted by the courts as expert in the specialised area of interviewing children for both social and court intervention.

The Evidence Act 1908 does not specify the way in which a videotape is to be prepared, or the way in which the recorded interviews are to be conducted. The Regulations evince the rules predicated by section 23I of the Evidence Act, but nowhere within the Act or Regulations are the necessary qualifications and skills for interviewers specified. There is a general presumption that the interviewer has the ability to judge whether the child complainant has the requisite understanding of truth, lies and a promise as stated in Regulation 5 (1)(c).

It is the process of the evidential interview that is liable to the defence strategy of attack, by assertion of "contamination" theories by the defence. This goes to the credibility of the child and the interviewer. The focus in relation to the credibility of a child witness is on the role of the

---

<sup>44</sup> Saywitz, Nathanson and Snyder, "Credibility of child witnesses: The Role of Communicative competence" in *Excellence in Children's Law*, National Association of Counsel for Children (1994) 81.

interviewers of child complainants, their expertise and the manner in which these interviews are conducted.

## 2. *Credibility and Reliability*

As has been stated earlier, reliability of children as witnesses has traditionally been seen as lacking, or by some commentators, absent, purely because they are children. They have been said to be consummate liars and manipulators who jettison these unfortunate characteristics on maturation. Pigot J recognised this in the 1990 Report on Child Witnesses when he stated:

Courts still prefer to rely on the accumulated wisdom of the past and have not absorbed or applied the fruits of modern research into child psychology.<sup>45</sup>

There have also been studies showing that there is no clear relationship between age and honesty, and, in a situation of prejudice, children are likely to be better witnesses than adults.<sup>46</sup> However, this is all relative to the manner in which children have been asked questions. Free recall and general questioning elicit more limited responses from children, than do more specific questioning techniques, but interviewers who use the latter techniques are then liable to criticism in that these can be construed as leading questions. However, there are major differences between correctly phrased specific questions and leading questions - differences which the lay person cannot always easily identify. Spencer and Flin report:

There is little doubt that the quality of a witness's report is dependent on the communication skills of the interviewer. Any specific questioning will increase the likelihood of incorrect responses and the rate of error appears to be directly related to the complexity of the questions posed. But even with simple sentence constructions, the power of language is easily demonstrated, asking "Did you see a knife?" is less suggestive than "Did you see the knife?" and even small children may be responsive to the change from the indefinite to definite article. (Dale et al. 1978). It is well known that leading questions can be particularly hazardous and the risk of suggestibility [exists] ...whilst there is no doubt that children can be influenced by suggestion, it must be emphasised that adults too are notoriously susceptible to suggestive and leading questions (Gudjonsson and Clark 1986; Loftus et al. 1989).<sup>47</sup>

---

<sup>45</sup> *The Report of the Advisory Group on Video Evidence from the Home Office (Pigot Report)* (1980), cited by McEwan, "In the box or on the box?" [1990] Crim LR 363, 365.

<sup>46</sup> Melton, "Children's Competency to testify" (1981) 5 *Law & Human Behaviour* 73, 79.

<sup>47</sup> Spencer, J and Flin, R *The Evidence of Children, The Law and Psychology* (1990) 241.



## 2. Contamination Defence

The theory of contamination or “pollution” of the credibility of children is based on the premise that repeated interviews and the use of leading questions by official interviewers can create a role play or “rote” learning situation so that children re-enact and repeat facts which can then form the basis of false allegations. Parents, from feelings of powerlessness and guilt, can often perpetuate this cycle by their use of leading questions.

The 1989-1990 Australian case of “Mr Bubbles” highlights this type of contamination that can be levelled by the defence at interviewers and those involved in prosecution. Mr and Mrs Deren and two other workers were charged with the sexual assault of seventeen children, all under the age of six, who attended a suburban kindergarten. The children's allegations of abuse centred on the spa bath at the kindergarten, hence the “Mr Bubbles” title. The allegations were investigated by police and a number of interviews were carried out by a police officer with very little experience in interviewing young children. The allegations made by the police, as a result of the investigation, involved such acts as the videotaping of children in pornographic poses, taking children from the kindergarten property and committing various sexual acts of indecency. All charges failed at the depositions hearing stage, and the main criticism was levelled at the police interviewers. This criticism involved both their interviewing practices and their directions to parents of complainant children.

Contrasted with this case is the New Zealand case of *R v Ellis* (or known in the media as the Christchurch Civic Creche case)<sup>48</sup> in which 118 children were interviewed by specialist interviewers, under the guidelines of the Evidence Amendment Act 1989 and the Regulations, regarding disclosure of multiple sexual abuse by Ellis of children in his care at the creche. Of the 118 children there were 11 complainants who chose to continue their charges. Ellis was convicted on the evidence of six children and 16 charges. The main defence strategy in this case, as in the Mr Bubbles case, was to assert that the testimony of all complainants was contaminated by the way in which the interviewers had “led” the children in the videotaped interview sessions, and also that parents had “put words in their children's mouths”.

Parallels between the two cases:

### *Ellis*

Pre-school creche

Children under 6 years

### *Bubbles*

kindergarten

children under 6 years

---

<sup>48</sup> *R v Ellis* [1993] 3 NZLR 317.

118 children : 45 reduced to 29 charges	17 children: 52 charges
competence of children to testify challenged: failed	competence of children to testify challenged: succeeded
reliability of children's testimony challenged by defence of contamination	reliability of children's testimony challenged by defence of contamination
interviewing techniques challenged on reliability and contamination	interviewing techniques challenged on reliability and contamination
media backlash about conviction	media backlash about unsuccessful prosecution
issues of memory reliability: current and recovered in media focus	issues of memory reliability: current and recovered in media focus
overseas expert witness testifies children too young to be competent witnesses	overseas expert witness testifies children too young to be competent witnesses.

It appears that the reforms of the New Zealand Evidence Amendment Act 1989 were such as to contribute to a successful conclusion in the similar case of Ellis; however the backlash by media was just as great as in the Mr Bubbles case. The issues of contamination and competence were raised despite the safeguards put in place by the legislation.

#### 4. Suggestibility

Another area of supposed unreliability in the child witness is that they, more than adults, are highly suggestible and prone to fantasising into reality. As recently as 1987, in the House of Lords debate on the Criminal Justice Bill, Lord Paget, an English lawyer stated:

Children do not speak the truth naturally. In the normal way children live so much in the world of their imagination. Another point is the tremendous and emotional suggestibility of children.<sup>49</sup>

Spencer and Flin disagree with this, arguing that “[t]hese attitudes are derived from cultural and legal mythology”.<sup>50</sup> Further, the research of psychologists Gudjonsson and Clark published in 1986 rightly concludes that adults are also liable to be highly suggestible. This study and others point out that children and adults are likely to be influenced by leading

<sup>49</sup> NZPD Vol 489, 1987: column 282.

<sup>50</sup> Spencer and Flin, *supra* note 46, at 253.

questions for a variety of reasons (referring to reports outlined in Spencer and Flin and quoted above).<sup>51</sup>

Psychologists continue their efforts to research this area of suggestibility, although there are different approaches within the research taken. Ceci and Bruck<sup>52</sup> have structured their research to highlight children's suggestibility by providing simulated situations which give just the right circumstances for suggestible reactions from children. Goodman and Bottoms<sup>53</sup> use a different approach. While recognising that children can be prone to suggestibility Goodman and Bottoms have designed blind testing situations in which their second group highlight children's strengths and weaknesses. Their findings indicate that children can resist suggestible situations if they are in direct contradiction to their true experiences. While the results may appear divergent, these studies are valuable as they assist in this area of child credibility in sexual abuse cases and the process of how effectively to interview children, and ensure that false allegations are uncovered at this early stage.

These research programmes show that we have to implement new ways of questioning children, both in the videotaped interview situations and in the courtroom. Competence of questioning is the ability of adults to elicit, and children to provide, reliable information, in question and answer format, about potentially traumatic, self-disclosing events. Therefore effective communication between adults and children depends on the adults' abilities to talk to children in language and concepts that they can understand, and to mould questions to children's stages of language and cognitive development. However, legal professionals (lawyers and judges) receive little if no instruction on the norms of child development. Furthermore, the adversarial nature of the process may mean that individual questioners may be motivated by different agendas: the defence counsel for his or her client, and the prosecution for the State.

Professional interviewers face similar dilemmas in their positions and thus require constant skilling in the latest research results. These interviewers must be aware of the language of the child and be able not only to converse on a trust basis with the child, but to adhere to the stringent requirements of the law with regard to competency and credibility issues.

---

<sup>51</sup> Cited *idem*.

<sup>52</sup> Ceci, S J and Bruck M, "Suggestibility of the child witness: A historical review and synthesis" (1993) 113 *Psychological Bulletin* 403-439.

<sup>53</sup> Goodman, G S and Bottoms, B L (eds) *Child Victims, Child Witnesses: Understanding and Improving Testimony* (1993).

In conclusion it would appear that children, like adults, are suggestible, and it is the skill, sensitivity and questioning techniques of the interviewer that are essential in eliciting the truth in child witness accounts. However lawyers are critical of these skills and of the "truth" thus presented in court and often hone in on the interviewers' questioning techniques and skills. In contrast:

[p]aradoxically, they do not seem to be in the least bit concerned about their own use of leading questions in cross-examination and the effects this may have on the quality of the child's evidence.<sup>54</sup>

The area of evidential interviews and the qualifications and skills required by the interviewers is one which engenders much argument from both prosecution and defence. It is an area where it can be difficult to recognise and understand the high level of skill necessary in achieving a legally acceptable interview, whilst at the same time responding to the needs of the child complainant for security and validation. This creates its own dilemmas in terms of child witness credibility. The tribunal of fact must weigh up the child's testimony and credibility. On the one hand, the child's testimony tells a story of hurt and anguish. On the other hand, the myths and stereotypes of society suggest that children are prone to lies, fantasy and distortion, which attacks the credibility of that testimony. In this area the sole expertise of the lawyer has been moved aside to allow room for other experts to enter, a development which appears not to have been easily or happily accommodated.

#### IV. CONCLUSION

It appears that in the area of evidence relating to child victims of sexual abuse there is a continuing struggle between two competing factors. On the one hand there is the need to ensure a fair trial to both the accused and the complainant and to follow the procedures used to maintain this balance. On the other hand there is the reluctance of society as a whole to accept the reality of child abuse and its effects on the concept of the family unit; this reluctance can perpetuate the belief that children lie, fantasise and make false allegations.

The competency test is the law's way of perpetuating the latter belief. It has had an unwieldy past, and, though easier with the advent of the Evidence Amendment Act 1989 and Regulation 5(1)(c), the burden of testing the competency of the child is now placed on the interviewer, and, in some cases, the judge. The child complainant is still disadvantaged in this system before he or she ever gets to the interview stage or front door

---

<sup>54</sup> Spencer and Flin, *supra* note 46, at 257.

of justice. The competency test promotes the exact opposite of our adversarial justice system by continuing to offer the primary challenge to children that, before they are to be believed, before they get to tell their truth, they must be judged "truthworthy". This is analogous to the French system where a person has guilt attached at the primary stage of the legal process and has to prove his or her innocence.

The competency issue reinforces societal disbelief of children. A young child, being scared and disorientated, with a well-meaning, qualified person in a strange room and environment, and with another person moderating the process and the filming of them, is bound to feel as if "they don't want to believe me". This is especially so if, at the outset, the child is asked (in whatever kindly manner) if he or she knows the difference between truth and lies and can understand the concept of a promise.

The advocates of the abolition of the competency test state that a child's testimony is in fact the only real test of his or her competency. They argue that the judge and, in particular, the jury should be left to weigh up whether the child is telling the truth. In essence that is what a jury does: it decides who is telling the truth, the child or the offender.

It is submitted that the best course of action would be to dispense with the competency test. Alternatively, if the competency test is retained, it is submitted that a different process should be provided in law. For example, the law could provide actual ways in which the interviewer and the judge could ask relevant questions of the child to ascertain his or her understanding of the difference between truth and lies and the ability to promise. The law could also provide standard and ongoing training for interviewers who bear the initial burden of this test, with continuing training during their careers. This would create surety in a process and more certainty in the law.

Aligned with this training could be the training of judges in the process of accepting evidence from child witnesses, and how they can ascertain that a child can promise and that a child does know the difference between truth and lies. The establishment of a court-appointed and trained child advocate should also be examined, where such a lawyer would be trained in representing the child in court and at interview sessions.

Linked with this notion of child fantasy and distortion is that of credibility. Interviewers are scrutinised to test that they did not lead the child into false allegations by the use of leading questions. However, scientific psychological research has proven that asking leading questions is sometimes the most appropriate way to assist a child complainant to verbalise his or her abuse. The language of a child compared to an adult is

still at an evolutionary stage, and, like statutes, may need interpretation to ascertain its true intent, meaning and spirit.

Until the justice system can allow more flexibility in this area of leading questions at the evidence-in-chief stage, the child witness might frequently be deprived of the right to justice. I am not advocating random unfettered leading questions, but rather a carefully devised system of questioning that could assist the truth to surface. Such a system or process should form part of standard training programmes for interviewers and judges alike to promote uniformity. Uniformity in turn gives emotional and physical boundaries which create safety for children who need to be able to trust in processes remaining known. As it is, the videotaped interview is not a process known to the child. The interviewer and the interview process could potentially abuse the child, who is perhaps naturally wary of information presently sought in such nebulous ways.

The legal issues of competency and credibility in the area of child victims of sexual assault are common in our criminal cases today, not only because these issues are those that bring challenges from both defence and prosecution lawyers, but also because of the media frenzy apparent in child abuse cases. There is much debate and much speculation as to how far the law will continue on its path of protecting child complainants. The reforms of 1989 have shown the legislature's willingness to scrutinise its own systems to provide better protection for victims. However, these reforms have not gone far enough.

Is it because child sexual abuse is a threat to the concepts of the ideal family and harmony that do not in reality exist? Is it because of the perpetuation of myths about children being liars, fantasizers and distorters of the truth? Is it that we as a society are scared of what we have begat, in that this crime exists and will not just go away?

The answers lie in two interconnected areas: the law and its ability to effect legal and social justice, and society whose pressures the law responds to and whose views in turn it shapes. Society's awareness of the reality of sexual abuse of children is shaped by the attitudes of those who have influence, by the education provided by those who work with survivors, by the publicity and public debate surrounding high profile legal cases of child sexual abuse and by a centuries-long history of denial. The law must continue to respond to new information and challenges, such as those discussed in this article, and it must do so quickly for the protection of our children.

**NARRATIVE MEDIATION:  
WAIKATO MEDIATION SERVICE'S ANSWER TO  
COMMUNITY CONCERNS, THEORETICAL SHIFTS AND  
PRACTICE DEMANDS**

BY JOHN WINSLADE\* AND RICHARD COHEN\*\*

I. INTRODUCTION

There is a growing recognition of the range of circumstances which call for mediation. In New Zealand, mediation is established by statute in situations such as landlord/tenant disputes, family court separation and custody matters, human rights violations, environmental and planning disputes, small claims disputes, and employment grievance and contract interpretation situations.<sup>1</sup> There is growing community interest in restorative justice<sup>2</sup> and in mediation as methods of choice for resolving a range of conflicts in the community, whether they involve individuals, businesses and their customers, employers and employees, professionals and their clients, or officials and the public. In some ways this heightened

---

\* MA (Auckland), Dip Ed (Massey), Dip T, Lecturer in Counselling, Department of Education Studies, University of Waikato.

\*\* BA (Florida), JD (Texas), Senior Lecturer in Law, School of Law, University of Waikato.

<sup>1</sup> Residential Tenancies Act 1986, ss 76, 88-90; Family Proceedings Act 1980, ss 8-19; Human Rights Act 1993, ss 77, 80; Resource Management Act 1991, ss 99, 267-268, 356; Disputes Tribunals Act 1988, s 18; Employment Contracts Act 1991, First Schedule s 8, Second Schedule s 9.

<sup>2</sup> The Department of Corrections is engaging in restorative justice mediations between those who offend and those who have been offended against under provisions of the Criminal Justice Act 1985, ss 22-23 and the Victims of Offences Act 1987, s 8. Proposals to expand this service are presently being considered by the Ministry of Justice. The most active form of restorative justice mediations presently occurring and in fact acting as an example for the world are the Youth Offending and Care and Protection Community Group Conferences being conducted by the Department of Social Welfare under provisions of the Children, Young Persons and Their Families Act 1989, ss 20-48, 245-271. Conceptually, restorative justice suggests that the traditional retributive justice paradigm is missing the mark and that the paradigm of restorative justice more clearly addresses the concerns of the victims of crime and is consistent with Māori and other indigenous justice models which emphasise healing and restoration of the imbalances caused by offending. For a detailed examination of restorative justice, see Consedine, *J Restorative Justice: Healing the Effects of Crime* (1995), Zehr, *H Changing lenses: a new focus for crime and justice* (1990), and Umbreit, *M Victim Meets Offender: the Impact of Restorative Justice and Mediation* (1994).

interest is not surprising. Common sense and ordinary experience suggest that sitting down and talking about differences so as to sort them out is worth trying.

It was with this climate in mind that a group of interested people from a variety of professional backgrounds began meeting and planning a mediation service for the Waikato. The result was the eventual formation of Waikato Mediation Services. We are a mix of academics, lawyers, counsellors, psychologists, probation officers and other professionals with a wide range of mediation and facilitation experience. We wanted to understand better the needs of the community with regard to mediation services. We also wanted to assure ourselves that whatever process we designed would include as wide a sampling of community interests as possible. We all agreed that empowerment was to be a general goal of any process we designed and as such it was essential to consult with prospective users. To determine these interests and needs we sent out an initial questionnaire to individuals whom we believed would be interested in mediation services. We followed up this questionnaire with a summary of the comments received and from this posed another round of questions from which we again received responses. It was from this process that we formed our specific goals and began to set our course.

The questionnaire asked a specific question about the philosophy or purposes which respondents saw as important for a community mediation service. In answer to this question, interested people in the community in which we were planning to work offered the following responses. Respondents stressed their wish for a mediation service to be empowering through giving responsibility for solving problems back to the community. They wanted a bicultural emphasis in the service from the start. They wanted a public education role to be prominent in the service's functions and they wanted this to reflect a concern with alternatives to violence and to adversarial processes of dispute resolution. They wanted the service to draw on the contributions of a variety of disciplinary traditions (such as law, counselling, psychology and community corrections). They wanted to promote alternatives to the justice system. These wishes were then fed back to all who had participated, and those with an interest in making these concepts materialise into a service began to meet regularly through 1994 with these aims in mind.

## II. THE PROBLEM-SOLVING TRADITION

We were beginning with the awareness that a range of societal problems had been stimulating mediators and negotiators during the period of the mid-seventies, the eighties and the nineties to work at describing creative ways to facilitate conflict resolution. The key effort seemed to be to shift



disputing parties away from win-lose competitive outcomes to win-win cooperative outcomes. Thanks to the pioneering work of Mary Parker Follett,<sup>3</sup> and the practical and influential work of Fisher and Ury<sup>4</sup> and the Program on Negotiation at Harvard Law School,<sup>5</sup> much progress in developing mediation methods was achieved in a short period of time. Problem-solving mediation was seen as a kinder, gentler process, one that was sensitive to all parties' needs and one that sought outcomes primarily through dialogue rather than argumentation.

The theoretical basis of problem-solving mediation has always been rather sketchy. Perhaps the major theoretical construct was and is that of neutrality. That is, the mediator's role is characterised as being neutral and impartial. This idea grew out of the neutral and impartial role of the judge. In order to distance the mediator from the judge a process of integrative or principled negotiation was developed. This involved focusing on interests rather than positions, separating the people from the problems, inventing options for mutual gain and insisting on objective criteria.<sup>6</sup> By following these steps negotiators and mediators were able to assist parties to resolve their own problems. Although emotions and other issues were discussed, the focus was always on "the problem" presented and it was this problem that needed resolution.

Part of the problem-solving focus of mediation has been an emphasis on needs fulfillment of the parties. Needs theory draws upon ideas in the fields of humanistic psychology and applied social psychology.<sup>7</sup> Needs theory suggests that everyone is primarily motivated by having his or her *individual* needs met. We believe this heavy reliance on individualism to be too narrow a focus and inconsistent with perhaps our greater responsibility to recognise our interconnectedness and mutual obligations.

---

<sup>3</sup> Well ahead of her time and writing in 1920s and 1930s in the field of labour management relations, Mary Parker Follett developed what she referred to as integrative bargaining which foreshadowed what was to become principled (win-win) negotiation of the 1980s. For a summary of some of her key ideas, see Davies, "An Interview with Mary Parker Follett" (1989) 5 *Negotiation Journal* 1.

<sup>4</sup> Fisher, R & Ury, W *Getting to Yes* (1981).

<sup>5</sup> The Program on Negotiation at Harvard Law School is committed to improving and developing the theory and practice of negotiation and dispute resolution. In 1986 the Program on Negotiation Clearing House was created, and its customers went from 150 to 2000 by 1993. The Harvard Program produces an ever-evolving collection of materials, exercises and videotapes. See *The Program on Negotiation Clearing House at Harvard Law School, Clearing House Catalog* (1993).

<sup>6</sup> Fisher and Ury, *supra* note 4.

<sup>7</sup> See Fisher, "Needs Theory, Social Identity and an Eclectic Model of Conflict" in Burton, J (ed), *Conflict: Human Needs Theory* (1990) 89.

Along with progress in developing mediation came doubts and criticism. Power always remained problematic. We were aware that by continuing to focus on “the problem” we were risking the perpetuation of old discourses, a kind of instrumentalism which we were sensitive to and conscious not to perpetuate.<sup>8</sup> For example in custody cases, if we focussed on the primary discourse of “the best interest of the child”, we were in danger of overlooking how the child's interests had become interwoven or sited within the parents' interests and those of extended families and communities in general.

Another concern was that mediation was seen to be disadvantageous at times for women since the power imbalances favour men so much that neutral mediators simply end up validating these imbalances. Further, the emphasis in mediation practice on confidentiality was seen by some as a process that lacked accountability and was subject to mediator dominance and due process or natural justice demands that everyone have their “day in court”.<sup>9</sup> Mediation was seen to be secretive and not open to public scrutiny and, particularly where violence is involved, subject to abuse.<sup>10</sup> We were also aware of the monocultural nature of the problem-solving model as well as cultural biases implicit therein.<sup>11</sup> Again, the individual and the individual's problems were made the primary focus, with little consideration of the connections between individuals and the social contexts that constrain them.

The group of us who were interested in developing Waikato Mediation Services were aware of these criticisms and did not want to ignore them. Indeed we wanted to take seriously the issues raised in relation to the standard approaches to mediation. The time seemed right for some fresh

---

<sup>8</sup> In the mediation field a number of writers have been challenging traditional problem-solving mediation. A compilation of some of these writings can be found in Folger, J & Jones, T *New Directions in Mediation Communication Research and Perspectives* (1994). Another recent text, Baruch Bush, R & Folger, J *The Promise of Mediation Responding to Conflict Through Empowerment and Recognition* (1994), establishes a theoretical basis for transformative mediation. See also Putnam, “Challenging the Assumptions of Traditional Approaches to Negotiation” (1994) 10(4) *Negotiation Journal* 336, for similar challenges in the field of negotiation.

<sup>9</sup> See Bryan, “Killing Us Softly: Divorce Mediation and The Politics of Power” (1992) 40(2) *Buffalo Law Rev* 441; and Grillo, “The Mediation Alternatives: Process Dangers for Women” (1991) 100 *Yale Law Journal* 1545.

<sup>10</sup> Busch and Robertson, “What's Love Got To Do With It” (1993) 1 *Waikato Law Review* 109.

<sup>11</sup> See Lederach, J P *Preparing for Peace: Conflict Transformation Across Cultures* (1995), and Durea, M *Conflict and Culture: A Literature Review and Bibliography* (1992).

thinking about mediation practice. Since we were in the process of establishing a new service we felt that we were in a good place to try to develop some new practices which were not tied to conventional ways of working. We began to search for a new method. Moreover, it became clear that we would have to train ourselves in a consistent approach to mediation if we were to become a coherent and credible service. And if we were setting out to train ourselves in a new method, we could not rely on training imported from other ways of practising that might be available. We made a decision to work from the beginning to establish our own style of mediation, our own models of practice, and our own methods of training.

### III. THE THIRD WAVE: THE NARRATIVE APPROACH<sup>12</sup>

In developing a new method, we were not starting from a position that resembled a vacuum. We were aware of some new developments in the mediation field. If win-lose approaches to conflict resolution can be classified as the first wave of disputing, and win-win problem-solving can be classified as the second wave, then close on the crest of the second wave we could see emerging the third wave. The third wave can be characterised as moving beyond problem-solving. Third wavers are concerned with how conflict is constructed and what stories people tell about themselves and how they come to dwell upon these stories or situate themselves within these stories. Problems may be solved but only after a deeper reflective understanding has been achieved. For example, in an extended family conflict over the selling of a jointly purchased home, problem-solving mediation would focus on "the problem" of how to divide up the property in a fair and equitable manner, using some objective standards of fairness. From a third wave or narrative approach, discussion first focuses upon non-conflict saturated family stories, drawing upon the rich mosaic of lived experience of the various family members. Examples of situations in which the family members were able either individually or collectively to protest against conflict in the past would be emphasised and we would reaffirm each party's competency and ability to get beyond conflict.

#### *1. The narrative metaphor*

Our ideas about narrative approaches to mediation had been maturing over recent years. On a study tour in the United States in 1994, I (Richard) had met a number of people who were thinking about mediation from a

---

<sup>12</sup> This term is borrowed from the Narrative Counselling literature. See O'Hanlon, "The Third Wave" (Nov-Dec 1994) *Networker* 19.

narrative perspective.<sup>13</sup> I had also been teaching negotiation and mediation practice from a narrative perspective as part of a required third year law course in Dispute Resolution at the Waikato Law School for the past two years. My ideas in this regard had been evolving over the past five years. We also had a number of people in the group who had encountered narrative thinking in the context of counselling. Moreover, the counsellor education programme at Waikato University in which I (John) am involved had made a strong commitment to developing a training programme for counsellors based on the narrative ideas that have developed in family therapy. These ideas have been most strongly identified with two people from Australasia: Michael White in Adelaide and David Epston in Auckland.<sup>14</sup> The group as a whole felt encouraged by what they heard from these two directions to explore an approach to mediation that was informed by the narrative metaphor. We wanted to demonstrate how this metaphor could be materialised.

## 2. *Philosophical shifts*

We were also aware that the shifts in practice and method that we were contemplating were heralded by some wider movements in the world of ideas. When each of us came to teach at Waikato University (Richard in 1990 and John in 1993) some of our colleagues introduced us to the idea that a theoretical shift in thought was emerging in many fields of inquiry - a shift from the Modern to the Postmodern. I (Richard) remember doing a library catalogue search for book titles under "Postmodernism". In 1990 I found no titles under that subject heading. At the time of writing this article (August 1995) the library catalogue lists 143 books.

That development has been described in Kuhn's<sup>15</sup> terms as a paradigm shift of some magnitude, especially in the social sciences. It is having a fundamental impact on how we see our place in the universe. Some of the ideas that impressed us include the following. Postmodernism was and is attempting to shift thinking from reliance upon the grand narratives or meta-narratives that explain things in terms of systems or scientific certainty, to an emphasis upon understanding the various discourses both historical and present within which knowledge is constructed and

---

<sup>13</sup> Of the many people I interviewed and met on this trip I would like to acknowledge in particular the encouragement given me by Albie Davis and Sara Cobb: Albie, who first brought to my attention the work of Mary Parker Follett, and Sara, for her creative and pioneering work in post-structural narrative mediation.

<sup>14</sup> White, M & Epston, D *Literate Means to Therapeutic Ends* (1989).

<sup>15</sup> Kuhn, T *The Structure of Scientific Revolutions* (1970).

perpetuated. The phrase “no essences only discourses”<sup>16</sup> captures this concept. Knowledge (with a capital K) is giving way to a raft of knowledges (written with a lower case k) which are in contest for legitimacy. Akin to this is the idea that everything, all knowledge, meaning, emotions and even ways of being, like male and female, are socially constructed. We saw this type of thinking as multi-contextual and a way of accommodating diversity without heavy reliance on universalist thinking, with all of its exclusionary repercussions.

For mediation, the implications are that the process is not aimed at the discovery of the verifiable truth of conflict and the arrival of solutions based on the application of reason in the situation. Rather, it is aimed at finding ways forward in situations where different truths are in contest. If the hallmark of the era of Enlightenment, the Modern era, was Descartes' statement, “I think therefore I am”, with its emphasis on reason and individual identity as the building blocks of knowledge, then we might reframe Descartes' statement in the Postmodern era as “we relate, therefore we become”. This is a shift from a discoverable and fixed rational reality to an indeterminate and relational reality, one that is contingent and malleable. By de-emphasising individualism in favour of a relational reality, we are returning to some aspects of the pre-modern era. Tribal peoples, then and now, tend to view themselves from a relational perspective.<sup>17</sup> Thus, instead of the mediator(s) trying to stand outside time and space in some sort of objective reality, the mediator(s) and the parties become interdependent parts of both the construction of the process as well as the unravelling of the conflict.

Another aspect of postmodernism that we consider relevant is the understanding that all of human knowledge is multi-contextual. We are never free from history or culture but are the products of it as we produce it. All of our understanding is the product of a particular historical moment and the particular discourses at work on us at that given moment. So, when Descartes said “I think therefore I am”, he was speaking from within the historical context in which the church with its transcendental explanations dominated Western culture. The rational self and the understanding of various rationally knowable systems or structures became

---

<sup>16</sup> See Madigan and Law, “Discourse Not Language: The shift from a modernist view of language to the postmodern analysis of discourse in family therapy” (1992) 1 Dulwich Centre Newsletter 31, 33, quoting Lowe, “Postmodern themes and therapeutic practice: Notes towards the definition of Family Therapy: Part 2” (1991) 3 Dulwich Centre Newsletter 41, 45.

<sup>17</sup> We find consistent with our concept of relational reality Māori concepts such as Puutahi (everything is connected to everything else) and Manaakitanga (in everything you do care for the people). See Ritchie, *J Becoming Bicultural* (1992).

the new foundationalism replacing the dominance of ecclesiastical thought, that is, reason replaced faith. This historical understanding helped us move beyond a kind of pragmatic dependence on reason as represented in the problem-solving models to a narrative model which allowed us to see how reason has been constructed. We learned to ask the question: "Whose reason and what standards of reason are to be followed?"

As mediators we are no longer limited by categories constructed by the dominant culture. This move from monoculturalism to biculturalism or multiculturalism enables us to construct processes that do not exclude the "outsider", and lets us construct standards that are eclectic and elicited from *all* the parties. There are limits: there remains a moral, ethical, pragmatic or legal backdrop. But the backdrop is just that, the backdrop, not the standard, and is always subject to negotiation.

A key tool of postmodernism is the process of deconstruction.<sup>18</sup> Deconstruction is a process that enables us to look behind the presented conflict, to make "visible that which is invisible".<sup>19</sup> It is a process that challenges the parties to reflect upon how they have constructed conflict or how conflict has been constructed.<sup>20</sup> Where critique dismantles processes and leaves the parties naked, deconstruction examines those discourses in which people are sited and site themselves with the goal of bringing a richer, fuller meaning to their lives. Deconstruction "is not a bombsite".<sup>21</sup> We saw no need to give up all prior knowledge. Prior knowledge is always subjective: we can never objectively know the universe but can recognise that what we know or understand is a product of a particular historical moment, a moment in time that will never exist again. The key is that there is no need to be dominated by any standards, ideologies, or theories. These constructs exist, not to be slavishly followed, but to be questioned and ultimately to be renegotiated within the particular context in which we perform our lives.

To illustrate deconstruction we might look at an example taken from problem-solving mediation in the employment field. The example is a

---

<sup>18</sup> Deconstruction is a concept associated with the ideas of Jacques Derrida. For a fuller description and analysis of deconstruction see Davies, M *Asking the law question* (1994) 254-274 and Cornell, D *The Philosophy of the Limit* (1992).

<sup>19</sup> Law, "A conversation with Kiwi Tamasese & Charles Waldergrave" (1994) 1 Dulwich Centre Newsletter 20, 23.

<sup>20</sup> We see similarities in deconstruction and the Māori concept of Whakakitenga (never presume to understand or, as Ritchie concludes, "the task of understanding is never complete") (supra note 17, at 64).

<sup>21</sup> Davies, supra note 18, at 262.

contract dispute between a medical clinic and a staff doctor working for the clinic under a five-year contract with a no-competition clause. The doctor wishes to leave her job because she and her medical doctor husband who also works for the clinic are getting divorced. The usual mediation discourse would revolve around the legal discourse introduced through the word "contract". Problem-solving analysis would suggest that this matter may be resolved by negotiating for mutual gain solutions. One of these solutions could be that the clinic open a subsidiary clinic so that the contract need not be breached and everyone's needs can be fulfilled.<sup>22</sup>

If we were to approach this example with deconstructive curiosity, we might ask about the relationship between the discourse and the people in the situation. For example the clinic director may be questioned about the non-competition clause of the employment contract. He may relate that he is afraid that, if the clause is not enforced, the clinic will lose business and as such lose profit, certainly a valid concern of any business. The clinic director may be asked if there are values other than profit with which he is concerned. If he suggests that there are, then questions are asked to explore what those other values may be. It may develop that values such as caring for employees' welfare play a significant role in the clinic's ethics. Caring for employees' welfare can be further deconstructed to discover what welfare means. Does it include looking after those employees who are experiencing great stress, from death, from divorce? This theme may be further related to communitarian values such as taking more responsibility for each other.<sup>23</sup> By looking at the political and economic context it may also be discovered that many of the clinic's decisions and attitudes are being affected by market economics, which in turn reinforce competition, individualism and emphasise profit above all other considerations.

It is from this deeper exploration that a new picture of the clinic may begin to emerge which in turn opens up new possibilities for accommodating its staff and for resolving what on the surface appears as simply a contract problem. The contract still remains as a backdrop but the larger context is considered, subjected to further exploration and given value. It may be that a win-win solution as suggested by Moore may still emerge, but other possibilities which go beyond winning may also be considered.

---

<sup>22</sup> This example and the solution posited is used by Chris Moore in his text *The Mediation Process* (1986) to illustrate win-win mediation.

<sup>23</sup> See Frazier and Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (1993) 1, where the writers suggest that communitarianism "can be briefly characterised as the thesis that the community, rather than the individual, the state, the nation or any other entity is and should be at the centre of our analysis and our value system".

There has been some expression of concern that postmodernism shows a kind of pessimism, a kind of fragmented relativism. For us it is just the opposite. The narrative approach embodies a postmodern interest in how power becomes constituted in conflict relations. It invites us to take a determined stand against the kinds of privilege that frequently gets ignored in the Modernist era's emphasis on foundational knowledge, universal truths or colonising cultures under nationalistic banners. We believe that we can devise conflict resolution processes that give us a chance to learn how not to perpetuate these Modernist developments.

By using a social constructionist approach we believe that we can help disputants become aware of how they are constructing and perpetuating conflict, and also how conflicts are constructing them. If we continue to work from a problem-solving approach we are in danger of missing those stories or narratives that make up the rich tapestry of people's lives. By only focussing on the conflict-saturated stories we would be limiting the parties' abilities to find the resources to transform these conflict-saturated stories into opportunities for real change, change in ways of relating and ways of creating meaning. In this regard we are reminded of Lyotard's suggestion that "[h]umanity is not made of creatures in the process of redeeming themselves, but of wills in the process of emancipating themselves".<sup>24</sup>

We therefore came to the conclusion that we had some starting points from which to develop an approach to mediation that drew upon local knowledge and would be sufficiently distinctive to make a contribution to mediation in general. We wanted this approach to be emancipatory in Lyotard's sense. We also were prepared to take ourselves seriously enough to think that we were in as good a position as anyone to develop this distinctive approach, given the particular mix of academics and practitioners of various disciplines that we had in our group.

#### IV. THE DISTINCTIVE NATURE OF THE NARRATIVE APPROACH

What does a narrative approach to mediation look like and how is it distinctive from the more usual problem-solving approach? The rest of this article sets out to answer this question. We shall argue that the narrative approach can be distinguished by its background assumptions, its goals and its methods.

---

<sup>24</sup> Lyotard, J-F *The Differend Phases in Dispute* (1988) 161.



### *1. Background assumptions*

We would assume that the stories by which we make sense of our lives are shaped by the underlying language patterns or discourses that grant privilege to certain understandings over others, even though we are seldom aware of this process because it is so familiar. But these discourses, from a narrative perspective, have real effects in people's lives. For example, stories of conflict frequently feature people verbally abusing others while at the same time validating their own actions by referring to them in the language of popular psychology: "I am entitled to express my anger, aren't I?" If the mediation process goes along with this kind of description of what has taken place, it risks excluding and invalidating the experience of the person who has been abused verbally in this way. That person's voice of protest is easily disqualified by default since it is given no ground on which to stand.

Simply working towards a meeting of the needs of the individual in the process of mediation is not as central to the narrative philosophy. This is because we do not assume that such needs are experienced as the result of some internally valid reference point for each person. Rather, personal needs are defined from a narrative perspective in social and linguistic terms. Pervasive discourses about race, gender and class as well as other more localised discourses shape people's experience of the world. What we understand to be our needs and entitlements are not exempt from these influences. We are not implying that we would somehow ignore people's needs, but we would at times engage in a deconstructive curiosity as to the history, the social influences and the discursive trajectories of such needs. Some people's "needs" can be distinctly patriarchal in nature, or racist, or classist. To negotiate win-win solutions on the basis of these without examining the discourses that constitute these needs can lead to the perpetuation of injustice through mediation.

For these reasons, we cannot subscribe to a view of the mediator as a neutral actor, objective and impartial with regard to the outcome of the mediation process. Rather, we would prefer to start from the assumption that the mediator works from a position of social location. As we open our mouths and choose from the available language we become implicated in the discourses embodied in such language. Often without intention or awareness we can exert influence over the possible outcomes of a mediation process in this way. Rather than neutrality, we prefer to emphasise transparency and reflexivity and to strive for accountability processes which require us to take note of the concerns of people who are in positions of social disadvantage or exclusion, lest we participate in their further oppression through mediation.

## *2. Goals of mediation*

One of our concerns with the problem-solving approach is the emphasis on solutions as a measure of the success of the mediation process. This can produce a pressure, in the minds of the mediators and participants, to settle disputes in ways that may not always be in the best interests of at least one of the parties. Moreover, there are areas of mediation practice (for example in family mediation and restorative justice mediation work) where participants are not always looking for outcomes that are best described in terms that look like legal contracts. Therefore we would want to subsume the goal of reaching solutions to problems under the wider goal of developing greater understandings of others' positions in a given conflict situation. We believe that sometimes a satisfactory solution in a conflict situation is simply not possible. However, increased understanding can still be possible.

The special kind of understanding that we would work towards in narrative mediation would involve a location of the conflict in a dominant story which is not of the participants' own making. Then we would work towards the articulation of an alternative story which features respect for difference and cooperation. This alternative story might have a neglected history that we would seek to bring out and it might offer the participants a chance to state a preference for a different kind of relationship in which conflict is relegated to the corner. Once such a preference has been stated we would aim to create openings for the performance of this new story and for the ongoing building of the story in relation to each act in its performance.

## *3. Narrative Methods*

### *(a) Co-mediation*

In Waikato Mediation Services we have adopted a policy of favouring the use of two mediators working in partnership rather than single mediators working alone. This co-mediation arrangement offers us several advantages. One is a chance to introduce greater reflexivity into our practice. The two mediators have the opportunity to discuss with each other and at times to question each other about their purposes, strategies and responses during the mediation. Sometimes this can be done in front of the participants who are invited to overhear the mediators talking about them. This is akin to the reflecting team conversations developed in

family therapy.<sup>25</sup> Such conversations are opportunities to reflect upon things that have been happening in the mediation process and to communicate slightly indirectly some challenges to the fixed positions participants may be taking up in a given conflict.

Another advantage is that some safety checks can be introduced against the mediation process colluding with power relations between the participants. Matching the gender or cultural differences between participants can frequently be possible. We can have a male and female pair of mediators or one Māori and one Pakeha mediator. With two mediators there is always the chance for one of the pair to sit back and observe the process for a few minutes during a mediation session and in so doing to notice more easily some of the influential processes at work including the effects of the power relations on the process. Such noticing can then lead to changes in the process to address these issues.

#### (b) Questioning style

The narrative questioning style that we try to adopt differs in purpose from that used in other approaches to mediation and counselling. Narrative questioning does not take place from an objective stance where the aim is to discover the facts of the situation. The mediators are not setting themselves up as neutral agents outside of the discursive world in which the conflicts have developed. Nor are they claiming any kind of privileged position of being able to see solutions because of their impartiality or expertise. Rather the narrative questioning style that we are working to develop focuses on the ways that people create meaning through telling their stories in mediation. We ask people about the meaning they make of the events that have taken place in the evolution of the conflict. Our emphasis is on addressing our curiosity to the meanings the participants are making rather than the more “expert” role of inquiring about the facts and then bending our experience to an interpretation of these facts. We don't want to offer the participants a diminished role of letting them tell us about events and then hoping that they will become curious about what we have to say about them.<sup>26</sup> Instead we want to engage them fully in exploring the possible meanings they can make about the facts they have told us.

---

<sup>25</sup> See Andersen, “The reflecting team: Dialogue and meta-dialogue in clinical work” (1987) 26 *Family Process* 415-428, and White, “Reflecting teamwork as definitional ceremony”, in *Re-authoring lives* (1995) chapter 7.

<sup>26</sup> See Anderson, and Goolishian, “The Client is the Expert: A Not-Knowing Approach to Therapy” in McNamee, S & Geregen, K *Therapy as Social Construction* (1992) 25.

We are also keen to direct attention to the background narratives that might be giving shape to these meanings. Background narratives might lay down culturally dominant understandings or power relations. In this way we intend our questions to have a deconstructive effect, unpacking the historical and discursive contexts in which the conflict has emerged. For example in a custody dispute we might ask participants to reflect on the extent to which background narratives about gender roles in marriage might operate on their sense of what they are entitled to expect in a custody mediation. Rather than painting the participants into the centre of their own stories, we are interested in tracing with them how they are positioned by the dominant discursive influences on them. In addition we are interested in how they view these discursive influences and in their preferences for any alternative positions available to them.

(c) Externalising conversations

One of the methods for achieving the above purpose is the linguistic shift that is involved in the use of externalising conversations. This use of the term “externalising” originates in the Narrative Therapies of Michael White and David Epston.<sup>27</sup> It refers to a way of talking that locates problem issues, such as conflicts, outside of individual persons' heads, and squarely in the world of the discourses that we share in our language communities. So, for example in a tenancy mediation, tenants may say, “I feel really guilty about my failure to keep up to date with rent payments”. The mediator may respond by asking about how “rent arrears” are tricking the tenants into thinking less of themselves or how “rent arrears” are influencing the relationship between tenant and landlord.

Our attempt is to objectify the problem issue rather than the person and to begin to separate the person from an identification with the problem. The reason for this is that we are concerned about the ways in which problems often objectify people and leave them in positions where their voice cannot be heard. As conflicts develop, blame usually is traded and each party engages in efforts to get the other to admit that he or she should take blame on board as guilt. But blame does not taste good and people usually spit out blame given to them by others. Or if they swallow it they suffer some sort of pain or indigestion. Externalising conversations try to detach people from blaming interactions. Instead of people becoming objectified, the conflict issue itself is objectified and the people are invited to begin to take up a subjective stance which is less under the influence of the problem.

---

<sup>27</sup> *Supra*, note 14.

Externalisation also allows a repositioning of the parties in relation to each other. As the participants tell their stories of the conflict that they are engaged in, the mediator might ask them to listen to each other speak about the effect of the conflict on themselves. Both parties are positioned in the same place in opposition to the conflict rather than in opposition to each other. Often a metaphor might be developed by the mediator, in collaboration with the parties, to encompass the experiences of both parties and to name the problem. This metaphor can then be extended and developed in conversation until it starts to serve as the basis for a new perspective on the issue.

#### (d) Relative influence questions

Michael White has suggested to us a two stage process in the development of the kind of conversation which illuminates the problem issue.<sup>28</sup> The first part of this conversation is familiar enough to all those who engage people in dispute in telling their story. They are asked about the effect of the problem on them. The story is told and listened to carefully by the mediators with empathy and careful attention to detail. The mediators communicate through their listening a respect for each person's right to give voice to their experience. Gradually, as mediators, we find opportunities to introduce externalising language. The conflict story is not talked about as if it is inevitably attached to the participants. Instead we might ask persons to notice and speak about how the conflict has shaped their interactions, their thinking, their finances, their personal life, their work or whatever else the particular situation might suggest.

Because the story has been talked about in an externalising way, a gap is opened up which enables us to ask another set of questions. These questions, instead of asking about the influence of the conflict issue or problem on the persons, ask about the reverse influence. How have the people involved managed to have an influence on the problem? This is usually a surprising line of questioning for the participants. They have usually come to mediation because they are at a loss to know how to have an influence on the problem. They have experienced it as overwhelming. They have allowed it to narrow their focus in a way that makes the conflict appear to define their relationship and to kill off other kinds of interactions that are not viewed through the filtering lens of the conflict.

We find that this line of questioning, because it tends to take participants by surprise, often requires considerable confidence and persistence from us as mediators. We base this confidence in a faith that all discourses, even

---

<sup>28</sup> White, "The process of questioning: a therapy of literary merit?" in *Selected Papers-Michael White* (1989).

apparently dominant ones, are incomplete and somewhat unstable.<sup>29</sup> Life is rich enough in complexity that no problem issue, and no story that can be told about a particular conflict, can capture the totality of lived experience. There are always events that stand outside of the conflict story. And there are always efforts that the participants have made that might be the basis for a very different story of their relationship in which the conflict is managed in quite different ways, which they might find much more preferable. These events are very likely to have been overlooked, to have been paid little attention, to have been left out of the stories that have been told about the issue. Little meaning has been built around these events. And yet they might offer the potential for a completely different story of the conflict issue, which has its origins, not in the wisdom of the mediators, but in the unstoried repertoires of experience that the disputants bring with them into the mediation process.

(e) Developing alternative stories

Michael White has borrowed the term “unique outcomes”<sup>30</sup> to describe the nuggets of gold that stand outside the story in which conflict is central.<sup>31</sup> They may be examples of cooperation that, if developed, might lead to a very different set of relations between the participants. They may be events in the past which are seldom recalled now that the conflict-saturated story has come to dominate the consciousness of the participants. They may be inconsistencies in the story of conflicted relations that offer hope for a different version of reality to emerge.

In order for these events to compete with the conflict-saturated dominant story they need to have life breathed into them through the kind of narrative conversation that White and Epston<sup>32</sup> and others have suggested in the field of narrative therapy. The aim of this kind of conversation is to direct the attention of the participants selectively towards the areas of experience which the conflict saturated story would usually prevent them from noticing. The unique outcomes that speak about cooperation and agreement are focussed on, and as mediators we would ask questions that invite the participants to make meaning around these events. We would ask them to draw connections between isolated events that otherwise might remain unconnected. We would ask them to explain how they had achieved things that they would otherwise tend not to regard as

---

<sup>29</sup> Foucault, M *Power/knowledge: selected interviews and other writings* (1980).

<sup>30</sup> Goffman, E *Asylums: essays in the social situation of mental patients and other inmates* (1961) 127.

<sup>31</sup> White, “Deconstruction and Therapy” in Gilligan, S & Price, R (eds) *Therapeutic conversations* (1993).

<sup>32</sup> *Supra*, note 14.

achievements. We would ask them to develop an alternative story that might stand as a counterplot to the influence of the conflict on their relationship and then work together with them to identify new possibilities for the performance of this counterplot. We would name the influence of power relations in their relationship and ask them about occasions when they had managed to relate together in ways that constituted some sort of protest against such power relations. The history of such a protest can then be traced. Even if it is a short history, we can ask about other histories to which it might relate.

We believe from the experience we have had of putting these ideas into practice that this approach leads to a very different kind of interaction than the problem-solving approach. Rather than the somewhat harsh and bruising crunch points where negotiation over outcomes takes place, we give the participants the opportunity to build a relational context which means that agreements and solutions are seen to emerge out of the forgotten narratives of the participants' experience. They do not therefore seem so sharp a disjuncture from the story of conflict.

(f) Documenting the new story

We still see a place for the negotiation of agreements and solutions. Even the brainstorming processes recommended in the problem-solving format still have value within a narrative approach. However we would use these within the context of the development of the alternative story. As the proposals for the resolution of the problem issues that had led to the conflict were aired we would ask the participants not just about whether they were in agreement with these proposals but also about the meaning they would or could make of such a resolution. For example we could ask whether a particular agreement would be likely to undermine the salience of the conflict story.

As the alternative story starts to emerge we would work with the participants towards some agreements that could be put into writing. These documents can serve as reference points for the continuing evolution of the new story. In later review meetings we might ask about the performance of the new story as written down in the documented agreements. We would not be asking about whether the agreed upon resolutions had "worked" or not. Indeed we would be likely to state openly that we would expect the old story of conflict still to have plenty of residual influence and that such influence might at times be undermining of the counterplot of cooperation. But we would be interested in any achievements that the participants had noticed in their relationship that contributed to the life of these resolutions. Some of these achievements might not even be part of the documented agreements but might have

arisen spontaneously in the intervening time. If this occurs (and we would expect that it would) we would invite the participants to speculate about the meaning of such events for the story of cooperation and agreement.

## V. CONCLUSION

We have attempted only a cursory description of the main features of the approach. We hope that this is enough to indicate the differences from the conventional approaches to mediation in the style of work that we have been developing in Waikato Mediation Services. In summary we would stress the following as distinctive features of our approach:

We are interested in, not just the stories that people tell mediators, but the background stories that give shape to experience and produce relations of conflict.

We do not want to rely on the cathartic venting of feeling to have a precipitating effect in bringing about change. Rather, we prefer a particular questioning style that calls forth new meanings for past and future events as the primary method of bringing about change.

We aim to create a conversational style that separates people from blame for conflict and avoids issuing invitations to internalise responsibility for the effects of socially constructed problem issues.

We want to take the effects of power relations seriously in the production of conflict and in the politics of the mediation process itself.

We aim to create the conditions that make possible for participants a movement from positions in dominant stories to positions in alternative stories, in preference to a movement from problem to solution.

These ideas draw clearly from emerging trajectories of thought in the area of social theory. They are Postmodern or Post-Structuralist in orientation. We believe that they are worth developing in a range of mediation contexts. We have been teaching them to tenancy mediators, social workers, environmental planners, probation officers and trade unionists. We have been practising them ourselves in contexts such as employment disputes, family court marriage counselling, organisational conflicts, restorative justice arenas and neighbourhood disputes. And we are looking to explore further the application of these ideas in other contexts, since, if they do represent paradigm shifts as we have argued above, then they might be expected to offer fresh perspectives for a range of human experiences.



**ENFORCEMENT OF INSIDER TRADING LAWS BY  
SHAREHOLDERS IN NEW ZEALAND:  
AN ANALYSIS AND PROPOSALS FOR REFORM**

BY PETER FITZSIMONS\*

There is no point whatever in having legislation dealing with insider trading and corporate abuse unless it is enforced.<sup>1</sup>

I. INTRODUCTION

In general, insider trading refers to persons buying or selling shares in a company when they possess information about the company which is not publicly available. In 1988, New Zealand acquired a statutory prohibition against insider trading with the enactment of Part I of the Securities Amendment Act 1988 ("the Act").<sup>2</sup>

In terms of the Act, members and former members of a public issuer, and a public issuer itself, were given the right to commence an action against a person who is an insider of the public issuer either for trading on the basis of inside information, or for tipping (or encouraging) others to trade.<sup>3</sup> The public issuer also acquired a right to apply to the court for the insider to be liable for a pecuniary penalty.<sup>4</sup> In addition to these personal rights of action, Part I also introduced two important provisions, sections 17 and 18. Section 17 allows a barrister to be appointed, with the prior approval of the Securities Commission ("the Commission"), to examine whether or not there are grounds for an insider trading action, and the public issuer is

---

\* BCom LLB (New South Wales), MComLaw (Hons) (Auckland), Lecturer in Law, University of Waikato.

<sup>1</sup> Burdon, NZPD Vol 490, 1988: 5300.

<sup>2</sup> For an overview of the Act see Van Schie, *A Insider Trading, Nominee Disclosure and Futures Dealing: An Analysis of the Securities Amendment Act 1988* (1994).

<sup>3</sup> Sections 7(1) and 9(1). Section 3 defines a person as an "insider" if he or she has received inside information in confidence or is connected in some way to a person or corporation who is defined as an insider. Section 2 defines "inside information" as information which is not publicly available and which would be likely to "affect materially the price of the securities of the public issuer if it was publicly available". Section 2 defines "public issuer" as a listed company (or one which was previously listed).

<sup>4</sup> Sections 7(2)(c)(ii) and 9(2)(g). The pecuniary penalty is the greater of three times the profit made or loss avoided by the insider, or the total consideration paid or received by the insider (sections 7(4) and 9(4)). Section 19 empowers the court to determine how the penalty will be distributed.

liable for the cost of the opinion.<sup>5</sup> Section 18 is a form of statutory derivative action for insider trading which allows a member or former member to apply to the court for its approval to commence an action against an insider in the name of the public issuer and at the expense of the public issuer. Section 18 requires the court to grant approval for the application unless there is “no arguable case” or there is “good reason” not to do so.<sup>6</sup>

This article analyses the background to the enactment of Part I of the Act and in particular the discussion surrounding the enforcement provisions. It also discusses the two cases dealing with Part I that have come before the courts in the six and a half years since it was put in place, the role of the Commission in attempting to deal with insider trading, and suggested proposals for reform.

## II. BACKGROUND TO THE ENACTMENT OF PART I OF THE ACT

Unlike overseas jurisdictions New Zealand did not have specific statutory provisions dealing with insider trading until the Act was passed in 1988. The move to provide statutory remedies was prompted by the Government’s concern about the state of the securities markets during the mid-1980s, which followed on from the deregulation of the New Zealand economy. The Minister of Justice had requested the Commission to consider insider trading and takeover law reforms in 1986, and when the Commission presented its report soon after the stockmarket crash in 1987 the Government was quick to take up its recommendations.<sup>7</sup>

The Securities Commission’s report recommended that legislation should be introduced to provide for civil remedies against persons who engage in insider trading, and suggested that “the best method of preventing insider trading is to equip companies and shareholders with the legal rights and powers to detect and deal with it”.<sup>8</sup> It was less enthusiastic about the introduction of criminal provisions in relation to insider trading, as overseas experience had indicated that prosecutions were difficult in the face of the “right to silence” and could interfere with any attempt to take civil actions.<sup>9</sup>

---

<sup>5</sup> Section 17(1) and (5).

<sup>6</sup> Section 18(2)(a) and (b).

<sup>7</sup> Fitzsimons, “The New Zealand Securities Commission: The Rise and Fall of a Law Reform Body” (1994) 2 *Waikato Law Review* 87, 104.

<sup>8</sup> NZSC, *Insider Trading - Report to the Minister of Justice* (1987), (*Insider Trading Report*) Vol. 1, 95 and 74.

<sup>9</sup> *Ibid.*, Vol. 1, para 10.6.

In the absence of a state agency to undertake civil actions for insider trading (which existed in overseas jurisdictions such as Ontario and Quebec in Canada, and the United States), the conduct of these actions would necessarily fall either to the companies or to the shareholders in those companies.<sup>10</sup> The Commission recognised that actions by shareholders might be limited and that there was a need to provide for the companies concerned to have appropriate causes of action.<sup>11</sup>

The Securities Commission, however, realised that reliance upon companies to bring these actions, and therefore to control insider trading, had its limitations as a result of the connection that often exists between those who engage in insider trading and those who determine whether or not an action is commenced:

The power to bring an action for the benefit of a company is usually vested in the directors of the company. The occasions on which a shareholder may bring a “derivative” action [at common law] are quite limited. There is, therefore, a problem where the directors (who may in some way be beholden to the insider) do not wish to sue the insider. That could deprive the shareholders of relief. We think that the bringing of responsible claims against insiders is a proper corporate function to be carried out at the expense and for the benefit of the company concerned. If the directors let the matter go by default, we think a shareholder or former shareholder should be entitled to intervene and take the conduct of the proceedings out of their hands, and to do so at the expense of the company.<sup>12</sup>

The Securities Commission also recognised that allowing some shareholders to engage in this type of action at the company’s expense where the directors and other shareholders were “bona fide” against the action was a difficult point. The Commission suggested that a Queen’s Counsel provide an opinion as to whether or not there was an arguable case of insider trading, the cost of which would be borne by the company, and if counsel found a cause of action the company would be required to commence an action.<sup>13</sup>

The Securities Commission expressed reservations about allowing contingency fees, and described the class action procedure as it is practised in the United States as “a terrifying instrument”.<sup>14</sup> As a result, the Commission decided against providing any concrete recommendations on the issue of derivative, representative, or class actions, and instead

---

<sup>10</sup> *Ibid.*, Vol. 1, 71.

<sup>11</sup> *Ibid.*, Vol. 1, 89, para 11.9.7.

<sup>12</sup> *Ibid.*, Vol. 1, 90, para 11.10.4 - footnotes in the text are omitted.

<sup>13</sup> *Ibid.*, Vol. 1, 90, para 11.10.5.

<sup>14</sup> *Ibid.*, Vol. 1, 91, para 11.10.6.

suggested that this matter should form part of the general company law review that was in progress at that time.<sup>15</sup>

The Government received the Commission's report in December 1987, by 31 March 1988 it had indicated it would implement the proposals, and by 21 July 1989 it had introduced the Securities Law Reform Bill for its first reading.<sup>16</sup> A significant amount of the discussion in Parliament centred on the corporate climate that had prevailed during the mid-1980s, and the necessity of dealing with insider trading in the New Zealand context.<sup>17</sup> The Securities Commission's rationale for the legislation was generally accepted by Parliament, as was its argument that the criminalisation of insider trading would not be appropriate in the light of overseas experience.<sup>18</sup>

However, the introduced Bill changed the Securities Commission's suggested approach.<sup>19</sup> The opinion obtained from the Queen's Counsel would not be binding on the company, and if the company refused then a complaining shareholder (or former shareholder) would need to commence an action in order to obtain court approval for the taking of the company's action. There was also a further requirement before the opinion could be obtained - that is, that the Securities Commission approve the obtaining of an opinion. In effect the Bill moved from a two stage approach (obtaining a favourable opinion and commencing an action) to a four stage approach (convincing the Securities Commission that an opinion was warranted; obtaining the opinion; if the public issuer did not commence an action, applying to the court for approval to take the action in the public issuer's place; and, if approval was obtained, commencing the action). No mention was made of this significant change in the Commission's suggested approach.

The reliance upon shareholder litigation by the legislature misread the New Zealand position compared with overseas jurisdictions. These jurisdictions combine civil remedies with criminal prosecutions, or provide for a state agency to intervene and either take an action in the company's name or obtain civil penalties which may or may not be paid to the company or shareholders.<sup>20</sup> New Zealand did not have a strong regulatory agency in the securities markets, and the lack of such a body required the

---

<sup>15</sup> *Ibid.*, Vol. 1, 91, para 11.10.8, and also 95.

<sup>16</sup> NZSC, *Annual Report* (1988) 4 and NZPD Vol 490, 1988: 5280.

<sup>17</sup> See generally the debate in NZPD Vol 490, 1988 and NZPD Vol 495, 1988 and in particular Kyd, NZPD Vol 490, 1988: 5298, and Burdon, *ibid.*, 5299.

<sup>18</sup> NZPD Vol 490, 1988: 5281, 5285.

<sup>19</sup> *Ibid.*, 5282.

<sup>20</sup> *Insider Trading Report*, *supra* note 8, vol 1, 71.

encouragement of shareholder litigation. The introduction of the derivative action was a positive step, necessitated by the absence of a state agency, but the introduction of multiple steps into the process worked against its effectiveness.

There was also a failure seriously to address the fundamental issue as to whether or not there was a need for a state regulatory agency to have power to take proceedings. The Securities Commission referred briefly to the fact that such a body would need adequate funding, but declined to put itself forward for such a role.<sup>21</sup> This failure perhaps resulted from two factors. The first is that New Zealand, unlike Australia, had never had a state regulatory agency. This was principally because New Zealand did not have the major frauds or scandals in its securities and financial markets during the post-war period that Australia experienced.<sup>22</sup> The problems New Zealand experienced were limited mainly to the primary securities market which was the original rationale for the Securities Act 1978 and for the creation of the Securities Commission.<sup>23</sup> The second is that the Securities Commission saw its role at this stage as a law reform body, not as a regulator. In the early 1980s it had been frustrated in its attempts to promote reforms to the secondary securities markets, but in the middle to later part of the 1980s it was at its zenith as a law reform body and obviously preferred to maintain this position rather than undertake a major regulatory role.<sup>24</sup>

When the Bill came back from its second reading the only substantive change that had been made was to alter the requirement for a Queen's Counsel to provide the opinion so that a barrister and solicitor could now provide an opinion. The lack of analysis of the substantive enforcement provisions was evident on the Government's side. In the second reading only Munro picked up the point that perhaps reliance upon shareholder driven litigation was not a substitute for state involvement.<sup>25</sup>

A commentator, Cox, considered the regime in New Zealand to be more coherent than that of Australia.<sup>26</sup> However, he noted that actions by shareholders in their own name as well as the derivative actions in New

---

<sup>21</sup> Ibid, vol 1, para 10.7.4.

<sup>22</sup> Fitzsimons, "Australia and New Zealand on Different Corporate Paths" (1994) 8 *Otago Law Review* 267, 283 and 292.

<sup>23</sup> Fitzsimons, *supra* note 7, 89; and Fitzsimons, *supra* note 22, 274

<sup>24</sup> Fitzsimons, *supra* note 7, 98-107.

<sup>25</sup> NZPD Vol 495, 1988: 8559.

<sup>26</sup> Cox, "An Economic and American Perspective of Insider-Trading Regulation in Australia and New Zealand" in Walker, G and Fisse, B (eds), *Securities Regulation in Australia and New Zealand* (1994) 637.

Zealand still created obstacles to the control of insider trading. He pointed out that the New Zealand regime only required an insider to disgorge the amounts of the profits when an action was taken by a person who has traded with an insider, with the result that:

...the insider is hardly worse off by failing to trade on his confidential information than if he trades and is reprimanded by having to disgorge what he would have lost had he not traded.

Moreover, there are several reasons why the actions by contemporaneous traders will likely prove ineffective. First, the amount of such recoveries under the Australian and New Zealand provisions for contemporaneous traders cannot exceed the insider's illicit trading profits. Thus, if the private attorney is to be compensated by the plaintiff in such actions, it may well be that the costs of the proceeding will overwhelm the expected recovery. Second, no individual investor may have lost a sufficient amount to make such litigation worthwhile. This problem is exacerbated in both countries by the absence of class action suit devices. A third problem is that investors, faced with uncertainty in initiating the suit's action and facing a small recovery, will be most reluctant to incur *ex ante* substantial attorney's fees. This problem is overcome in America by the contingency fee device which permits the private bar to be less risk-averse than their class of clients.<sup>27</sup>

Cox noted that a well-designed deterrent against insider trading would result in an insider facing greater losses or costs than the "illicit gains". In this regard he felt that the New Zealand provisions better fulfilled this aim as they allowed not only a recovery of:

...insider-trading profits ... but also the public issuer may recover a fairly sizeable penalty, up to greater of either the price of the securities traded or treble the insider-trading profits.<sup>28</sup>

He thought that this aspect was enhanced by the ability of the shareholders to stimulate the public issuer into action by obtaining a barrister's opinion under section 17, and because the shareholders could, with leave of the court, take over the public issuer's action against the insider.<sup>29</sup> However, he pointed out that these aspects might not be realised in practice as:

...the protracted litigation in the *Wilson Neill* case demonstrates how a procedure whose main appeal in theory, is its efficiency, becomes cumbersome and

---

<sup>27</sup> Ibid, 634.

<sup>28</sup> Idem.

<sup>29</sup> Idem. As he noted, this overcame the lack of significant monitoring of the securities markets.

expensive when the issuer resists the 'outsider's' prosecution of its officers. That is, the deterrence that may be possible through the issuer's cause of action is greatly eroded by the tendency of boardroom colleagues to rush to the support of one another.<sup>30</sup>

In America, the instances in which the board of directors resists the attempts by derivative suit plaintiffs to redress wrongs committed by high-ranking officers are very much the rule, and place a good deal of strain on the derivative-suit court in resolving who (the derivative suit plaintiff or the board of directors) truly speaks for the corporation on the question whether the suit's continuance serves the corporation's interests. Only if the supervising court acts resolutely in judging the propriety of the action proceeding can the full promise of this enforcement mechanism be achieved. The lesson from the American experience in this area is that the New Zealand supervising court must be prepared to view critically claims that continuation of the action against the insider harms the corporation because of its impact on employee morale, adverse publicity, and anticipated deflection of officers from their work. In the end, the New Zealand court must place its faith in the strong enforcement of Parliament's insider-trading proscriptions.

### III. ACTIONS BASED ON SECTIONS 17 AND 18

The legislature put in place the Securities Amendment Act 1988 without a significant discussion of the ability of the Act's procedures to enforce the rights of shareholders and public issuers effectively. Since Part I came into effect in 1989, there have been three principal developments. No actions were commenced under sections 7 or 9 by shareholders in their own right, two actions were commenced by shareholders attempting to rely upon section 18, and the Commission took a more active role in the regulation of insider trading than had been foreseen by either the Commission or the legislature.

---

<sup>30</sup> Ibid, 635. Mulholland also notes the conflict of interest between shareholders and directors. The reasons for this include "boardroom bias" where directors support their fellow directors, and a desire to dispose of proceedings as quickly and cheaply as possible. See Mulholland, "Insider Trading in New Zealand: Aspects of the *Wilson Neill Case*" in Walker and Fisse, *supra* note 26, 656.

### 1. *The Wilson Neill decisions*<sup>31</sup>

The first application to be brought under section 18 was in relation to sales of shares by interests associated with a director and a substantial security holder of Wilson Neill Limited.<sup>32</sup> The aggrieved shareholders were successful in petitioning the New Zealand Securities Commission to appoint a barrister under section 17 to consider insider trading allegations. Mr Young QC found that there were arguable cases against a number of the directors and a case which was not as strong against a substantial security holder, Magnum Corporation Limited. The public issuer had already commenced an action against some of the alleged insiders, but the applicant shareholders commenced a section 18 application seeking to take actions against other persons under section 18(1), and to take over the proceedings already commenced by the public issuer (under section 18(3)).<sup>33</sup>

In the section 18 application Heron J decided under the “good reason” limb of section 18(2) that the company should control any proceedings against the insiders, primarily on the basis that the costs of the litigation could be significant, that Wilson Neill was in a difficult financial situation which could be exacerbated by an order requiring it to fund the litigation to be controlled by the complaining shareholders, and that the complaining shareholders could take action in their own right as they were “substantial investors in the marketplace and can foot it with the others”.<sup>34</sup> A significant concern was whether the complaining shareholders would “conservatively manage” the proceedings “in the interests of all shareholders”, as they wished to extend the action to Magnum Corporation Ltd (against whom Mr Young QC had indicated he saw only a marginal chance of recovery) and other parties. Heron J held that any concern about the potential conflicts of interest on behalf of those who were directing the company’s proceeding could be dealt with by the complaining shareholders commencing their own actions and having those actions joined to the public issuer’s proceedings.<sup>35</sup>

---

<sup>31</sup> *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1993] 2 NZLR 657 and [1994] 2 NZLR 152. For a detailed analysis of this action and the various hearings see Mulholland, *supra* note 30, 641, and for a view of the process from one of the complainants see Gaynor, “Bad Handling Marked Wilson Neill Insider-Trading Case”, *National Business Review*, June 2, 1995.

<sup>32</sup> Section 2A defines a substantial security holder as a person “who has a relevant interest in 5 percent or more of the voting securities of that public issuer or body”.

<sup>33</sup> Mulholland, *supra* note 30, 644-649.

<sup>34</sup> *Ibid*, 658-659, and [1993] 2 NZLR 657, 679.

<sup>35</sup> [1993] 2 NZLR 657, 679, 681.



The complaining shareholders unsuccessfully appealed Heron J's decision to the Court of Appeal. Two factors which clearly weighed on the Court of Appeal's mind in upholding Heron J's decision were that the complaining shareholders included institutional shareholders who were well able to afford their own insider trading actions, and that the potential expense of an insider trading action should not have to be borne by the other 14,000 shareholders of a company which was already experiencing a difficult financial situation.<sup>36</sup>

As a result, the complaining shareholders' first attempt to invoke section 18 was unsuccessful. As Cox had noted, the proceedings were protracted and became cumbersome and expensive.<sup>37</sup> It is doubtful if the legal costs involved would have justified the applicants commencing their own actions, despite the comments of the Court of Appeal.

## 2. *The Kincaid Case*<sup>38</sup>

The second decision on section 18 dealt with trading in shares of the Bank of New Zealand (BNZ). Fay, Congreve, Ricketts and Richwhite were directors of Capital Markets Limited (CML). The first three were also directors of the BNZ. Fay Richwhite was contracted to manage CML's investments, and it was also employed as an adviser to the BNZ. In July 1990, CML sold 10 million shares in the BNZ to the National Provident Fund at a price of 90.5 cents per share. This was at a time when the allocation price was 85 cents per share and the market price approximately 95 cents per share. These shares had been taken in lieu of a dividend which had been announced in May 1990.

The BNZ was taken over by National Australia Bank in 1992 and political pressure led to an enquiry by the Securities Commission, which published a report in 1993.<sup>39</sup> Two items were highlighted by the Securities Commission Report (the *BNZ Report*) which raised questions as to the veracity of the BNZ's accounts in 1989 and 1990.<sup>40</sup>

After the Securities Commission's *BNZ Report* was published, Mr Kincaid, a former shareholder in the BNZ, wished to commence proceedings against Fay, Richwhite, Congreve, Ricketts, and CML.

---

<sup>36</sup> [1994] 2 NZLR 152, 161-2. See Mulholland, *supra* note 30, 663-667.

<sup>37</sup> Cox, *supra* note 26, 656

<sup>38</sup> *Kincaid v Capital Markets Equities Ltd* [1994] 3 NZLR 738, and *Re Bank of New Zealand; Kincaid v Capital Markets Equities Ltd (No. 2)* (1995) 7 NZCLC 260,718.

<sup>39</sup> *Report of an Enquiry into Certain Arrangements Entered into by Bank of New Zealand in March 1988 (1993) (BNZ Report)*.

<sup>40</sup> (1995) 7 NZCLC 260, 718, 260, 726 and 260, 731.

However, unlike the complaining shareholders in the *Wilson Neill* case, he could not personally rely upon sections 7 or 9 because he had sold his shares to National Australia Bank in 1992 pursuant to its takeover of the BNZ. He decided instead to apply for approval under section 18 to exercise the public issuer's right of action under sections 7 or 9 against the alleged insiders. Mr Kincaid did not first apply to the Securities Commission for approval to have a barrister prepare an opinion under section 17, which further distinguished this case from that of *Wilson Neill*. Instead, he attempted to obtain information by interlocutory applications, and then he relied upon the Securities Commission's BNZ Report as the basis of his application under section 18.<sup>41</sup>

Like *Wilson Neill*, the *Kincaid* decision had one preliminary hearing to determine procedural and evidential matters, and one section 18 hearing. The first decision was brought down by Henry J. He held that the Securities Commission's *BNZ Report* was admissible as evidence for the section 18 application.<sup>42</sup> In the second decision Henry J considered the section 18 application. The defendants opposed the application on the basis that there was no arguable case, and that there was good reason for the application not to be approved. After a detailed consideration of the arguments of both sides, Henry J found in favour of Kincaid.<sup>43</sup> Capital Markets considered an appeal to the Court of Appeal, but the matter concluded in a settlement between the parties.<sup>44</sup>

This was the first successful application under section 18, but its value as a precedent and as an incentive to other complaining shareholders is somewhat limited. In the first place Kincaid appeared to have very little to gain personally from the action as he did not deal with CML. As Henry J noted, Kincaid showed "no compelling personal reason [for the application] other than an expressed desire to see that the statutory provision prohibitions against insider trading are observed". Henry J was of the view that the mere fact that a person did not have a financial interest in the application did not prevent the application since such a person had

---

<sup>41</sup> Mulholland, *supra* note 30, 655. Kincaid's use of the Commission's Report for the section 18 application had a number of advantages including avoiding the costs associated with persuading the Commission to appoint a barrister under section 17, avoiding the time delays associated with obtaining that opinion, and providing the information necessary to mount a section 18 application.

<sup>42</sup> [1994] 3 NZLR 738. For a discussion of this decision see Fitzsimons, "Statutory Derivative Actions and Insider Trading" [1994] NZLJ 440.

<sup>43</sup> (1995) 7 NZCLC 260, 718.

<sup>44</sup> "Fay Richwhite to Appeal", *National Business Review*, April 21, 1995; and O'Sullivan, "Settlement Brings an End to Fay Richwhite Insider-Trading Case", *National Business Review*, October 6, 1995.

been included by the legislature as a person entitled to apply.<sup>45</sup> However, it is unlikely that many other shareholders would be prepared to undertake such an action for altruistic motives.

A second reason why this decision does little to encourage shareholders applying under section 18 is that, apart from having very little to gain personally from the application, a shareholder potentially faces a significant liability if the section 18 application failed. In this case Kincaid retained two counsel, while the various defendants had retained eight counsel in total, including one Queen's Counsel. He was faced with one preliminary hearing, and then a section 18 application, which was to have gone on appeal prior to the matter being settled. It has been estimated that his costs up to and including the second High Court hearing were in the region of \$200,000, and that an appeal to the Court of Appeal, and possibly the Privy Council, could have pushed these costs up to \$500,000, while the costs of the other parties could have been as high as \$1.5 million for the High Court hearings alone.<sup>46</sup> In addition to these costs Kincaid also faced a potential liability for the costs of expert witnesses called by the defendants.<sup>47</sup> While Henry J clearly made an effort to be supportive of the section 18 application by placing the onus of proof on the defendants,<sup>48</sup> it is unlikely that many shareholders would be prepared to take such an action unless the case was very clear (in which case the insider would probably attempt to settle the matter with the public issuer before the matter was pursued by the shareholders).

These two decisions, while clarifying procedural issues, do not appear to provide much hope that shareholder-driven litigation, even taking into account section 18, will act as a significant deterrent to insider trading. In particular, private (non-institutional) investors are unlikely to be able to use the procedures for a number of reasons. As Mulholland points out, private investors do not have the market expertise and knowledge of market transactions that institutional investors possess. He commented:

An investor who trades in small volumes on the market would rarely perceive when trading has occurred based on inside information. If any investor was aware of insider trading, proceedings under section 17 and 18 are of little use. Private investors ... who do not have the funds available to pursue an action would conclude that it is not financially viable to first petition the [Securities Commission] for approval, obtain a barrister's opinion, and then apply to the court

---

<sup>45</sup> (1995) 7 NZCLC 260, 718, 260, 738.

<sup>46</sup> O'Sullivan, "Parties Faced Prospect of Costs Being Exorbitant", *National Business Review*, October 6, 1995.

<sup>47</sup> *Ibid*, 260,728.

<sup>48</sup> *Ibid*, 260,725.

for leave. Shareholders are likely to be further deterred as under section 7(4)(b) and section 9(4)(b) of the Securities Amendment Act 1988 the pecuniary penalty is only available in an action brought by or through the public issuer. A successful application by a shareholder would only recover the amount of the insider's illicit gains or the losses incurred by the shareholder. In the case of small investors, the losses incurred may be insufficient to make such litigation worthwhile.<sup>49</sup>

After the *Wilson Neill* decision Mulholland pointed out that:

...the legislation in its present form is impractical. The costs involved and the chances of success are likely to deter investors from utilizing these procedures, even those with deep pockets. It is difficult to pursue insiders given the costs involved and difficulties of proof.<sup>50</sup>

The *Kincaid* decision, while allowing the section 18 application for the first time, is unlikely to lead to shareholders using this provision extensively without changes to the Act.

#### IV. THE SECURITIES COMMISSION'S ROLE IN INSIDER TRADING AFTER 1988

##### 1. *The nature of the Commission's role*

The Securities Commission did not envisage a significant role for itself in relation to insider trading. It indicated that it felt that the most effective means of dealing with insider trading was for civil rights of action to be granted to public issuers and shareholders.<sup>51</sup> However, once Part I of the Act came into effect in 1989, the Securities Commission found itself playing an increasing role in the regulation and detection of insider trading, in the almost total absence of shareholder and public issuer actions.

In the years prior to the passing of the Act the Commission had carried out informal investigations into a number of matters affecting public issuers, including issues related to insider trading.<sup>52</sup> After the Act came into effect

---

<sup>49</sup> Mulholland, *supra* note 30, 661-662.

<sup>50</sup> *Ibid*, 666.

<sup>51</sup> *Insider Trading Report*, *supra* note 8, vol 1, para 10.7.6.

<sup>52</sup> Patterson in an address in 1984 indicated that the Commission had become involved in investigating insider trading claims when they were reported to it, or when there was a takeover and insiders have been known to deal in shares during this time. From Patterson's comments it appears that the Commission would summon the "offenders" and admonish them. He commented: "we have asked those people to see us. I believe it has not been a comfortable experience for them". See Patterson,

the Commission carried out more investigations into insider trading than for breaches of Part II, where it had a formal enforcement role.<sup>53</sup> Most of these investigations continued to be informal with no details released as to the public issuer or the persons involved.<sup>54</sup> However, the Commission also carried out a number of investigations that led to the publication of formal reports, and which either suggested, or provided evidence of, insider trading.<sup>55</sup> It was as a result of these investigations and reports, and the realisation that the insider trading provisions were not being enforced that prompted the Commission to suggest reforms to the Part I so that it would be more effective.

## 2. The Commission's suggestions for reform

In 1994 the Securities Commission published a Practice Note, which described the Commission's policies and procedures in relation to insider trading actions,<sup>56</sup> and a review document of the insider trading laws.<sup>57</sup>

The first document set out the Commission's view as to how insider trading actions could be brought. These included an action commenced by an aggrieved party after that party had accumulated the necessary evidence (or after obtaining leave of the court for a section 18 application), an action commenced after obtaining an opinion under section 17 with the approval of the Securities Commission, and an action commenced after the

---

"Insider Trader and Business Ethics" [1984] NZLJ 369, 371. See also NZSC, *Annual Report* (1987) 6; NZSC, *Annual Report* (1988) 5; and NZSC, *Annual Report* (1989) 5.

<sup>53</sup> NZSC, *Annual Report* (1990) 9-10; NZSC, *Annual Report* (1991) 16; NZSC, *Annual Report* (1992) 14; NZSC, *Annual Report* (1993) 10; NZSC, *Annual Report* (1994) 10; and NZSC, *Annual Report* (1995) 9.

<sup>54</sup> NZSC, *Practice Note on the Administration of the Rules of Law About Insider Trading* (1994) (*Practice Note*), para 3.3, and para 3.22. See also "Insider Insiders Out to Keep Outsiders Outside", *National Business Review*, April 3, 1992.

<sup>55</sup> NZSC, *Report on Enquiry into Dealings in the Voting Securities of Gulf Resources Pacific Limited (Formerly City Realities Limited) during the period November 1989 to January 1990* (1992); NZSC, *BNZ Report*, supra note 39; and NZSC, *Report of An Inquiry into Aspects of the Affairs of Regal Salmon Limited Including Trading in its Listed Securities* (1994). The latest report is NZSC, *Report of an Inquiry into Aspects of the Affairs of Fortex Group Limited (in Receivership and Liquidation) including Trading in its Listed Securities* (1995) (*Fortex Report*) which also deals with alleged insider trading (see *ibid*, Part IV).

<sup>56</sup> *Practice Note*, supra note 54.

<sup>57</sup> NZSC, *Review of the Law of Insider Trading: A Discussion Paper* (1994) (*Insider Trading Discussion Paper 1994*).

Securities Commission had obtained information by using its statutory powers.<sup>58</sup> The Commission indicated that its practice:

...has been to endeavour to assemble at the outset the information which may be material not only to a decision on the request at the outset for a notice of approval [for the appointment of a barrister under section 17] but also to the preparation of the opinion [under section 17].<sup>59</sup>

The Commission indicated that it saw it had a further role to play in the effectiveness of the insider trading regime by the use of its broad general powers. The Court of Appeal in the *Wilson Neill* case had commented favourably on the Securities Commission's approach on this issue,<sup>60</sup> although the use of these powers had not been foreshadowed in the Securities Commission's *Insider Trading Report*.<sup>61</sup> The Securities Commission had substantially changed its position since that report. Combined with its practice since the early 1980s of making informal enquiries into allegations of insider trading,<sup>62</sup> the legislature had possibly accelerated this change in approach by requiring the approval of the Securities Commission before a section 17 opinion could be obtained. This requirement meant that the Securities Commission would have been exposed to more complaints of insider trading than perhaps would otherwise have been the case. This exposure obviously led it to realise that reliance upon shareholders to initiate actions, and the provision of a favourable opinion by a barrister appointed under section 17, was insufficient to regulate insider trading adequately.

The second document indicated that the Commission considered that the current role it played (including the use of its broad general powers) was insufficient to control insider trading.<sup>63</sup> It included a number of suggestions for reform of procedures for insider trading actions. Minor reforms included providing the Commission with the power to require the lawyer to consult the Commission, and providing for the court to have the ability to order any person to reimburse a public issuer for the costs of

---

<sup>58</sup> *Practice Note*, supra note 54, 4-5.

<sup>59</sup> *Ibid.*, 8. The Commission indicated that it was desirable for it to obtain the evidence for three reasons. These were that it possessed explicit statutory powers that were more suitable than those of the lawyer, that the crystallisation of issues before the lawyer commenced work should mean that the lawyer encountered less difficulties in dealing with interested parties, and that the greater the definition of the issues before the lawyer started work the sooner the opinion would be completed (*ibid.*, 9).

<sup>60</sup> *Supra* note 31, 159.

<sup>61</sup> *Insider Trading Report*, supra note 8.

<sup>62</sup> *Patterson*, supra note 52, 371.

<sup>63</sup> *Insider Trading Discussion Paper 1994*, supra note 57.

obtaining a section 17 opinion.<sup>64</sup> A more fundamental change the Commission suggested was for the Commission to have standing to apply to the Court to take action where it was alleged that there had been insider trading. The Commission's rationale for this fundamental change was:

The Commission has observed the often understandable reluctance of public issuers to instigate proceedings for insider trading where the costs of bringing proceedings are borne by the public issuer itself. It seems likely insider trading laws would be more likely enforced if the Commission had standing to bring proceedings.<sup>65</sup>

The Commission envisaged that it would be able to commence proceedings in the name of the public issuer without the leave of the court, and with the leave of the court would be able to intervene in existing proceedings "for the purpose of continuing, defending, supporting or discontinuing proceedings on behalf of the public issuer".<sup>66</sup>

The suggestion that the Commission should have an enforcement role (even if only a subsidiary role) clearly represented a significant alteration in the stance of the Commission from its 1987 proposals where it did not foresee a role for itself in the enforcement of insider trading remedies, nor did it even consider a role for itself in relation to the collation of information for a section 17 opinion.<sup>67</sup> It also represented a recognition that what had been seen as an "exciting development" in 1988 had in fact turned out to be of less value than originally envisaged.<sup>68</sup>

---

<sup>64</sup> Ibid, paras 2.2 and 3.1.

<sup>65</sup> Ibid, para 6.1.

<sup>66</sup> Ibid, para 6.2, suggested clause 18A(a)(b). The Commission indicated that the circumstances when it would seek to utilise this power included where the public issuer was in receivership and unable to fund the action, where there were complex issues and the resources had been used to assist in the preparation of a section 17 opinion, and where there was no shareholder willing to fund a section 18 application and the company was unwilling to commence proceedings against an insider (ibid, para 6.4). There appeared to be no limitation on this third ground that the Commission would not take action against the wishes of the public issuer and the shareholders, although the action would be at the expense of the Commission, not the shareholders or the public issuer.

<sup>67</sup> *Insider Trading Report*, supra note 8, vol 1, 90, para 11.10.5.

<sup>68</sup> Woollaston, NZPD Vol 495, 1988: 8551. To overcome the stigma attached to taxpayer-funded litigation for the benefit of private parties, the Commission also suggested that the Act be amended to enable the court to award "quite full recovery of costs incurred by the Commission in respect of any proceedings brought under Part I, also Part II, of the Amendment Act" (*Insider Trading Discussion Paper 1994*, supra note 57, para 7.1). Such a power would be necessary given the ambivalent

### 3. The Tyler Review of the Securities Commission

The Securities Commission's proposals for an increased role in insider trading actions met with opposition in the securities industry. This opposition was translated into criticisms of its general role in the securities market in a review that took place in 1994.<sup>69</sup> Tyler, a former Auditor-General, was appointed by the Government to review the funding base of the Securities Commission. This led him to consider the role of the Securities Commission in the light of its statutory functions and to solicit comments not only from members of the Commission, but also from other persons who were involved in the industry.<sup>70</sup>

Tyler received both favourable and unfavourable comments about the enforcement role of the Securities Commission. The favourable comments noted that, although the Securities Commission has only a limited enforcement role, it had used this power:

...in cases where for one reason or another (often a question of costs and knowledge) individuals are unwilling or unable to pursue courses of action on their own behalf even in conjunction with other investors or affected persons. Such enquiries represent a major effort on the part of the Commission, the recent Regal Salmon enquiry being a case in point.

This is a most valuable function of the Commission. Publication of such reports, especially where they identify unacceptable behaviour, can be most important to investors in considering future investments and the persons to whom they entrust their funds. Publication in itself can act as a sanction against unacceptable behaviour even if the Commission cannot exercise formal powers of imposing penalties.<sup>71</sup>

The Commission itself argued that it was able to investigate only "the most flagrant cases of suspected insider trading", and that it was unable to be proactive in this area. It pointed out that with increased funding it would be in a position to identify suspected cases of insider trading more readily.<sup>72</sup>

---

attitude of the judiciary to the Securities Commission's applications to enforce Part II of the Act (which deals with substantial security holder disclosure) (see Fitzsimons, "*Securities Commission v. R E Jones*" (1993) 1 Waikato Law Review 165, 170, where the awarding of costs to, and against, the Commission by the courts under Part II of the Act is discussed).

<sup>69</sup> Tyler, *Securities Commission Funding Review* (1994) (Tyler Report).

<sup>70</sup> Ibid, 4-7.

<sup>71</sup> Ibid, para 3.10.

<sup>72</sup> Ibid, 30.



The unfavourable comments received by Tyler were, in the main, threefold. The first criticism was that the overall nature of market supervision should be reviewed and determined before any steps were taken to consider the specific role and funding of the Securities Commission.<sup>73</sup> The second criticism was directed at the combination of an advisory role to government with a regulatory/enforcement role. Most of the participants viewed this as an unfavourable proposition, and preferred the limitation of the Securities Commission to a role of promoting disclosure and educating the investing public.<sup>74</sup>

The third criticism related to whether or not the Securities Commission should have an enforcement role in the market. The Stock Exchange was the most strident in its criticism of the Securities Commission as an enforcement body and it commented that “[t]he Commission’s lack of visible results ... indicates that it should not be given any enforcement capability”.<sup>75</sup>

As Tyler noted, the question as to whether or not the Securities Commission should play a role in enforcement was in reality a philosophical issue as to whether the appropriate mechanism for enforcement was by way of provision of private remedies, or whether there existed a need for a state regulatory agency. Those who opposed the Securities Commission having an enforcement role relied upon the report of the Ministerial Working Group (*Roche Report*), which had favoured private enforcement in the securities market.<sup>76</sup>

Tyler recommended that the Commission’s funding should be increased so as to enable it to employ more staff, and that it should also be provided with a specified sum for the purposes of litigation.<sup>77</sup> However, the opposition to these proposals appears to have been successful, and the Commission has shelved plans for a greater enforcement role. The proposals set out in the *Review of the Law of Insider Trading* (1994) were produced while Peter McKenzie was the chairperson. By contrast, the new chairperson, Euan Abernethy, was reported as saying that the main role for the commission was in “supporting laws that make it easier for transgressions to be detected and dealt with, either by an individual, or by

---

<sup>73</sup> Ibid, section 4.

<sup>74</sup> Ibid, paras 4.4 and 4.8.

<sup>75</sup> Ibid, para 4.8.

<sup>76</sup> *Report of the Ministerial Working Group on Securities Law Reform* (1991) (*Roche Report*) Executive Summary, 6, 10.

<sup>77</sup> Ibid, para 6.48.

some arm of the state".<sup>78</sup> He did not favour the Commission having the power to bring actions because in his view this might create difficulties if the Commission was to act as "both an advisory arm of the Government and as a prosecuting agency".<sup>79</sup> This appears to be a change in his position from the previous year as Tyler credited him as being one of a number of respondents who viewed the work of the Commission:

...particularly in the areas of *enforcement* and disclosure, [as being] of great significance in maintaining the credibility and integrity of our financial markets in the eyes of both domestic and international investors.<sup>80</sup>

#### 4. The Securities Commission Discussion Paper 1995

The Commission released a further discussion paper on insider trading in September 1995.<sup>81</sup> The paper commented on a number of issues, including three issues relevant to this article. The first is that the Commission confirmed that it would not propose any increase in its enforcement powers, although it raised the issue of what role the state or a state funded agency should have in enforcing securities laws.<sup>82</sup> The second issue dealt with the issue of awarding costs against an unsuccessful section 18 applicant. The Commission recommended that:

...section 18 be amended more generally to exclude the power of the Court to award costs against a person who has applied for leave under the section where the person is seeking to advance a cause of action identified in a section 17 opinion.<sup>83</sup>

This recommendation, while removing one potential source of costs for an applicant, would force an applicant to go through the section 17 process in order to obtain immunity from a costs award. This would potentially eliminate an application of the kind made by Kincaid, where he had relied upon the Commission's own report. Henry J accepted Kincaid's approach as legitimate as clearly section 18 does not require such a report.<sup>84</sup> Requiring an opinion could have two effects. The first is that it would

<sup>78</sup> Stride, "Abernethy seeks 'investor comfort'", *New Zealand Herald*, December 13, 1994.

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

<sup>80</sup> *Tyler Report*, *supra* note 69, paras 6.5-6.6 and footnote 3 (emphasis added).

<sup>81</sup> NZSC, *Review of the Law on Insider Trading: A Discussion Paper* (1995) (*Insider Trading Discussion Paper 1995*).

<sup>82</sup> *Ibid*, para 10.1-2. This change was foreshadowed in its 1995 Annual Report (NZSC, *Annual Report* (1995), 14; see also Hart, "Insider Trading Switch - Securities Commission Retreats on Enforcement", *New Zealand Herald*, August 26, 1995).

<sup>83</sup> *Ibid*, para 7.3.

<sup>84</sup> See *Kincaid No 1*, *supra* note 38.

require submission of a request to the Commission and entrench its role within the process. The second effect would be to slow down the section 18 application by requiring the applicant first to go through the process of obtaining a barrister's opinion, rather than allowing an applicant to proceed on the basis of other evidence (for example, a report of the Commission). It would be preferable for the proposal that there be a costs award indemnity not to be limited to section 17 opinions, but rather it should be extended to other applications where there are sufficient grounds. What are sufficient grounds could be left to the discretion of the court and could encompass the point made by Henry J in *Kincaid No 1*, where he stated that he would receive and consider evidence provided that "it came from a source in which the Court [could] have an acceptable degree of confidence".<sup>85</sup> The extension of the Commission's proposals to applications based on evidence other than a section 17 opinion would be consistent with attempting to strengthen the ability of shareholders to institute actions against insiders.

The third recommendation was to allow the court to approve insider trading claim settlements.<sup>86</sup> This approval would be available notwithstanding the lack of a section 17 opinion. If court approval was not obtained then any settlement would not be final and binding on the parties and a shareholder would still be able to commence a section 18 application. This proposal was obviously aimed at preventing settlement of disputes between the alleged insider trader and the public issuer which occur without the involvement of shareholders (as happened in the cases of *Regal Salmon*, *Wilson Neill*, and *Tasman Properties*).<sup>87</sup> This proposal has an advantage in that it requires public notification of settlement terms, although persons accused of insider trading and public issuers are unlikely to welcome this suggestion, both because of the costs involved in a High Court application and because of the publicity attached to the suggested process. This proposal, however relies upon information of alleged insider trading and the resulting settlement. In addition, it makes the process relating to section 17 opinions even more important. The Commission has indicated that it generally informs both the company and the insider about allegations of insider trading and allows both to respond prior to the

---

<sup>85</sup> Ibid, 741.

<sup>86</sup> *Insider Trading Discussion Paper 1995*, supra note 81, para 6.1ff.

<sup>87</sup> *Wilson Neill* eventually settled its action against Herbert for an undisclosed amount ("Herbert Payment Settles Case", *New Zealand Herald*, September 15, 1993). In relation to *Regal Salmon* see "Regal Rules Out Action on Trading", *New Zealand Herald*, December 15, 1994, and Hart, "Regal Dips Out of Legal Fight", *New Zealand Herald*, December 17, 1994. For *Tasman Properties* see Sullivan, "Jones Insider-Trading Case Fades Away", *National Business Review*, September 30, 1994.

approval of a request for a section 17 opinion to be obtained.<sup>88</sup> Clearly both parties will be concerned to refute allegations of insider trading at this early stage so as to avoid the prospect, and expense, of a section 17 opinion,<sup>89</sup> and the possible need for a public settlement.

#### V. SUGGESTED REFORM OF INSIDER TRADING ACTIONS

There need to be changes to the enforcement regime that provide an enhanced role for private actions and also allow appropriate public enforcement. In general terms the insider trading regime should encourage compliance with the prohibition on insider trading and, in the event of insider trading taking place, facilitate the attainment of effective sanctions and compensation.<sup>90</sup> For effective sanctions and compensation what is needed is a reduction in the expense and risk of litigation for shareholders, increased shareholder access to information, increased incentives for shareholders (rather than public issuers) to take actions, and a more clearly defined role for the Commission.

The Commission's 1995 proposals are unlikely to overcome the significant difficulties that shareholders face in attempting to take an action against an insider. The removal of costs for the respondents under a section 18 application does not remove the cost factor that shareholders will face for their own counsel, nor does it alleviate the information asymmetry that shareholders face. To reduce the expense and risk of litigation one obvious reform is to allow contingency fee litigation, perhaps combined with a rule that prevents cost recovery by a person who successfully defends an action. The United States experience, as Ramsay points out, is that this has not resulted in excessive shareholder litigation.<sup>91</sup> However, given that New Zealand, like the majority of the Commonwealth, has not previously ventured down this track, the success or otherwise of a

---

<sup>88</sup> *Practice Note*, supra note 54, para 3.5.

<sup>89</sup> The Commission also suggested that the court be given the power to order any person (apart from a shareholder who requested the opinion) to pay for the preparation of the section 17 opinion (*Insider Trading Discussion Paper 1995*, supra note 81, para 8). For an example of a prompt reaction to inquiries into insider trading by the Commission see the comments made in relation to the *Fortex Report*: "Fortex Inquiry Slammed", *National Business Review*, October 20, 1995.

<sup>90</sup> For a general discussion of private versus public enforcement, see Dugan, "Insider Trading and Trade Practices: Private versus Public Enforcement of the Law" in Gorrynge, P and Dugan, R *Fairness and Incentives: Economics and Law Reform* (1990).

<sup>91</sup> Ramsay, "Enforcement of Corporate Rights and Duties by Shareholders and the Australian Securities Commission: Evidence and Analysis" (1995) 23 ABLR 174, 176. See also *Roche Report*, supra note 76, 14.

contingency fee system on its own cannot be determined at this stage.<sup>92</sup> As a result it would be unwise to rely upon this procedural change alone.

A further reform is to increase shareholder access to information. This, however, is a difficult issue. In addition to the fact that directors of public issuers exercise control over corporate information,<sup>93</sup> private investors are unlikely to have the expertise to be able to evaluate the information (particularly the extent to which information was “publicly available” and whether or not it was “material”) and determine whether or not to commence an action. Perhaps contingency fee litigation may encourage professionals to evaluate such information and promote insider trading actions. However, it is arguable that it is more likely that a state agency, charged with a regulatory mandate, would be in a better position to access the information and evaluate its significance. The Commission has suggested that the court should be able to order any person to reimburse a public issuer for the costs of obtaining a section 17 opinion.<sup>94</sup> This proposal could be extended to enable the state agency to recover the costs of investigating allegations of insider trading from any person (subject to reasonableness of costs, and an appeal to the court).<sup>95</sup>

Further reforms are needed to increase the incentives for shareholders to take actions in their own names. Under the current insider trading regime the public issuer supposedly has an incentive to take an action against an insider for the recovery of a pecuniary profit under section 7(2)(c)(ii). This approach could be varied by granting shareholders the right to apply for a pecuniary penalty in the same way as a public issuer, with the civil standard of proof. This would increase shareholders’ likely return, and improve their incentive to take action.<sup>96</sup> This would be more likely to

---

<sup>92</sup> See McDermott, “Contingency Fees and the Law of Champerty” [1993] NZLJ 253 for a discussion of the New Zealand position on contingency fees. In 1995 the United Kingdom decided to introduce contingency fee (or conditional fee) litigation. The merits of this move have been strongly debated. See Zander, “Well Anyway, Conditional Fees Should be a Bonanza for Lawyers” [1995] New Law Journal 920.

<sup>93</sup> See Fitzsimons, *supra* note 22, 292, for a brief discussion of shareholder access to corporate information.

<sup>94</sup> *Insider Trading Discussion Paper 1994*, *supra* note 57, para 3.1; and *Insider Trading Discussion Paper 1995*, *supra* note 81, para 8.

<sup>95</sup> To a certain extent this would mirror the arrangement that the New Zealand Stock Exchange has with listed companies where they are charged with the costs of investigations, and they are required to post a bond as security (NZSE Listing Rules, Rules 2.8.1 and 2.8.2). See Fitzsimons, “The New Zealand Stock Exchange: Rights and Powers” in Walker and Fisse, *supra* note 26, 551.

<sup>96</sup> Section 19 would have to be amended to give the court the power to distribute any pecuniary penalty awarded after a shareholder’s application. The bulk of the penalty

increase the deterrence aspects of the insider trading laws than the current provisions which, as Cox noted,<sup>97</sup> only penalise the insider to the extent of the profit made or loss avoided when a shareholder takes an action. Providing shareholders with the right to recover a pecuniary penalty would be consistent with a continued condemnation of insider trading, without the difficulties which were identified by the Commission in criminalising this type of behaviour.

Allowing shareholders to bring an action for a pecuniary penalty in their own names would also reduce the need for a section 18 application. This would relieve the courts of the task of having to weigh up legislative rights granted to minorities against the legitimate concern to protect majorities. This was a significant factor in the refusal by the Court of Appeal to grant the application in the *Wilson Neill* decision, as it took into account the potential effects of the litigation on the financial viability of the company, and also the potential impact of the litigation on 14, 000 other shareholders.<sup>98</sup> As Ramsay noted, allowing minority shareholders rights to commence litigation on behalf of the company is not necessarily the most appropriate approach, since they have “very little incentive to consider the effects of the litigation on other shareholders who are the supposed beneficiaries”.<sup>99</sup> A move to provide shareholders with the incentive to bring an action in their own names would help to reduce the need for section 18 applications.

Even with these amendments I would suggest that there is still a need for a state agency to have a role in the gathering of information, and to take actions to supplement private enforcement. This point was recognised by the Ministerial Working Group. Although it strongly advocated a private enforcement regime, it also stated that:

The Securities Commission could only take enforcement action if there is no other adequate avenue of remedy available to the complainant or if the matter affects a significant number of participants in the market.<sup>100</sup>

---

could be awarded to the applicant shareholder with the balance payable to persons who traded with the insider during the relevant time.

<sup>97</sup> Cox, *supra* note 26, 634.

<sup>98</sup> *Supra* note 31, 161. This approach would also overcome the problem where the public issuer is unable to fund an action due to its insolvency as has happened in the *Fortex* case (see *Fortex Report*, *supra* note 55).

<sup>99</sup> Ramsay, *supra* note 91, 178-179.

<sup>100</sup> *Roche Report*, *supra* note 76, 23. For a discussion of the use of civil remedies by state agencies in place of criminal sanctions see Duns, “A Silent Revolution: The Changing Nature of Sanctions in Companies and Securities Legislation” (1991) 9 C&SLJ 365.

The difficulty lies in determining the appropriate line between supplementing private actions and excessive actions by the state agency. The Commission suggested the occasions when it would use the power to commence actions, if it had an enforcement role.<sup>101</sup> With appropriate guidelines and controls on funding it is possible that a solution between the present system of almost no private enforcement and excessive regulatory intervention could be found.<sup>102</sup>

A further development which should be considered is explicitly to provide the Commission with the power to facilitate administrative settlements. As Dellit and Fisse noted, regulatory enforcement can be viewed as not unlike a pyramid, with the apex composed of the severest forms of sanctions moving down through decreasingly drastic measures to the most often used and mildest enforcement mechanisms of warnings, censures, advice and guidance.<sup>103</sup> In the securities markets one of the useful instruments that can be employed by regulators is that of settlements. Dellit and Fisse pointed out that the Securities and Exchange Commission in the United States uses settlements extensively and overtly in a number of areas, including insider trading.<sup>104</sup> The Trade Practices Commission in Australia also uses this strategy, as does the Commerce Commission in New Zealand.<sup>105</sup> They argued that such settlements, while having disadvantages, have a number of benefits including saving time, financial costs and court resources, allowing compromise, encouraging learning, helping self-regulatory organisations towards regulatory cooperation, and allowing compensation for investors and cost recovery for the regulator.<sup>106</sup> The ability for the Commission formally to use settlements as a regulatory

---

<sup>101</sup> *Insider Trading Discussion Paper 1994*, supra note 57, para 6.4.

<sup>102</sup> Tyler discussed ways that the Commission's litigation fund could be controlled (see *Tyler Report*, supra note 69, para 6.36). Tyler had suggested that the court should be able to award it full recovery of costs in order to overcome the stigma attached to taxpayer funded litigation for the benefit of private parties (see *Insider Trading Discussion Paper 1994*, supra note 57, para 7.1).

<sup>103</sup> Dellit and Fisse, "Civil and Criminal Liability under Australian Securities Regulation: The Possibility of Strategic Enforcement" in Walker and Fisse, supra note 26, 584.

<sup>104</sup> *Ibid*, 581, 583, 596-99.

<sup>105</sup> *Ibid*, 600. The Commerce Commission uses settlements as an alternative to taking proceedings against persons who breach the Commerce Act 1986 or the Fair Trading Act 1987. See Commerce Commission, "Commission Settlements", *Fair's Fair*, August/September 1995, 8; and Commerce Commission, *A General Guide for the Business Community* (1991), 7.

<sup>106</sup> *Ibid*, 602-611.

instrument would not entail a radically new approach as it has engaged in brokering settlements since early in its life.<sup>107</sup>

The usefulness of settlements is predicated on their place in the “regulatory pyramid”, below that of the criminal and civil enforcement powers of the regulator.<sup>108</sup> Assuming that the Commission would not become a regulator with significant criminal prosecutory powers, what would be needed for the effective utilisation of settlements would be for the Commission to have at least a civil enforcement role, which could include the ability for it to be able to obtain the pecuniary penalties that are available to a public issuer under section 7(2)(c)(ii), and to obtain full cost recovery for the costs of taking action.<sup>109</sup> This would align Part I with Part II where the Commission has the power to apply to the court for pecuniary penalties to be levied against a security holder who fails to comply with the relevant disclosure provisions.<sup>110</sup>

A combination of the above approaches would clearly take the law regulating insider trading closer to the ideal than does the present regime. They would not be without cost, and with the experience of time they would almost certainly need amendment. However, they would certainly improve the current position of almost no shareholder enforcement and a state agency which is excluded from the formal enforcement process, yet plays a central role in a regime that is largely ineffective.

## VI. CONCLUSION

The statutory insider trading regime introduced into New Zealand in 1988 was predicated on shareholders playing a significant part in either taking actions, or encouraging public issuers to take actions, against insider traders. The means by which this would be accomplished were not adequately considered by either the Securities Commission or the legislature at the time the Act was passed. The attempt to rely upon a statutory derivative action, with shareholders taking action against an insider in the public issuer’s name and at its expense has failed. The

---

<sup>107</sup> See Patterson, *supra* note 52, 371; and NZSC, *Annual Report* (1992), 10.

<sup>108</sup> Dellit and Fisse, *supra* note 103, 584.

<sup>109</sup> Section 19 could be amended to allow the court to determine how any pecuniary penalty will be distributed (after the payment of the Commission’s costs) so that insider trading litigation does not create a windfall situation for the Commission but rather benefits the affected shareholders and the market.

<sup>110</sup> S 31(a). It should be noted that, although a number of parties have the power to apply for an order against a security holder who fails to disclose relevant holdings, all the actions under Part I, with the exception of one case, have been brought by the Commission (see Fitzsimons, *supra* note 68)



history of this provision has shown that the procedure to enforce these rights is inadequate and needs reform.

At the same time the analysis shows that the Commission played an increasingly significant role in attempting to control insider trading, a role which was in excess of that originally contemplated. This role, because of a lack of formal enforcement powers, has been inadequate to enable the effective enforcement of the laws relating to insider trading.

Current proposals for reform are aimed at enhancing shareholder enforcement of the rights in Part I. The reforms will be unlikely to have any major impact upon the regulation of insider trading without further, more substantial reforms. Further reforms should encompass improving the incentives for shareholders to take actions in their own names, and the formal recognition of the role of the Commission in the enforcement of these laws. The Commission should have the ability to obtain pecuniary penalties, take action against an insider on behalf of a public issuer, and obtain settlements between insiders, affected shareholders and public issuers. Unless serious consideration is given to enhancing the ability of shareholders and the Commission to take action against insider trading, it is likely that New Zealand will continue to have laws that prohibit insider trading, but which are unenforced and therefore ineffective.



# **Bank of New Zealand means business.**

Different business sectors have different banking requirements. The Bank of New Zealand recognises this by providing the legal profession with an innovative range of tailored products and services.

Whether you, or your clients, need investment or lending advice, our experienced staff will provide the products and services to best suit your requirements.

To find out more, call into any branch of the Bank of New Zealand, or simply ring our freephone number below between 8am and 8pm weekdays

**0800 502 903**



**Bank of New Zealand**

*Tailoring banking to **your** needs*

# THE CONTRADICTION BETWEEN COMPARATIVE ADVANTAGE IN INTERNATIONAL TRADE AND ENVIRONMENTAL PROTECTION

BY ALEXANDER GILLESPIE\*

There is an inherent conflict between free trade and environmental protection through market mechanisms. This conflict resides in the contradictory objectives of internalising the costs of environmental externalities and the pursuit of comparative advantage within free trade.

## I. ENVIRONMENTAL EXTERNALITIES

Economic externalities are created where the activity of one person or entity affects the welfare of other persons or entities who have no direct means of control over those activities, and the costs of this interference are not reflected in the price of the good that creates this intrusion.<sup>1</sup> In essence this means that the effect the product had on the third party goes unnoticed. The inequitable result of this is that the person or entity that causes the externality is receiving a public (or "neighbourhood") subsidy for the product. Thus, the price of the product does not reflect its true cost.<sup>2</sup>

This problem has traditionally received only peripheral attention. However, in the area of environmental policy, these externalities have become so obvious with many international environmental problems that they can no longer be ignored.<sup>3</sup>

The solution to the problem is believed to lie in making the polluter internalise the cost of the externalities. Internalisation creates an incentive to reduce the activity that produces the external cost, as the prices paid for the item in question rise to reflect the full value of all the sacrifices made to produce it.<sup>4</sup> This argument has now been extended to cover

---

\* LLB, LLM (hons) (Auckland), PhD (Nottingham), Lecturer in Law, University of Waikato.

1 See Ruff, "The Economic Common Sense of Pollution" in Dorfman, R D & NS (eds) *The Economics of the Environment* (1977) 3, 16.

2 Daly, H E and Cobb, J *For the Common Good: Redirecting the Economy Towards the Community, the Environment and a Sustainable Future* (1989) 53.

3 Ayers, "Industrial Metabolism and Global Change" (1989) 41 *International Social Science Journal* 365; and Daly and Cobb, *supra* note 2, 37, 55.

4 Caimcross, F *Costing the Earth* (1991) 46-47; Breslaw, "Economics and Ecosystems" in Barr, J (ed), *The Environmental Handbook* (1971) 83, 84-86.; Dorfman, *supra* note 1, xviii; and Daly and Cobb, *supra* note 2, 56.

environmental externalities. For example, Principle 16 of the 1992 Rio Declaration on the Environment and Development states:

National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to public interest.<sup>5</sup>

In response to the problem of externalities, new methods have been devised to correct the market failure.<sup>6</sup> The primary method is through taxation, which is a popular idea in both Green theory<sup>7</sup> and contemporary political debate.<sup>8</sup>

This idea of taxes to counter environmental externalities is typically ascribed to Arthur Pigou. He devised a series of taxes and subsidies to account for the social costs which were not incorporated in private decision-making.<sup>9</sup> Crudely, a tax is placed on polluters to bring their cost function into line with what it would have been had they faced the true social cost of their production. Thus, environmental taxes are a way of incorporating the indirect costs into the economy, correcting the shortcoming of the market.<sup>10</sup> This ideal is also broadly consistent with the Polluter Pays Principle. This is a guiding principle of the OECD's environmental policy, which recognises:

---

<sup>5</sup> Principle 16, *Rio Declaration on Environment and Development*, A/Conf 151/5/Rev 1, 13 June 1992.

<sup>6</sup> See, for example, Dudek, "Energy and Environmental Policy: The Role of Markets" in (1991) 6 *Natural Resources and the Environment* 22, 25.

<sup>7</sup> Kemball-Cook, D *The Green Budget* (1991) 15-45; Goldsmith, E/Ecologist, *Blueprint for Survival* (1972) 37; O'Riordan, T *Environmentalism* (1981) 105; Goodin, R E *Green Political Theory* (1992) 196-197; Lewis, M W *Green Delusions: An Environmentalist's Critique of Radical Environmentalism* (1992) 180-187; and Lang, T and Hines, C *The New Protectionism: Protecting the Future Against Free Trade* (1993) 143-145.

<sup>8</sup> See, for example, Brown, L R (ed) *Vital Signs: The Trends That Are Shaping Our Future* (1993) 21-22; Barrett, "Global Warming: The Economics of a Carbon Tax" in Pearce, D (ed) *Blueprint 2: Greening the World Economy* (1991) 31, 32; Hutton, "The Penalty for Pollution" *Guardian*, December 6, 1991; Brown, "Market Forces Key to Greener Britain" *Guardian*, October 2, 1992; Ghazi, "Car Use to be Curbed in U-Turn on Transport" *Observer*, September 27, 1993; and "Gummer Moots Greening of Taxes" (1994) 231 *ENDS Reports* 5-6.

<sup>9</sup> Pigou, A C *The Economics of Welfare* (1920) 17.

<sup>10</sup> Jacobs, M *The Green Economy* (1991) 150; Daly and Cobb, *supra* note 2, 142-143; and Dorfman, *supra* note 1, i, xxxviii.

when the costs of [environmental] deterioration are not adequately taken into account in the price system, the market fails to reflect the scarcity of such resources ... the costs of these measures should be reflected in the costs of goods and services which cause pollution and/or consumption.<sup>11</sup>

This concept is intuitively attractive, as it embodies the idea that environmental externalities should be internalised by those who cause them.<sup>12</sup>

## II. COMPARATIVE ADVANTAGE

Adam Smith opened the door for international economic integration. His thesis of laissez-faire was embodied in his influential work *The Wealth of Nations*.<sup>13</sup> Smith disagreed with domestic protectionist ideals, and sought to end mercantile institutions by moving towards the "free laws of commerce" in an international setting which would allow the free market system and societies within them to find their true balance, and thus create economic efficiency via specialisation, which would benefit all of those involved.<sup>14</sup> David Ricardo elaborated upon this idea with his thesis of comparative advantage. He postulated that:

Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This

---

<sup>11</sup> See principles 2 & 4 of the *OECD's Guiding Principles on the Environment* US Dept of State Release, No 130, June 1, 1972 ((1972) 11 International Legal Materials 1172). See also Pearce, "The Practical Implications of Sustainable Development" in Ekins, P and Max-Neef, M (eds) *Real Life Economics: Understanding Wealth Creation* (1992) 403, 409.

<sup>12</sup> The idea of environmental taxes is also attractive because of the possibility of redistributing finances, their flexibility to adjustment, and their ability to apply them in situations where there are multiple sources of externality creation. See Tietenberg, "Economic Instruments for Environmental Protection" in Helm, D (ed) *Economic Policy Towards the Environment* (1991) 86, 105; Brown, "Launching the Environmental Revolution" in Brown, L R (ed) *State of the World* (1992) 179; Ruff, supra note 1, 1, 17; Jacobs, supra note 10, 153; Lewis, supra note 7, 183-186; and Kemball-Cook, supra note 7, 6-7, 19-23.

<sup>13</sup> Smith, A *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776).

<sup>14</sup> *Ibid*, Book iv, chapter 1. See also Kittrell, "Laissez-Faire In English Classical Economics" (1966) 27 *Journal of the History of Ideas* 610-620; Sabine G H and Thorson, T C A *History of Political Theory* (1973) 623-625. For a discussion of this approach as a modern ideology, see Warnock, J W *Free Trade and the New Right Agenda* (1987) 72-81; and Hagelstam, "Mercantilism Still Influences Practical Trade Policy at the End of the Twentieth Century" (1991) 25 *Journal of World Trade Law* 127.

pursuit of individual advantage is admirably connected with the universal good of the whole.<sup>15</sup>

The idea that all benefit from free trade has reappeared in the international environmental arena. For example, Section 2.5 of Agenda 21 states:

An open, equitable, secure, non-discriminatory and predictable multilateral trading system that is consistent with the goals of sustainable development and leads to the optimal distribution of global production in accordance with comparative advantage is of benefit to all trading parties.<sup>16</sup>

The use of comparative advantage is believed to be in accordance with sustainable development. This is because free trade is expected to improve the environment through international competition which is alleged to be environmentally beneficial because of the efficient use of resources, higher productivity and increasingly efficient technologies. These factors are all deemed necessary for sustainable development.<sup>17</sup>

In this context, the ideal of comparative advantage involves an important assumption, namely, that the environment can be used to achieve comparative advantage. In essence, this means that low environmental standards are seen as part and parcel of a country's comparative advantage to be exploited through trade.<sup>18</sup> Thus, as the Secretariat of the GATT stated:

in principle there is no difference between the competitiveness implications relating to different environmental standards and the competitiveness consequences of many other policy differences between countries - tax, immigration and education policies for instance.<sup>19</sup>

---

<sup>15</sup> Ricardo, D *Principles of Political Economy and Taxation* (1817) 133-134. Note, Adam Smith also realised that "both may find it more advantageous to buy of one another, than to make what does not belong to their particular trade (supra note 13, Volume 1, 280).

<sup>16</sup> Section 2.5, *Agenda 21* UNCED Doc A/CONF 151/4. See also Johnson, S P (ed) *The Earth Summit* (1993).

<sup>17</sup> Schmidheiny, S and Business Council for Sustainable Development, *Changing Course* (1992) xi - xii; World Bank, *World Development Report 1992: Development and the Environment* (1992) 67; and Bergeijk, "International Trade and the Environmental Challenge" (1991) 25 *Journal of World Trade Law* 105, 106.

<sup>18</sup> Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict" (1992) 49 *Washington and Lee Law Review* 1227, 1243-44.

<sup>19</sup> GATT Working Group, *Trade and the Environment*, 4 *World Trade Materials* (1992) 20. See also Jackson, supra note 18, 1227, 1243-44.

Thus, as the OECD suggested earlier, “[d]ifferent national environmental policies, for example, with regard to the tolerable amount of pollution, are justified”.<sup>20</sup> Consequently, the international trading system ought not to apply to redress or harmonise the different environmental approaches that different countries are willing to tolerate.<sup>21</sup> Therefore, trade advantages gained by countries willing to accept lower environmental standards are treated as part of the “efficient reallocation of production internationally”.<sup>22</sup> Under this theory, Southern countries should take advantage of the fact that their environmental standards are lower than in Northern countries, as a means to attract more investment.<sup>23</sup>

### III. THE CONFLICT BETWEEN INTERNALISING ENVIRONMENTAL EXTERNALITIES AND COMPARATIVE ADVANTAGE

A conflict arises between internalising environmental externalities and comparative advantage when one nation chooses to internalise environmental costs, through for example the creation of taxes, whereas another does not, and, in contrast, actively externalises environmental costs in an attempt to obtain comparative advantage.<sup>24</sup> In such settings, the externalising nation will be actively exploiting a malfunctioning market place, as it is in effect claiming an environmental subsidy by not

<sup>20</sup> See principle 6 of the *OECD Guiding Principles on the Environment*. U.S. Dept of State Release, No 130, June 1, 11 International Legal Materials (1972) 1172.

<sup>21</sup> See Low, P (ed) *International Trade and the Environment* (1992) iii. See also Jackson, supra note 18, 1227, 1249; and Schmidheiny, supra note 17, 70.

<sup>22</sup> Pearson, “The Environment and International Economic Policy” in Joint Economic Committee, *The United States Role in a Changing World Economy* (1989) 114-115.

<sup>23</sup> Porter, G and Brown, J W *Global Environmental Politics* (1991) 139. The implicit assumption in this is that eventually, after a country has absorbed a set level of environmental damage, and has enough economic strength to choose otherwise, it will adopt a path that is less environmentally damaging. See Anderson, K and Blackhurst, R (eds) *The Greening of World Trade Issues* (1992) 3, 16-17, 19-20, 167, 241-42.

<sup>24</sup> For the problems of the proposed European carbon tax, see Persaud, “More Hot Air on CO2 Emissions: The Community Proposal for An Energy Tax” (1991) 6 Oil and Gas Taxation Law Review 200; Porritt, “Will The World Save the Earth ?” (1992) 10 (5) BBC Wildlife 5; Marshall, “European Challenge to Britain on Energy Tax” Independent, March 24, 1993; Carvel, “Britain Alone in Barring EC Energy Tax” Guardian, April 24 1993; Palmer, “EC Waivers Over Plan To Tax Carbon Dioxide Emissions” Guardian, April 30, 1992; Palmer, “EC Chief To Boycott ‘US-Led Cocktail Party’” Guardian, May 28, 1992; and Spinks, “Multinationals Get Hot Under the Collar Over Europe’s Carbon Tax” Guardian, March 17, 1992. 28. See also the *ENDS Reports*, in 1992, volume 214, 1, volume 205, 23-24, volume 206, 25, volume 211, 30-31; and in 1993, volume 218, 35-36, volume 219, 37-38, volume 220, 23, volume 222, 12-13, 40-42, volume 25, 35-36; and in 1994, volume 230, 39-40.

insisting that the correct price, that takes into account the externality considerations, be paid.<sup>25</sup>

This problem comes to a head when two nations allow their products to compete in an international open economy. Indeed, as the Business Council for Sustainable Development recognised:

The question remains - and to which we have no convincing answer nor indeed know of one - is how can a ... nation charge a price for exports that reflects their environmental costs, and compete against other nations willing to absorb such costs for short term profits?<sup>26</sup>

The difficulty is that there is an imbalance in price, as any product that does not incorporate the costs of externalities, as opposed to a product that does, will be cheaper. This means that a country that chooses to internalise its environmental costs will be at an economic disadvantage in an open market place.<sup>27</sup>

In such a setting, the most obvious solution, if the objective is to internalise the costs of environmental externalities, is to be found in unilateral or regional actions between like-minded countries in an effort to create level economic playing fields.<sup>28</sup> To do this, it is primarily necessary

---

<sup>25</sup> Kramer, "The Single European Act and Environmental Protection" (1987) 24 *Common Market Law Review* 659, 676, 678; Carrol, S *The Single European Dump: Free Trade in Hazardous and Nuclear Wastes in a New Europe* (1991) 9; Lomas, "Environmental Protection, Economic Conflict and the European Community" (1988) 33 *McGill Law Journal* 507, 531, 533; Ritchie, "GATT, Agriculture and the Environment: The U.S. Double Zero Plan" (1992) 22 *Ecologist* 214, 216; Goldman, "Resolving the Trade and Environment Debate: In Search of A Neutral Forum and Neutral Principles" (1992) 49 *Washington and Lee Law Review* 1279, 1291; and Persaud, *supra* note 24, 200.

<sup>26</sup> Schmidheiny, *supra* note 17, 80.

<sup>27</sup> Fish and South, "Industrialised Countries and Greenhouse Gas Emissions" (1994) 6 *International Environmental Affairs* 14, 34-36; Buckley, "International Trade, Investment and Environmental Regulation" (1993) 27 *Journal of World Trade* 101, 123; Susskind and Ozawa, "Negotiating More Effective Environmental Instruments" in Hurrell A and Kingsbury, B (eds), *Global Environmental Politics* (1992) 142, 162; MacNeil, J Winsemius, P and Yakushiji, T *Beyond Interdependence: The Meshing of the World's Ecology and the World's Economy* (1991) 74-75, 106; Shrybman, "How Free is Free Trade?" 22 *Ecologist* 174; Persaud; *supra* note 24, 200; Spinks, *supra* note 24, 31; Kemball-Cook, *supra* note 7, 30; and Cairncross, *supra* note 4, 77.

<sup>28</sup> Goldman, *supra* note 25, 1279, 1290; Lang and Hines, *supra* note 7, 51-53, 89-91; and Buckley, *supra* note 27, 101, 104, 121, 123.



to impose restrictions upon products which do not incorporate the costs of environmental externalities in the same manner that a domestic producer may.

#### IV. UNILATERAL ACTIONS

Despite the possibility of averting the conflict through unilateral actions which may create level economic playing fields by making all competitors internalise environmental costs, a further impediment stands in the way. This is the *prima facie* rejection of unilateral actions in international trade policy when dealing with environmental concerns. In such settings the emphasis is that all actions on environmental issues which could affect differing nations' exports should be based upon international consensus. This belief stems from an established fear that individual domestic environmental protection justifications which are unilaterally introduced into free trade arenas could act as potential barriers to products that are produced in different, and in this instance, environmentally unfriendly ways.<sup>29</sup> This fear has been particularly acute with Southern countries.<sup>30</sup> Consequently, they are strong advocates of "environmentally unhindered" free trade.<sup>31</sup>

---

<sup>29</sup> Porter and Brown, *supra* note 23, 140.

<sup>30</sup> See Whalley, "The Interface Between Environmental and Trade Policies" (1991) 101 *The Economic Journal* 180, 187; and Pearce, "A GATT To Our Heads" *BBC Wildlife* (1992) 58.

<sup>31</sup> This position can be traced back to the 1971 Founex report which stated some of the fears Southern countries had of international environmental regimes: (1) Fear that the developed nations will create rigorous environmental standards for products traded internationally and generate "neo-protectionism" excluding non-conforming goods from poor lands. (2) Fear that the developed lands will unilaterally dictate environmental standards to the developing lands without considering how to relate those standards to the conditions of the developing lands (Founex Report, *Environment and Development* (1971), reprinted as Annex 1 to UN Doc A/CONF 48/10, December 10, 1971, or *International Conciliation* No 586, 1972). These fears partly found their way into Recommendation 103 of the 1972 Stockholm Conference on the Human Environment, which states: "All countries present at the Conference agree not to invoke environmental concerns as a pretext for discriminatory trade policies or for reducing access to markets, and recognise further that the burdens of the environmental policies of industrialised countries should not be transferred either directly or indirectly to the developing countries" (UN Doc A/Conf 48/14, 1972). This ideal was earlier recognised in principle 4 (e) of the UNGA Res 2849 (XXVI) Dec 7, 1970 on *Development and the Environment* which suggested that the 1972 Stockholm Conference should "avoid any adverse effects of environmental pricing on the economies of developing countries, including [through] international trade".

This idea was forcefully brought out at the 1992 United Nations Conference on Environment and Development (UNCED), where the use of unilateral trade distorting measures designed to protect the environment was explicitly and repeatedly rejected.<sup>32</sup>

This outlook reflects the 1991 ruling by a GATT panel of the “Mexican Tuna” issue, where the United States unilaterally restricted the importation of tuna which was caught by Mexican fishermen using fishing methods that are detrimental to dolphins.<sup>33</sup> There it was held that environmental protection considerations extending beyond a country’s jurisdiction could not be used to restrict imports. This would be acceptable only if action was required by international law, such as the Convention on International Trade in Endangered Species of Flora and Fauna<sup>34</sup> or the Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>35</sup> but not if it was required only by domestic law.<sup>36</sup>

Thus, the application of tariffs to the products of other countries which do not attempt to incorporate the costs of environmental externalities may be struck down if there is no pre-existing international agreement dictating the needs for such policies.

---

<sup>32</sup> See Article 2 (5) of the *United Nations Framework Convention on Climate Change*, UNCED A/AC 237/18 (PART II) Add 1, May 5, 1992; article 13 (a) & 14 of the *Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* UNCED, Doc A/CONF 151/6/ Rev 1, Principle 12 of the *Rio Declaration*, supra note 5; and sections 2.8, 2.22, 11.24, 17.6 and 39.3 (d) of *Agenda 21*, supra note 16. See also Paragraph 152 of the *Cartagena Commitment from the Eighth UNCTAD (1992) 22 Environmental Policy and the Law* 189, 190.

<sup>33</sup> *Tuna/Dolphin Panel Report* GATT Doc DS 21/R, September 3, 1991.

<sup>34</sup> See Article 1 (c), II (2) & (3) of the *Convention on International Trade in Endangered Species* UNTS 973 (No 1, 14537) 243-438.

<sup>35</sup> See Articles 4 (2) & (3) of the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987) 26 *International Legal Materials* 1541. For discussions of this and the above Convention in this area, see Housman and Zaelke, “Trade, Environment and Sustainable Development: A Primer” (1992) 15 *Hastings International and Comparative Law Review* 535, 578-82. See also Saunders, “Legal Aspects of Trade and Sustainable Development” in Saunders, J O (ed) *The Legal Challenge of Sustainable Development* (1990) 370, 383.

<sup>36</sup> See “Update: Summary of Panel’s Decision” (1991) 21 *Environmental Policy and the Law* 214; “Marine Mammal Protection Act” (1991) 21 *Environmental Policy and the Law* 214; McDorman, “The GATT Consistency of U.S. Fish Embargoes” (1991) 24 *George Washington Journal of International Law and Economics* 477, 505-506; and Hooley, “Resolving Conflict Between GATT and Domestic Environmental Laws” (1992) 18 *William Mitchell Law Review* 483, 489-98.

## V. TOWARDS A SOLUTION?

Comparative advantage, which works upon externalising environmental costs, is not only an oversight in pricing, it also provides a subsidy by discounting the cost of environmental destruction. However, the Subsidies Code of GATT<sup>37</sup> encourages parties to eliminate subsidies as a form of domestic trade regulation because they are trade distorting.<sup>38</sup> Nevertheless, despite this general appearance of GATT and its inherent dislike for subsidies, certain subsidies continue to be tolerated within free trade agreements (such as for defence industries.)<sup>39</sup>

This is a political choice. If this type of trade distorting subsidy is accepted, there should be an equal or more compelling reason for the elimination of environmental subsidies, through externalities, which openly distort free trade. Yet ironically the definition of subsidy is often stated in very broad terms, and environmental protection, not environmental destruction, can be classified as such.<sup>40</sup> Additionally, the preference in times of conflict is for the capture of comparative advantage, rather than the internalisation of environmental costs. For example, point five of the OECD's Guiding Principles on the Environment notes that the correct pricing of the environment:

Should be an objective of member countries ... provided that they do not lead to significant distortions in international trade and investment.<sup>41</sup>

This perspective is in accordance with the view that a willingness to destroy the environment should be openly tolerated to achieve comparative advantage. However, this comparative advantage works upon a manipulation of market pricing. Hence the contradiction of free trade in a manipulated market.

---

<sup>37</sup> See Article VI, XVI & XXIII of GATT 55 UNTS 187.

<sup>38</sup> *Agreement on Technical Barriers to Trade* GATT Doc LJ4907, BISD (26th Supp) 56 1980.

<sup>39</sup> Ritchie, "Free Trade Versus Sustainable Agriculture: The Implications of NAFTA" (1992) 20 *Ecologist* 221, 225; and Shrybman, "International Trade and the Environment: An Environmental Assessment of GATT" (1990) 20 *Ecologist* 30, 32.

<sup>40</sup> See Pearce, D and Warford, J J *World Without End: Economics, Environment and Sustainable Development* (1993) 307, 309-312; Ritchie, "GATT, Agriculture and the Environment: The U.S. Double Zero Plan" (1990) 20 *Ecologist* 214; Jackson, *supra* note 18, 1227, 1247-48; Housman, *supra* note 35, 541, 555; Shrybman, *supra* note 39; Warnock, *supra* note 14, 159-162; and Ritchie, *supra* note 39, 225.

<sup>41</sup> Point 5, OECD, *supra* note 11.

There are three possible responses to this problem. One, the nations that internalise environmental costs protect their markets and risk retaliatory measures in the international trade arena. Two, comparative advantage is retained in its classical sense, and environmental costs are willingly incurred and the environment is increasingly destroyed in a race to the bottom for environmental concerns, in the absence of international agreements. Finally, environmental costs are internalised and the market is corrected, consequently increasing environmental protection, and comparative advantage is rightfully orientated to mean free trade, in a free market, in a more sustainable manner.<sup>42</sup>

---

<sup>42</sup> Note that certain important commentators such as David Pearce (*supra* note 40, at 299-300) suggest that it is better to adopt “corrective policies” such as international financial assistance and technology transfers to Southern countries, rather than distort international trade in an attempt to incorporate environmental externalities. The problem with this is that while it may encourage Southern exporters to adopt better environmental policies it neither economically protects countries that do incorporate the costs of environmental externalities, nor encourages Southern countries to work directly towards incorporating environmental costs. A better approach would be to protect the entities which internalise environmental costs, and redistribute a portion of the increased tariffs that are incurred by non-internalising countries (depending upon their economic position) to parties which do attempt to internalise their costs.

# “LAW IN CONTEXT” - TAKING CONTEXT SERIOUSLY

BY PAUL HAVEMANN\*

## I. INTRODUCTION

For at least 30 years, academic lawyers have been exhorted to teach law so that it is understood by law students in the context of society.<sup>1</sup> Much rhetoric has been uttered to demonstrate that this is being done, but has this new pedagogic imperative had the expected impact? Social context is taken seriously in very few of the eclectic array of courses and texts claiming to locate law in the context of society.

Traditionally, jurisprudence courses carried the burden of providing a concentrated exposure to a contextual perspective and conceptual framework. Later, Law and Society and “Law in Society” courses in law schools evolved, to offer a syllabus alongside, as an outgrowth of, or as an alternative to, the traditional jurisprudence course. Today, law schools commonly make at least rhetorical commitments to the need to teach *all* subjects in “context”. However, as the architects of new law school curricula and reformers of established programmes will readily concede, this is much easier said than done. For the purposes of this essay I am treating jurisprudence, law and society, and law in context as a cognate cluster of courses which claim to teach law in its social, political, economic, historical and cultural context.

Teaching “law in context” has been a growth area in the legal academy since the 1960s. The foundation courses in jurisprudence now accommodate Marxism, post-modernism, critical legal studies (CLS) and feminist legal theory. Many topical social and moral problems provide the vehicle for debate, analysis and theory testing. But does the “law in context approach” derived from jurisprudence or reflected in mainstream/malestream law and society texts and courses take the social context sufficiently seriously? I argue that it does not, primarily because of a flawed approach to curriculum design which is cravenly law-centred, obscurantist, and derivative of Anglo-American liberal legal ideological assumptions.

---

\* LLB(Hons) LLM (London), Professor of Law, University of Waikato.

<sup>1</sup> *The Committee on Legal Education, Cmnd 4595* (1971) (Ormrod Report); *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1983) (Arthurs Report); and *Australian Law Schools, a Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) (Pearce Report).

In this article I do four things. First, I discuss traditional and existing approaches to teaching law in context. Secondly, I outline the establishment and mission of the Waikato School of Law - my particular site of reflexive learning for critical literacy, and the pedagogic goals and values informing my approach to teaching/learning law in context. Thirdly, I summarise the Waikato Law and Societies course, in order to demonstrate my pedagogic strategy for taking context seriously; and fourthly I make suggestions for teaching and learning for critical literacy. Although many colleagues have worked on the course, I use the first person pronoun; I would be presumptuous to claim that they associated themselves with all aspects of this exercise in reflexivity.

## II. ANYTHING GOES?

### THE UNDETERMINED PROVINCE OF LAW IN CONTEXT

The province of jurisprudence as currently taught in the U K, Canada and Australia has been determined elsewhere in useful detail.<sup>2</sup> No survey of the New Zealand practice is available but there is no evidence of a radical shift away from the Euro-American corpus of knowledge revealed by the Barnett survey. The legal academy has eclectically patched old and new social science theories about law, knowledge and social phenomena into the aging fabric of jurisprudence text and syllabus.<sup>3</sup> Theorists range from Aquinas to Unger; theories range from anarchism to utilitarianism; schools range from American Realism to Scandinavian Realism, with Marxism, CLS, postmodernism, feminist legal theory, and law-and-economics adding a more "modern" look.

Barnett's British, Canadian and Australian subjects apparently accept as universally relevant a cluster of theorists, schools, topics, and choices of textbooks. In my view, however, most of the theories and texts offer rather obscure routes to achieving what the legal academy says it wants them to do. The respondents to the Barnett survey strongly supported jurisprudence because it:

makes students think about the nature of law, gives a broader perspective and understanding of law as an important social activity, is a necessary part of higher education.<sup>4</sup>

I take this to include the development of reflexivity. I define reflexivity as a capacity to understand and act from a basis of critical literacy. Critical literacy involves a form self-awareness based on being sufficiently

---

<sup>2</sup> Barnett, "The province of jurisprudence determined - again!" (1995) 15 *Legal Studies* 88.

<sup>3</sup> Barnett equated law and society with jurisprudence for the purpose of her survey.

<sup>4</sup> Barnett *supra* note 2, at 107.

conceptually literate to read and critique key aspects of the social order and to understand one's status and role in it. I infer from this that a justification for jurisprudence and cognate courses is, to use my language, to facilitate the development of critical literacy.

Obscurity is the enemy of critical literacy. The extent to which obscurantism characterises teaching intended to contextualise the law and thus promote critical literacy is alarming. The texts from Anglo-American metropole are obscurantist in this sense even in their context. Their obscurantism is more acute for teachers and students in the postcolonial periphery. Are our shared histories of colonisation, of the common law and of capitalism sufficient for the hegemonic British texts and Anglo-American theorists to provide a useful contextual and conceptual framework for, say, New Zealand/Aotearoa? Where do students become sensitised to the specificities and historical contingencies which make up the histories and hegemonies of their own societies? Surely such universals are too crude a nexus out of which to create a knowledge of law in the context of particular societies - that is, if one wants to take the "society" or contextual part of the law in context equation seriously.

From this position it is at first difficult to explain to social scientists outside the law why jurisprudence and law and/in society courses, in their many eclectic guises, are flourishing. Why, given their largely metropolitan and under-explicated approach to the social context, does the law in context rhetoric still speak in the imperative? Why are the courses mostly considered to be a "good thing"? Several coincidental factors may provide an answer.

From above there is official discourse<sup>5</sup> in which it is said that legal education must be training for the craft of lawyering, yet at the same time constitute a broad based liberal and/or liberalising education. Furthermore, the political economy of higher education means that the law school now operates within a competitive university environment in which its publication and research "outputs" are "benchmarked" against those of social science disciplines. The universities have, over time, come to recognise that the law in context field may be a fertile one for grants and that it is populated by a cadre of rather prolific academics.

From within the university law schools there is also an internally generated momentum. This comes from a generation of legal academics in Australia, Canada, the UK, the USA and New Zealand who have drawn much of their intellectual nourishment from outside the law and so now analyse and teach about the law at least in part through the prism of the

---

<sup>5</sup> *Supra* note 1.

(albeit often Euro-American) social sciences. They no longer rely upon the internally consistent logics of the law or the orthodox legal paradigm to supply their analysis.<sup>6</sup> Instead, critiques from within Marxism, feminism, postmodernism, cultural studies, postcolonialism, history, sociology, politics and economics have given this generation of scholars the conceptual scope and intellectual curiosity to move beyond relatively infantile, and largely implicit, law-centred (“legocentric”?) explanations of legal phenomena.

Such new critiques have enabled notably Canadian and some Australian and New Zealand academics (as well as some in the Euro-American metropolitan establishment) to treat seriously those historical specificities and contingencies which make the context of their own societies. In Canada and Australia an autochthonous social-legal literature (in New Zealand the process is at a much earlier stage) is being generated despite the totalising influence of Euro-American epistemological frameworks and the monopoly of metropolitan publishing houses. This augurs well for taking context seriously, though I contend that the process has some way yet to go.

Barnett's survey shied away from specifically surveying the stated pedagogic aims and objectives of jurisprudence and cognate “law in context” courses in the law school curriculum.<sup>7</sup> Perhaps, given the characteristics of the curriculum in this field of interest, this omission is hardly surprising; yet, given the requirement nowadays to provide explicit course content and assessment statements, and clear aims and objectives “meeting best practice standards” and so on, it should have been possible to survey these.

What is evident from the survey responses about course content and the contents of texts in jurisprudence and law and society identified as “popular” is that nearly “anything goes”. While, all around, academic auditors trail, academics impose discipline and surveillance mechanisms on themselves through quality assurance manuals, and the profession and government impose discipline on them, it appears from the Barnett survey that some scope for relatively unaccountable academic autonomy remains.

The “anything goes” approach to syllabus is both appealing and problematic. Does it mean that these courses are a gestural anachronism to placate the liberal academy and its supporters? Can it be that they are not perceived as sites of counter-hegemonic struggle by proponents or

---

<sup>6</sup> See, eg, Havemann, “The Pakeha Constitutional Revolution? Five perspectives on Maori Rights and Pakeha Duties” (1993) *Waikato Law Review* 53.

<sup>7</sup> *Supra* note 2.



opponents of such intellectual activism? The “anything goes”, even “law-centred”, approach, is appealing to curriculum designers and teachers because it is safe or because, as an antidote to externally imposed rigidifying requirements, it allows scope for exploration and possibly, even, the introduction of counter-hegemonic ideas.

The “anything goes” approach is also problematic, because eclecticism and reliance on the intrinsic worth of a nebulous curriculum make the field vulnerable to a form of malaise. Courses may become Trojan horses for pedagogic authoritarianism, essentialism, and instrumentalism which are among the more disempowering dimensions of contemporary academic culture. The credibility of such a course among even politically correct colleagues is undermined when symptoms of this malaise are recognised, and as a result the whole contextual enterprise may be jeopardised.

A related but separate source of vulnerability for the “law in context approach” is that courses which claim to contextualise, but which can not explain how they do this and hence justify their existence, simply get displaced by more coherently specified and “practical” courses. Greater relevance and cost/benefit are grounds that prevail without much ado in the present climate. The “measuring” of outcomes against claimed objectives is a line of attack which can easily be legitimated, if not actively precipitated, by funding formulae and academic audit requirements structured within new public management contractualism.<sup>8</sup>

Even if courses in the field are neither afflicted with the “-ism” malaise nor displaced for “irrelevance”s, if they fail to transcend the law-centred obscurantism perpetuated by so many of the texts, they may still perpetuate the legal mystique and leave the social dimensions and impact of legal intervention under-examined or concealed, thereby unwittingly becoming part of the very problem the “law in context” approach was meant to solve. Consequently, denied rigorous exposure to knowledge which gives them a reflexive view of the form and functions of law as an expression of ideology within a particular society, law students may be less able to develop for themselves an understanding of what, in power terms, it is to be a lawyer or to know the law.

The *raison d'être* for the “law in context” approach is heavily ideologically laden and reflects its ideological provenance. The egalitarianism nurtured and sustained in the Fordist epoch (1945-1980s),<sup>9</sup> though experienced in

---

<sup>8</sup> Boston, J (ed) *Contracting Out the State* (1995).

<sup>9</sup> Amin, A (ed) *Post-Fordism: A Reader* (1994); Havemann, “Regulating the Crisis: from Fordism to PostFordism in Aotearoa/New Zealand 1984-1994: Some

different forms and at different stages in Australia, Canada, the UK, the USA and New Zealand, generated a number of similar educational goals. Most significant for our purpose was the fundamental challenge to educational, institutional and professional practices which maintained oppressive social hierarchies.<sup>10</sup> From the 1960s the challenge to hierarchy was reflected in the democratisation of higher education, anti-professionalism, the critique of the disabling professions, the deprofessionalising movement and, ironically, the professionalising of tertiary pedagogy to cater to the new students. Self-consciousness about the creation of self-perpetuating WASP masculinist elites led explicitly to a repudiation of “training for hierarchy”<sup>11</sup> by some legal academics, a massive growth of access to legal education, the dramatic transfer of legal education to legal academics from a system dominated by part time “downtowners”, and the claim to have “trashed” a “black letter” craft school version of legal training analogous to the “banking education”<sup>12</sup> model described by Paolo Freire, a radical educator of the period.

In the context of the post-1960s legal academy the “law in context” approach especially manifested in intermingled Marxist, political economy of law, CLS and feminist legal theory, with their critiques of hierarchy, attempted to offer students a more reflexive, if not conscientising,<sup>13</sup> comprehension of the social dimensions and ideological functions of law - an understanding of what, in power terms, it is to be a lawyer and to have access to legal knowledge. Critical literacy is akin to the process of “conscientization” developed in Third World adult education. This approach to pedagogy provides guidelines for developing the model articulated here. I don’t want to pretend that teaching in the law school is the same as teaching in the *barrios* of Rio. The nexus between the two environments lies in the need to facilitate reflexivity as the basis for praxis/action. Wherever one attempts to do this, in my view, affective (attitudinal) and cognitive (substantive) learning and skilling need to be balanced and dialogical, the curriculum and the teaching/learning process ought to be challenging, not mystifying or disempowering, and tensions

---

Contradictions in the Interregnum, Morbid and Otherwise” (1994) 18 (1) *Humanity and Society* 74; Obrien, M and Wilkes, C *The Tragedy of the Market* (1993).

<sup>10</sup> Cohen S *Visions of Social Control* (1984).

<sup>11</sup> Kennedy, “Legal education as training for hierarchy” in Kairys, D *The Politics of Law: A Progressive Critique* (1983).

<sup>12</sup> Freire, P *Pedagogy of the Oppressed*, (1992),

<sup>13</sup> “Conscientisation” is a Freirian term connoting political emancipation through knowledge, including self-knowledge and an analysis of features of the structural context which are inimical to substantive equality.

must be acknowledged between the subjectivity of the learner and objective standards of knowledge to be met by the learner.<sup>14</sup>

I unashamedly argue that certain basic conceptual tools are needed for a “law in the context of society” approach to succeed in enabling students to become more reflexive, let alone to mount an assault on hierarchy or the hegemonic ideology. These are, appropriately, the conceptual tools of the social sciences which were, after all, developed to analyse society. Such elementary conceptual tools include an understanding in their own right of: ideology; culture; power; the process of the social construction of identity; categories such as ethnicity, gender and class; social institutions such as the state, the economy and the family; and the way we conceive of the over-arching biophysical phenomenon of the ecology. These conceptual frameworks ought to provide the contextual prism through which we examine law in context.

Once we open ourselves up to being reflexive about learning, teaching and practising law, it seems to me that we must explicitly acknowledge in the curriculum that this reflexivity places individuals in particularly complex and contradictory roles in relation to the law. Study of “the” law is not marginalised by taking context seriously: it is contextualised, and becomes a complex, contradictory notion not easily taken for granted. As such “the” law represents a conjunction of hegemonic power and knowledge which, as Thompson observed, is “imbricated at every level of society”.<sup>15</sup> Law is the dominant form of official discourse. Law constructs class, gender and ethnic identities. Foucault observed that law constitutes the subject often without revealing its own intervention.<sup>16</sup> For Gramscian theorists of ideological hegemony, the law is the “ideal synthesis of ‘coercion and consent’”.<sup>17</sup> To challenge the rationality of the law is to challenge hegemonic liberal legal ideology. It is to question the “social contract” binding citizen and state in a supposedly consensual and rational pact - scary stuff!

To be reflexive about the gendered and racialized character of “the” law in a settler society and its power to construct identity is to swallow a bitter and embittering pill. Writing about the “laws” of aesthetics imposed by the hegemonic English cultural establishment upon the Irish, Eagleton conveys poignantly how such ‘laws’ impose meaning on the individual:

---

<sup>14</sup> Freire, P, supra note 12, at 46; McLaren, P and Leonard, P (eds) *Paolo Freire* (1993).

<sup>15</sup> Thompson, “The Rule of Law” in Beirne, P and Quinney, R (eds) *Marxism and Law* (1981).

<sup>16</sup> Foucault, M *The Archaeology of Knowledge* (1977) 49.

<sup>17</sup> Fine, B *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (1984) 144.

each individual must somehow give the law to himself, work all by herself, discover the law inscribed in her very affections, sensations, and bodily impulses ... in short that historically new form of power that Antonio Gramsci has termed 'hegemony'. ... Any such hegemony is far more difficult to construct in colonial conditions. For the law in such conditions will appear visibly alien, heteronomous to the individual rather than the secret structure of her identity. It is the embarrassment of colonial ruling classes, as it is not so much of the metropolitan governing elites, that they figure as perceptibly "other" to their subordinates, perhaps speaking a foreign language or having a different colour of skin.<sup>18</sup>

Perhaps it is because of this "embarrassment" that the imposition of law and the construction of meaning in the ethnic (coloniser/colonised) relations of the colonial hinterland (Australia, Canada, New Zealand) has been executed with such savage ferocity. Nor can we ignore the double and triple "jeopardy" constructed by ethnic, gender and class hierarchies. A syllabus designed to conscientise and challenge law students to consider themselves, their professional aspirations and their place in the hegemonic and counter-hegemonic discourses of the law has to give students the conceptual frameworks for understanding the construction of class, ethnicity and gender.

When one looks through the "popular" and classic texts in jurisprudence<sup>19</sup> and law and society, it becomes crystal clear that these conceptual tools are seldom addressed in their own right. Most often texts treat such conceptual tools for understanding society as givens - largely as implicit epistemological props holding up the law-centred lens through which legal phenomena will be examined. If this judgment seems harsh, I repeat that even a casual perusal of some classic and, in their own terms, excellent law and society texts will support it.<sup>20</sup> Jurisprudence texts are especially eclectic and unselfconsciously Euro-American.<sup>21</sup> Even some new books look like only modestly refurbished versions of materials to which I was exposed taking jurisprudence in the late 1960s at London University!

---

<sup>18</sup> Eagleton, T, Jamieson, F and Said, E *Nationalism, Colonialism and Literature* (1990) 32-33.

<sup>19</sup> Barnett, *supra* note 2, at 123.

<sup>20</sup> See U S texts such as Schur, E M *Law and Society: A Sociological View* (1968); Friedman, L *Law and Society: An Introduction* (1977); and Vago, S *Law & Society* (1988). See U K texts such as Podgoreki, A *Law and Society* (1974); Campbell, C and Wiles, P *Law and Society: readings in the Sociology of Law* (1979); and Roshier, B and Teff, H *Law and Society in England* (1980).

<sup>21</sup> See Barnett, *supra* note 2, at 123.

Things are slowly changing, as illustrated by the 1991 *Law in Context* from Australia.<sup>22</sup> This edited collection starts to employ organising categories such as liberalism as the hegemonic ideology; gender; class; “aborigines” as socially constructed categories: conceptual tools which illustrate the specificities and historical contingencies of the impact of law in Australian society. Independently, and much more explicitly, a law and societies course has been evolving here at the University of Waikato.

### III. THE ESTABLISHMENT AND MISSION OF WAIKATO SCHOOL OF LAW

One of the final acts of the Fourth Labour Government (1984-1990) was to promise to fund the creation of a new law school, the first in over 90 years. The proposed law school's mission, course structure and individual syllabus designs envisaged a legal education with strong social democratic commitments to ethnic, class and gender equity and the involvement of the state in guaranteeing these equities as a dimension of citizenship. Particular stress was laid on the Treaty partnership and “biculturalism” (though the meaning of this is elusive). The University of Waikato's submission was approved by the then extant University Grants Committee and Labour Cabinet on the basis of the Report of the University's Law School Planning Committee entitled *Te Matahauriki*.<sup>23</sup>

Literally, “Te Matahauriki” conveys the sense of:

the horizon where earth meets the sky; in a practical sense, a meeting place for people and their ideas and ideals; in a spiritual or metaphysical sense, aspiring towards justice and social equity. It alludes to a philosophy which reflects concerns that humans have for each other. It aspires to an environment of participation, of challenge, debate, and justice in the world as it was, as it is, and as we want it to be.<sup>24</sup>

The *Te Matahauriki* report spoke specifically of the creation of the Law school as a “reaffirmation and a professional extension of our commitment to biculturalism” and an “opportunity to give meaning to the notion of a partnership of good faith that is central to the Treaty of Waitangi”. The Treaty provided a meeting point for both Maori and Pakeha. It sought to encourage the integration of Maori and English law, a confluence of two streams of thought.<sup>25</sup>

The “overall goal” developed for the School was:

---

<sup>22</sup> Bottomley, S, Gunningham, N and Parker, S (eds) *Law in Context* (1991).

<sup>23</sup> *Te Matahauriki* (1988); Wilson, “Waikato Law School: A New Beginning” (1990) 14 NZULR 103.

<sup>24</sup> *Te Matahauriki* (1988) 2.

<sup>25</sup> Idem.

to contribute to the development of a New Zealand jurisprudence that supports the principles of justice, democracy, equality and a sustainable environment, and that respects and reflects the rights and responsibilities of all peoples and cultures.<sup>26</sup>

The guiding principles expressing the mission (or utopian vision)<sup>27</sup> which underpinned the School are summarised as:

the creation of an environment of participation, challenge, debate and justice, in which a legal education program would be developed on the basis of a commitment to professionalism, biculturalism, and the analysis of the law and the legal system within the society.<sup>28</sup>

The strategies envisaged to achieve this goal were:

- the creation of an environment that enables the staff and students to think freely and boldly and is free from the discriminatory attitudes and practices that deny individuals equality of opportunity and outcomes because of their sex, race, age, disability, religious or ethical belief or sexual orientation;
- the pursuit of excellence in teaching and research;
- imparting to the students the skills and knowledge to pursue careers that will give them self fulfilment and enable them to contribute to the wellbeing of their community.<sup>29</sup>

The LLB programme designed to realize the School's mission consists of a four year law degree taught in context. Law I consists of four non-law subjects and three law subjects designed as a skill-oriented and contextual programme. The law courses are Legal Systems (structures, processes and institutions), Legal Method (research skills and analytical technique, computer literacy and ethical considerations) and Law and Societies (social context of law). All courses aim to realise a commitment to biculturalism and the analysis of law and the legal system within the context of society.

Law II contains a compulsory Jurisprudence course which has abandoned the "schools of thought"-based approach epitomised by the findings of the Barnett survey. At Waikato, Jurisprudence builds on the context provided in Law and Societies in year 1. The syllabus is explicitly designed to

---

<sup>26</sup> Law School Handbook (1990) 5.

<sup>27</sup> Foster, G *Design of University Courses and Subjects: A Strategic Approach*: HRDSA Green Guide No 15 (1993) 3.

<sup>28</sup> Law School Handbook (1990) 5.

<sup>29</sup> *Idem*.

expose students to the philosophical and ideological underpinnings of core concepts found in the law. The focus is on concepts such as: sovereignty, justice, rights, property, liability, and legal personality. Critiques from within liberal legal ideology itself as well as feminist, Marxist and Maori perspectives are employed. The other Law II courses are Public Law A (New Zealand constitutional law and the organs of government) and Public Law B (administrative law relating to citizen/state relationships), Contracts, and two non-law courses. The privileging of jurisprudence reflects the commitment to teaching “law in context”. The privileging of public law (two courses) in this LLB reflects the School’s social democratic pedigree by overtly identifying the state, that is, the public sphere, rather than the market, that is, the private sphere, as a key organising arena.

Law III aims to teach Criminal law, Torts, Corporate Entities, Land law, Equity and Succession, all in context and with an awareness of Maori concepts and practices. Critical literacy is facilitated through a compulsory course on the theory and methods of Disputes Resolution. The Disputes Resolution course enables students to role play powerful and less powerful, to comprehend ethnic, class and gender as key differentials in legal transactions, and to understand the scope and limitations of the hegemonic adversary model.

Law IV contains no compulsory subjects but offers a range of electives. These include legal practice oriented subjects like Evidence, Civil Procedure, Commercial Transactions, Family Law, Corporate Securities and Finance Law, Employment Law, and Environmental Law. Other electives cover the Treaty of Waitangi, Maori Land Law, Social Security Law; Fair Trading and Consumer Law, and Public International Law. The students are given choice so that they can define their needs and interests.

At the graduate (LLM) level concentrations of courses are evolving focussed on commercial law, the law relating to Maori and other indigenous First Nation peoples, and women and the law (especially the law relating to violence against women). These concentrations reflect the strengths of staff and the School’s perception of how best to articulate its founding mission, overall goals and guiding principles.

Each year since 1991 when the LLB programme began the School has admitted 150-190 students from a very competitive field of choice to which no quotas have been applied. In race and ethnicity terms, 23% self identify as Maori and there is also a significant percentage of Pacific Island, Indigenous and Indo Fijians, New Zealanders of Chinese ancestry, Malaysians and other minorities. Fifty-eight per cent of the students are female, and at least forty per cent are “mature” students. The majority of

students self identify as New Zealanders of European extraction (Pakeha). Whether they are graduates or not they must take the Law I programme. Only 10% of the students have no previous tertiary experience. The student group is thus very heterogeneous in terms of race, gender, class, age, educational and experiential background, and motives for studying law. As can be imagined, it is no simple task to assist such a group to develop reflexivity about law and lawyering and at the same time to facilitate them in learning the difficult conceptual vocabulary of the law and the social sciences which are needed to study law in context.

#### IV. TAKING CONTEXT SERIOUSLY IN THE LAW AND SOCIETIES COURSE

##### *1. Planning the course*

The Law and Societies syllabus provides a concrete case study for illustrating how I gave effect to an approach to teaching law in context. My commitment to facilitating reflexivity through teaching law in context is a commitment to promoting critical literacy on the part of students. The calendar prescription states that:

The purpose of this course is to develop understandings of the interface between society and law and the function and nature of law within New Zealand/Aotearoa; with special reference to the Maori socio-legal order and the common law and other selected legal systems and societies.

Planning what ought to go into the course I eschewed an “anything goes approach” and accordingly made some firm decisions about context, content and critiques based on answers to the following three questions.

##### 1. Where are the antipodes?

Asserting our place in the context of New Zealand /Aotearoa defines course content. This made it essential to liberate the curriculum from simply imitating metropolitan (their centre) approaches to curriculum and to highlight the specific and historically contingent nature of relevant events, processes and hegemonic revolutions in this corner of the 'hinterland' (our centre).

Too often texts, readings and ideas from the metropolitan academy have in the past been delivered to students without a proper context of their own.



Dependency on these paradigms impedes the transition to an authentic post colonial/postcolonial scholarship.<sup>30</sup>

## 2. Histories and Herstories: Who are the antagonists in a plural society?

Critical literacy for understanding law in the context of contemporary New Zealand/Aotearoa calls for an understanding of power. This is best reflected by studying the nature, origins and impacts of antagonisms involving coloniser and colonised, Maori and Pakeha, male and female, capital and labour, humankind and the ecology.

Three chronologies of events in the evolution of New Zealand law and public policy since the signing of the Treaty in 1840 were compiled and included in the course materials book. These chronologies have been compiled with a focus on women's experience, the Maori experience, and the working class experience in New Zealand/Aotearoa.

## 3. The False Dichotomy: Social or Economic?

Recognition of the inter-relatedness of social and economic policy and the legal instruments which implements such policies<sup>31</sup> enables us to avoid the false dichotomy between social and economic policy. Through a political economy analysis a critique of the construction of the public and the private spheres is provided in order to challenge essentialist understandings of social relations and instrumentalist understandings of economic relations.

## 2. Structure and Content of the course

The syllabus of the course is organized around the following modules:

- Part I Society , Race, Class and Gender: Law and Public Policy.
- Part II State/State-Free Societies: Belief Systems, Institutions and Processes.
- Part III The Ecology: Environmental Law and Ordering.
- Part IV Kinship Systems and Family Forms: Law and State.
- Part V Market based and pre-Market Economies: Law, Capital, Land and Labour.<sup>32</sup>

<sup>30</sup> Ashcroft, B et al (eds) *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures* (1989); and Giroux, H "Paolo Freire and the Politics of Postcolonialism" in McLaren and Leonard, supra note 14.

<sup>31</sup> Armstrong "Handling the Hydra: Feminist Analyses of the State" in Duplessis, R et al (eds) *Feminist Voices* (1992) 224; and Hyman, P *Women and Economics; A New Zealand Feminist Perspective* (1995).

<sup>32</sup> See below Appendix A.

Each part of the course commences with a module focussed on relevant Maori concepts, institutions and processes so as to counterbalance the predominantly Pakeha (liberal/social democratic, patriarchal, settler capitalist) paradigm which inevitably infuses the other sources. For these sections wherever possible Maori sources were used. These modules of the course ought ideally to be approached from a Maori perspective and using a Maori process.

Freire argues that although dehumanisation as a concomitant of colonisation is a concrete historical fact, it is not a given destiny, but the result of an unjust social order engendered by the oppressor. The oppressed are dehumanised ... by the loss of their land, their fisheries and the loss of their language through cultural invasion. But the great humanistic task of the oppressed is to recover their stolen humanity: to liberate themselves and to liberate their oppressors as well.<sup>33</sup>

Each year a significant number of the essays show a strong empathy on the part of Pakeha students for what they understand to be Maori culture and experience. (There were also some essays by male students revealing a strong critique of the hegemonic masculinity and identification with feminist critiques of it). Ideally a partnership approach allowing teaching and learning to be facilitated in the idiom of the subject by the subjects themselves needs to be facilitated.<sup>34</sup> This would mean men leading learning self consciously about masculinity, women leading learning self consciously about women, and Maori leading learning self consciously about tikanga Maori. Such a partnership approach avoids the risk of cultural trespass and the appearance of misappropriation of knowledge, expertise and identity. Walker highlights the importance of knowing about the "other" for critical literacy:

Freire's contention that 'knowledge of the alienating culture leads to transforming action resulting in a culture which is being freed from 'alienation' is borne out of the Maori experience.<sup>35</sup>

Critical literacy as an approach can expose students to the dominant epistemological (masculinist, metropolitan) frameworks in a fashion which enables them to grasp this alien knowledge in order to participate in the market place while retaining their identity and culture.<sup>36</sup>

As far as possible readings from within the relevant social science discipline on the topic are chosen, as well as those which provide socio-

---

<sup>33</sup> Walker, R *Ka Whawahai Tonu Matou / Struggle Without End* (1990).

<sup>34</sup> Freire, *supra* note 12 at xi.

<sup>35</sup> Walker, *supra* note 55 at 192.

<sup>36</sup> Walker, *supra* note 54 at 194.

legal commentaries.<sup>37</sup> This ensures that the conceptual vocabulary offered to students enables them to analyse the law through the prism of the social context in its own terms.

### *3. Essays for critical literacy in the study of law in context*

In the first semester of our case study (1993) assessment was conducted through the medium of an essay which could be up to 5000 words in length. The essay topics, including the option to design one's own topic, were handed out at the start of the semester. The aim was to encourage students to view each week of the subject as an opportunity to do research for their chosen topic. Synthesis of ideas from different parts of the course was signalled as a highly esteemed approach. Three teaching/learning sessions were devoted to explaining topics, refining approaches and sourcing preparation for research. These "workshopping" sessions revolved around grouping students by topic and encouraging peer learning and sharing; the teacher participated in discussion with each group in order to answer questions. Students also had the option of meeting the lecturer by appointment and during a weekly 2-hour open door period. Interestingly, students did not perceive that they had made much use of these resources.

The essay topics were constructed to encourage answers based on the students' own thoughts, some wider research and the use of the course materials as a resource. They were hard questions which required effort to interpret and tackle. Part of the workshop time was spent talking about techniques for researching, writing and structuring essays. Many students expressed anxiety about producing a long essay. Course appraisal results reveal students perceived themselves to have made only a little to some use of these workshops. Anecdotal feedback from students after they had completed the essay was positive and the value of the "rite of passage" appreciated. The essays, by and large, were well done and the ambitious syllabus and sophisticated questions were managed well by the majority of students.

The assessment criteria for the essays required the students to demonstrate an intelligent use of the materials book and to give evidence of some further reading and independent library research; to demonstrate an ability appropriately to use the conceptual vocabulary and terminology offered by the course; and to synthesise material from throughout the course. The questions circulated to students covered most if not all of the topics of the

---

<sup>37</sup> See below Appendix A.

course, including one which allowed the students to frame their own question arising from the course.<sup>38</sup>

Not surprisingly, given the hegemony of the “banking” tradition in secondary and tertiary education, very few students chose to frame their own question. Typically Maori students explored topics which invited a Maori perspective and the topic of gender was treated almost exclusively as a “women’s question”. More work is needed to address masculinity without reinforcing the implicit but nonetheless hegemonic masculinity of our epistemology. Inevitably, the essays and classroom-based discussions of gender relations reflected some anger (on both sides). Racial conflict was not overt in classroom discussions. Some gender- and race-focussed essays demonised, romanticised and essentialized. Most students had evidently struggled and managed to analyse the socially constructed nature of these categories.

Class was a category which aroused passionate interest in a few, mostly very capable Pakeha, students. At this conjuncture the class dimension of New Zealand society was not a prism through which the students, by and large, viewed power, social relations and the level of subsistence:

Global capitalism's theatre of terror continues to shape the social imagination of both the First and the Third Worlds with its insipid colonizing logic and its delusion producing politics of desire. Its shift from organised to disorganized capitalism (post fordism in the West) has been accompanied by a shallow optimism, a grandiose banality and vulgarity, an increasing need for the production of autonomous pleasure and a growing indifference to the issue of class and cultural oppression.<sup>39</sup>

Some of these judgments resonate with us. However, the increasing impact of PostFordist policies<sup>40</sup> was well understood, as were the inequalities that were being structured into social relations, though such understanding was not reflected in indifference so much as in a sense of powerlessness.

An assessment of the students' performance in essays and the end of year take home exam was that they had exceeded my expectations and have perhaps more reason to be confident in their grasp of the ideas, skills and

---

<sup>38</sup> See below Appendix B.

<sup>39</sup> McLaren and Tadeu da Silva, “Decentering Pedagogy: Critical Literacy, Resistance and the Politics of Memory” in McLaren, P and Leonard, P (eds) *Paolo Freire* (1993).

<sup>40</sup> *Supra* note 9.

understanding of the feelings which surround the subject matter of the course than their own assessment reveals they have.<sup>41</sup>

## V. TEACHING AND LEARNING FOR CRITICAL LITERACY

I put forward some prescriptive propositions for organising and facilitating teaching and learning “law in context”. These propositions borrow from the “paradigm for radical practice”<sup>42</sup> I learned from work in the sphere of professional education for the human services.<sup>43</sup> Some measure of critical literacy and a command of interdisciplinary knowledge have been mandatory in the human services curriculum for some decades. My propositions are that the course ought to provide a learning context for the following:

*1. To enable students to identify and analyse contradictions between the rhetoric of liberal democracy such as the “rule of law” and claims of social equality and the differing realities of their potential clients*

Some clients are likely to be “more equal than other citizens in terms of their command over power”. Some are greatly disempowered and unfairly served by the legal system. Furthermore, the power-knowledge couplet constituted by professional education not only renders students as subjects of power, it also constitutes them, or some of them, as powerful subjects:<sup>44</sup> Freire’s dual (bicultural) beings who must manage the conflicting loyalties demanded by being a professional in the dominant culture and by their own indigenous culture.<sup>45</sup>

*2. To enable students to identify and analyse the dialectical relationship of people with, and within, systems*

Critical literacy enables us to comprehend the nature of the material forces which structure the experiences which combine with ideology to constitute identity, and through this comprehension to move beyond naive

---

<sup>41</sup> See Havemann, “Race, Ethnicity, Gender and Class in the law school curriculum: Designing a Law and Societies Course for New Zealand /Aotearoa” in Collins, J (ed) *Confronting Racism* (1995).

<sup>42</sup> Leonard, “Towards a Paradigm for Radical Practice” in Bailey, R and Brake, M (eds) *Radical Social Work* (1975).

<sup>43</sup> Havemann, “Canadian Realist Criminology in the 1990s; Some Reflections on the Quest for Social Justice” in Lowman, J and MacLean, B (eds) *Realist Criminology: Crime Control and Policing in the 1990s* (1992).

<sup>44</sup> Ball, “Introducing Monsieur Foucault” in Ball, S (ed) *Foucault and Education: Disciplines and Knowledge* (1990) 5.

<sup>45</sup> Walker, *supra* note 55 at 180.

voluntarism or vulgar determinism to recognise that people are created by, and can create, their social worlds. Hence race, gender and class are only ideological categories. In the constructivist paradigm they are understood as socially constructed. This proposition has particular salience to empowering students faced with life, work and worklessness in a PostFordist environment which may be hostile to their interests and those of many of their clients. Rights as a key element of counter hegemonic struggle may be comprehended not as mystification but as a political resource for change.<sup>46</sup> Second generation rights are emerging as the site of struggle for local and global citizenship.

The constructivist paradigm challenges essentialism. Essentialism based on biological and religious determinism legitimated the male supremacy and European supremacy of the nineteenth century. This form of essentialism justified the unequal legal and political status of the “other” race(s), women and the working class(es) within Victorian liberal/conservative discourse. The law is still redolent with echoes of its Victorian pedigree and, of course, is still serving the same interests. Today even the supposed corrective to the discriminatory past, namely “formal equality”, assimilates difference rather than differentiating between unequals. Hence law and the state continue to structure unequal social relations and much individual “rights-talk” constitutes an interpretive monopoly which may silence rather than give voice to the “marginal” for whom it is not their “first” language.

A critique of essentialism must not be conflated with an intolerance of self determination, separateness or the politics of difference. Instead, constructivism permits an ideology predicated on the possibility of change. It offers a means to understand difference and yet discover affinities. Through this discovery we may avoid demonising or romanticising supposed perpetrators and victims, superordinates and subordinates. This enables us to avoid perpetuating negative stereotypes based on ascriptive criteria. Such perpetuation is the essence of what we simplistically label racism, sexism and classism.

The Law and Societies syllabus is constructed on a framework based on four inter-related conceptual systems. These are adapted from the conceptual framework for critical literacy developed by Leonard.<sup>47</sup> Three conceptual systems are socially constructed; the fourth is the ecology. In the context of Pakeha and Maori New Zealand, two historically distinct and contrasting understandings of these systems need accommodating in

---

<sup>46</sup> Hunt, “Rights and Social Movements: Counter Hegemonic Strategies” (1990) 17 *Journal of Law and Society* 309; and Scheingold, *S The Politics of Rights* (1973).

<sup>47</sup> Leonard, *P Personality and Ideology* (1984).

the syllabus: the nuclear family system and the extended kinship system of iwi, hapu and whanau; the economy as a capitalist and profit maximising market and the reciprocal, kinbased mode of production for use and exchange; the state as a liberal and secular assembly of specialist institutions and the holistic, kin centred, spiritual-political social order of state-free Maori society. The inclusion of the ecology reflects the impact of holistic Maori perspectives on our approach. Maori society and its spiritual-political social order is incomprehensible unless the holistic (rather than anthropocentric) world view of Maori is recognised. Fortuitously, the new-found ecological sensitivity of some forces within the dominant society makes dialogue more possible than it was before an “environmental ethic” began to emerge in liberal/social democratic discourse.

Competing and complementary systems, like the state and state free social order, are conceptual tools and are best thought of as “platforms of process”,<sup>48</sup> not concrete, reified entities or living beings with minds of their own. Political institutions, kin systems and economies are the sites on which class, gender and ethnic antagonisms are mediated, managed, reproduced, compromised and settled. The dialectical relationship between humankind and the ecology ought to be tackled to overcome the limitations of an excessively anthropocentric and materialist analysis. The syllabus has included the ecology as the fourth dimension of our conceptual framework. Ecological theorizing and green political thought are now fundamental to critical literacy.<sup>49</sup> Understanding the interaction between humankind, society, law and the ecology is a surprisingly neglected feature of jurisprudence and law in societies curricula and texts. Critical literacy about the way humankind conceptualises and uses the natural environment will be crucial to facing the cultural, political-legal and economic challenge posed by ecological crises the planet is now facing.

*3. To enable students to identify and analyse what it means that their personal and professional world contains systems which are both oppressive and emancipating for them and their clients*

The law and state practices are particularly powerful media for defining what is deviant and esteemed, for discrimination and emancipation, for reinforcing gender, race, class and age hierarchies and for promoting equity, for determining levels of material subsistence and for propagating

---

<sup>48</sup> Cerny, C *The Changing Architecture of Politics: Structure, Agency and the Future of the State* (1990).

<sup>49</sup> Dobson, A *Green Political Thought* (1990).

the world view of the dominant ethnic group, class or gender in both hegemonic and counter-hegemonic forms.

The oppressive role of the state, law and legal system as platforms of process producing and reproducing structured race, class and gender inequalities must be juxtaposed with its other dimension. This is its supportive or emancipatory value. The counter hegemonic potential of the law and the state as a resource for making antagonisms visible, defending and advancing interests - that is, the politics of rights<sup>50</sup> - and procuring settlements, should not be neglected.

Students of law need to comprehend the limits of instrumentalist or reductionist analyses in which the law and the capitalist/patriarchal/settler state are understood as oppressive tools of domination. A dialectical perspective, without illusions, which highlights the contradictory and uneven character of the state and legal agencies,<sup>51</sup> transcends the conceptual shortcut of instrumentalism and may be more empowering in practice and less alienating reflexively.

*4. To facilitate safe opportunities for students to explore their own individual consciousness, as this is the path to critical literacy*

The media for this facilitation process are researching and writing essays; classroom interaction; self organised, co-operative study groups; peer support; and meetings with the lecturer. As a teacher, one needs to recognise the impact of past and present events upon individuals causing anger, pain, suffering, hope and despair, disempowerment and guilt. Such feelings are inevitable when the subject matter of Law and Societies deliberately includes history which students may encounter as a history of themselves as the coloniser, oppressor, and pauperiser, or of themselves as the member of a colonised race, oppressed gender or pauperised class.

Critical literacy can not be achieved through guilt<sup>52</sup> or hatred or indoctrination. A dialogical process informed by history needs to be

---

<sup>50</sup> Scheingold supra note 65, Hunt supra note 65, Thompson, "The Rule of Law" in Beime, P and Quinney, R (eds) *Marxism and Law* (1981).

<sup>51</sup> Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research" in Evans, P et al (eds) *Bringing the State Back In* (1985); Franzway, S Court, S and Connell, R *Staking a Claim: Feminism, Bureacracy and the State* (1989); and Walby, S *Theorising Patriarchy* (1990).

<sup>52</sup> Kelsey, J "The Treaty of Waitangi and Pakeha Responsibility - Directions for the Future", unpublished comments for Waitangi Forum 4 February 1987, 5; and Ritchie, J "Honouring the Treaty of Waitangi: Some Pedagogical Considerations" MEd (Counselling) unpublished Dissertation (1990).



facilitated to achieve self awareness. A process of searching for affinities and respecting differences is needed. In my view, the Maori social order must be presented in its own right and not exclusively through the prism of the impact of colonisation. The hazards of masculinity as well as the hazards women endure in the contemporary form of gendered culture both need to be addressed.<sup>53</sup>

Public opinion poll data reflect the ever present spectre of the “backlash” against any gains made by the less powerful such as women, Maori and the unemployed.<sup>54</sup> These attitudes abound among the student population. To achieve critical literacy a “law in context” syllabus must avoid taking the easy route to “consciousness raising” by constructing a “victimology” of the oppressed to guilt the oppressor. This will be ineffective and may be counter-productive. Equally the materials and teaching/learning process must avoid overt and covert “victim blaming” which allows the oppression to be explained away through supposedly biologically determined or voluntarily contracted defects of the victim.<sup>55</sup> A “culture of denial” through, for example, “neutralisation” of recognition of the violations by colonisers, batterers and the like, through denial of injury, denial of victim, denial of responsibility, condemnation of condemners, or appeal to higher values, must not be perpetuated. Nor must the curriculum deny the past through the construction of revisionist, stylised histories.<sup>56</sup>

## VI. CONCLUSION

Law and Societies is not a compulsory subject at other New Zealand Law Schools. It is traditionally seen as an elective, as an optional extra. Neither the profession nor the legal academy have strong views about its content. It has the potential to adopt the “anything goes” approach and fall prey to obscurantism and many other malaises. Indifference about course content gives the course designer some space to take risks. Taking risks involves rewards and “punishments”. I have had both. Ultimately I have produced an explicit and defensible set of aims and objectives, a concrete syllabus to effect these, and a pedagogic strategy for teaching law in context which is explicit about the need to develop critical literacy.

A self-styled feminist colleague attacked the approach of the course for engendering a lack of that respect for “the law” which she saw as a prerequisite for any critique of the legal order, and specifically for

---

<sup>53</sup> James, B and Saville Smith, K *Gender, Culture and Power* (1989).

<sup>54</sup> Vowles and Aimer, supra note 51.

<sup>55</sup> Ryan, W *Blaming the Victim* (1972).

<sup>56</sup> Cohen, S “Human Rights and Crimes of the State: The Culture of Denial” (1993) 26 (2) *Australian and New Zealand Journal of Criminology* 97.

“deconstructing” society. My response to the last charge was that the course in fact assisted students to *construct* categories for analysing the dominant “commonsense”, for example, ideology, state, race, class, gender, and power. Others imply that the approach ought to overcome “student resistance” to liberalising and correct ideas more robustly or through engendering guilt.

The conservative attack I experienced mimics attacks on the CLS movement exemplified by Carrington<sup>57</sup> in the USA. It is unnecessary to enter into the detail of the debate, though it is well worth exploring.<sup>58</sup> This debate corresponds to any debate between protagonists of “banking” education (craft school legal training) and protagonists of pedagogy for critical literacy. The radical critique reflects dimensions of pedagogic authoritarianism equally compatible with “banking” education and inimical to enhancing critical literacy.

I try, however imperfectly, through a dialogical discourse, to eschew a dominant liberal pluralist narrative which subordinates difference and which privileges only those affinities that are identified by the hegemonic modernist, metropolitan and masculinist discourse. This has not always been easy or welcomed, since the law lends itself to a “banking” approach to craft school teaching, not easily permeable by emancipatory critical literacy approaches and the new feminist, postmodern, de-colonizing or post colonial agendas which now form so much a part of the intellectual context in which “law in context” is taught. What I as a teacher continually strive to do is to continue to listen more carefully and to monitor more rigorously the learning process we set in train. I recognise that the processes of attitude change and the offering of opportunities for developing greater reflexivity continue to require strenuous examination. My experiences teaching critical literacy will continue to benefit from discussion with, and analysis by, others engaged in similar educational praxis.<sup>59</sup> Authentic partnerships bringing the subjects of our study into the classroom must be forged. The essence of teaching “law in context” for critical literacy is “to ground all knowledge of social life in human history,

---

<sup>57</sup> Carrington, “Of Law and the River” (1984) 35 J Legal Educ 222.

<sup>58</sup> For the USA see Finman, “Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington’s River” (1985) 35 J Legal Educ 180; Martin, “Of Law and the River, and of Nihilism and Academic Freedom” (1985) 35 J Legal Educ 1; Gordon and Nelson, “An Exchange on Critical Legal Studies between Robert W Gordon and William Nelson” (1988) 6 (1) Law and History Review 139; for shades of it in New Zealand see Havemann, “The ‘Pakeha Constitutional Revolution’”, *supra* note 6.

<sup>59</sup> Ritchie, *supra* note 71.

culture, and relations of power”.<sup>60</sup> I hope that others cannot accuse me of not “taking context seriously”, even if it is not their understanding of “context”.

#### APPENDIX A

Below is a selection of the lecture titles and readings which made up some modules of the course in 1993.

##### *Society, Race, Class and Gender: Law and Public Policy*

1. Conceptual Overview and Some Key Terms and Concepts - eg law, state, economy, family, region, class, gender, race, ideology, power, colonialism, social control, policy, property, land, culture, and ecology.

Glossaries, Directive Word Table;

Leonard “Key Concepts in Materialist Analysis”, in *Personality and Ideology* (1984);

Novitz, D and Willmot, B (eds) *New Zealand in Crisis* (1992).

2. Historical Overview: New Zealand Society, Public Policy and the Law since 1840. White Settler society 1840s-1890s, Family farm society 1890s-1930s, Industrial society (Fordism) 1930s-1970s, Market Society (PostFordism) 1980s-1990s.

Shannon, “The Development of Public Policy”, in *Social Policy* (Critical issues in New Zealand Society) (1992);

Boston, “Redesigning New Zealand's Welfare State”, in Dalziel, R and Boston J (eds) *A Decent Society* (1992).

3. Race and the Law: Public Policy And The Social Construction of Identity.

Race and Law Chronology - follow up the Hansard debates about any Bill listed as an Act in the chronology;

Belich, “The Victorian Interpretation of Racial Conflict”, in *The New Zealand Wars* (1986);

Spoonley, “Racism and Ethnicity” in Spoonley, P (et al) (eds) *New Zealand Society* (1990);

McConnochie, “The Meaning of Race” in McConnochie, K et al (eds) *Race and Racism in Australia* (1988);

Ritchie, “Hobson's Choice”, in *Becoming Bicultural* (1992).

4. Gender and the Law: Public Policy and the Social Construction of Identity.

Women and Law Chronology - follow up the Hansard debates about any Bill listed as an Act in the chronology; track material in the media on 1893-1993 Centenary of Women's Vote;

Novitz, “Gender” in Spoonley, P (et al) (eds) (1990);

James and Saville-Smith, “The Contemporary practice of Masculinity and Femininity” and “The Costs of a Gendered Culture” in *Gender, Culture and Power* (1989);

---

<sup>60</sup> McLaren and Tadeu da Silva, *supra* note 58 at 53.

O'Donovan, "Gender as a Socially and Legally Constructed Category" in *Sexual Divisions in Law* (1985).

*The State and State-Free Societies: Belief Systems, Institutions and Processes*

1. Holistic Belief Systems of Maori and other Indigenous Peoples. Inter-relationships: social <-> legal order <-> spirituality <-> kinship <-> ecology.

Ritchie, "Values", in *Becoming Bicultural* (1992);

Marsden, "God, Man and Universe: A Maori View", in King, M (ed) *Te Ao Hurihuri: The World Moves On* (1992) reprint.

2. Liberalism, the "Rule of Law" and Ideology. Democratic States - governing and problem solving: social democracy/democratic socialism, equality, individualism, citizenship, economic rationalism/economic growth, the new (green) politics.

Goodwin, "Liberalism", *Using Political Ideas* (1987);

Reasons and Perdue, "The paradigms of social problems" in Reasons, C and Perdue, R *The Ideology of Problems* (1981) 4-14.

3. Maori Decision-Making: Hierarchy, Consensus and Participatory Processes for Social Order - the Marae, Hui.

Winiata, "Leadership in pre-European Maori Society", in *The Changing Role of the Leader in Maori Society* (1967);

Mulgan, "Maori authority and decision making" in *Maori, Pakeha and Democracy* (1989);

Walker, "Marae: A Place to Stand" in King, M (ed) supra in King 1992;

Metage, "The Marae", in *The Maoris of New Zealand* (1967) 227-238.

*The Ecology: Environmental Law and Ordering*

Ecological/Environmental Values and Law-making: Green/Holistic Maori versus Atomised World Views.

Milton, "Interpreting Environmental Policy: A Social Scientific Approach" (1991) 18 *Journal of Law and Society*;

Dobson, "Thinking about Ecologism", in *Green Political Thought* (1990);

Ritchie, "Bicultural responsibilities: Stewardship in a New Environment", in *Becoming Bicultural* (1992);

RMLR Working paper 29 *The Natural World and Natural Resources; Maori Values and Perspective* (or Perspectives?) (1988).

*Kinship Systems and Family Forms: Law and State*

1. Maori and Indigenous Concepts of Kinship, Identity, and Social Organization.

Metge "Kinship", "Descent and Descent Systems", "Marriage and Family", in *The Maoris of New Zealand* (1967).

2. Monolithic versus Multi-dimensional Perspective on Family forms.

Eichler, "Beyond the Monolithic Bias in Family Literature" in Eichler, M *Families in Canada Today: Recent Changes and their Policy Consequences* (1988);

Whitehead, "Women, Men, Kinship and Property" in Hirshon, R (ed) *Women and Property and Women as Property* (1984).

3. Non-capitalist Modes of Production, Land, and the Tangata Whenua: Maori Social and Economic Order.

Metge, "The Maori before 1800" and "Basic Concepts of Maori Culture", in *The Maoris of New Zealand* (1967);

Kawharu, "Customary Tenure and Colonisation" in *Maori Land Tenure* (1977).

4. Land, Colonisation and Law: Owning it or Belonging to it; Whose Perspective?

Williams, B *The Passage of Maori Land into Pakeha Ownership - A Maori View* (1987);

McHugh, "The legal status of Maori Property Rights: Common Law Aboriginal Title", in *The Maori Magna Carta* (1991).

5. The State, the Market and the Law: Regulation and De-Regulation: Who Benefits?

Rudd, "Politics and Markets; The Role of the State in the New Zealand Economy", in Holland, M and Boston J, *The Fourth Labour Government* (1990);

Mascarenhas, "State Owned Enterprises", in Boston, J et al (eds) *Reshaping the State* (1991).

## APPENDIX B

Below are the essay topics circulated amongst students enrolled in the course in 1993.

1. Frame your own question arising from the course, using one or more of the following directive words: analyse, criticise, trace and discuss. Note, your question must be approved by the instructor by the last week of lectures this semester.

2. Gender, class and racial identity are shaped in part by law and policy. Examine and trace the impact of law (or a piece of legislation or judicial decision) on the identity and power of people identified in terms of race or class or gender.

3. "Prendergast C J's judgment in *Wi Parata v Bishop of Wellington* (1877) reflects that Victorian scientific racism which Belich argues (*The New Zealand Wars*, 1986) led to suppression of knowledge about Maori successes and Pakeha atrocities in the New Zealand Wars of the mid 1800s. Yet Maori were made British subjects in 1840 and the Native Rights Act was passed in 1865". Explain and relate these observations.

4. "No student of the law or legal historian would ever subscribe to the myth that there was no class conflict in the New Zealand state". Discuss and illustrate.

5. The law both reflects and reproduces our “gendered culture”. Outline some of the legal and cultural processes which serve to perpetuate the negative features of this culture and suggest some ways to change it.
6. “The holistic Maori belief system based on wairuatanga, whanaungatanga, rangatiratanga, manaakitanga and kotahitanga clashes with settler liberal ideology based on the rule of law, private property, secular materialism, individualism, majoritarianism, egalitarianism and democratism. Yet there are also points of similarity which are too easily ignored in the effort to contrast these belief systems in contemporary New Zealand”. Examine and compare the two world views in a discussion of these statements.
7. According to Colin James (*The New Territory*, 1992), the prosperity consensus is a spent force in New Zealand. Over the last decade the citizenship-rights-based model of the welfare state has undergone a dramatic shift towards a more targeted, residualist model. Underpinning this shift in the liberal conception of the state are competing views of the social order and human nature. Order, pluralist and conflict paradigms are frequently used by socio-legal scholars to classify these. Describe the paradigms and criticise the assertions.
8. The institutions of leadership and law-making processes are markedly different in Maori and Pakeha societies. Compare and contrast the underlying assumptions of each system about social order and leadership.
9. The Westminster model’s first past the post (plurality) system for electing legislators from which the executive branch (Cabinet) of government is selected was resoundingly rejected by the New Zealand electorate in the 1993 referendum. Argue the case for or against changing to MMP and explain the criticisms of the current system.
10. Our view of the role law should play in protection of the earth, sea, air, water, fauna and flora is dependent on whether we see nature as fragile, capricious or robust. Environmentalist, ecological and indigenous analyses converge and diverge on how they see nature. Discuss and explain.

## DRAFTING: PLAIN ENGLISH VERSUS LEGALESE

BY STEPHEN HUNT\*

Drafting is a central feature of legal work. Lawyers draft statutes, contracts, jury instructions, statements of facts, memos, pleadings, interrogatories, letters, wills, trusts and research papers.<sup>1</sup> This article focuses on legal drafting but much of the discussion is also relevant to writing in other fields.

This article is based on my initial assumption that because lawyers use legalese and not plain English they do not write as well as they could. I have tested this assumption by comparing published discussions of plain English and legalese styles with my own field research. The field research involved having 86 anonymous individuals (with and without specialist legal training) read a legalese contract and its plain English translation and then complete a written questionnaire.<sup>2</sup> The contracts are contained in Appendix One, and the questionnaire and a summary of quantitative responses are found in Appendix Two.

The methodology used in this article is drawn from the social sciences and reflects the perspective I bring to this article. Initially a wide-ranging literature review was undertaken to establish the boundaries of this article. Once the boundaries were established the depth of the review was increased. The in-depth review was used to identify the issues that form the basis of my field research.

This article has two sections. Section One is historical and places legal drafting in its broader context. It explains why legalese developed in the way that it did and proposes that plain English is a reaction to perceived inadequacies in legalese. Section Two investigates the views of published theorists and the 86 respondents. The investigation centres on whether legalese or plain English is the more effective drafting style. Comparison is derived from the in-depth literature review and focuses on the issues of recognition, past performance, transition, precision, terms of art, efficiency, business sense and sexist language.

---

\* BSoc Sc, LLB (1st class honours) (Waikato), barrister and solicitor, High Court of New Zealand. Stephen practises in the firm East Brewster, Rotorua. The first draft of this article was written in late 1994 as part of the honours component of his LLB degree, and the draft has since been considerably reworked.

<sup>1</sup> Ray, M B and Cox, B J *Beyond the Basics: A Text for Advanced Legal Writing* (1991).

<sup>2</sup> The choice of the respondents to the questionnaire was not random and reflects the personal contacts of my former research supervisor, Tim Blake, and myself.

## I. HISTORY

### 1. *The historical development of legalese*

Legalese is a style of writing that is wordy, complex, legal and shaped by history. Legalese contracts are drafted, read and interpreted almost exclusively by lawyers. Legalese contracts endeavour to be comprehensive, precise and give complete protection to lawyers' clients.<sup>3</sup> Clients enter into legalese contracts without a complete understanding of their effect, choosing instead to trust the judgment of their lawyer. History has moulded legalese into a style that is recognisable to the general public. Outlined below are six historical features that have shaped legalese.

#### (a) Transfer from the oral to written word

During the early fifteenth century the legal profession slowly began moving away from the spoken word to the written word. The focus on writing meant that pleadings which were previously oral were being reduced to writing prior to their presentation in court. The immediate effect of this was to limit the tactic of changing the substance of a pleading depending on how the hearing was proceeding. The long-term effect was to render more attractive the tactic of basing pleadings on what had worked before.<sup>4</sup>

#### (b) The printing press

The development of the printing press in the late fifteenth century considerably increased the importance of the written word.<sup>5</sup> The printing press allowed large amounts of legal text to be reproduced with relative ease. The need to reproduce the same text was driven by the newly attractive tactic of basing pleadings on what had worked before. The printing press and its modern-day equivalent the word processor significantly increased the currency of legalese.<sup>6</sup>

#### (c) The filing fee

In the sixteenth century the filing fee was introduced.<sup>7</sup> A client was charged a filing fee when a document was filed in court. The level of the fee depended on the length of the document, the longer the document the

---

<sup>3</sup> Siegel, A and Felsenfeld, C *Writing Contracts in Plain English* (1981) III and 26.

<sup>4</sup> Asprey, M M *Plain Language for Lawyers* (1991) 30.

<sup>5</sup> *Idem.*

<sup>6</sup> *Idem.*

<sup>7</sup> *Idem.*



higher the fee.<sup>8</sup> Understandably the length of documents filed grew. The filing fee was not popular with all of the legal community. In 1506 this point was demonstrated by one English Lord Chancellor. He ordered that the middle of a particularly wordy document be cut out and that the writer be paraded around the Westminster Hall with his head through the hole to serve as a warning to others.<sup>9</sup>

#### (d) Tautologies

Legal tautologies<sup>10</sup> or word strings<sup>11</sup> developed because at several points in English legal history there was a choice between two languages. Initially there was a choice between Celtic and the language of the conquering Anglo-Saxons. Subsequently the choice was between Latin and English and later between French and English. As a direct consequence of the uncertainty about which language was dominant lawyers started using paired words to express one meaning. For example “free and clear” derived from the old English *freo* and the old French *cler*.<sup>12</sup> While these tautologies were initially used for clarity, they quickly became enshrined in the law through the doctrine of precedent.

#### (e) Forms and precedents

From the sixteenth century onwards the number of legal texts and writings has steadily grown.<sup>13</sup> Of particular interest in tracing the history of legalese was the development of books and guides containing “forms and precedents”.<sup>14</sup> The rationale for these forms and precedents was the belief that they had been carefully drafted and tested to ensure that they were precise and unambiguous.<sup>15</sup> The dominance of these forms and precedents coupled with the conservatism of the legal profession meant that original drafting occurred only in unique situations. Legalese dominated the forms books in the early 1970s.

<sup>8</sup> *Idem*.

<sup>9</sup> *Mylward v Welden* (Ch 1596) reprinted in *Monro, C Acta Cancellariae 692* (1847).

<sup>10</sup> *Wydick, R Plain English for Lawyers* (2 ed, 1985) 19.

<sup>11</sup> *Siegel and Felsenfeld, supra note 3, at 124, drawing on Mellinkoff, D The Language of Law* (1963).

<sup>12</sup> *Wydick, supra note 10, at 19.*

<sup>13</sup> *Asprey, supra note 4, at 31.*

<sup>14</sup> Examples of forms and precedents include *Goodall, S I Goodall's Law and Practice Relating to Conveyancing in New Zealand with Precedents* (1951); *Jacob, Sir J I H and Iain, S (eds) Bullen & Leake & Jacob's Precedents of Pleadings* (1990); *Britts, M M G Pleading Precedents* (1990); and a loose leaf serial *New Zealand Forms and Precedents* (1986 onwards).

<sup>15</sup> *Alder, M Clarity for Lawyers* (1990) 1.

## (f) Lack of innovation

Change may have been deliberately stifled by lawyers to protect their ability to make a living.<sup>16</sup> This view arises because legalese contracts are drafted, read and interpreted almost exclusively by lawyers. A second view is that the lack of innovation was not a deliberate ploy by lawyers but arose out of a desire to protect their clients.<sup>17</sup> A third view, which I favour, is that the lack of innovation reflects the conservatism of the legal profession.<sup>18</sup>

Collectively these six features shaped the language of legal drafting to create legalese. Legalese is wordy and complex. The length and complexity of documents were justified by the view that legalese was comprehensive, precise and gave lawyers' clients complete protection.<sup>19</sup>

## 2. Criticism of legalese and development of plain English

In the 1970s criticism of legalese became common. Observations made in a summary of a survey viewed legalese as:

flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganised, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy handed, jargon and cliché ridden, ponderous, weaseling, overblown, pseudo intellectual, hyperbolic, misleading, uncivil, laboured, bloodless, vacuous, choked, archaic, orotund and fuzzy.<sup>20</sup>

These criticisms are reinforced by the view that legalese takes longer to draft, read and understand and is ambiguous.<sup>21</sup> Interestingly the opinion that legalese is ambiguous contrasts with its primary aim of precision.

The plain English style of drafting developed as a reaction to criticisms of legalese. Three alternative years have been proposed as marking the beginning of the use of plain English in the legal field: in 1974 when the Nationwide Mutual Insurance Company simplified two of its insurance

---

<sup>16</sup> Thomson, K A "The Marketing of Law in English History: The Professional Self Interest of Lawyers at Work" (M Jur thesis, University of Auckland).

<sup>17</sup> Alder, *supra* note 15, at 15.

<sup>18</sup> Thompson, *supra* note 16.

<sup>19</sup> Siegel and Felsenfeld, *supra* note 11, at III and 26.

<sup>20</sup> Martineau, R J *Drafting Legislation and Rules in Plain English* (1991) 1, drawing on Goldstein, T and Lieberman, J *The Lawyer's Guide to Writing Well* (1989) 3.

<sup>21</sup> Alder, *supra* note 15, at 4.

policies;<sup>22</sup> in 1975 when Citibank revised its consumer loan note;<sup>23</sup> and in 1978 when United States President Carter issued his executive order directing that federal regulations be “as simple and as clear as possible”.<sup>24</sup> The particular year is not of vital importance, other than to show that the plain English style is about 20 years old.

Since the mid 1970s there has been a rapid increase of plain English statutes, contracts and documents. These documents are not exclusively legal and to assume that plain English is only a legal phenomenon would be simplistic. It has been stated that “plain English is now a part of the culture of law, business and government”.<sup>25</sup>

### *3. What is plain English?*

Plain English is writing that is easy to understand.<sup>26</sup> At a more complex level plain English is a term that is potentially undefinable.<sup>27</sup> I will consider plain English at a more complex level.

Good plain English writing should sound as though it was not written exclusively for lawyers.<sup>28</sup> Plain English is distinguishable from legalese by its economy of words, lack of archaic or lawyerly phrases, relatively short sentences and small gaps between verbs and their objects. It has been suggested that the use of plain English is an effort to pander to illiterates.<sup>29</sup> This view is rebutted by the view that plain English is not the reduction of writing to its simplest form.

Plain English is “... a collection of principles in the service of simple direct economical writing and drafting”.<sup>30</sup> A more comprehensive statement is that:

Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not baby talk, nor is it a simplified version of the English language.

---

<sup>22</sup> Kimble, “Plain English: a Charter for Clear Writing” (1992) 9(1) *Thom M Cooley LR* 1, 2.

<sup>23</sup> An alternative date of 1973 is suggested in Asprey, *supra* note 4, at 17.

<sup>24</sup> Exec Order 12, 291, 46 *Fed Reg* 13193 (1981).

<sup>25</sup> Kimble, *supra* note 22, at 3.

<sup>26</sup> *Ibid*, 19.

<sup>27</sup> *Ibid*, 14.

<sup>28</sup> Wydick, *supra* note 10, at 2.

<sup>29</sup> Siegel and Felsenfeld, *supra* note 3, at 231.

<sup>30</sup> Kimble, “Protecting Your Writing from Law Practice” (1987) 66 *Mich B J* 912-913.

Writers of plain English let their audience concentrate on the message instead of being distracted by complicated language. They make sure that their audience understands the message easily.<sup>31</sup>

The notion of simplicity can be taken too far if verbs and pronouns are left out because the writing will not convey the meaning it intends. In my view the statement that really captures the essence of plain English writing is that "... everything should be made as simple as possible but not simpler".<sup>32</sup>

## II. ANALYSIS

This section analyses the effectiveness of plain English and legalese. In so doing I consider the distinctions and similarities between published sources and my field research.

### 1. Recognition

Published writers on the topic of legal writing suggest that legalese is commonly recognised as the traditional language of the law.<sup>33</sup> Consequently, when people read a legalese contract they are alerted to the fact that it is likely to confer legal rights and obligations. Plain English contracts can also be written so that it is clear that they confer legal rights and obligations. The key distinction is that the recognition is automatic in a legalese contract because of the language used, as opposed to being the result of a deliberate choice of words in a plain English contract.

My field research does not support the view that a contract written in legalese is easier to recognise as a contract than a contract written in plain English. Of the respondents, 63 percent of those with legal training and 80 percent without legal training said that the plain English contract was easier to recognise.<sup>34</sup> Any link between legalese and recognisability can be further challenged by considering the reasoning of the legally trained respondents who said that the legalese contract was the easier to identify. Of that group only half said that they recognised the contract because of the use of legalese.

---

<sup>31</sup> Eagleson, R D *Writing in Plain English* (1990) 4.

<sup>32</sup> Albert Einstein: In Asprey, *supra* note 4, at 25.

<sup>33</sup> This is clearly highlighted above where the history of legalese is traced back to the early 15th century, but plain English has only developed in the last 20 years: Aitken, J K *The Elements of Drafting* (1991) 6-7; Mellinkoff, *supra* note 11, at 4.

<sup>34</sup> See Appendix Two, question one.

The headings “Contract for Building a House” and “Conditions of the contract” in the plain English contract sufficiently alert most respondents to potential legal obligations. The view that legalese alerts the reader to the likelihood of legal obligations is wrong. A clear plain English contract more effectively alerts the reader to potential legal obligations.

## *2. Past performance*

Published writers suggest that an advantage of legalese is that it is tried and tested. Legalese is a mature form of drafting with established meanings and lawyers are confident that they know the consequences that flow from a legalese contract.<sup>35</sup> The second limb to this argument is that plain English has not been tested. There is likely to be considerably less certainty about the rights and duties that flow from a plain English contract.

The view of published writers that legalese is tried and tested is echoed by my field research, although not to the same extent as it is advocated in theory. A number of respondents identified the precision, certainty, consistency, tradition and accepted meaning of legalese terms. Not surprisingly this confidence in the meaning of legalese was especially prevalent from respondents within the legal profession.

One respondent observed that, because the meaning of some legalese terms has been established through litigation, it is now unlikely that the meaning of these terms will be challenged. A second observation was that legalese encourages the public to get professional advice and as a consequence indirectly protects the public. A third and in my opinion cynical view was that legalese is used to keep lawyers in jobs. This view does however find support in the discussion in Section One on lack of innovation.

## *3. Transition*

Published writers observe that plain English is not easy to produce, requiring time, effort and skill.<sup>36</sup> These skills cannot simply be learned but must be acquired through practice and analysis.<sup>37</sup> If there was a widespread transition to plain English in the legal profession there would have to be large scale re-education. This re-education would be disruptive

---

<sup>35</sup> Siegel and Felsenfeld, *supra* note 3, at 230; Alder, *supra* note 15, at 75.

<sup>36</sup> Kimble, *supra* note 22, at 27.

<sup>37</sup> Wydick, *supra* note 10, at 6.

and expensive. The transition would also give rise to some litigation with the meaning of words being challenged.<sup>38</sup>

My field research identified a strong desire within the legal profession to change from legalese to plain English documents. Of the respondents, 77 percent with legal training and who use legalese documents in their work said that they would like to change to plain English.<sup>39</sup> The desire to change is motivated by a perception that plain English is easier to understand, will result in less litigation and will lead to greater client satisfaction. With a satisfied client being more likely to return for more advice, a change to plain English makes good business sense. The perception that the use of plain English is likely to result in less litigation is in direct conflict with the observation that legalese is a tried and tested form of drafting, which will result in less litigation.<sup>40</sup> These two points are not reconcilable without embarking on a major review of case law and this is outside the ambit of this article.

My field research suggests that the process required to complete the transition from using legalese documents to plain English documents in a law firm closely mirrors the views of published writers. The transition would require a considerable amount of time and extreme care to ensure that the meaning of a legalese contract is carried through into a plain English contract. The need for care is highlighted by considering that the plain English contract in the questionnaire is a translation of the legalese contract. A number of respondents pointed out that the two contracts do not confer identical bargains. In the legalese contract Jill Black is identified as John Smith's surveyor, but in clause 3(a)(iii) of the plain English contract Jill Black is identified only by name. When I drafted clause 3(a)(iii) I thought it would be more precise to identify the surveyor by name. Regardless of what I thought, this particular translation seems to have caused ambiguity. A second point was that the plain English contract has no clause permitting Mary Jones to assign her obligation to build the house. This is potentially a vital omission and illustrates the difficulty involved and the care needed in translating a legalese contract into plain English.

My field research suggested that consumer demand would drive the transition. One New Zealand example clearly highlights the costs involved: retraining, workshops, editing and rewriting of precedents cost one law firm over \$100, 000 last year and they expect to have similar costs this year. The firm anticipates that in 18 months they will lead the field in

---

<sup>38</sup> Alder, *supra* note 15, at 76.

<sup>39</sup> See Appendix Two, questions 9 and 10.

<sup>40</sup> See discussion above.

plain English documents and will attract a number of new clients as a result.

Practical hindrances to a widespread transition to plain English have come from members of the profession. The general perception at present is that older practitioners and overworked sole practitioners have not actively tried to modify their contracts. To ensure an effective change these practitioners will have to be educated about the benefits of plain English and encouraged to change.

#### *4. Precision*

A debatable advantage of legalese is that it is more precise than plain English. This precision occurs because legalese has developed with the law and as a consequence is better suited to deal with the complexities of the subject. It is suggested that because the subject is complex the language explaining the problem needs to be complex.<sup>41</sup> An alternative view is that legalese is not as precise as is claimed because it fails to explain the common use of words that do not have a precise meaning like “reasonable”, “substantial” and “satisfactory”.<sup>42</sup> In response to this view I would suggest that words like “reasonable” are used deliberately when the exact boundaries of the subject matter are not clear, or where defining them would be very difficult.

The view that legalese is more precise than plain English is challenged by the view that a complex topic does not need to be explained by complex language.<sup>43</sup> Plain English does not prevent complex ideas being considered with precision. It is argued that plain English is more precise than legalese because its simplicity allows errors to be more easily detected.<sup>44</sup> Coupled with this is the opinion that plain English can make complex ideas clearer, because their complexities are not compounded by a difficult writing style. Plain English allows long and complicated ideas to be expressed in a manner that is precise and clear.

Clearly there are arguments for and against the precision of both styles; I argue that the balance of the authority at present favours plain English. A notable exception to the discussions of precision by most published writers is a potential general limitation of both styles. If the law and the associated rights and duties are not clear, then it is impossible to write

---

<sup>41</sup> Martineau, *supra* note 20, at 7.

<sup>42</sup> Mellinkoff, *supra* note 11, at 301.

<sup>43</sup> Martineau, *supra* note 20, at 8.

<sup>44</sup> Kimble, *supra* note 22, at 21.

precisely about them. Language can only be as precise as the subject matter.

Published writers state that if a document is more precise it will be more persuasive. A Californian survey of ten appellate judges and their research attorneys concluded that passages in legalese were "...substantively weaker and less persuasive than the plain English versions".<sup>45</sup> This view is echoed in two other United States surveys.<sup>46</sup> Collectively these three surveys give support to the view that plain English is more understandable, readable and as a consequence more precise than legalese.<sup>47</sup>

Despite the debate regarding the precision of each style it is clear from my field research that in practice the plain English style is more precise. Of the respondents, 91 percent with legal training and 100 percent without legal training identified the plain English contract as being the more precise.<sup>48</sup> Factors that encourage precision were the breaking down of the contract into clauses, the use of effective punctuation and clear and simple language.

### 5. *Terms of art*

It is suggested by published writers that plain English cannot deal with terms of art such as hearsay, plaintiff, defendant, fee simple and mens rea.<sup>49</sup> Terms of art have a generally accepted meaning although their boundaries have always inspired scholarly debate.<sup>50</sup> Terms of art cannot be replaced by simple words; they are words with their own specialist legal meaning. The use of terms of art is consistent with the main principle of plain English, to convey a clear meaning in the simplest form. If a term of art is not used where appropriate the contract would not be as precise as it could be. Imprecision is likely to arise when the lawyer does not know the meaning of the term of art or has mistaken legal jargon for a term of art. A correctly used term of art will be precise. The use of terms of art is limited because there are only a few true legal terms of art and as a consequence

---

<sup>45</sup> Kimble supra note 22, at 24, drawing on Benson and Kessler, "Legalese v Plain English: An Empirical Study of Persuasion and Credibility in Appellant Brief Writing" (1987) 20 LOY L A Rev 301.

<sup>46</sup> Kimble supra note 22, at 24, drawing on the *State Bar Report*, Cal Law, and Harrington and Kimble, "Survey: Plain English Wins Every Which Way" 66 Mich B J 1024 (1987).

<sup>47</sup> Kimble, supra note 22, at 23-25.

<sup>48</sup> See Appendix Two, question 4.

<sup>49</sup> Siegel and Felsenfeld, supra note 3, at 172 and Garner, B A *The Elements of Legal Style* (1991) 184.

<sup>50</sup> Wydick, supra note 10, at 20.



they will form only a small part of any contract.<sup>51</sup> Terms of art should be incorporated into a contract and the balance should be written in plain English.<sup>52</sup>

The conclusions from my field research were not clear. A number of respondents correctly pointed out that the plain English contract does not include any terms of art, so it is difficult to conclude that they were used effectively. Most of these respondents then observed that the legalese contract by default used terms of art most effectively. One respondent pointed out that terms of art have a specialist meaning and should be used only where necessary. The same respondent also suggested that in this case no terms of art were needed and so the plain English contract used them most effectively. Unfortunately no accurate conclusions can be drawn and in hindsight it is apparent that slightly different contracts would have allowed this point to be investigated more thoroughly.

### *6. Efficiency*

Published writers have observed that the use of plain English documents achieves efficiency gains. These efficiency gains are derived from faster processing and less inquiries and complaints.<sup>53</sup>

My field research assessed two aspects of efficiency: first, the efficiency of the creation of each contract, and secondly, whether each contract communicates its meaning quickly and clearly. Of the respondents, 70 percent with legal training and 96 percent of those without thought that the legalese contract was easier to produce.<sup>54</sup> They thought that the systematic approach of breaking the contract into parts used in the plain English contract would have allowed it to be drafted quickly. This is especially true when contrasted with the stream of consciousness technique used in a legalese contract. One respondent correctly identified the steps that occurred when the two contracts were drafted. The legalese contract is a precedent and the plain English contract is a translation of that precedent. As a direct result of this process, the plain English contract took considerably more time to draft than the legalese contract.

Another view was that it is often more difficult to draft things simply than to fall back on precedents. I think that this difficulty can not be overstated and arises out of the need to know exactly what bargain the parties to the

---

<sup>51</sup> Garner, *supra* note 49, at 184.

<sup>52</sup> Kimble, *supra* note 21, at 21; Wydick, *supra* note 10, at 20.

<sup>53</sup> Siegel and Felsenfeld, *supra* note 3, at 58-62; Kimble, *supra* note 21, at 25-26 where 10 reported examples of efficiency gains are given.

<sup>54</sup> See Appendix Two, question three.

contract are trying to achieve and to include only terms that give effect to that bargain. This is in contrast to a legalese drafter who excludes only terms that are definitely not required.

The drafting of a plain English contract that is a translation of a legalese document is not as simple as I had initially thought; it required considerable care, time and skill. The real efficiency gains associated with the plain English contract did not occur in the drafting process, they occurred because of the limited amount of time it takes the reader to comprehend a plain English contract.

Of the respondents, 96 percent with legal training and 100 percent of those without identified the plain English contract as being the easier to read and understand.<sup>55</sup> The reasons behind this ease were the effective use of spacing, punctuation, short sentences, layout and paragraphs. Another reason identified by a respondent without legal training was that the legalese contract "...almost puts your brain into neutral". It is clear from these responses that the plain English style achieved its goal of creating a contract that was easy to understand.

### *7. Business sense*

Published writers suggest that drafting in plain English will give lawyers a competitive edge over those that do not.<sup>56</sup> This edge occurs because plain English is efficient and more acceptable to the general public. Public acceptance and client satisfaction are the key to a law firm's survival in today's competitive market. If clients are not satisfied they will go elsewhere. Changing to plain English could potentially be an important self-preservation mechanism for modern lawyers.<sup>57</sup> In short, plain English makes good business sense.<sup>58</sup>

The general presumption surrounding a practical discussion on business sense is that the "customer is always right". Therefore it makes more sense to draft in a style that is more readily acceptable to the public. Of the respondents to the survey, 96 percent identified the plain English

---

<sup>55</sup> See Appendix Two, question six.

<sup>56</sup> Asprey, *supra* note 4, at 43.

<sup>57</sup> Similarly, retaining legalese was a self-preservation mechanism for lawyers in the past. See discussion above.

<sup>58</sup> Walker, "Plain Language can make good Business Sense" Law Talk 401, 20 September 1993.

contract as the contract they thought the public would prefer.<sup>59</sup> Similarly, 100 percent of the respondents preferred the plain English contract.<sup>60</sup>

Reasons for the preference include a perception that plain English empowers members of the public by clearly setting out their rights and duties. The empowerment is limited because lawyers still have an influential role in ensuring and reassuring their clients that all the legal aspects are covered. Other reasons for the preference are the use of everyday language and the format of the document.

### *8. Sexist language*

A point not alluded to by most published writers is the potential for plain English to remove sexist language from the law. 60 percent of the respondents thought that plain English would be a good way to remove sexist terms like “workmanlike”.<sup>61</sup> An additional 30 percent of the respondents pointed out that sexist language is inherent in the author and not directly related to the style of drafting. While this is true, what needs to be appreciated is that lawyers will continue to use precedents. Most legalese precedents are sexist; new plain English precedents need not be.

## III. CONCLUSION

The legalese style was shaped by historical events. The development of the printing press and reliance on precedent are two of the most notable. The legalese style was heavily criticised in the early 1970s and the plain English style developed as a reaction to this criticism.

Published writers suggest that documents drafted in a legalese style are easier to recognise as contracts than documents drafted in plain English. The field research suggests the opposite, and leads to the conclusion that the theoretical observation was wrong.

Published writers and the field research state that legalese is a mature form of drafting. This maturity will result in the meaning of legalese terms being less open to challenge.

The field research identified a desire from within the legal profession to change from legalese to plain English. The transition from one style to the

---

<sup>59</sup> See Appendix Two, question seven.

<sup>60</sup> See Appendix Two, question eight. This personal preference was qualified by a number of respondents because they also suggested that the ambiguities in contract B should be removed.

<sup>61</sup> This term can be found in Contract A: Appendix One.

other will require a considerable amount of time and expense. In addition extreme care is needed to ensure that the rights and obligations expressed in a legalese document are carried through to a plain English document.

Published writers are not united about which style is the more precise. The field survey lends support to the view that it is plain English. Linked to this precision is the view that plain English terms are less likely to be challenged in court. This is in direct conflict with the view that legalese terms are less likely to be challenged. The conflict between the two views is not reconciled in this article.

Plain English is considerably more efficient than legalese, especially when the reader's ease and accuracy of comprehension are considered. Linked to this efficiency is the business sense of using plain English. Both the public and practitioners want to use plain English, and firms that do not do so are likely to be at a commercial disadvantage.

Neither style provides a panacea for sexist language because such language is author specific and not style specific. But the plain English movement does give authors with an opportunity to remove sexist language as precedents are progressively redrafted into plain English.

Plain English is clearly more effective than legalese. An important rider to this simple conclusion is that converting from legalese to plain English is probably not as simple as one might initially think. Extreme care, planning and skill is needed to ensure a successful transition.

## APPENDIX ONE: TWO CONTRACTS

The respondents to the questionnaire were asked to read two contracts carefully and then answer the following questions.

## CONTRACT A

An example of a traditional legalese style contract.

*Agreement for Building a House.*

**MEMORANDUM OF AGREEMENT**, made and entered into this second day of May, 1994, between John Smith of the one part, and Mary Jones of the other part, as follows, viz. **THE SAID** Mary Jones, for the consideration hereinafter mentioned, doth agree with the said John Smith that she, the said Mary Jones, or her assigns, will, within the space of three calender months next following day of the date hereof, find and provide all fit and proper materials and things, and erect, build and finish, in a good, sound, substantial, and workmanlike manner, one brick house or building on a certain piece or parcel of ground, situate in 41 Matipo Ave, Rotorua, according to the plan thereof hereunto annexed. **AND THE SAID** John Smith for the consideration aforesaid, doth agree with the said Mary Jones well and truly to pay or cause to be paid unto the said Mary Jones, the sum of 60,000 dollars of lawful money of New Zealand, in manner following; that is to say, 20,000 dollars, part thereof, as soon as the foundation of the said house shall be laid, 20,000 dollars other part thereof, when the brick work of the said house shall be carried up and covered in, and 20,000 dollars, being the remainder thereof, in full payment of and for building the said house, when the same shall be completed inside and out fit for occupation, subject to the approbation of Jill Black, as surveyor of the said John Smith: **AND LASTLY, THE SAID** John Smith and Mary Jones do further to agree to perform for each other, with all convenient speed, this memorandum of agreement, in penalty of 500 dollars for each individual week, for any failure by more than one week, of the true performance of the erecting, building and finishing, in a good, sound, substantial, and workmanlike manner the aforesaid house, or failure to pay, or failure to pay part thereof, for building the said house. **AS WITNESS, &c.**

John Smith.

Mary Jones.

[Contract A is based on a precedent contained in Woolaston, F L *Woodfall's Law of Landlord and Tenant* (1840)].

**CONTRACT B**

An example of a modern plain English style contract.

**Contract for Building a House:**

**Date:** May 2, 1994.  
**Between:** John Smith the landowner and  
Mary Jones the builder.  
**To:** Build a house at 41 Matipo Avenue,  
Rotorua.

**Conditions of the contract:**

1. Mary Jones agrees to build a house for John Smith by August 2, 1994.
2. The house will be built to the specifications of the attached plan.
3. John Smith will pay Mary Jones 60,000 dollars for building the house.
  - a. The payment will be in three instalments of 20,000 dollars.
    - i. John Smith will pay the first instalment when the foundations have been laid.
    - ii. John Smith will pay the second instalment when the brick work is completed and the house is covered in.
    - iii. John Smith will pay the third instalment when the house is completed to a standard which is acceptable to Jill Black.
4. If John Smith does not pay an instalment within one week from the day it is due a penalty will be incurred. The penalty is incurred every week an individual instalment remains unpaid. The penalty is 500 dollars per week per unpaid instalment.
5. If Mary Jones does not complete the house within one week from August 2 1994 a penalty will be incurred. The penalty is incurred every week the house is not completed. The penalty is 500 dollars per week.

**Signed:**

John Smith.

Mary Jones.

[Contract B is my "translation" of Contract A into plain English]

APPENDIX TWO: QUESTIONNAIRE

The following are the quantitative questions and a summary of the quantitative results of my field research. The respondents also offered comments where they felt that this was appropriate. These comments are not included in the summary but are incorporated in the article.

There were 26 respondents without legal training and 60 respondents with legal training. Of the 60 respondents with legal training, 40 were solicitors, 14 were legal graduates, four were at law school with less than two years experience, one was a barrister with two to five years experience and one was a public servant with five to ten years legal experience. Of the 40 solicitors, 12 had less than two years experience, 11 had two to five years experience, five had five to ten years experience and 12 had over ten years experience. Of the 14 legal graduates six had less than two years experience, four had two to five years experience and four had five to ten years experience.

Question	Respondents with legal training		Respondents without legal training	
1. Which of the two options is easier to recognise as a document that is going to confer legal obligations?	A  14		B  47	
2. Which contract would you feel more confident about entering into if:  You were the builder?	A  1		B  59	
You were the purchaser?	A 11	B 49	A 8	B 18
3. Which contract do you think was harder to produce (ie took the longer time and involved more thought)?	A  43	B  15	A  4	B  25

4. Which contract is the more precise (ie less likely to be ambiguous)?	A 6	B 54	A 10	B 21
5. What contract more effectively uses terms of art (ie words with specialist legal meanings)?	A 34	B 17	A 23	B 3
6. What contract was the easier to read and understand?	A 1	B 59	A 2	B 24
7. Which contract do you think the public will prefer?	A 1	B 59	A 7	B 16
8. Which contract do you prefer?	A 0	B 59	A 0	B 26
9. Do you use traditional legalese style documents in your work?	Yes	Some-times	No	
Respondents with legal training	10	34	10	
Respondents without legal training	3	10	1	
10. If you do use traditional legalese documents in your work, would you ideally like to change to modern legal drafted documents?	Yes		No	
Respondents with legal training	39		0	
Respondents without legal training	3		0	



# A LITTLE SOMETHING ABOUT WRITING

BY PETER JONES\*

In September of this year I was given the task of marking over 250 Contracts opinions, submitted by LLB students in Law 1 and Law 2. I offer the following advice in the hope that it will be of benefit to students who intend to pursue a career in law. The following comments also serve as an indicator of the point we have reached in modern education and writing standards.

## 1. WRITING IN ENGLISH

All papers were submitted in the English language. The following comments therefore apply to the whole class, although some students need the advice more than others.

It is wise to recall that the point of any written work in the law, whether in an opinion, correspondence, or a contract, is to express thought. For that reason, clarity and precision of expression are the basic necessities. If you do not express yourself clearly and precisely, then people can misunderstand you. And, as has often been said, if people *can* misunderstand you, then they *will* do so.

To assist in expressing your thoughts clearly in writing in English, here are a few pointers:

1. Sentences have verbs. Verbs are doing words.
2. If you do not know very well what a word means, do not use it. You can use your dictionary to learn very well what a word means.
3. The apostrophe's function is to indicate possession of something, as in "the apostrophe's function", or to indicate that you've left some letters out of words, as in "you've left". There is one major exception to the possessive use of the apostrophe, which is that "it's" is short for "it is". Its use is for that purpose only, and the possessive is "its", as in "its use".
4. The plural of words is used to denote more than one of things. You add the letter "s". You do not use apostrophes. You do not write the first sentence of this paragraph as, "The plural's of word's are used to denote more than one of thing's".

---

\* LLB, MComL (Auckland), barrister and solicitor of the High Court of New Zealand, Senior Lecturer in Law, University of Waikato.

5. Write in short sentences if at all possible. Make sure that each separate sentence makes sense on its own. Each sentence should express its own thought.
6. Separate different groups of thoughts into paragraphs so that your reader can perform the same separation.
7. Every error in spelling or punctuation is important. Even if the meaning can be discerned, the reader's attention is diverted from your thought to your error. That diversion does not help the reader understand your thoughts.
8. Over many years of having been exposed to writing from all over the world, we on the staff have learned that if we cannot work out from their writing what people mean, then it is *they* who are not thinking properly.
9. The English language has developed a huge number of words each to cope with different things. Near enough is not good enough; the point of having different words is that they mean different things.

## II. WRITING A LEGAL OPINION

1. The point under 1.9 above is emphasised in the law. There is an old Latin tag which, when translated, says that to express one thing is to exclude the other. Another principle deems the use of different words in a document to be for the purpose of referring to different things.
2. The point under 1.2 above applies even more strongly to technical terms and to technical legal terms. Use a law dictionary, preferably a current New Zealand one.
3. When you are asked to express an opinion, you are to do just that. It is not good enough to say that a court could decide either way. Because the problem is not cut and dried, and because a decision might go either way, a client or supervisor comes to you for your expert opinion on what the outcome should be at law.
4. A problem in the law will probably not fit into one neat little box. Usually, there is a range of potential solutions. You need to consider all the alternatives. Most civil matters in the courts have multiple alternative causes of action pleaded in them.
5. Adjectives and adverbs lend colour to expression in fictional and poetic writing, but more usually than not detract from understanding of legal

argument. In a similar vein, jokes which work well in speech often fall flat in written submissions.

6. All legal documents, whether opinions, letters, contracts, or conveyancing documents, need layouts which assist and do not hinder understanding. Readers must not be required to move back and forth in the pages to make sense of what you have written.

7. If you the lawyer fail to express yourself clearly and concisely, you will be treated sarcastically or brutally, or both. You will have no choice in the mode of treatment. Such treatment may, furthermore, result in your being ignored, to the ultimate detriment of your income.

# Three judges. No appeals.

Effective writing and confident public speaking are the keys to modern legal practice. At Russell McVeagh we prize both.

We demand the highest standards in legal writing from ourselves, and support the aims of New Zealand's top legal journals.

At the country's law schools, we sponsor the annual Russell McVeagh Paper Presentation Competition.

The format of the Competition

For entry information, contact your student representatives, or write to the Human Resources Manager, Russell McVeagh McKenzie Bartleet & Co, PO Box 8, Auckland.

is simple. Competitors must present and speak to a legal paper (in conditions identical to those found in practice) before three judges: a practitioner, an academic, and a member of the local community.

At stake is the right to represent each law school at the annual New Zealand and Australasian Law Students' Conferences.

We encourage all students to compete. But prepare to be tested: it's demanding, challenging, rewarding.

So if you're willing to take the challenge, and go that one step further in your training, get involved. We are.

You never know what it could lead to in the future.

RUSSELL McVEAGH McKENZIE BARTLEET & CO

BARRISTERS, SOLICITORS & NOTARIES PUBLIC

# DOING AWAY WITH UNEMPLOYMENT BENEFIT?

BY KEN MACKINNON\*

## I. INTRODUCTION

That a recipient of unemployment benefit must be unemployed might be thought to be one of the most self-evident of truisms. Equally as obvious is the proposition that an unemployed person should not be discouraged from taking on work and becoming less dependent on welfare. However an analysis of New Zealand social security law, highlighting the treatment of those engaged in part-time and casual work, reveals that unemployment benefit not only inhibits participation in the workforce and fails to provide income support for those on the margins between work and unemployment, but also fails to treat those people on the margins consistently, honestly and equitably.

In this article I shall argue that, while it is possible to improve the situation by tinkering, the system has been so overtaken by economic and social restructuring, and is so entangled in its own exceptions and inconsistencies, that the only comprehensive solution to these difficulties is to abolish unemployment benefit in its present form. I am not suggesting that we adopt the ideas of Adam Smith and leave the fate of the unemployed to charity; nor am I putting forward a millennial manifesto proclaiming that tomorrow will bring a return to full employment. Rather, what I am suggesting is that the benefit provision for the unemployed, which frequently excludes the under-employed and those with marginal, atypical or peripheral work,<sup>1</sup> should be replaced by a form of income support with eligibility criteria more consistent with its policy objectives, and, ultimately, one which transcends the false dichotomy between work and unemployment. Of the alternatives identified, the one with least problems appears to be a guaranteed basic income system.

---

\* MA, LLB (Cambridge), LLM (Aberdeen), Senior Lecturer in Law, University of Waikato. I am grateful to Jacquelin Mackinnon and to the Waikato Law Review referee for substantive and structural improvements which they suggested. Since this article was written the Government has announced changes to the benefit system some of which are foreshadowed here: the benefit abatement system is to be recalibrated; dependent spouses are to be subjected to the "work test"; and young and long-term unemployed will receive individualised assistance. The thrust of my argument is unaffected by these changes.

<sup>1</sup> "Atypical" or "peripheral" forms of work - also known as "non-standard" or "marginalised" - include part-time, seasonal, temporary, casual or irregular work and equivalent forms of self-employment.

## II. THE UNEMPLOYED TEST AS A CRITERION OF ELEGIBILITY FOR UNEMPLOYMENT BENEFIT

Historically (even though the workhouse regime was left behind in Britain) one of the objectives of state intervention was to ensure that those receiving unemployment benefit were *not* idle but were instead earning their keep through participation in public works schemes.<sup>2</sup> Thus the idea of working while being in receipt of unemployment benefit is not new. What is paradoxical is that now a recipient of unemployment benefit who attempts to avoid idleness while unemployed puts in jeopardy his or her continued support from the state. This is especially paradoxical if

the fundamental objective of income support is to provide individuals with the capacity to participate adequately as members of their family or community.<sup>3</sup>

In New Zealand an unemployment benefit is not (as in some countries) a guaranteed insurance-based compensation for lost employment, but a conditional income-tested benefit to keep the recipient from poverty. The conditions which must be met are that the recipient is unemployed, capable of undertaking and willing to undertake suitable work, has taken reasonable steps to find such work, and has resided continuously in New Zealand for at least twelve months at some point.<sup>4</sup> Excluded from unemployment benefit is anyone who qualifies for New Zealand superannuation, who is a full-time student, or who is not employed because of a strike by himself or herself or by other members of his or her trade union at the same place of work.<sup>5</sup> Applicants who are 55 years or over and do not qualify for New Zealand superannuation are eligible for benefit on less rigorous conditions.<sup>6</sup> The benefit of a recipient who has an income, or whose spouse has an income, is reduced or "abated" in proportion to that income.<sup>7</sup>

Although the first statutory requirement for eligibility for an unemployment benefit in New Zealand is that the applicant is unemployed, no definition of "unemployed" is provided in the Social Security Act

---

<sup>2</sup> Unemployment Act 1930. Later in the 1930s when work could not be found for the unemployed, the idea was dropped: Oliver, "Origins and Growth of the Welfare State" in Trlin A D, *Social Welfare and New Zealand Society* (1977).

<sup>3</sup> Department of Social Welfare, *A Social Impact Report on Proposed Reforms of the Social Security Benefit System* (1990), reiterating the values identified in the *Report of the Royal Commission on Social Security in New Zealand* (1972).

<sup>4</sup> Social Security Act 1964, s 58(1).

<sup>5</sup> *Ibid.* See Employment Contracts Act 1991, s 61, for the definition of "strike".

<sup>6</sup> The "55+ Benefit".

<sup>7</sup> Social Security Act 1964, s 59 and Ninth Schedule.

1964.<sup>8</sup> No doubt, in many cases, it will be obvious whether an applicant is unemployed or not. In practice, however, a number of situations have emerged where it is unclear whether the applicant is “unemployed”, particularly when he or she might be described as self-employed in some way. The applicant may be occupied, for example, carrying out maintenance on his or her own property, keeping an eye on the neighbour's children, engaged in a (potentially) remunerative hobby such as painting or beekeeping, or doing voluntary work. Others may be engaged in a consultancy or an enterprise (such as freelance book-keeping, running a smallholding or taking in “homestay” guests should any appear), but through (in some cases, seasonal) lack of business or clients may not be actively occupied or bringing in an income from this undertaking.

A certain amount of case law, arising out of such situations, has been built up both by the administrative tribunal which was set up to hear appeals under the Act, the Social Security Appeal Authority, and, less commonly, by the courts. Unfortunately, “unemployed” has not been interpreted clearly and consistently in the case law. However, two main approaches to the “unemployed” criterion can be discerned in the cases: a formalist approach which concentrates on whether the applicant is occupied; and a purposive approach focusing on whether he or she has an income as a consequence of such occupation.

### *1. Formalist approach to the “unemployed” criterion*

The formalist position is that the mere fact that an applicant is working, either for someone else or as self-employed, is sufficient in itself to disentitle him or her:

One of the first conditions of entitlement to an unemployment benefit is that the applicant or beneficiary is unemployed. This condition takes no account of the level of remuneration for employment, it simply indicates that if an applicant is employed there will be no entitlement to an unemployment benefit.<sup>9</sup>

This interpretation has been applied even where the applicant has been merely “helping out” as a stop-gap measure.<sup>10</sup> Nor does an applicant

---

<sup>8</sup> There is, however, a statutory definition of “full employment”, used for other purposes in the Act: Social Security Act 1964, s 3(1), definition of “full employment”.

<sup>9</sup> Social Security Appeal Authority Decision No 108/93, unreported, 3 November 1993.

<sup>10</sup> Social Security Appeal Authority Decision No 116/92, unreported, 6 October 1992 in which a beneficiary, capable of and seeking outside work, was working the family farm, albeit unprofitably. He was held not to be unemployed. Had he found outside work, he would have had to have been replaced on the farm. But this is not consistent with Social Security Appeal Authority Decisions Nos 51/87, unreported, 7 August

qualify as unemployed, even for periods when that person is not actually working or when pay is not received, if he or she remains under a continuing full-time contract of employment.<sup>11</sup> Furthermore, where the applicant is doing the kind of work for another person for which payment might normally be expected to be made, even though no contract exists and no direct payment is made, he or she does not qualify as unemployed.<sup>12</sup> However, surprisingly, the Appeal Authority has also held in a case involving a man who undertook casual decorating work, bringing in a total of \$3779 gross, that “[h]e was not employed in the formal sense”.<sup>13</sup>

This formalist approach has been applied to the self-employed, despite added complications arising out of the nature of self-employment:

As far as an employee is concerned, the hours worked are the paid hours - work is the time paid for by employers. But it is often difficult to decide if what a self-employed person is doing can count as “work”. In addition to the hours when they are paid for services or are directly performing the functions of their trade or profession, they may also have to allocate time to activities such as seeking business, record keeping, maintaining equipment or even merely holding themselves available for business. Some self-employed people such as authors or

---

1987 and 88/93, unreported, 31 August 1993. In the latter case the appellant “helped out” at his partner’s fast food business and admitted that if he had another job he would still work at the business at night. The Appeal Authority noted that he obtained other work from time to time and therefore that he was available for work: he was held to be eligible for unemployment benefit.

- <sup>11</sup> Social Security Appeal Authority Decision No 77/85, unreported, 12 December 1985, where a relief teacher was held not to be unemployed during the school holidays between terms. See also Social Security Appeal Authority Decision No 24/92, unreported, 10 March 1992, where the appellant who was contracted on a “commission only” basis to sell real estate was held not to be unemployed even when she had no income. On the other hand a person suspended without pay may be eligible for unemployment benefit, despite a continued contractual relationship with an employer: New Zealand Income Support Service, *Main Benefit Manual* (1995) 10.1033 and 10.9041.
- <sup>12</sup> Social Security Appeal Authority Decision No 144/92, unreported, 18 December 1992, where a woman not related by blood or marriage was housekeeping and child minding for a sole parent family.
- <sup>13</sup> Social Security Appeal Authority Decision No 66/92, unreported, 9 July 1992. The earnings were then averaged over the 26 weeks for which benefit was paid in order to calculate whether there was an overpayment.



artists need “thinking time” which can appropriately be combined with domestic or “non-work” activities for example, gardening or household chores.<sup>14</sup>

A lack of customers or a paucity of work does not of itself convert a self-employed person to the status of unemployed.<sup>15</sup> Similarly, if an applicant is engaged in business, there is no eligibility whether or not the business is making a profit or a loss:

The question of whether the business was operating at a profit is not relevant to the question whether the appellant can be regarded as unemployed for the purposes of section 58. Unprofitability may entitle an applicant to an emergency unemployment benefit but it does not entitle an applicant to an unemployment benefit pursuant to section 58.<sup>16</sup>

An attempt has been made to distinguish applicants who are self-employed from those who are merely starting out in self-employment. Again, the cases are not consistent, though most have held the applicant to be not unemployed. Where a business was fairly new and experiencing a seasonal downturn, it was suggested that “the appellant had to make a choice between retaining his business and providing for his needs as best he could, or disposing (or suspending the operation) of his business and seeking other employment”.<sup>17</sup> Where an applicant agreed to purchase a business but the purchase was not concluded for a further six months, he was declared not to be unemployed during that six months because he was occupied in operating the business and responsible for rent and other outgoings.<sup>18</sup> However, some cases, according to the Appeal Authority, do involve

---

<sup>14</sup> Boden, R and Corden, A *Measuring Low Incomes: Self-Employment and Family Credit* (1994).

<sup>15</sup> Social Security Appeal Authority Decision No 11/89, unreported, 31 March 1989.

<sup>16</sup> Social Security Appeal Authority Decision No 36/89, unreported, 1 August 1989. See also Social Security Appeal Authority Decision No 15/94, unreported, 12 April 1994. The Director-General of Social Welfare has discretion under s 61 of the Social Security Act 1964 to grant a (means-tested) emergency unemployment benefit in cases of hardship; it is generally granted when the applicant fulfils all but one of the eligibility criteria for a main benefit.

<sup>17</sup> Social Security Appeal Authority Decision No 24/86, unreported, 17 June 1986. Cf Social Security Appeal Authority Decision No 91/93, unreported, 13 October 1993 where the appellant, who was able to obtain only intermittent work during the establishment stages of his business, was permitted to separate weeks of work from weeks with no work and was disqualified from benefit only for the weeks in which he had work.

<sup>18</sup> Social Security Appeal Authority Decision No 50/95, unreported, 19 June 1995.

a determination whether ... the appellant was in fact self employed or whether he was in the process of becoming self employed. The process of becoming self employed might more accurately be described as taking reasonable steps to obtain suitable work within the meaning of s 58(1) Social Security Act 1964 and may be a useful distinction between employment and unemployment.<sup>19</sup>

An Enterprise Allowance may be granted by the New Zealand Employment Service to assist with the establishment of a business, but a condition of the Enterprise Allowance agreement prohibits the recipient from also claiming an unemployment benefit.<sup>20</sup> It has been suggested in one case that the period immediately before an Enterprise Allowance is granted should be treated as one of unemployment, even where “a considerable amount of work on the business idea” is expended by way of preparation (though eligibility for unemployment benefit during this period may depend on the beneficiary’s openness to alternative offers of work).<sup>21</sup>

Thus, there is a line of decisions (not always consistent in itself) in which the Appeal Authority has taken a formalist line which looks only to the beneficiary’s involvement in, or commitment to, an occupation and disregards the level of income derived from that occupation.

## 2. *Purposive approach to the “unemployed” criterion*

There has been a move away from the formalist approach by both the judiciary and the Appeal Authority. For example, Doogue J has held, in a case of criminal prosecution for failing to declare partial employment, that the accused was reasonable in assuming that work or employment which was unpaid was not included as work to be entered on a benefit renewal form.<sup>22</sup> The Social Security Appeal Authority itself in one case, having referred to a dictionary definition of “unemployed” as “temporarily out of work”, went on to consider what is meant by “work”:

In the context of the Social Security Act 1964 it seems to us that the “work” must be of such a nature that it carries rewards sufficient to provide a basic standard of living. Even so, of course, there is still room for considerable argument concerning what is and what is not a basic standard of living.<sup>23</sup>

---

<sup>19</sup> Social Security Appeal Authority Decision No 86/95, unreported, 8 August 1995.

<sup>20</sup> Social Security Appeal Authority Decision No 99/93, unreported, 14 October 1993.

<sup>21</sup> Social Security Appeal Authority Decision No 86/95, unreported, 8 August 1995.

<sup>22</sup> *Campbell v DSW*, unreported, High Court, Hamilton, AP 32/93, 5 April 1993.

<sup>23</sup> Social Security Appeal Authority Decision No 51/87, unreported, 7 August 1987.

In a series of cases, the Social Security Appeal Authority has departed to a remarkable degree from the literal wording of the statute in order to enable appellants to satisfy the “unemployed” criterion. It distinguishes

work which is capable of providing (and does in fact in some form or other provide) an income and work which is performed as an alternative to sitting idle and which is not capable of providing (or does not in fact provide in some form or other) income.<sup>24</sup>

According to this formulation, particularly the clauses in parentheses, the test is an income test not an employment test. Then in the same case the Appeal Authority turned to the definition of “full employment” in section 3 of the Act for assistance in defining “unemployed” and, flying in the face of the laws of logic (and precedent!), restricted “employment” to what would be full employment if done for 30 hours per week or if done full time for a contract. Having improperly restricted “employment” in this way, it was easy to find the appellant “unemployed”. In a second case decided the same day the test shifted to whether the business which the appellant had set up was or would ever be viable.<sup>25</sup>

In an earlier departure from the formalist way of treating the “unemployed” test, the Appeal Authority noted:

The Commission took the view that the appellant (and his wife) were employed because they were fully engaged - indeed for ten hours per day seven days a week - in work on their farmlet. We feel however that their actions in this regard are clearly open to the construction that they were engaged in a desperate effort to make ends meet and that they should not be penalised because they chose to work around the farmlet rather than do nothing.<sup>26</sup>

---

<sup>24</sup> Social Security Appeal Authority Decision Nos 39/94, unreported, 31 May 1994 and 14/95, unreported, 13 March 1995. But this is in stark contrast with Social Security Appeal Authority Decision No 62/90, unreported, 21 December 1990, in which the Appeal Authority held that “The appropriate determination is whether an applicant is employed or not for the requisite time not whether a business venture for a self-employed person is capable of sustaining a profit”.

<sup>25</sup> Social Security Appeal Authority Decision No 15/95, unreported, 13 March 1995. The appellant was no doubt assisted in the success of his appeal by the fact that he had been refused an Enterprise Allowance because the business was not viewed as viable and by the fact that his clients were mainly voluntary agencies. Although the business was “open” on weekdays, the custom was minimal.

<sup>26</sup> Social Security Appeal Authority Decision No 51/87, unreported, 7 August 1987. The Appeal Authority noted that the decision was reached on the particular circumstances of the case and was not to be treated as a precedent. A factor may have been that the farmlet was viewed by the Rural Bank as an uneconomic unit and virtually unsaleable.

Yet in the same case the Appeal Authority agreed that unemployment benefit is not

to effectively be a means of financing a business by providing a measure of income maintenance during a period when the business is not returning a profit.

This latter approach applies also where a person is self-employed in an occupation with seasonal patterns: the business (unless it is only recently established) is expected to generate adequate revenue during the productive periods of the year to meet seasonal contingencies.<sup>27</sup> On the other hand, an employee who loses paid employment as a result of a seasonal downturn in that type of employment is entitled to an unemployment benefit if the other eligibility requirements are satisfied, but not if he or she leaves before the seasonal work has ceased.<sup>28</sup>

If a self-employed person can obtain only intermittent work, particularly during the establishment stages of a business, it may be possible either to average income over the period of receipt of benefit or to separate weeks of work from weeks during which no work is done, and for unemployment benefit to be granted for only the weeks of no work:

Intermittent self employment poses a particular problem for those in receipt of unemployment benefit and those administering the Social Security Act 1964 because it does not fit neatly into any of the provisions of the legislation. This is particularly so when the income which results from the self employment is low and often barely sufficient to cover associated expenses. In the past when we have been faced with this difficulty we have looked to s 64 of the Act to lengthen the period over which income can be averaged out and we have taken an income based approach to whether an overpayment should be established.<sup>29</sup>

---

<sup>27</sup> Social Security Appeal Authority Decision No 4/90, unreported, 29 January 1990.

<sup>28</sup> Social Security Appeal Authority Decision No 150/92, unreported, 18 December 1992. In contrast, the national insurance system in the UK did not cover even the seasonal employee, on the grounds that the off-season was not an unforeseen loss and should have been covered by the seasonal worker's own provision: Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 21 (revoked by SI 1989 No 1324, reg 8).

<sup>29</sup> Social Security Appeal Authority Decision No 91/93, unreported, 13 October 1993. The Social Security Appeal Authority has, on occasion, also sanctioned an alternative approach to intermittent work, which is to treat the issue as predominantly an income one, lengthen the period over which income is to be averaged, and abate unemployment benefit accordingly: eg Social Security Appeal Authority Decision No 65/92, unreported, 9 July 1992. See also Social Security Appeal Authority Decision No 32/90 [1990] NZAR 381.

The Social Security Appeal Authority has recently held that the Director-General has an option in a case where a beneficiary worked only one week:

[of] averaging the appellant's income over four weeks in order to establish an overpayment for that period or, as occurred in this case, simply establishing an overpayment on the basis that the appellant was not entitled to unemployment benefit for one week. The results are different in that the overpayment established by the former method is lower than that established by the latter.<sup>30</sup>

Thus a growing number of cases eschew the strict wording of section 58 of the Social Security Act 1964, ignoring the requirement that the beneficiary be "unemployed" at all times to qualify for benefit. A further such concession is that, as a matter of Departmental policy, voluntary community work is disregarded, if the other conditions for benefit entitlement are met.<sup>31</sup>

Even the Social Security Act itself is not consistent. By fixing an income threshold above which an unemployment beneficiary's benefit rate abates, Parliament has allowed beneficiaries to receive income (currently, up to \$50 per week) apart from the benefit itself, while in receipt of a full benefit.<sup>32</sup> This was doubtless intended to cover unearned income such as bank interest, but that distinction between earned and unearned is no longer maintained by the Income Support Service.<sup>33</sup>

---

<sup>30</sup> Social Security Appeal Authority Decision No 22/95, unreported, 30 March 1995. The Appeal Authority directed the Director-General to average out the earnings in this particular case.

<sup>31</sup> New Zealand Income Support Service, *Main Benefit Manual* (1995) 10.1600. See also Social Security Appeal Authority Decision No 14/87, unreported, 16 March 1987. In 1988 the Australian legislation itself was amended to allow a beneficiary to undertake approved voluntary work and remain eligible for benefit: Social Security Act 1947, s 116A.

<sup>32</sup> Social Security Act 1964, s 59 and Ninth Schedule. In Social Security Appeal Authority Decision No 634, unreported, 17 March 1981, it was held that ss 58 and 59 must be read together. In that case it was noted as working in the appellant's favour that "[t]his is a case where a person has endeavoured to help himself (and incidentally the taxpayer) by endeavouring to earn moneys (sic) to obviate the necessity for receipt by him of the unemployment benefit".

<sup>33</sup> New Zealand Income Support Service, *supra* note 31, at 10.1700: "Often a self-employment venture will start in a small way, eg developing a hobby, toy making or casual work. The customer is entitled to earn income and have the benefit rate adjusted where the income is over the exemption". See also Social Security Appeal Authority Decision No 634, unreported, 17 March 1981, accepting that s 58 must be read together with the income exemption in s 59 and the Ninth Schedule.

The contradiction within the statute is compounded by the provisions under which only those on unemployment benefit who are working for less than eight hours per week can be brought into the Community Task Force scheme. These provisions clearly envisage the possibility of other unemployment beneficiaries having employment of over eight hours per week.<sup>34</sup>

There are therefore several problems with the use of the “unemployed” test as a criterion of eligibility for unemployment benefit. It is applied inconsistently - often it seems capriciously - and is open to potential abuse by Income Support Service officials. Consequently and additionally, applicants for benefit cannot predict what work, if any, will be disregarded. It has two other far-reaching effects: it runs counter to public policy insofar as it acts as a disincentive to self-help for those in receipt of benefit;<sup>35</sup> and, secondly, for many in marginal work, it prevents unemployment benefit from operating as income support.

### III. SOME OPTIONS FOR REFORM

#### 1. Defining “unemployed”

The most obvious way to attempt to solve a least some of the problems resulting from the inconsistent use of the term “unemployed” in the case law is to define the term more precisely. This aspect of eligibility for unemployment benefit is more tightly regulated in United Kingdom (UK) social security law and that approach might be of assistance comparatively. Without defining “unemployed” directly, the UK system has, through legislation and regulations, narrowed its scope by identifying its parameters and has specified those situations where people who might be thought of as unemployed count as employed and vice versa.

Section 25 of the Social Security Contributions and Benefits Act 1992 (which in this area is merely a consolidation of previous legislation) entitles an otherwise qualified person to unemployment benefit “in respect of any day of unemployment which forms part of a period of interruption of employment” after the first three days of an interruption of employment.

---

<sup>34</sup> Social Security Act 1964, s 60M.

<sup>35</sup> Indeed with respect to the supplementing of benefits, the test discriminates against the unemployed when compared to, say, the recipients of domestic purposes benefits, since the latter do not have to be unemployed. It is quite possible for a domestic purposes beneficiary to be in receipt of wages or to start up a business, such income having the effect of merely abating the benefit and not invalidating it: Social Security Appeal Authority Decision No 24/94, unreported, 12 April 1994, where an Enterprise Allowance was simply treated as income.

A person is excluded from unemployment benefit if he or she is in gainful employment (including self-employment).<sup>36</sup> The test for whether employment is gainful is whether the claimant had the hope, desire or intention of obtaining remuneration or deriving profit from it.<sup>37</sup> "Day of unemployment" is not defined in the statute nor specifically in the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983.<sup>38</sup> But "period of interruption of employment" is defined as any two days of unemployment, whether consecutive or not, within a period of six consecutive days.<sup>39</sup>

A preliminary point of significance is that generally only those who have made sufficient National Insurance contributions as employed earners are eligible for unemployment benefit in the UK.<sup>40</sup> The consequent exclusion of the self-employed from the scheme means that many of the marginal cases, such as those involving the intermittently self-employed considered in New Zealand, do not arise.

Eligibility is further restricted in scope by very complex rules excluding certain workless days from counting as days of unemployment. First, Sunday or any other day substituted as a day of rest is not treated as a day of unemployment and must be disregarded in computing any period of consecutive days.<sup>41</sup> Secondly, holidays and days for which the claimant receives compensation arising from the termination of employment are not days of unemployment.<sup>42</sup> Thirdly, those workless days on which a worker who is still under a contract of employment would not be working anyway

---

<sup>36</sup> Social Security Contributions and Benefits Act 1992, ss 2, 122 and Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 7(1)(g).

<sup>37</sup> CU 30/49. However a person who has the opportunity to earn money from employment (eg on a commission basis) but chooses not to take it, is not unemployed: R(U) 11/60.

<sup>38</sup> SI 1983 No 1598.

<sup>39</sup> Social Security Contributions and Benefits Act 1992, s 57(1)(d). A further period of interruption separated by no more than 8 weeks is treated as part of the same period. "Employment" is defined as including "any trade, business, profession, office or vocation and 'employed' has a corresponding meaning": s 122(1).

<sup>40</sup> Social Security Contributions and Benefits Act 1992, s 25(2)(a) and Schedule 3 Part I paragraph 1.

<sup>41</sup> *Ibid*, s 57(1)(e). See also Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 4. This has the odd effect of allowing a beneficiary to have a Sunday job.

<sup>42</sup> Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 7(1)(h) and (d).

do not count as days of unemployment.<sup>43</sup> Fourthly, a day is not a day of unemployment if on that day a person does no work but is employed in that week to the full extent normal for him or her.<sup>44</sup>

Conversely, there are situations where an applicant may be working during a day but that day does nevertheless count as one of unemployment. The first example is where a person's shiftwork goes on past midnight: that shift causes only one day to be treated as one of employment (that is, the day in which the greater part of the shift falls).<sup>45</sup> Secondly, a day is treated as one of unemployment if the claimant is working but earning less than £2 per day, and if either the work is not his or her usual main occupation or it is done as a recognised charitable service.<sup>46</sup> In any event, the claimant must remain available for full-time employed earner's employment.

Because the legislation and regulations attempt to specify not only the standard case but the exceptions as well, the test of unemployment in the UK has become a particularly complex one with a correspondingly high number of cases going to appeal. Clearly some of the intricacy arises because the unit for calculation is a day rather than a week. However the general approach could be applied in New Zealand to a weekly calculated entitlement. A week would need to be defined, presumably as any continuous seven day period or as running from a particular day (for example, Monday) to the next such day. Although it may seem rather foolish to increase the administrative complexity of the benefit system, it would be technically possible, it appears, to define more precisely when the "unemployed" requirement is applicable, with a view to reducing the present inconsistencies. Granted that it is feasible to identify the parameters of "unemployment", the next issue is a policy one of deciding

---

<sup>43</sup> Social Security Contributions and Benefits Act 1992, s 57(1)(b). This is known as the "normal idle day" rule. It is qualified in Regulations by a series of detailed exceptions, eg where the employee is indefinitely suspended: Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 19.

<sup>44</sup> Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 7(1)(e). This is known as the "full extent normal rule". Originally intended to prevent full-time workers from concentrating their working hours into part of the week and claiming for the rest, it does not apply where adverse industrial conditions have affected the period worked.

<sup>45</sup> Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 5.

<sup>46</sup> Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983, reg 7(1)(g).



where those parameters are to be set. This is determined in large part by the nature and function of the New Zealand social security system.<sup>47</sup>

Where benefit is viewed as an insurance-provided cushion against a sharp fall in income, as in the UK, attention focuses on the contingent event (such as unemployment, sickness or widowhood) which gives rise to a claim, rather than whether the actual financial circumstances of the claimant reveal need.<sup>48</sup> The event in itself activates a contractual entitlement. Thus, being "unemployed", as the operative criterion activating benefit payment in a social insurance system, is as precisely defined as practicable.

In contrast, in a benefit system which is a residual or needs-based one, an applicant has to land on the poverty floor before consideration is given to his or her plight. The basis of a claim for income support is actual need, while the contingent event which may have brought about the need is thus correspondingly less significant. It is quite appropriate in such a system for the contingent event to be described fairly loosely since the operative criterion activating benefit payment is not the contingent event but rather the applicant's degree of need.

Ever since the path-breaking Old-Age Pensions Act of 1898, the dominant philosophy in New Zealand has been that only those who fall into a category (such as the unemployed and widows) *and* are poor (often as a result) qualify for the main benefits. New Zealand's unemployment benefit system is a residual one, partly, it has to be admitted, because the state traditionally tried to obviate the need for the system through intervention in the economy (with the aim of ensuring full employment and an adequate social wage).<sup>49</sup>

The residual nature of the New Zealand system is evidenced by the income-testing of main benefits such as unemployment benefit. It is not sufficient that the applicant be unemployed to trigger an automatic entitlement to benefit; and the joint income of the applicant and his or her

---

<sup>47</sup> For New Zealand's place in the classification of welfare states, see Esping-Andersen, G *The Three Worlds of Welfare Capitalism* (1990), Castles, F *Welfare in Australia and New Zealand* (1985) and Davidson, A *Two Models of Welfare* (1989).

<sup>48</sup> Indeed, a function of the payment of benefit in this type of system is to avoid need arising.

<sup>49</sup> Castles, supra note 47; Mabbett, "Labour Market Policy and New Zealand's Welfare State" in Royal Commission on Social Policy, *April Report* vol III part 1 (1988); and O'Brien, M and Wilkes, C *The Tragedy of the Market* (1993). In other areas of social security provision, such as family benefit and national superannuation (both now abolished), the New Zealand system has been more universalist.

spouse must be low, otherwise a benefit abatement regime comes into play in such a way that at a relatively modest family income the entitlement to benefit disappears. Further evidence is provided by the nature of the New Zealand stand down (waiting) periods: a beneficiary has to wait two weeks before benefit is payable, because, it is assumed, no one leaving employment is sufficiently needy as to be without resources to cover that period. There is provision for that stand down period to be reduced if need is shown. The unemployed who have been in employment at a higher income immediately before claiming have to wait up to ten weeks during which time they are to use up their accumulated resources. This is not the sign of an insurance type system under which the insured has a right to cover as soon as the particular event (unemployment) occurs.

The case law discussed earlier adds to the argument that benefits in New Zealand serve a residual rather than an insurance function. In the increasingly numerous cases where the Social Security Appeal Authority has based its decisions on income issues, there seems to be an unarticulated acknowledgement that the function of unemployment benefit is to meet need and that the statutory provisions have to be interpreted so as to allow it to perform that function.

It is my contention that if detailed regulation of the requirement that a beneficiary be unemployed is to be consistent with the New Zealand income support system, it should be worded explicitly to permit the beneficiary to receive benefit unless he or she is both employed *and* earning a basic standard of living.

## *2. Individualised agreements*

A significant part of the objection to the inconsistent use of the term "unemployed" in New Zealand is that the beneficiary is unable to predict what work, if any, can be undertaken without unemployment benefit being lost. A misjudgment by a beneficiary as to what work is permissible can lead to repayment of benefit and even the imposition of a penalty.<sup>50</sup> Beneficiaries would be greatly assisted if they knew in advance what work was permissible. An intriguing alternative to trying to construct an all-encompassing definition of "unemployed" or set of regulations is a contractual approach whereby receipt of benefit would be conditional on the beneficiary entering into an agreement with the Income Support Service to abide by certain conditions in return for benefit. This might well include an agreement that the beneficiary could continue or take some

---

<sup>50</sup> Such misjudgments are all the more likely if the rules are complex and arcane, while beneficiaries tend to be poorly educated and alienated from the system by culture or class.

part-time work - for instance, to maintain work skills. Any voluntary work could be included in the contract. This approach would not be alien to the New Zealand system insofar as payment of benefit is already conditional.<sup>51</sup>

A contractual approach underlies the Australian Job Search (for the short-term unemployed) and Newstart (for longer term unemployed) programmes. The Australian scheme allows the Department of Social Security to disregard paid work which would otherwise deprive a period of activity of its character as "unemployment".<sup>52</sup> However, this discretion has been used conservatively in such a way that the only work which is disregarded is that which does not take up most of the week and is temporary and not highly remunerated.<sup>53</sup>

It would be quite feasible (but very time-consuming) for these conditions to be individually negotiated so that some useful part-time occupation would not disqualify the beneficiary from a (reduced rate) benefit. Staff would need to have guidelines as to the scope of their discretion in such negotiations, and they (or some specialist staff) would need to be trained in negotiation. There would be an advantage in that beneficiaries would have a greater choice available and the system would be more flexible in responding to individual circumstances. The system would be more open and hence any inconsistencies or abuse of departmental discretion would be more readily detected. However it would also be a system with a high degree of administrative discretion, and, to minimise this and maintain consistency, there would be a demand for the compilation of very detailed and no doubt contentious rules, either in the form of regulations or hidden in policy guidelines.

There would thus be little advantage over the detailed regulation of a system like the British one described above. Furthermore, if it were to achieve its present purpose of permitting certain unemployment beneficiaries to negotiate to carry out some employment, then it puts in question the necessity of the "unemployed" condition for receiving unemployment benefit. It is this last realisation which lies behind the next two options, both of which involve doing away with the requirement that a beneficiary must be unemployed.

Neither a more regulatory approach nor even the more individualised approach outlined above has provided a satisfactory solution to the full

---

<sup>51</sup> *Supra* note 4 and *infra* note 55.

<sup>52</sup> Social Security Act 1991, ss 516 and 595. For discussion, see Carney, T and Hanks, P *Social Security in Australia* (1994) 175-7.

<sup>53</sup> *Re Waller* (1985) 8 ALD 26.

range of problems linked with the requirement that an applicant for unemployment benefit in the New Zealand system must be “unemployed”. Both would entail extensive exceptions to the requirement. I am not alone in wondering whether the problem may lie in the requirement itself. Towards the end of a recent essay on the Australian system, Tim Field and Michael Sassella identify a number of possibilities for reform including the following:

Perhaps the current “unemployed” requirement could be dispensed with. The nature of payments could then change somewhat from an unemployment payment to an “under-employment” wage supplement depending on the amount of remuneration being received for paid work. ... The Act would probably benefit from relinquishing the concept of “unemployed” in order to permit the Secretary to treat employed people as “unemployed” in certain situations. ... [T]he Act could work with fewer payment types, the emphasis being on provision of assistance to help employable people into employment regardless of the cause of their under-employment or unemployment.<sup>54</sup>

### *3. Removing the “unemployed” requirement*

It would be quite feasible to remove the requirement that a beneficiary be unemployed without causing a dramatic increase in applicants. This is because an applicant must satisfy all the eligibility criteria for unemployment benefit, and, as Black, Harrop and Hughes have noted in relation to the “unemployed” criterion,

in most difficult cases the cumulative conditions for eligibility under s 58 will probably rule out entitlement. This is particularly so bearing in mind the requirements that the applicant be capable of undertaking and willing to undertake suitable work and have taken reasonable steps to obtain suitable work. For example, self-employed people who spend a substantial proportion of their time attempting to establish a business may not be regarded as satisfying such requirements.<sup>55</sup>

If greater reliance is to be placed on these other criteria (collectively, “the work test”) because of the removal of the “unemployed” requirement,

---

<sup>54</sup> Field and Sassella, “The Restructured Economy, Work and the Social Security Challenge” in Disney, *J Current Issues in Social Security Law* (1994) 48.

<sup>55</sup> Black, J et al *Income Support Legislation and Practice* (1994) A/909. Other applicants, currently ineligible for unemployment benefit because they do not meet the “unemployed” requirement, would find, if it were removed, that they still do not receive benefit because their income (including of a spouse, if any) is too high. To allow for intermittent work, the standard assessment period for income should be several months.

there should be a rationalisation of these other criteria. They need to be rationalised because two tests have evolved. The first appears in the main unemployment benefit section of the Social Security Act 1964, that is section 58, which requires that the claimant

- (b) is capable of undertaking and is willing to undertake suitable work; and
- (c) has taken reasonable steps to obtain suitable work.

The second work test is found in section 60J, giving the Director-General power to cancel a benefit if the beneficiary fails or refuses without good reason to undergo work assessment or training or if, where the beneficiary could reasonably be expected to be in full employment, the beneficiary is making insufficient efforts to find full employment (including temporary or seasonal work), has declined two offers or interviews, or has failed to make himself or herself available for suitable employment. Since part of the rationale of removing the “unemployed” requirement is to accommodate those in low paid part-time or casual work, a reworded work test might require recipients of unemployment benefit to seek whatever suitable employment would take their income above a level entitling them to benefit.<sup>56</sup> This could be taken further by requiring the spouse of a recipient to be undertaking an active job search too.

The first point to note about the removal of the “unemployed” criterion of eligibility is that it endorses what is the existing practice for a number of beneficiaries who have been permitted to take on work while in receipt of benefit, and extends the same opportunity to others who either have been disqualified from benefit on the grounds of not being “unemployed” or have kept themselves qualified for benefit by deliberately not taking up peripheral work. There need be no fear that such a reform might appear to encourage beneficiaries to move into the black economy. Although it becomes legitimate to take on work while on benefit, to fail to declare it would remain an offence. While some may not be caught, the more significant contributors to the black economy are, as Hakim points out, those who are otherwise employed and are working for “extra pocket

---

<sup>56</sup> “Suitable employment” need not be full-time, and might be additional to or a substitute for any existing employment. It should be borne in mind that applying a work test rigorously may necessitate the expansion of government-sponsored work schemes such as the Community Task Force to test willingness to work. For the Community Task Force (sometimes regarded as New Zealand’s version of “workfare”), see Social Security Act 1964, s 60M. Some minor alterations to the statutory provision could bring within its provisions those who have been unemployed for less than 26 weeks and those who have part-time employment for more than eight hours per week.

money” on the side.<sup>57</sup> The fiscal cost would be more than matched by the increased activity in the economy.

Any concerns about potential increased black economy participation should be balanced against the fact that more people, previously reliant on benefits for their entire income, would take on (or be forced to take on) temporary, casual or part-time work, payment for which would replace part of their benefit. Not only would this save taxpayer money but it could also reduce welfare dependency. The beneficiary would feel personally responsible for part of his or her income and indeed may be spurred into seeking fuller employment (though only if the abatement scheme were revised in a way which made worthwhile the beneficiary's increased earnings).<sup>58</sup> Cass' research for the Australian Social Security Review indicates that this idea of partial work as a stepping stone to full employment applies particularly to those who take on intermittent or casual work,<sup>59</sup> but it would hold attractions, too, for many in part-time employment.

The present requirement that the beneficiary be unemployed does nothing to further the goal of employment (full-time or otherwise) but may instead inhibit moves back into the workforce by prohibiting the stepping stone of partial employment.

Policy towards the unemployed has failed to address the fact that it is counter-productive to insist on complete inactivity as the price for continued receipt of unemployment benefits. The unemployed need to 'keep their hand in' in their trade or profession, to keep in touch with the realities of paid employment, to keep in touch with the social network of colleagues who can inform them of new job opportunities, in order to maintain the interest, motivation and ability to regain paid employment. Restricting social contacts to other unemployed people is far more conducive to creating a culture of welfare dependency than policies which prevent the social isolation of the unemployed. The policy of rigorously enforced inactivity is counter-productive and should be reconsidered.<sup>60</sup>

There may be concern that people already in low paid casual or part-time work might apply for unemployment benefit to supplement their earnings.

---

<sup>57</sup> Hakim, "Unemployment, Marginal Work and the Black Economy" in McLaughlin, E *Understanding Unemployment* (1992).

<sup>58</sup> On the abatement rate, see Prebble, M et al *Report of the Change Team on Targeting Social Assistance* (1991).

<sup>59</sup> Cass, B *Income Support for the Unemployed in Australia: Towards a More Active System* (1988) 122.

<sup>60</sup> Hakim, "Unemployment, Marginal Work and the Black Economy" in McLaughlin, E *Understanding Unemployment* (1992).

Since it would be difficult to differentiate equitably between them and those who take on work to supplement their benefit, the additional cost involved would have to be accepted. There seems to be little good reason for denying a right to a basic income security to this particular group who are on the margins of employment and unemployment. On the contrary, income support would assist peripheral workers to remain in employment and would serve the policy objective of relieving or even preventing need. But, given the income tested nature of benefits, and the existence already of family support/guaranteed minimum family income provisions and of (means-tested) supplementary allowances, any increase in numbers of peripheral workers applying for benefits would be small, largely restricted to single people without families. More importantly, if they do so choose they will be faced with the work test requirements of unemployment benefit (and in some cases with the provisions penalising voluntary unemployment).

A difficulty does arise in the case of someone who over a number of years is running a business unprofitably or reinvesting the profits in the business: in such cases an unemployment benefit might be thought of as a subsidy towards the accumulation of capital at the expense of the taxpayer.<sup>61</sup> Again, the check against this is the work test.

That these reforms are not out of the question is demonstrated by the fact that something similar was introduced in Parliament in the Social Welfare (No 2) Bill 1990, but was never enacted.<sup>62</sup> Clause 9 of the Bill replaced the “unemployed” requirement with a requirement that an applicant “is not in full employment”.<sup>63</sup> Consistent with the fact that being unemployed would no longer be a requirement for obtaining the benefit, the relevant benefit came under a generic “Universal Benefit”. Perhaps the name “Job Search Allowance” would be more acceptable. This name is already in use in the New Zealand legislation to signify a benefit paid for 13 weeks to 16 and 17 year olds who have been in employment or training for six months and are seeking employment. The name could be adopted as a

---

<sup>61</sup> For example, Social Security Appeal Authority Decision 15/94, unreported, 12 April 1994, relates to “a fully functioning farm ... albeit one which does not appear to show a taxable or otherwise healthy profit”.

<sup>62</sup> The Bill picked up the recommendations of A Ministerial Task Force on Income Maintenance, *Benefit Reform - the Next Steps* (1987).

<sup>63</sup> Although the Bill would avoid the payment of benefit as a subsidy to a self-employed person running a full-time business inefficiently, there would still remain some difficulties with a sufficiently clear definition of “not in full employment”. Paying benefit to all those who are not making ends meet but are seeking employment might avoid these difficulties.

replacement for “unemployment benefit”, perhaps with special conditions for 16 and 17 year olds.<sup>64</sup>

#### 4. *Abolishing unemployment benefit*

I have attempted so far to find ways for the social security system to acknowledge peripheral employment among the “unemployed” and economic need among the peripherally employed. The type of reform outlined above does accommodate these groups within welfare provision and is consequently a very worthwhile change. However, that reform is relatively conservative in that it retains a work test. In the background, there still seems to be a set of assumptions: that full-time work is available, that beneficiaries are to a great extent at fault in not finding it, and that atypical employment is merely a transition to full employment. In fact, it may well be, as McLaughlin discovered in UK studies, that vacancies are usually filled by employed persons transferring jobs and that mainly peripheral or atypical work is left for the unemployed job seeker.<sup>65</sup>

Workforce restructuring over the past decade has seen a relative decline in full-time work and a corresponding increase in atypical work.<sup>66</sup> Further increases in the incidence of atypical work are likely. What the conservative reforms fail to recognise is the validity of atypical or peripheral employment in itself, especially for Māori, Pacific Islanders and women (all of whom, partly because of family structures, are disproportionately engaged in such work), rather than as a step to full employment. The reality of permanent atypical employment as part of a dual labour market has been greeted as a disaster by some workers who want or need to obtain the economic and statutory security of full-time employment, has been welcomed by others as an opportunity to have a more flexible working life, but seems to have little impact on policymakers, a point noted by the recent Prime Ministerial Task Force on Employment:

---

<sup>64</sup> Social Security Act 1964, s 60D. In Australia it has since 1991 replaced the unemployment benefit for the first 12 months and it requires that a recipient be unemployed and be complying with an agreement (a “Job Search Activity Agreement”) with the Department of Social Security in respect of efforts to find work: Social Security Act 1991, Part 2.11.

<sup>65</sup> McLaughlin, “Work and Welfare Benefits: Social Security, Employment and Unemployment in the 1990s” 20 J Soc Pol 485, 489.

<sup>66</sup> For the figures in respect of atypical work, and part-time work in particular, see Department of Labour, *Half Yearly Employment Survey and Quarterly Survey* (1984-95).



There was strong consensus that the income support system has not changed sufficiently in response to new patterns of work and participation in the labour market, especially the growing importance of part-time and casual work.<sup>67</sup>

Regulation of unemployment benefit in a way that pushes beneficiaries towards only full-time work is a failure to comprehend the economic and social changes that are taking place. There is simply not enough work available for everyone to have full-time employment; if everyone is to have an income, it cannot be linked exclusively to possession of (or a commitment to obtaining) a "standard" job.

The right to work, the right to a job and the right to an income have been confused for a long time. They cannot be confused any longer. Unemployment benefits and early retirement are an acknowledgement of this fact - but at the same they conceal it. ... Treating unemployment as if it were an accidental, temporary phenomenon and paying benefit as a charity rather than as a right avoids the fact that there cannot be full-time full employment, now or in the future.<sup>68</sup>

It follows that the requirement placed on an unemployed person to be actively seeking full-time work is inappropriate.<sup>69</sup> Already disadvantaged in terms of job security and social security,<sup>70</sup> those in atypical employment should not be continually harassed into seeking additional work and the unemployed should not be discouraged from accepting or creating atypical work. The proposals already outlined separate receipt of unemployment benefit from being totally unemployed. The next, more radical, development would be to separate receipt of unemployment benefit from the work test, leaving need as the main operative eligibility criterion. This would signify an acceptance of the inevitability of under-employment and an endorsement of atypical work.

Such a change comes close to more familiar ideas: negative income tax and the Family Support/Guaranteed Minimum Family Income tax credit systems in force in New Zealand and administered under the aegis of the Inland Revenue Department.<sup>71</sup> An alternative would be a universal (non-targeted) guaranteed basic income scheme under which all citizens receive a standard sum to which they can add income without penalty, which,

---

<sup>67</sup> Prime Ministerial Task Force on Employment, *Proposals for Action* (1994).

<sup>68</sup> Gorz, A *Paths to Paradise: On the Liberation from Work* (1985).

<sup>69</sup> This has been partially recognised by a relaxation of the work test for those over 55 years of age - the "55+ benefit".

<sup>70</sup> Fevre, "Emerging Alternatives to Full-Time and Permanent Employment" in Brown, P and Scase, R (eds) *Poor Work: Disadvantage and the Division of Labour* (1991).

<sup>71</sup> Income Tax Act 1994, Subpart D. The other social security benefits, too, would be replaced under these proposals.

despite an impact on the market economy, would be preferable insofar as it would be less likely to create poverty traps and a low paid underclass.<sup>72</sup> Although discussion of the relative merits of negative income tax schemes and of basic income proposals is outside the scope of this article, the plight of the atypical worker under the present social security provisions may strengthen the case for revisiting that debate.<sup>73</sup>

#### IV. CONCLUSION

The thesis of this article is that income support provision for the unemployed must accommodate those who are not completely unemployed, such as those in peripheral or atypical work. This can be attempted surreptitiously (which is what is occurring in an inconsistent fashion in New Zealand), or it can be attempted by detailing in statute and regulation various rules and exceptions (as in the UK), or it can be attempted by individualised contracts (for which there is a framework in the Australian legislation). None of these is entirely successful. An alternative is to remove altogether the requirement that the beneficiary be unemployed. This would serve the dual function of encouraging people who are totally unemployed to take up atypical employment, and of permitting needy people in peripheral work to receive income support. However, the work test undermines the position of the peripheral worker almost as greatly as does the “unemployed” test. A benefit without either an “unemployed” test or a work test could take two forms: an income tested provision of income support or a universal basic income. Through such a benefit, the New Zealand social security system could simultaneously affirm the value of atypical employment, facilitate participation by the unemployed in society, assist marginalised workers to prevent poverty, and avoid the inconsistency and administrative difficulties experienced under the present scheme.

---

<sup>72</sup> See Jordan, B *Paupers: the Making of a New Claiming Class* (1973), and Dean, “In Search of the Underclass” in Brown and Scase, *supra* note 70.

<sup>73</sup> See Dilnot, AW et al, *The Reform of Social Security* (1984); and van Parijs, P (ed) *Arguing for Basic Income* (1992).

## BOOK REVIEW

ESSAYS ON THE CONSTITUTION ed Philip A Joseph. Wellington, Brooker's, 1995, xxx and 411 pp. Price \$110 plus GST (clothcover), \$75.00 plus GST (softcover).

It has become a cliché to state that New Zealand is living in interesting constitutional times. It has certainly been a time of great change to New Zealand's constitutional arrangements. The extent of the changes that have taken place over the past 10 years can be seen from a recitation of the major constitutional events, which began with the enactment of the Constitution Act 1986. This Act defined the constitutional institutional framework. It was followed closely by a restructuring of the state sector, including the transfer of resources and functions from the public sector to the private sector; the formal recognition by the Electoral Royal Commission and the Court of Appeal of the constitutional significance of the Treaty of Waitangi; the enactment of the Bill of Rights Act 1990; a fundamental change to the system of political representation; an extension to the jurisdiction of the Human Rights Commission; the restructuring of local government; and changes to the jurisdiction of the courts.

This period of constitutional activity does not appear to be at an end yet. It is only a question of time before appeals to the Privy Council are repealed, which will prompt a further restructuring of the court system. Also, the decision of Australia to move towards the creation of a republic has raised the question as to whether New Zealand should retain the monarchy. The republican debate is a reminder of the close links between Australia and New Zealand, not only on economic matters, but also through their shared history and tradition of parliamentary democracy. While both countries have developed different forms of parliamentary democracy, they share the issue of how to right the wrongs to indigenous peoples, and create a new more equal partnership among the distinct groups that now occupy the same territory. Further, they are faced with preserving their own identity within a region where they are a cultural minority.

On an even more fundamental level, New Zealanders have begun the debate on the meaning of the concept of sovereignty for New Zealand. This debate will provide a focus for the post-colonial quest of establishing a national identity in an age where there is a serious question as to whether the nation-state will survive as a viable entity of governance on any matter of importance. The consequences of globalisation on national economies highlights the fragility of the nation-state as an independent entity. The development of communication and information technologies also threatens the preservation of distinctive cultural identity. For those who wish to comment on current constitutional developments, there is much to

discuss. The challenge, when compiling a collection of essays on constitutional matters, must be what to include and what to exclude. Such dilemmas are normally resolved by organising the essays around a unifying theme.

In the case of the present collection, that theme appears to be the institutional constitutional framework, and, more specifically, the legal framework. While the need to make a choice of material to include in the essays is understandable, it is important to acknowledge that the perspective on the constitution conveyed through this collection is a limited one. It is limited because the constitution is viewed through the dominant lens of legal institutions and rules. The exception to this approach is found in the excellent essay by Paul McHugh on the "Historiography of New Zealand's Constitutional History". His argument for a contextualist approach to understanding the way in which history is a construction provides the necessary conceptual framework within which to read many of the other essays. After reading this essay which was positioned at the end of the book, I wondered why it had not been the lead essay.

One of the interesting aspects of this collection is the insights it gives us into the thinking of the country's leading judicial officers. The President of the Court of Appeal discusses the suggested evolution, or as he describes revolution, of the New Zealand constitution from a monarchy to a republic, and raises the legal difficulties in effecting such a change. His essay again raises the complex relationship between the legislature and the judiciary, and whose view should prevail in matters of constitutional importance. This whole question is explored in much more detail in the essays of F M Brookfield and B V Harris. Professor Harris' conclusions seem to fall on the side of curtailing the powers of the judiciary, and to support the recently advocated position of the Business Roundtable that judges can be made accountable through fixed non-renewable terms of appointment. He further argues for appointment of judges to be vested in a group which is representative of the community. Since Parliament contains such a group under our system of democracy, I wondered who these people would be and how they themselves would be made accountable. Emeritus Professor Brookfield in contrast argues for the powers of Parliament to be subject to judicial review. He also argues for a written constitution, with which I would agree, that protects both the rights conferred under the Treaty of Waitangi and the Bill of Rights.

The Chief Justice's essay on the foreshadowed repeal of appeals to the Privy Council provides an important reminder of the need to acknowledge the contribution that Privy Council judgments have made to the development of a New Zealand jurisprudence. While the abolition of

appeals to the Privy Council is not only inevitable but necessary for New Zealand to continue on the path of developing its own jurisprudence, this essay is a useful reminder of the perils of failing to acknowledge our historical legal roots. In contrast, yet also complementary to the Chief Justice's essay, are the two essays on New Zealand's relationship with Australia. These essays speculate on the nature and form of future legal institutions in New Zealand as the dominance of the English tradition is replaced by that of the Asia-Pacific region. Professor Taggart's essay "Public Utilities and Public Law" explores the need for New Zealand jurisprudence to develop to fill the legal gaps created through the corporatisation and privatisation of former public services and assets. He also explores our common law roots to establish the legitimacy of the concept of the public interest, and mines the rich jurisprudence of the United States for future directions for New Zealand jurisprudence.

Sir Ivor Richardson in his essay addresses one of the most important constitutional issues that have been highlighted by the policies associated with the structural adjustment. He describes it as "[t]he challenge for our society to develop laws and institutions which provide a proper balance between the rights and obligations of individuals - those of minority groups, particularly indigenous and ethnic minorities - and those of the community". This issue is not a new one and lies at the heart of any democracy. In the New Zealand context the challenge is greater because of the need to balance individual human rights with group rights, as asserted presently by Māori, but they are unlikely to be the only ethnic group in the future to seek specific recognition of group rights. The consequences of the failure to find solutions to these questions is seen in the tragedy that has befallen the former Yugoslavia. Although there is much to comment on in this essay, of particular note is the increasing need to provide the courts with a cost-benefit analysis when presenting a case. The increasing acceptance of "non-legal" evidence is yet another example of the increasing acceptance of what is sometimes called the "contextualist" approach to analysis and decision-making.

There are two other essays that provide a valuable insight into parts of the constitutional process that are not often reviewed in collections of this nature. They are the essays of David McGee on "The Legislative Process and the Courts", and the Honourable Paul East's essay "The Role of the Attorney-General". A former Attorney-General, Sir Geoffrey Palmer, has played a major role through his writing in making the policy-making process more transparent. The Honourable Paul East continues in this tradition. His essay will provide a valuable resource for teachers of public law. Likewise, David McGee's essay provides a useful reminder that the primary business of the legislature is not politics, but law-making. While the two processes are interwoven, there is a technical side to law-making

that is often more determinative on the nature of the legal outcome than the political posturing that achieves the media headlines.

Other essays in the collection include Professor John Burrows' essay on "Freedom of the Press under the New Zealand Bill of Rights Act 1990", which argues for the media having constitutional importance in our society. While one can only agree with the importance of freedom of information being an integral part of New Zealand's constitutional arrangements, it is equally important to acknowledge the reality of knowing who controls the media and in whose interests the media are controlled. The globalisation of the media raises serious issues for any country's constitutional arrangements. Alan McRobie's essay on "The Electoral System" is useful, as is Peter Oliver's essay on "Cutting the Imperial Link - Canada and New Zealand", which rehearses the arguments as to whether New Zealand is really independent. The legal answer to this question depends on whether the New Zealand constitution is self-embracing, and therefore has broken the ties with the English constitutional institutions which have provided the grundnorm for the constitution.

As I read the collection of essays I was struck by the emergence of a theme that was frequently unstated in the essays, but which seemed nevertheless to dominate the discussions. It was a genuine preoccupation with how we define what is meant by a New Zealand identity. The editor expresses something similar in his introduction when he claims that "[t]hese essays are a reflection of our national culture". I would have felt more comfortable with his claim if it had said "aspects of our culture". My reason for this is twofold. First, the contributors are not representative of our culture, but only one, albeit powerful sector of New Zealand society. There are no Māori or women contributors, and few from other disciplines outside the law. The essence of the culture that is emerging for some of us is that diversity is formally acknowledged, and that it is from this platform that the task of constitutional development can proceed into the next century.

The second reason is that culture is a difficult concept but it does encompass a sense of distinctive identity. A preoccupation with identity is understandable at a time of real change. There is an uncertainty and ambivalence about whether there exists in reality a cultural identity through which all New Zealanders can claim some distinctive national identity. In constitutional terms, a search for identity is associated with a search for legitimacy. In the context of the discussion in this collection, which focuses on the institutional constitutional arrangement, legitimacy is sought through the never-ending search for the grundnorm. In the past we have looked through the mists of English, then British, history for the

origins of the common law and the institutions through which those fundamental principles that underpin our society are expressed. However, if one conducts the search only through institutional arrangements, especially legal institutional arrangements, it is unlikely that one will ever find the legitimacy that is necessary to create a new, distinctive and representative national identity. The search must be much wider, as is indicated in Dr McHugh's essay.

"Essays on the Constitution" raises these important constitutional issues, but it does not develop them. This is not its purpose, however. The strength of the collection lies in that it provides a snapshot of the thinking of those individuals who are influential in the formation of constitutions. It provides much useful information and stimulating ideas and will be gratefully used by teachers of public law. It will also hopefully provoke a publisher to commission a cross-disciplinary collection of essays on constitutional issues, so that a comprehensive and inclusive debate on these important issues can take place.

MARGARET WILSON\*

---

\* LLB (Hons), M.Jur (Auckland), Professor of Law, University of Waikato.



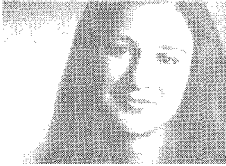
**Wherever**

**in the future**

**you see yourself,**

**we'll see you**

**there...**



**Bell|Gully**

BARRISTERS AND SOLICITORS

Auckland

Manukau

Wellington