

# WAIKATO LAW REVIEW

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## EDITOR'S INTRODUCTION

The fourteenth issue of the *Waikato Law Review* includes regular features such as the Harkness Henry Lecture, and the review of *Contemporary Issues in Māori Law and Society* by Linda Te Aho. Justice Hammond's Harkness Henry Lecture deals with sobering issues concerning miscarriages of justice. We thank the partners of the firm for their continuing sponsorship of this significant event.

I thank all the authors who submitted articles, casenotes and book reviews for the Law Review; along with the referees to whom articles were sent for consideration. I thank Janine Pickering, Jennifer Campion, Erin Burke, and Steven Farnworth for their careful work on documents, text editing, and references. Thanks are also due to Amanda Colmer at Waikato Print for quick and accurate typesetting, and for her skill with Māori as well as English text.

Professor Barry Barton  
Editor



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# THE HARKNESS HENRY LECTURE

## THE NEW MISCARRIAGES OF JUSTICE

BY HON GRANT HAMMOND\*

'I regard injustice, or even the risk of injustice perpetrated in the august precincts of a court of law, with calm consideration and time for reflection, as utterly repellent.' Peter Ustinov, *Dear Me* (1977).

### I. INTRODUCTION

Whilst in Chicago recently, I indulged a private passion for black and white photography and visited the Museum of Modern Photography. I was in luck. As it turned out, Taryn Simon's photographic exhibition 'The Innocents' had just been moved from New York to Chicago, on loan.<sup>1</sup> Ms Simon had hit upon the idea of photographing individuals who had served lengthy terms in prison (some on death row), for violent crimes they did not commit, and who had been pardoned when their innocence was incontrovertibly established. She travelled across the United States to take these pictures, often to remote locations. There are several dozen portraits of the wrongfully convicted at locations relating to their respective cases: the scene of misidentification, the scene of arrest, the alibi location, or the scene of the crime. The photographs are accompanied by concise case profiles.

It is a mesmerising exhibition. Something like eighty juries had been completely wrong, which should stop any professional judge dead in his or her tracks. Mostly they were wrong because the line between truth and fiction had become blurred. Ironically, that is precisely what superb photography can do. So art and life met in this exhibition. Some of the unfortunates in the exhibition appear jaded or beaten; others have come through it all with grace and compassion, as shining examples of the human spirit.

Miscarriages of justice – the subject of tonight's lecture – are like those photos too: wracked with ambiguities and difficulties, and some examples of justice finally shining through. Hence, to step into the subject area of miscarriages of justice is to step into a grainy world of great difficulty.

Professional judges should approach the subject of 'justice' with 'trembling hands'.<sup>2</sup> The prospect that he or she, or a jury over which he or she presides, may have 'got it wrong' is, it may come as some surprise to uninformed critics, an ever-present concern. But the subject is, as Lon

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\* Sometime Professor of Law and Dean of the Faculty of Law, University of Auckland; a Justice of the Court of Appeal of New Zealand. I am grateful to my clerk, Joel Harrison, for his editorial assistance. The lecture was delivered on 15 August 2006.

1 The photographs and commentary can be purchased in book format: T Simon, P Newfield and B Scheck, *The Innocents* (2003).

2 I am grateful to Baragwanath J for the phrase. The source is apparently G Canivet, 'Nous rendons justice les mains tremblantes' (7 January 2006) *Le Monde* 21.

Fuller would have termed it, ‘polycentric’. That is, the dilemmas are located in many parts of the legal spectrum, which makes it particularly difficult to know where to start.

I will begin by limiting the scope of the subject area I will canvass in this lecture. It is too big for a single lecture. In our criminal justice system there are two categories of offences. There are summary – or ‘lesser’ offences – which are heard in the lower courts, with an appeal to the High Court. Indictable offences are more serious offences which are generally heard with a jury in the District Court or High Court, and with an appeal against conviction lying from the trial court to the Court of Appeal of New Zealand. There is now the possibility of a further appeal to the Supreme Court of New Zealand. I do not underestimate the likelihood of miscarriages of justice in summary proceedings. Far too many considerations of this subject turn their attention only to higher profile cases. However, the conceptual and practical problems I wish to address can most conveniently be ordered around appeals in relation to indictable offences.

The essential causes of miscarriages of justice have now been well identified in the various common-law jurisdictions. There can be problems with the investigation of the crime, with the evidence adduced at trial, with representation of the accused, with the trial itself, and even a faulty appeal. It may be as well to enlarge somewhat on these subsets,<sup>3</sup> although the incidence of them varies from jurisdiction to jurisdiction.

- (A) There is an ever-present danger of falsification of evidence. For instance there may be informers (who may also be co-accused) who may well have self-serving reasons for exaggerating the role of the particular accused. Regrettably the police are sometimes in a position to manipulate evidence, for example by ‘verballing’ the accused. That is, it is possible to invent damning statements, or passages within them, although that danger has been much lessened by the use of modern technology, such as video interviews. That this occurs in a ‘noble cause’ (as in the cases of the Birmingham Six and the Tottenham Three in England) makes them no more excusable. Police may also suffer from what has been called ‘tunnel vision’ – bringing narrow mindedness, based on a personal sense of justice, to any particular case. Then too the abolition, by legislatures (as occurred in New Zealand) of the requirement for corroboration in sexual offences, which by their very nature usually occur in private, ‘broadened’ justice for victims (usually women), but left an accused at greater risk from false claims.
- (B) Police or lay witnesses may prove to be unreliable when attempting to identify an offender. This is especially so in fleeting or difficult conditions, or in a situation of stress.
- (C) There may be unreliable confessions as a result of police pressure or the mental instability of the accused.
- (D) The evidential value of expert testimony has been over-estimated in some instances, where subsequent investigation has found that the tests being used were inherently unreliable, or that the scientists conducting them carried them out poorly.

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3 In what follows in this section of the lecture I have drawn freely on ch 27 (Clive Walker), in M McConville and G Wilson (eds), *The Handbook of the Criminal Justice Process* (2002) 511-512. There are a number of texts which also cover these problem areas: C Walker and K Starmer, *Miscarriages of Justice: A Review of Justice in Error* (1999); B Woffinden, *Miscarriages of Justice* (1987); R Nobles and D Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (2000); M McConville and L Bridges (eds), *Criminal Justice in Crisis* (1994); C Walker and K Starmer, *Justice in Error* (1993); N Padfield, *Beyond the Tariff: Human rights and the release of life sentence prisoners* (2002); R Huff, A Rattner and E Sagarin, *Convicted But Innocent: Wrongful Conviction* (1996). See also, S Greer, ‘Miscarriages of Criminal Justice Reconsidered’ (1994) 57 MLR 58.

- (E) There can be non-disclosure of relevant evidence by the police or prosecution, to the defence. At the outset, the investigation of a case is by and large reliant on the police. It is the police who speak to possible witnesses and arrange for forensic testing. The difficulty for the defence is that routinely it begins its task late, and it has neither the financial resources to undertake such work, nor the opportunities in terms of access to check the police investigation. Unfortunately, there have been instances that demonstrate that the police, forensic scientists, and prosecution cannot always be relied upon fairly to pass on evidence which might be helpful to the accused, despite there being no other agency which might bring it to light.
- (F) The conduct of a trial may itself produce miscarriages of justice. For instance, the Court in the Birmingham Six case exhibited an unfortunate propensity to favour the prosecution evidence, rather than act as an impartial umpire. And there may be a failure to appreciate defence submissions, either in law or fact, which then gives rise to unfairness in rulings or directions to the jury.
- (G) Defence lawyers are sometimes not beyond reproach. They may not always be as competent or assertive as they should be. Institutionally, legal aid funding is given a much smaller proportion of public funds than is made available to police and prosecution work.
- (I) Defendants can sometimes be portrayed in a prejudicial way. This is particularly noticeable in the common-law world in the so-called ‘terrorist’ cases, although it is also true of particularly heinous crimes, such as bizarre serial killings. There may be a pejorative labelling of the accused, very heavy-handed and obvious security arrangements, and quarantined appearances in the dock, leaving the media with a heavy influence in such cases.
- (J) Then there are a subset of problems associated with appeals. Appellants may have exhausted the patience of counsel, or their funds, so that there is a lack of access to lawyers and limited legal aid funding. The strength of such claims of a miscarriage often then have to depend on extra-legal campaigns. The case may or may not be taken up by the media.
- (K) Then there is the problem of how intermediate appellate courts approach their tasks. Courts of appeal are solely creatures of statute. They have to interpret their own appeal provisions. If there are inappropriately narrow restrictions to the basis of an appeal, then the possibilities of a miscarriage increase.
- (L) Finally, there are some very difficult problems thrown up by the advent of human rights legislation, and Bills of Rights. The very difficult question here is whether, in terms of those instruments, a safe conviction is entirely contingent upon a fair trial.

In this lecture, I do not propose to address the problems associated with the factual accuracy of a conviction. That subject was, in this jurisdiction, explored in the recent report by Sir Thomas Thorp and the subsequent proceedings of a Legal Research Foundation symposium.<sup>4</sup> What I propose to concentrate on is what I will term the ‘new’ miscarriages of justice, which arise out of what are essentially questions of law, such as whether the Court of Appeal of New Zealand has unduly narrowed its jurisdiction; the impact of the New Zealand Bill of Rights Act 1990 on appeals; the difficult questions relating to representation of accused persons which have reared their head in more recent times; the formal constitution of juries; and such-like questions.

Before I leave this introduction, there is an important element of balance to be added. Undoubtedly, miscarriages of justice do occur, for varying reasons and to varying degrees, in all

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<sup>4</sup> Sir Thomas Thorp, *Miscarriages of Justice* (2005); Legal Research Foundation, *Miscarriages of Justice Symposium* (Auckland, New Zealand, 24 February 2006).

jurisdictions. Justice is not perfect. But that should not obscure the fact that the vast majority of ‘injustices’ of one kind or another are caught, and corrected. For instance, in the calendar year 2005, there were seventy one pure conviction appeals heard in the Court of Appeal; twenty seven were allowed and forty eight were dismissed. Those figures are very close to the one-third figure for successful appeals which obtains quite widely around the western world.

## II. THE CONCEPT OF A MISCARRIAGE OF JUSTICE

Is it possible to articulate a central conception of the idea of a miscarriage of justice? Historically, the term has been seen as one of somewhat indefinite meaning. At least since the time of Aristotle the ‘sense of injustice’ felt by individuals with respect to decisions affecting them, or of cases which attract public attention, has been recognised as some sort of index to the idea of ‘justice’. Of course it is easier to recognise what one regards as injustice than the converse, but in the end it is quite unsatisfactory simply to say ‘I know an injustice when I see it’.

The various attempts to elucidate instances of injustice have not, generally speaking, been productive of general ideas in law, or in philosophy at large. In consequence, the authors of the standard works on criminal law and appeals are forced simply to try and identify sub-categories of cases in which wrongful convictions or miscarriages have been held to exist. More recently, there have been more rigorous attempts by senior academics to articulate ‘deeper’ conceptions of miscarriages of justice.

Literally, a ‘miscarriage’ means a failure to reach the intended destination or goal, which in this case is ‘justice’. Justice in and of itself is about distributions, about according persons their fair shares, and like treatment. Thus, one argument runs, fair treatment and the dispensation of criminal justice in a liberal, democratic society means that all individuals should be treated with equal respect for their rights and for the rights of others. It does not follow from this that individual rights are absolute; but it does follow (as the New Zealand Bill of Rights Act recognises<sup>5</sup>) that it is rational to accept some limitations to preserve the rights of others, or at least competing rights.

The primacy of individual autonomy and rights is central to the ‘due-process’ model evolved by H L Packer,<sup>6</sup> who recognised the possibility of human fallibility and error yielding grave injustice, as when the system convicts the innocent or even convicts without respecting procedural rights. The argument runs that the criminal justice system is not just about convicting persons, but that other factors are at risk, including humane treatment, liberty, privacy, and family life – even the very right to existence in a jurisdiction with capital punishment.

Out of those sorts of concerns have come arguments – perhaps most compellingly of recent times from Dr Andrew Ashworth, the Vinerian Professor of English Law at Oxford – that an individualistic, rights-based approach to miscarriages of justice should be adopted. A ‘miscarriage’ should be said to occur whenever suspects or defendants, or for that matter convicted persons, are treated by the state in breach of their rights. This is said to occur because of a deficient process, or through the misapplication of laws, or because there is no factual justification for the applied punishment, or because suspects or convicted persons are treated adversely and in a disproportionate way by the state in comparison with the need to protect the rights of others or even the state itself.<sup>7</sup>

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5 In particular, see New Zealand Bill of Rights Act 1990, s 5.

6 H L Packer, *The Limits of the Criminal Sanction* (1969).

7 See for example, B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (2001).

More radically, there are recent arguments by other commentators that miscarriages of justice should not be defined at all in terms of exceptional cases. From a Foucauldian, post-modern perspective the argument is that the main discourses that mediate the miscarriage of justice problem can be said to exclude from their frame of reference or critical gaze far more than they have taken into account. The concern here is not just with the domination of the weaker (an individual) by the stronger (the state), it is that the production of concepts, ideas, and structures of social institutions, including the criminal justice system, are attributable to the operations of power in all its forms. Proponents of this school of thought argue that what is in the end an impossible pursuit of innocence should be discarded, and a more appropriate debate about 'justice in error' could then proceed.<sup>8</sup>

I admire these searching academic analyses, but I do not think they will carry the day in New Zealand. I do not discount completely the prospect of some modern-day Hohfeld arising from our ranks and evolving an internally consistent creation of analytic jurisprudence as to what a 'miscarriage of justice' is. But I think that is unlikely. And I am not at all sanguine about rights-based approaches succeeding in this jurisdiction. New Zealanders and the legal system in New Zealand have only begun to scratch the surface, and then in a largely unsystematic way, with rights-based approaches. And arguments based, essentially, on the post-modern European intellectual tradition will likely not gain a foothold in Kihikihi.

What is much more likely to hold appeal in New Zealand, given our rather pragmatic approach to things, is a more instrumental approach. The question then is: What are we entitled to expect in New Zealand today with respect to a 'satisfactory' verdict?

It seems to me that the answer to that question must be: factual accuracy in relation to the verdict; adherence to the rule of law; and moral authority in the verdict. If we have a verdict that reflects those things, then I think it can fairly be said to be a 'legitimate' or 'satisfactory' verdict.<sup>9</sup> At any rate, it is on this basis that I propose to approach the subject area of the newer forms of miscarriage of justice.

As I have said, I will not address the question of factual inaccuracies in convictions. That is, wrongful conviction cases in the sense that the source of the problem is that factually the wrong person has been convicted. Instead, I will go straight to the more diffuse and conceptually difficult questions of how the rule of law should be approached in this subject area, and what we might mean by the moral authority of a verdict.

### III. THE RULE OF LAW

#### A. *Is the Appeal Legislation Itself Outdated?*

There are three provisions which need to be considered in response to this question. First, the general appeal provision in section 385 of the Crimes Act 1961; secondly, the so-called proviso to

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8 See M Naughton, 'Reorientating Miscarriages of Justice' in P Hillyard, C Pantazis, D Gordon and S Tombs (eds), *Beyond Criminology: Taking Harm Seriously* (2004). See also, M Naughton, 'Redefining Miscarriages of Justice' (2005) 45 *Brit J Criminology* 165.

9 This has much in common with the well-known arguments as to 'legitimacy' theory in political science. I am not the first to suggest this sort of approach. See, for instance, I Dennis, 'Fair Trials and Safe Convictions' (2003) 56 *CLP* 235.

that section; and thirdly, section 406 of the Crimes Act, which is the present adjunct to the age-old royal prerogative of mercy.

As to the general appeal provision, section 385 provides that on any appeal to the Court of Appeal or the Supreme Court, that Court must allow the appeal if it is of the opinion –

- (1) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
- (2) That the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
- (3) That on any ground there was a miscarriage of justice; or
- (4) That the trial was a nullity.

There is then a proviso to the section: the Court of Appeal or the Supreme Court may, ‘notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred’.

These features of our law are direct descendants of the Criminal Appeal Act 1907, in the United Kingdom. That Act, which accompanied the creation of the Court of Criminal Appeal in that jurisdiction, itself attracted considerable controversy. The limitations of space to this one lecture do not permit me to canvass in detail those quite controversial events in the late nineteenth century and early twentieth century. They are well documented elsewhere, but they still have a curious resonance today.

What led to the creation of the Court of Criminal Appeal in the United Kingdom was grave concern over a number of miscarriages of justice (notably, the case of Adolf Beck). Eventually it was accepted (though not without much debate) that there should, in principle, be a separate Court of Criminal Appeal. Even so, there was real disquiet over whether there should be included in the new statute grounds of appeal going to questions of fact. What seems to have greatly concerned senior members of the English judiciary (including the then Lord Chief Justice, Lord Alverstone) was a fear, from a constitutional viewpoint, of the erosion of the position of the jury and of a possible weakening of the juror’s sense of responsibility.<sup>10</sup>

Interestingly enough, even in 1907, one draft of the Bill provided for a conviction to be quashed if it was ‘unsafe or unsatisfactory’. However the then Attorney-General rejected that as being ‘loose to the point of obscurity and ... unscientific’.<sup>11</sup> But still there was some ambivalence. During the passage of the legislation the Attorney-General struggled with the wording of this seminal Act because he was anxious ‘that the Court of Appeal should not be fettered by rigid rules in the exercise of its “wide discretion”’.<sup>12</sup> Even so, the Attorney-General stressed the essential primacy of the jury verdict. One hundred years later, this conundrum is still a critical concern.

In the result, as so often happens with the passage of legislation, what is now section 385 of the Crimes Act 1961 in New Zealand, and which was also widely adopted around the British Commonwealth, is a curious amalgam. It is easy to understand that something which does not conform to law, or which is a nullity, should give rise to an appeal point. But the provision relating to ‘inadequate evidence’ sits rather oddly before the much wider ground of a ‘miscarriage of justice’. This is explicable only in historical terms, namely that the senior judiciary in the United

10 In this section I have drawn on R Nobles and D Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (2000) ch 3, which covers in depth the matters here touched on.

11 29 July 1907, United Kingdom Parliamentary Debates (House of Commons) c.635-636.

12 Ibid.

Kingdom at that time had very grave reservations about letting the new court loose on questions of fact at all. Some sense that there was likely to be resistance from the judges about setting out on this path can be gained from the speech of Lord James of Hereford (who was an ardent supporter of the Bill) in the third reading in the House of Lords. His Lordship said that he felt 'confident that whatever might be the opinion of the Judges in respect of this legislation, they would loyally administer the Act'.<sup>13</sup>

The proposed 1907 general standard of an 'unsafe or unsatisfactory' conviction resurfaced (and became the law in England) in the reforms of 1966, after a further spate of dreadful miscarriages of justice had led to calls for a widening of the basis of the court's jurisdiction, or at least criticism of the unduly narrow way in which the English Court of Criminal Appeal was said to have approached its statutory mandate.

Even then, there was marked conservatism. Lord Parker CJ, in the Parliamentary debates on the 1966 change to the English legislation, was of the view that the change in wording was merely semantic, and that the practice of the Court of Criminal Appeal had always been to quash unsafe verdicts. He said: 'This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it. To say that we have not done it, and we ought to have the power to do it, is quite wrong.'<sup>14</sup> Whether that statement was accurate has been the subject of some debate amongst legal historians and the academic commentators. The general view has been that in practice the Court of Criminal Appeal had seen things far too narrowly, particularly in relation to appeals relating to the facts.

The so-called 'reference provision' in section 406 of the Crimes Act 1961, can also only be understood in historical terms. It is essentially a present day adjunct of the royal prerogative of mercy.

Where an application is made to the Governor-General for the exercise of the royal prerogative of mercy, the Governor-General may proceed under section 406(a) and refer the conviction or sentence imposed on the applicant (whether in the High Court or the District Court) to the Court of Appeal for its opinion. Alternatively, the Governor-General may make a more limited reference of a single point only under section 406(b).

The provision is very much a 'last ditch' provision even although, in theory, all appeal rights need not have been exhausted. In a case like *R v Haig*,<sup>15</sup> which recently generated considerable public and media attention in this country, an appellant may have gone right through the entire trial and appeal process and had his or her appeal dismissed; but there may then be other events which suggest that the case should be reopened.

Once appeal rights are exhausted, complainants ultimately go to the Governor-General, and there is then an administrative review by officials (as opposed to an independent enquiry) as to whether the matter should again be referred to the courts, although in a section 406(a) case today an opinion is usually taken from a Queen's Counsel as to whether the provision should be invoked.

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13 16 August 1907, United Kingdom Parliamentary Debates (House of Lords) c.1773-1774.

14 12 May 1966, United Kingdom Parliamentary Debates (House of Lords) c.837.

15 Unreported, Court of Appeal, 23 August 2006, CA267/04, William Young P, Hammond and Chambers JJ.

## B. Questions to Consider

There are three questions which ought to be asked, in contemporary circumstances, about this body of legislation.

The first is whether Courts of Appeal have been too rigid, particularly in their approach to the admission of new evidence. The leading modern authority in New Zealand is *R v Bain*,<sup>16</sup> which, in practice, sets up very substantial hurdles to the admission of new evidence on appeal. The test laid down in that case is:

An appellant who wishes the Court to consider evidence not called at the trial must demonstrate that the new evidence is: (a) sufficiently fresh; and (b) sufficiently credible. Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation. If that were not so, new trials could routinely be obtained on the basis that further evidence was now available. On the other hand the Court cannot overlook the fact that sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled.<sup>17</sup>

It is easy enough to see the attraction, in principle, of such rules. There is a basic policy requirement in both our civil and criminal law of 'one trial'. A defendant ought generally not to be permitted to have a second bite of the cherry by saying 'there was other evidence which I could have called, but did not'. The same concern applies to 'after-thought' defences, although the policy justifications there for exclusion are very weak indeed. The rule of law itself requires that where there was a defence available which has been overlooked, regard should be had to it.

Nevertheless, several comments can be made on this approach. The approach of appellate courts, at least in England and New Zealand, can be shown to have steadily hardened against appellants in this area of fresh evidence, both as to doctrine and practice. For instance, the cases cited in the 1918 edition of *Archbold* (20th edition) show no reluctance at all as to the reception of new evidence, and it was certainly not regarded as 'exceptional' after the new legislation to allow it. However, by 1931 (25th edition), there had to be 'special' circumstances.<sup>18</sup> And by the 1960s, the tide had distinctly turned in favour of *Bain* type pronouncements.

The justification for this arteriosclerosis in practice, in a miscarriage provision, is not self-evident. Indeed, the Royal Commission on Criminal Justice in the UK (The 'Runciman' Commission)<sup>19</sup> was particularly critical of what it found to be undue deference to juries, and an unduly restrictive attitude to fresh evidence.

As to the doctrinal expression of the rules, the *Bain* formulation is not without difficulties. The opening words are distinctly didactic, which is not entirely apt in a miscarriage provision. It is also essentially the same formula that is found in the civil law. Yet this is applied to criminal cases where there is a claim of a miscarriage of justice. There is surely a strong argument for saying, at least where there is a serious issue as to a potential miscarriage of justice, that a lesser standard should be applied which would freely enable the reviewing court to have regard to all the evidence

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16 [2004] 1 NZLR 638 (CA).

17 *Ibid*, para 22.

18 This analysis is from R Nobles and D Schiff, *Understanding Miscarriages of Justice* (1987) 58.

19 Commission on Criminal Justice *Report* (Cmd 2263, United Kingdom, 1993) (the 'Runciman' Commission).

that ought to be reviewed. That has, for instance, been the position in Canada for many years now.<sup>20</sup> And curiously, New Zealand case-law jurisprudence under section 406(a) is more in keeping (as to fresh evidence) with the Canadian position, than the New Zealand jurisprudence under section 385. The High Court of Australia in *Mallard v The Queen*<sup>21</sup> has also recently expressed distinct concern about undue doctrinal constraints on what further evidence is available, or should be available, to be considered in miscarriage cases.

For my part, I entirely concur with what was said by Lord Bingham of Cornhill extra-judicially in his Sir Dorbji Tata Memorial Lecture in New Delhi in 1999:

Appellate courts should be ready to exercise the full powers conferred upon them in any case where it appears that a miscarriage of justice has or may have occurred, *whether or not there is fresh evidence before them* and whether or not the original trial was tainted by legal misdirection or procedural irregularity.<sup>22</sup>

A second problem with our legislation concerns the severe difficulties occasioned by the proviso. It can be infernally difficult to apply in practice, and has on occasion given rise to strong differences between even the most senior judicial officers, as witness the debate over *R v Howse* in the Privy Council.<sup>23</sup> It is easy enough to see what the proviso is aimed at: it enables a court hearing a criminal appeal to dismiss the appeal if it accepts that, although there has been some form of error in the trial, there was ‘no substantial miscarriage of justice’. The existence of the proviso reflects the need to balance an accused person’s right to a fair trial, conducted according to law, with the desire to avoid overturning convictions on the basis of inconsequential errors at trial.

Recently, there has been some debate around the common-law world – although the issue has not yet been revisited in New Zealand – as to the standpoint from which this exercise must be approached. The question is whether the test should be: what would the effect have been ‘on the jury’ if there had not been an error (which is the present New Zealand position) or, in cases where some error has been made, is the appellate court itself required to review the entire record to decide whether a substantial miscarriage of justice has actually occurred?

The High Court of Australia has recently held in *Weiss v The Queen*<sup>24</sup> that the latter answer is now to be regarded as correct in that jurisdiction. The long line of conventional jurisprudence in that country to the contrary (which was to the same effect as that in New Zealand) is now to be regarded as having been over-ruled. The High Court said that an appellate court must review the whole record of the trial when it is required to consider the application of the proviso. The Court explicitly recognised that to do so could conceivably increase the burden ‘on already over-burdened intermediate appellate courts’, but it sought to offset that burden by saying that ‘no less im-

20 See *McMartin v The Queen* (1964) 46 DLR (2d) 372, 381 (SCC) per Ritchie J, adopting the view of Sloan CJBC in *R v Buckle* [1949] 3 DLR 418, 419-420 (BCCA): ‘[T]he rule to be applied in criminal cases in relation to the introduction of fresh evidence and consequential relief which may be granted by the Court, is wider than its discretionary scope than that applied by the Court in civil appeals’. See also *Palmer v R* [1980] 1 SCR 759.

21 (2006) 22 ALR 236, para 6 (‘a full review of all the admissible relevant evidence available in the case, whether new, fresh or already considered in earlier proceedings ...’). Also, the ‘descriptive term the evidence adduced ... might be given’ does not matter (see para 13).

22 Reproduced in TH Bingham, *The Business of Judging* (2005) 282 (emphasis added).

23 [2006] 1 NZLR 433. See also, R Lithgow, ‘Criminal Practice’ [2005] NZLJ 269; and C Penhallurick, ‘The Proviso in Criminal Appeals’ (2003) 27 MULR 800.

24 (2005) 223 ALR 662.

portantly, the proviso, properly applied, will, in cases to which it is applicable, avoid the needless retrial of criminal proceedings'.<sup>25</sup>

The only Supreme Court of New Zealand authority to date on our legislation is *R v Sungsuwan*,<sup>26</sup> which deals only with counsel incompetence as a ground of miscarriage. The decision emphasises that it is the effect, not the cause, of things which matters in a miscarriage case. *Howse* is to like effect. That must be right, but there are observations in *Sungsuwan* (particularly in the judgment of Elias CJ)<sup>27</sup> which suggest that the broader approach to miscarriages which I favour (that it is substance which matters), might ultimately find favour in our own Supreme Court.

The third question is whether our legislation – or at least section 385 – could profitably be re-written. For myself, I would prefer to operate off a simple principle that an appellate court is entitled to interfere if the verdict as returned is 'unsafe or unsatisfactory'.

The first limb would go to the soundness (or the factual accuracy) of the verdict. Essentially, it would concern itself with evidential matters. The lack of safety in the verdict should extend to a 'lurking doubt' as to the soundness of the conviction on the part of the Court of Appeal, as is the case in England.<sup>28</sup>

The second limb would be overtly concerned with the 'fairness' of the trial, and whether, in the view of the reviewing court, the unfair events were such as to render the trial unsatisfactory. What I mean by that will be enlarged upon later in this lecture.

The proviso should be repealed.

### C. *The Relationship Between a Fair Trial and a Safe Conviction*

The issue under this head is this: what, if any, is the relationship between the concepts of a fair trial and a safe conviction? To put it in another way, is the fairness of a trial always a condition of the safety of the conviction? Or yet again, is it legally possible for the accused to have a trial which is found to be unfair, but which nevertheless results in a conviction which can be upheld on appeal as being safe?

This issue has not yet been definitively addressed in New Zealand. The defence bar of course wants the Court of Appeal to say that an 'unfair' trial must inevitably result in an unsafe conviction. It is tempting to say, 'well, they would, wouldn't they'. But that would be evasive, and it does not do justice to the moral force of the concern in a modern, democratic jurisdiction which should be appropriately rights conscious.<sup>29</sup> A start can perhaps be made by identifying the possible approaches which could be taken to this issue.

The first would be to say that no contingency at all is to be allowed with respect to the relationship between safety and fairness. That is, that the fairness of a trial is always a necessary condition

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25 Ibid, para 47.

26 [2006] 1 NZLR 730. *Condon v The Queen* [2006] NZSC 62 was delivered on 23 August 2006, and there was not therefore opportunity to address it in this lecture.

27 See for example, *R v Sungsuwan* [2006] 1 NZLR 730, para 6.

28 The 'lurking doubt' principle was first articulated by Widgery LJ in *R v Cooper* [1969] 1 All ER 32, 34 (CA): 'That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it'.

29 See, in the New Zealand context, New Zealand Bill of Rights Act 1990, s 25.

of the safety of the conviction. There is high authority for this proposition. In *R v Forbes*<sup>30</sup> Lord Bingham of Cornhill was firmly of the view that, 'if ... it is concluded that a defendant's right to a fair trial has been infringed, a conviction will be held to be unsafe ...'.<sup>31</sup> In *R v A (No. 2)*<sup>32</sup> Lord Steyn used the language that the guarantee of a fair trial under Article 6 of the Human Rights Act 1998 (UK) is 'absolute: a conviction obtained in breach of it cannot stand'.<sup>33</sup> The judgment of Lord Rodger of Earlsferry in *Howse* is to like effect.

A more intermediate position can be detected amongst some senior appellate judges. In *R v Togher*<sup>34</sup> Lord Woolf CJ put a gloss on the first proposition, by saying that 'if the defendant has been denied a fair trial *it will almost be inevitable* that the conviction will be regarded as unsafe'.<sup>35</sup>

A third position is more cautious and pragmatic. For instance, in *R v Davis, Rowe and Johnson*<sup>36</sup> Mantell LJ said that it is not helpful to deal in presumptions. 'The effect of any unfairness upon the safety of the conviction will vary according to its nature and degree.'<sup>37</sup> Hence, on this third view, an unfair trial may result in an unsafe conviction, but whether it does so, in the time-honoured phrase, 'all depends on the circumstances of the case'. This approach is similar to the method of the majority of the Court of Appeal in *R v Shaheed*<sup>38</sup> to Bill of Rights violations, in New Zealand.

Which of these three views should be adopted in New Zealand is a most important issue, and one which goes well beyond the older concern with the reliability of a conviction. It raises the difficult issue of whether the appellate courts' powers of review in New Zealand extend, and if so, how far, to consideration of the legality and the fairness of the process leading to convictions. This issue is in turn complicated by questions as to what other remedies might be available (short of quashing a conviction or even ordering a re-trial) for breach of the right to a fair trial. The possibilities would appear to be exclusion of evidence; mitigating the penalty imposed on conviction; making a declaration of violation on the basis that that will amount to 'just satisfaction'; or even granting a remedy in damages, while leaving the conviction intact.

Jurisprudentially, the problem appears to be to try and identify central principles for defining the relationship between fairness and safety. The question whether it is possible to have an unfair trial but a safe conviction is maddeningly simple. But there is no clear answer. Some commentators have sought to find answers on an analogy with the considerations which are appropriate to an abuse of process. Still others have seen the question more broadly; are the more modern appeal provisions to which I have referred there simply to provide a mechanism for the redress of possible or actual miscarriages of justice (i.e. wrongful convictions), or are they also to have a rights-protector function? And if the appellate court enters the choppy waters of a rights-protector function, how is the law to prioritise the competing values which would then have to be faced?

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30 [2001] 1 AC 473 (HL).

31 *Ibid.*, 487.

32 (2001) 2 Cr App R 351 (HL). For an argument to similar effect in New Zealand, and a review of the New Zealand cases, see D Mathias, 'The Accused's Right to a Fair Trial: Absolute or Limitable?' (2005) 2 NZ Law Review 217.

33 *R v A (No. 2)* (2001) 2 Cr App R 351, 366 (HL).

34 (2001) 1 Cr App R 457 (CA).

35 *Ibid.* 468 (emphasis added).

36 (2001) 1 Cr App R 115 (CA).

37 *Ibid.*, 135.

38 [2002] 2 NZLR 377.

Notwithstanding the difficulties, I think the broader view is preferable. The moral authority of a conviction is hopelessly lessened with significant rights violations. And it is a less 'safe' conviction. Who can really say what the outcome might have been had the rights in issue been properly observed? In that kind of case, the remedy may well need to be the quashing of the conviction.

I do not underestimate the implications of the broader view. There are few, if any, 'perfect' trials. What goes wrong may range from something which is little above a minimalist slip by the police or prosecuting authority, or the judge, to an egregious rights violation. But that is the role in which the court is engaged: the marking off of boundaries.

My basic concern is that anything less than a standard which requires appropriate adherence to Bill of Rights protected interests is to fail, on the part of the courts, to observe the provisions of the Bill of Rights Act itself. That obligation is cast on the courts by the Bill of Rights itself,<sup>39</sup> and to fail to enforce these provisions is to fail to observe the rule of law itself.

I do not argue for an absolute rule of acquittal. But anything less than a firm prima facie rule, with the prosecutor having the onus of justifying why validity should be given to the conviction, is itself deficient in Bill of Rights terms. In my view, adopting an 'analysis' like that in *Shaheed*, based as it is on open discretionary questions dependent always on the facts and circumstances of the case, is not enough. What is more, it is a dangerous path.

The criminal justice system is not just about convicting the guilty and freeing the innocent. There is the critical importance of the maintenance of the moral integrity of the criminal process itself. A conviction should only be brought about in a manner that is acceptable to the citizens of this country, as Parliament has enacted the law. The line is crossed when whatever procedural or process flaw has been identified jeopardises the moral integrity of the trial process.<sup>40</sup>

'Pragmatism' falls well short of the mark in this area. Can proponents of that school of thought really point to anything other than their (unverified) assumptions as to public perceptions about 'letting criminals off the hook on technicalities' to support an unprincipled position? And it is no part of the function of a modern appellate court to engage in fostering a crime control policy; the Court itself is bound to act on principles enacted by Parliament, in the Bill of Rights.

#### D. *Counsel Incompetence*

This leads me to another area of contemporary concern, which, until recently, rarely featured in appeals, or the law reports – counsel incompetence. It has long been recognised that representation that is in some ways inadequate on the part of defence counsel might give rise to a miscarriage of justice. This possibility was noted even in the United Kingdom Parliamentary debates on the 1907 Act, to which I have referred. For the better part of a century both in that jurisdiction and New Zealand such complaints were relatively rare. Now they have become legion.

The complaints against counsel fall broadly into three main categories: (a) a failure to act in accordance with the defendant's express or proper instructions; (b) dreadfully incompetent advocacy; and (c) where a tactical decision has been taken in which all the promptings of reason and common sense point the other way.

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39 New Zealand Bill of Rights Act 1990, s 3.

40 I entirely agree with Taylor and Ormerod, 'Mind the Gaps: Safety, Fairness and Moral Legitimacy' [2004] Crim LR 266, that it is not just a question of degree, or 'grossness'. The moral integrity of the criminal justice process is central in our society.

This is a thoroughly difficult area for all concerned. It is not a pleasant experience for counsel who have done their best in the District Court or the High Court, according to their lights, to be told that an appeal is going to be mounted against a conviction on the basis that his or her performance was not up to the mark. My own view is that counsel should only draft and sign grounds criticising former counsel if they are arguable and also have some real prospect of success. Sadly, there are some New Zealand counsel who do not appear to either be aware of, or heed, that caveat. The danger then is that this ground for review runs the risk of being looked at disdainfully by appellate courts on the footing that it becomes the last refuge of a hopeless appeal.

Procedurally, when such allegations are made, a waiver of privilege must be provided by the appellant, and New Zealand practice has been for former counsel to file an affidavit. Sometimes requests are made to cross-examine former counsel on that affidavit in the Court of Appeal. Indeed, where there is a factual dispute between a client and former counsel, both the appellant and that counsel may be required to give evidence so that issues of fact may be resolved. This is also troublesome; traditionally appellate courts are not finders of fact.

Perhaps I might intrude a practice note at this point. It is startling how many appeals reach the Court of Appeal with a dispute about whether the client did or did not want to give evidence. Many defence counsel are purely 'opportunistic'. That is, the hope is that the prosecution will shoot itself in the foot, or that it can be said on some basis or another that there was a reasonable doubt as to whether some element of the offence was made out. Given this approach, counsel assiduously try to keep their client out of the witness-box. But when convicted, the client then turns around and says, 'I wanted to give evidence but my lawyer wouldn't let me, or deflected me from doing so'. The standard practice which obtained when I was junior counsel, of carrying a notebook in which clients' instructions on this issue were always recorded, and the client was asked to countersign them, seems to have largely disappeared. It would not stop every appeal, but the existence of a countersigned note would do much to cut down this unfortunate feature of too many appeals.

In *Sungsuwan*, the Supreme Court said that there is not a 'jurisdictional' feature to this head of appeal, namely that there has to be a 'flagrant' error before the broader question of a miscarriage of justice was reached. Tipping J expressly said that there had been some 'slippage' in the Court of Appeal on this point.<sup>41</sup> That said, it is notable that the Supreme Court referred to only a handful of cases (including *Sungsuwan* itself) in which that error had undoubtedly been made. However, so far as I am aware, the Supreme Court did not have any empirical work carried out on these cases in the Court of Appeal. If it did, that research was not referred to. The figures are revealing. Prior to 1995, according to the Court of Appeal records, there were eight such cases; in 1996 five; in 1997 eight; in 1998 twelve; in 1999 thirteen; in 2000 sixteen; in 2001 twenty three; in 2002 eleven; in 2003 twenty four; and in 2004 thirty four (including *Sungsuwan* in that year).

These figures reveal several points of interest. First, there is of course the increasing numbers of such appeals. Secondly, a perusal of the names of the cases within the figures I have given shows that most major criminal trials now also subsequently feature (solely, or amongst other grounds) allegations of counsel incompetence. And thirdly, on examination, the vast majority of these cases did not make the error which concerned the Supreme Court in *Sungsuwan*: having identified whatever it was that was complained about on counsel's part, the reviewing panel quite

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41 *R v Sungsuwan* [2006] 1 NZLR 730, paras 103, 104, 109.

properly went directly to the question of whether what was complained of had in some ways contributed to an actual miscarriage of justice.

The existence of this ground of appeal does, however, give rise to real problems in the administration of criminal justice in New Zealand. First, it must inevitably have some debilitating effect on defence counsel who can usually only resort to those resources which are provided on legal aid.

Secondly, there is the problem of 'baby barristers'. Up until (say) twenty years ago it was the highlight (if a melancholy one) of a barrister's career to appear in a murder trial. Now, with the structural changes which have taken place in the profession, and the difficulty or disinclination of young lawyers to go into firms which should and usually do provide adequate training schemes, it is not all that uncommon to see a trial being conducted in relation to very serious criminal charges by somebody who can only be described as terribly 'green'. Whatever may be said about young barristers learning at the expense of their clients in (say) simple traffic violation cases, there can be no question that learning at the expense of the client in a very serious criminal charge is another matter altogether.

In fairness to the defence bar, it has to be said that there have also been some worrying signs of a lowering of standards in relation to prosecuting counsel as well. I leave to one side the perennial judicial complaint, at both the trial and appellate level, of prosecution overcharging (which unnecessarily complicates trials); of too often tardy or incomplete disclosure; of unlawful search warrant applications, and the like. But in recent years there have been more instances than there should have been of prosecutorial over-reaching in presenting cases. In some instances, the court has had to set aside verdicts where prosecutors have gone too far in their comments to juries, to an extent that the verdict was rendered unsafe.<sup>42</sup>

### *E. Conclusion*

My basic point will not have escaped your attention: a major difference between the old style (but still ever-present) concern simply with wrongful convictions has enlarged to encompass a deep-seated concern with, and searching examination of, the system for the administration of criminal justice itself and the actors within it, as to how that brings about miscarriages of justice.

In short, the 'system' itself is now under scrutiny. This may well make judges, and perhaps the bar, uneasy but it is no less than is required in a well-functioning system for the administration of criminal justice.

## IV. THE MORAL VALIDITY OF A VERDICT

It may be said by some that this part of the lecture should not be here at all. That is, if the verdict is factually accurate, and there was at least a satisfactory trial from a process point of view, what has anything as broad as 'morality' got to do with things at all?

It seems to me that the essential concern here is to have, in terminology once utilised by the Supreme Court of the United States, 'a verdict worthy of confidence'.<sup>43</sup> That may require far more than factual accuracy and a fair trial.

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<sup>42</sup> See for example, *R v Hodges*, unreported, Court of Appeal, 19 August 2003, CA435/02, Tipping, Hammond and Paterson JJ.

<sup>43</sup> *Kyles v Whitley* 514 US 419, 434 (1995).

Time permits me to illustrate my general concerns under this head with only one illustration – that of jury selection. Take this situation. I deliberately use a neutral ‘foreign’ example. An African-American boy from the wrong side of the tracks in Chicago (say the Cicero area) is accused of stealing money from a petrol station. His trial is conducted downtown in the Cook County Criminal Courts before an all-white male jury of twelve. The Judge does the trial by the book. The all-white male jury convicts. But jury deliberations are sacrosanct, and hence what really was said in the jury room will never be known. This is an area which makes everyone feel uncomfortable, because we would have to allow for the possibility of racial bias, but we do not know much about whether it really happens, and to what extent it contributes to miscarriages of justice.

The judicial line could not be plainer. As long ago as *Mylock v Saladine*<sup>44</sup> Lord Mansfield CJ said that jurors ‘should be [metaphorically] as white as paper’. And jurors are told by all trial judges to approach their task without any preconceived ideas and by reference to the evidence alone.

Yet we know that in the United States the moral authority of juries has been shaken by some very high-profile cases in which the verdict appeared in the eyes of a great many people to be affected by racial considerations. The two best known trials are the O J Simpson trial, and the Rodney King case. The Simpson trial saw that gentleman acquitted by a predominantly black jury of the brutal murder of his estranged wife and her companion, despite highly incriminating evidence. Conversely, a jury lacking African-American members exonerated Los Angeles police officers who were actually filmed beating Mr King, a black motorist, as he lay helpless on the road.<sup>45</sup>

The concerns are not confined to the United States. Writing in the most recent edition of the Cambridge Law Journal, Gillian Daly and Rosemary Pattenden have analysed fifteen recent English jury trials in which there were subsequent complaints of racial bias against juries.<sup>46</sup> In some of these cases, it was jurors themselves who complained as to what had gone on within the jury room.

Justice Michael Kirby of the High Court of Australia, delivered a lecture at the Law School of the University of Adelaide on 12 August 2002, on the subject of ‘Black and White Lessons for the Australian Judiciary’, relating to the Stuart case in South Australia.<sup>47</sup> Mr Max Stuart was an aboriginal man who was accused of raping and murdering a nine-year-old girl in a cave by the seashore. What he said from the dock was:<sup>48</sup> ‘I cannot read or write. Never been to school. I did not see the little girl. I did not kill her. Police hit me. Choked me. Make me say these words. They say I killed her. That is what I want to say’.

On the final appeal to the High Court, that Court said that ‘certain features of this case have caused us some anxiety’.<sup>49</sup> As Justice Kirby has said, at that time such words from a final appellate court were very unusual indeed. But the anxiety engendered was not sufficient to result in an order quashing the conviction, and the death sentence, and the ordering of a re-trial. Finally, the press got to work, and there was much public agitation about the ‘good deal of anxiety’ to which the High Court had referred, but which it had not acted on. Eventually there was a Royal Commis-

44 (1764) 1 Black W 481; 96 ER 278 (KB).

45 See H Fukurai and R Krooth, *Race in the Jury Box* (2003).

46 (2005) 64 CLJ 678.

47 (2002) 23 Adel LR 195.

48 *Ibid.*, 202. See also, *Stuart v R* (1959) 101 CLR 1, 7; K Inglis, *The Stuart Case* (2ed, 2002).

49 Hon M Kirby, ‘Black and White Lessons for the Australian Judiciary’ (2002) 23 Adel LR 195, 203; *Stuart* (1959) 101 CLR 1, 3, 10.

sion, and the death penalty was commuted to imprisonment for life. Mr Stuart is today at large as a very old man in central Australia.

Perhaps the most lasting legacy of Stuart's case is that, coincidentally or not, it is very much on the cusp of the point of time at which the High Court of Australia began to take a distinct interest in criminal appeals. New Zealand jury trial Judges seem to think the High Court of Australia is unduly severe on the judicial handling of cases by trial judges. Undoubtedly, the High Court of Australia is firm in relation to the way trial judges run jury trials; and Australian appellate judges generally are severe about trial court summings-up. The result is that re-trials are ordered more often in Australia (and, I think, in Canada), than they are in New Zealand. But the concern rests on a principled basis: that the rule of law must apply. Sloppy trials should not be permitted.

Curiously, it was another Max Stuart type case which seems to have triggered off somewhat similar changes in approach in Canada. That was the unfortunate case of Donald Marshall, in which a black man was wrongfully imprisoned for many years, in a clear and gross miscarriage of justice.<sup>50</sup>

Perhaps the last word on this issue should go to Sir John May, in his Final Report on the Guildford and Woolwich bombings:

Thus I suggest that a miscarriage of justice occurs when the result of criminal proceedings is one which might not have been reached had a specific failing in the criminal justice system not occurred in connection with or in the course of those proceedings. Such a failing may be one of procedure, it may be a breach by the investigating police officer of the rules of proper practice, it may be an error on the part of the trial judge or the Court of Appeal, it may be that a witness or witnesses perjured themselves, it may arise because a witness who could give relevant evidence could not be found or refused to testify, or through the passage of time has forgotten or has muddled memory of that which he observed. It may be the result of incompetence on the part of the lawyers, or the inadequacy or inherent uncertainty of some of the rules of evidence. *It may even be due to prejudice on the part of the jury.*<sup>51</sup>

## V. CONCLUSION

At the end of the day, miscarriage of justice cases are about justice in the most fundamental sense. They are not just about checking that the formal dotting of 'i's and crossing of 't's took place, and respecting juries. Formalism is simply not enough.<sup>52</sup>

The criminal justice system is about much more than convicting the guilty and shielding the innocent from conviction. There is a critical responsibility to maintain and enhance the moral integrity of the criminal process. A conviction should be brought about in a publicly acceptable manner – which does not mean a judge's view of what the public might think. It means getting processes up to a standard that Parliament itself has required, in the Bill of Rights and elsewhere. Courts should not be continually pressed to overlook deficient evidence and trials, in the name of an unarticulated crime-control thesis.

The newer forms of miscarriage are intrinsically very difficult. They are complex, and raise deep questions as to what standards we set for our own legal system and the administration of justice. In short, they tell us how we value justice in our own land.

50 See P Sankoff, 'Wrongful Convictions and the "Shock Wave" Effect' [2006] NZLJ 134.

51 Sir John May, *Report of the Inquiry into the Circumstances Surrounding the Convictions Arising out of the Bomb Attacks in Guildford and Woolwich in 1974, Final Report* HC 449 (1993-1994), para 21.4 (emphasis added).

52 Hon M Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 Adel LR 195, 211; see also, E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005).

# EXCLUSIONARY BUNDLING, PREDATORY PRICING AND SECTION 36: *CARTER HOLT HARVEY PRODUCTS GROUP LTD V COMMERCE COMMISSION*

BY GEOFFREY BERTRAM\*

Predatory pricing seems a simple idea; a powerful firm, wishing to exclude an equally or more efficient rival or would-be rival from its market, lowers the price of its product to a level at which the rival cannot survive, inducing exit and leaving the predator in command. The predator's market share is thus increased, or successfully defended, by a strategy which reduces the number of economically viable competitors and thereby reduces the extent of competition in the market.

While sightings are continually reported, in the past two decades successful court proceedings have been rare in the United States, Australia and New Zealand,<sup>1</sup> and the issue arises whether predatory pricing, in the sense of any sort of behaviour that could fall foul of section 36 of the Commerce Act 1986, exists. The Privy Council's rejection of the Commerce Commission's case in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*<sup>2</sup> echoes a pattern of legal decisions from *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp*<sup>3</sup> and *Brooke Group Ltd v Brown & Williamson Tobacco Corp*<sup>4</sup> in the United States to the Australian High Court's decision in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*.<sup>5</sup>

Chicago-School writers have criticised the traditional model of price predation for impugning conduct which is inherently competitive, not anti-competitive. Any vigorously competitive firm, so the argument goes, may cut its prices to gain market share from its rivals. Firms engaged in price-cutting should be presumed to be competitors, not predators, unless extremely stringent evidential tests are satisfied.

One necessary test used to be Areeda-Turner<sup>6</sup> – that the price set by the predator must be below some meaningful measure of that firm's supply cost, since (provided both firms' activities are confined to a single market and single product) an above-cost price can always be matched by an equally or more efficient competitor.<sup>7</sup> This was for some time regarded as a necessary bright-line

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1 EU cases decided under the Treaty of Rome continue to sanction predation.

2 [2006] 1 NZLR 145; (2004) TCLR 200.

3 475 US 574 (1986).

4 509 US 209 (1993).

5 (2003) 195 ALR 609.

6 Donald F Turner and Philip Areeda, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act' (1975) 88 Harv L Rev 697.

7 As is discussed later, above-cost predatory pricing is now recognised as a possibility; see e.g. Aaron Edlin 'Stopping Above-Cost Predatory Pricing' (2002) 111 Yale L J 941.

test for predation, though it can clearly not be sufficient. By driving price below cost the predator would be gambling that it can survive the resulting bloodletting longer than can its rivals; this must imply that the predating firm has access to financial resources sufficient to outlast the prey, and that short-run losses incurred during the price war can somehow be recovered, for otherwise 'victory' is pyrrhic.

This last observation led to Judge Easterbrook's bright-line test of recoupment in *AA Poultry Farms Inc v Rose Acre Farms Inc*.<sup>8</sup> Without the clear prospect of recovering losses by later raising the price of the predator's product, Easterbrook said, predation itself cannot be a rational strategy. This line of argument was central to both the Australian High Court in *Boral* and the Privy Council in *Carter Holt Harvey*. However, it is obviously incomplete; where predation in one market confers spillover benefits in another, recoupment in the target market will not be necessary to render predation a rational strategy. Such leveraging of market power from one market to another is clearly contemplated by the words 'that or any other market' in section 36 of the Commerce Act 1986.

Widespread, often uncritical, acceptance of Chicago produced in the 1990s a culture of judicial scepticism regarding the theory of price predation.<sup>9</sup> The essential Chicago-School argument that 'because of its costs to the would-be predator, predation is irrational and hence not likely to occur',<sup>10</sup> as originally formulated by Bork<sup>11</sup> and Easterbrook,<sup>12</sup> amounted in fact to little more than the trite (and circular) observation that if predatory pricing is irrational it will not be undertaken by profit-maximising firms. Therefore, they argued, courts should never expect to encounter predatory conduct; but this, with respect, is a *non sequitur*. If the facts of a given situation carry unmistakably the scent of anti-competitive conduct, the concern of a court ought to be to enquire which assumptions of the Easterbrook-Bork story do not apply – not to assume the applicability of Easterbrook-Bork and reject allegations of predation accordingly. Fisher's dictum cuts both ways: 'Whenever predatory actions are alleged, it pays to analyze how the type of predation alleged could have been successful.'<sup>13</sup>

Such analysis in *Carter Holt Harvey v Commerce Commission* should quickly have drawn attention to two aspects of the Chicago model that did not apply; the restriction of analysis to a single product in a single market, and the idea that later recoupment in the form of a price increase by the predator is necessary to establish predation.

In this article I shall argue that the quest for bright-line tests based upon over-simplified economic theories has led the Australian High Court and the Privy Council up a blind alley. The central error lies in the assumption that both predator and prey operate in one and only one market, for a single product. In the real world, the most striking examples of predatory behaviour involve multi-product firms predating on single-product rivals. The strategic position of the predator typically spans more than one market, and its ability to prevail in the preyed market rests not upon

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8 881 F 2d 1396 (7th Cir 1989).

9 The sceptics' arguments are reviewed approvingly by Paul Scott, 'Is a Dominant Firm's Below Cost Pricing Always a Breach of Section 36 of the Commerce Act?' (2004) 21 NZULR 106.

10 A K Klevorick, 'The Current State of the Law and Economics of Predatory Pricing' (1993) 83 AER 162, 162; see also J A Ordover and G Saloner, 'Predation, Monopolization and Antitrust' in Richard Schmalensee and Robert D Willig (eds), *The Handbook of Industrial Organization* (North Holland: Amsterdam, 1989) 537.

11 Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).

12 Frank Easterbrook, 'Predatory Strategies and Counterstrategies' (1981) 48 U Chi L Rev 263.

13 Franklin M Fisher, 'On Predation and Victimless Crime' (1987) 32 Antitrust Bulletin 85, 92.

superior productive efficiency relative to the prey, but rather upon the ability to leverage market power from one market to another through practices such as bundled discounting. Both Boral Besser Masonry and Carter Holt Harvey were multi-product firms confronting single-product rivals, and the conduct described in the facts of these cases does not match the single-product Chicago story.

Ironically, at the very same time that the Privy Council majority was delivering its decision in *Carter Holt Harvey v Commerce Commission*, the United States Supreme Court was denying *certiorari* in *3M v LePage's*, a decision which directly addressed the issues raised by multi-product predators, and which suggests that *Carter Holt Harvey* was wrongly decided.

### I. *CARTER HOLT HARVEY V COMMERCE COMMISSION*: THE FACTS

A Carter Holt Harvey subsidiary, INZCO, manufactured and sold throughout New Zealand a range of home insulation products including Thick Pink Batts.<sup>14</sup> The firm was dominant in the market for this type of insulation. INZCO found its product line confronted, in the Nelson region, by a locally-produced substitute for Pink Batts named Wool Bloc, which was differentiated by the fact that it was made of wool and so was able to advertise on the basis of being more environmentally friendly than synthetics such as fibreglass batts.

Not only was the Wool Bloc product distinguished by branding characteristics that gave it a marketing edge in the eyes of many buyers; it also turned out that the local manufacturer, New Wool Products (NWP), could produce the insulation more cheaply than INZCO was able to produce and deliver a competing wool-polyester mix, even after extensive R&D efforts.

The distribution structure in the insulation market was significantly imperfect, relative to a competitive benchmark. Building-supply merchants in the Nelson area had an arrangement with INZCO to carry that company's range of building products with some degree of exclusivity, whereas Wool Bloc was sold directly to users and was not stocked on the shelves of building supply merchants.

Consider the position of a building-products merchant in a competitive environment. A highly competitive new product has entered the market, and is rapidly winning customer acceptance and eroding the market share of the products you currently stock. It might be supposed that the logical reaction would be to ask NWP for supplies of Wool Bloc in order to offer retail customers a full range of cost-competitive products to meet their insulation needs. Even if NWP were unwilling to sell to merchants at wholesale,<sup>15</sup> a sharp-eyed merchant in a fully-competitive market would surely look at joining the queue of retail buyers of Wool Bloc in order to put the product on its shelves, at a price including a margin to cover the selling costs, to attract custom from buyers interested in one-stop-shopping for a bundle of items and uninterested in seeking out the small local manufacturer to obtain Wool Bloc directly. A nationwide chain of hardware stores, receiving news of the

14 This account is based largely upon the High Court judgment, [2000] 9 TCLR 535, Williams J.

15 It is unclear how hard the merchants tried to secure supply from NWP. The High Court at [2000] 9 TCLR 535, para 83, describes negotiations between the merchants and NWP in intriguingly cloudy terms, which the Privy Council at [2006] 1 NZLR 145, para 20 translates into an unequivocal 'NWP had been free to sell its product through merchants if it wanted, but it had made a commercial decision not to do so' – a statement which, with due respect, entirely begs the questions of whether a commercial decision in the other direction would have been (a) possible, and (b) to the long-run benefit of consumers.

new product, might have seen a competitive opportunity and offered NWP a nationwide distribution arrangement in competition with Pink Batts.

Such was not, however, the actual course of events.<sup>16</sup> Instead of stocking the new low-cost Wool Bloc product, the Nelson merchants appealed to INZCO to supply a wool-based product that would ‘enable them to compete with Wool Bloc’. Finding that INZCO could not supply such a product at a competitive price, the merchants again did not turn to NWP for supply. Instead they continued to lobby INZCO to bring down the price of its Wool Line product.

The story here is a variant on the so-called ‘Chicago Three-Party Argument’ discussed in a recent review by Farrell<sup>17</sup> and in detail by Bernheim and Whinston.<sup>18</sup> The game begins with an incumbent supplier, INZCO, and an incumbent coalition of buyers, the merchants, already mutually committed to an exclusive marketing arrangement. A new product, Wool Bloc, with costs lower than those of the incumbent supplier of Pink Batts for which Wool Bloc is a close substitute, presents the merchants with a choice between changing supplier or using the threat of NWP’s entry to extract rents from their existing upstream partner, INZCO. INZCO then acts in conjunction with the merchants to try to force NWP out by marketing the new fighting brand of wool-polyester insulation, Wool Line, at a price 17-28 per cent below INZCO’s supply cost and below the full-cost price of Wool Bloc to final users. The fall in price resulting from this action expands market demand, thereby raising the total surplus available to INZCO and the distributors, but enabling the distributors to capture more than 100 per cent of the increase, leaving INZCO worse off in relation to its Wool Line revenues, but secure in the affections of its distributors.

The Commerce Commission ran an Areeda-Turner ruler over the cost and price information, and proceeded against INZCO for predatory pricing. (At roughly the same time in Australia, in another building-products case, and on the basis of similar price/cost data, the ACCC proceeded against Boral for selling its concrete blocks below cost.) Having succeeded in the High Court<sup>19</sup> and the Court of Appeal<sup>20</sup> the Commerce Commission’s case was rejected by the Privy Council<sup>21</sup> on the basis that INZCO was doing no more than compete vigorously, benefiting consumers in the process, and so had not breached section 36. The ACCC met the same fate in the Australian High Court.<sup>22</sup>

The majority in the Judicial Committee of the Privy Council found that INZCO was dominant and had undoubtedly had the purpose of driving Wool Bloc out of the market, but that it had not ‘used’ its position of market dominance to do so.<sup>23</sup> The majority argued that that ‘the effect of preventing a monopolist from competing with its competitors like everyone else would be to protect inefficient competitors.’<sup>24</sup> Their Lordships did not provide any satisfactory explanation of how a

16 Notwithstanding the assertion, repeated by the Privy Council at [2006] 1 NZLR 145, para 13, that INZCO’s distribution agreements ‘were continually under threat of defection’.

17 J Farrell, ‘Deconstructing Chicago on Exclusive Dealing’ (2005) 50 *Antitrust Bulletin* 465, 473-478.

18 D Bernheim and M Whinston, *Anti-competitive Exclusion and Foreclosure Through Vertical Agreements* (unpublished lecture, Centre for Operational Research and Economics, Université Catholique de Louvain, Belgium, 2000).

19 *Commerce Commission v Carter Holt Harvey Building Products Group Ltd* [2000] 9 TCLR 535.

20 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2001] 10 TCLR 247.

21 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145.

22 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* [2003] 195 ALR 609.

23 The new s 36 wording of ‘substantial degree of market power’ and ‘take advantage of’ makes no perceptible difference to the logic (such as it is) of the judgment.

24 *Carter Holt Harvey v Commerce Commission*, above n 21, para 40.

'monopolist' could have 'competitors' to 'compete with like everyone else',<sup>25</sup> nor did they address directly the possibility that allowing monopolists to compete like 'everyone else' might destroy efficient competitors to the detriment of consumers, because monopolists are not like everyone else. They concluded, however, that 'the margin between legitimate competition and anti-competitive conduct is not crossed by the lowering of prices. It is crossed when the dominant firm uses its ability to raise prices without losing its market share.'<sup>26</sup> The Judicial Committee majority thereby adopted the recoupment rule for identifying 'use of a dominant position' in the context of alleged predatory pricing, as the Australian High Court had done in *Boral*.<sup>27</sup>

Having adopted this rule, the majority found against the Commerce Commission on the basis of the so-called 'counterfactual test' from *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd*,<sup>28</sup> and New Zealand's only predatory-pricing action to date had failed.

## II. THE COUNTERFACTUAL TEST

The Privy Council majority noted with apparent surprise that '[i]t is evident that the courts below showed a marked lack of enthusiasm for what has come to be known as the counterfactual test.'<sup>29</sup> A brief review of the application of that test by their Lordships in *Carter Holt Harvey* readily accounts for that lack of enthusiasm.

Start with the crucial section in which the majority's decision was explained:

There must ... be a causal connection between the dominant position and the conduct which is alleged to have breached s 36. That will not be so unless the conduct has given the dominant firm some advantage that it would not have had in the absence of its dominance. It is the ability to recoup losses because its price cutting has removed competition and allows it to charge supracompetitive prices that harms consumers. Treating recoupment as a fundamental element in determining a claim of predatory pricing provides a simple means of applying the section without affecting the object of protecting consumer interests ...

Their Lordships are not persuaded that the facts which were found proved in this case show that INZCO's conduct, in the face of strong competition from NWP and in response to the demands of its distributors, was any different from that which a non-dominant firm of equivalent financial strength would have resorted to in the same circumstances ... [T]here was no evidence that the 'two-for-one' pricing of Wool Line was resorted to by INZCO with a view to charging supracompetitive prices at a later date on that or any other of its products ... The price level had been set by NWP, and no one could sell a product comparable to Wool Bloc at a higher price and be competitive. Without the offer of a comparable product to that of its distributors INZCO was at risk of losing its market share ...

[F]rom start to finish it was the need to compete in the South Island regional market that was the driving force. This was not conduct in which INZCO was using, and thus abusing, its position of dominance.<sup>30</sup>

Notice in particular two things the Privy Council says here.

25 This is not a new problem. Following *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC), there was much talk in New Zealand of monopolists behaving 'as otherwise-similar firms would do in a competitive market', a formulation which remained unintelligible to many observers including the present author.

26 *Carter Holt Harvey v Commerce Commission*, above n 21, para 53.

27 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*, above n 22. *Boral* is cited as authority in the Privy Council judgment at [2006] 1 NZLR 145, para 60(c).

28 Above, n 25.

29 *Carter Holt Harvey v Commerce Commission*, above n 21 para 50.

30 *Ibid.*, paras 67-69.

Firstly, recoupment, in the form of a causal connection between the price war and the charging of ‘supra-competitive prices at a later date on that or any other products,’ is essential to prove a claim of predatory pricing and the necessary evidence was lacking in the *Carter Holt Harvey* case. In writing this at paragraph 68, their Lordships seem, with respect, to have overlooked their previous apparent acceptance<sup>31</sup> of Ralph Lattimore’s (and the Court of Appeal’s) view that the price of Pink Batts had always included high margins amounting to ‘super-profits,’ which meant that the pricing being defended by the INZCO attack on NWP was already ‘supra-competitive’ and would continue to be so. The most generous interpretation of the Judicial Committee’s argument would seem to be that, knowing that supra-competitive prices are not *per se* a breach of the Commerce Act 1986, and accepting that INZCO had started out with enough market power to charge such supra-competitive prices, the Board decided that protecting those not-illegal monopolistic margins by destroying new entrants threatening to compete them down constituted some sort of legitimate business justification for deploying the resources of a financially-strong firm in an attempt to crush a new rival. How the clearly-intended maintenance of the existing supra-competitive pricing of INZCO’s Pink Batts, post-predation, was to be distinguished from recoupment was not explained by their Lordships – let alone how consumers were in some way supposed to come out ahead.

Secondly, the actions taken by INZCO were in some sense an example of normal and legitimate business practice and in accordance in some way with economic notions of rationality and competitive behaviour. This is admittedly a loose translation of the passages above but, as will be seen shortly, it seems to be what the Board meant to say.

There is a pregnant passage in the Privy Council judgment, where the counterfactual test is directly and explicitly applied:

It is by no means self-evident that INZCO would have behaved any differently if it had not been in a dominant position in the market when it was deciding what it should do to meet the competition which it was facing in that market from Wool Bloc. It would have been presented with the same complaint that the price which was originally set for Wool Line was uncompetitive. *The obvious response, in a truly competitive market, was to cut the price of Wool Line to a level that was competitive.*<sup>32</sup>

As economic reasoning this is not cogent. Imagine a truly competitive environment, assume (as the Privy Council evidently did) single-product firms, and consider INZCO with its Wool Line, trying to break into the submarket<sup>33</sup> for wool-based insulation products to attack the already-established Wool Bloc product. If INZCO is unable to match the price of the incumbent NWP without pricing below cost, then INZCO:

- (i) is productively inefficient and should not have entered to start with, since society’s resources are being wasted; and
- (ii) should exit quickly once the red ink starts to flow – and if it does not do so of its own volition, should rapidly be driven into insolvency, to the applause of anyone with a genuine commitment to economic efficiency in production.

There is, with respect, nothing ‘self-evident’ or ‘obvious’ about their Lordships’ suggestion that the correct way for a powerful but inefficient supplier to respond to a more efficient rival is to cut price below cost and hang in. The outcome of such a strategy, if successful, would be to destroy

31 Ibid, para 48.

32 Ibid, para 29, emphasis added.

33 While INZCO was dominant in the market for building insulation products, it was NWP which introduced the new wool-based insulation product, presenting INZCO with the task of entering the newly-created submarket.

the efficient supplier which is able to supply profitably at the low price, leaving an inefficient new entrant which cannot sustain its entry price without cross-subsidy from somewhere else. In the standard economics textbook account, a well-functioning truly competitive market weeds out the productively inefficient in order to leave the efficient. The acid test is supply price, based on actual supply cost. INZCO's Wool Line failed that test. The inferior product achieved entry to the market only by a pricing strategy that could never have crossed the minds of the management of a neoclassical rational single-product firm under truly competitive conditions.

It is therefore doubly ironic that a couple of pages further on the Judicial Committee majority talks of 'preventing a monopolist from competing with its competitors like everyone else'<sup>34</sup> as though this is in some way a fair and reasonable characterisation of INZCO's behaviour, and says that the 'effect' of protecting firms such as NWP from predation by a productively-inefficient but financially strong monopolist would be 'to protect inefficient competitors.'

What can possibly have been in their Lordships' minds? I think we find the answer by reading carefully their (hostile) analysis of Professor Lattimore's opinions, and especially the passage: 'If it was rational for INZCO to [price below cost on Wool Line] in the face of competition from Wool Bloc, it would have been rational too for *anyone else* who was facing the same competition and was seeking to meet the demands of its distributors.'<sup>35</sup>

Professor Lattimore may have exposed himself to this by 'accept[ing] that it was rational for INZCO to continue with Wool Line because it gave it the range of products that distributors required and helped to keep out other products';<sup>36</sup> but (with respect) this is no excuse for the passages emphasised above. 'Anyone else' must presumably include non-dominant firms in competitive markets (after all, the behaviour is being defended as in some sense a generally acceptable and justifiable rule of good business practice); but such firms could never get away with INZCO's behaviour, because they do not have the market power to do so, and it is not rational to take short-run losses for no long-run gain. The Privy Council is here defending INZCO for acting in precisely the way that the Chicago theorists point to as irrational and therefore never likely to be observed in the real world – especially not in uncontested fact evidence before the New Zealand High Court.

There is still something highly significant in the second emphasised section above, relating to 'the demands of its distributors' and thereby to a wider canvas on which INZCO was acting as a multi-product, not a single-product, firm. In that setting, it could certainly be rational for INZCO to protect its position as preferred supplier to its distributors, and rational for the distributors to seek to maintain their exclusive arrangement or understanding with INZCO, even if they might have been able to get one of their bundle of retail products more cheaply from NWP. Once the argument moves from single-product predator and single-product prey, into the totally different arena of multi-product predator versus single-product prey, we enter a world beyond the self-imposed analytical boundaries of the Australian High Court majority in *Boral* and the Privy Council majority in *Carter Holt Harvey*.

Why, to provide the curtain-raiser for the next two sections, did the Nelson building-supply merchants not do what the Staples superstore in the United States did with LePage's sticky tape, namely sell it at store-brand prices alongside the premium-branded 3M product, and let customers

34 *Carter Holt Harvey v Commerce Commission*, above n 21, para 40.

35 *Ibid.*, para 44, emphasis added.

36 *Ibid.*, para 44.

choose for themselves? Probably, one surmises, for precisely the same reason that generic sticky tape came into the United States market only once superstores had appeared with enough countervailing power to resist demands from the 3Ms and INZCOs of the world for exclusive rights to shelf space, and to stock the products of smaller competitors.

### III. THE GROUND SHIFTS: *LEPAGE'S v 3M*

In both *Boral* and *Carter Holt Harvey*, the superior courts made reference to precedents set in the *Matsushita*<sup>37</sup> and *Brooke Group*<sup>38</sup> decisions of the United States Supreme Court, which laid down bright-line tests for predatory pricing, including recoupment after the event as well as below-cost pricing. A strong New Zealand precedent was set also by the Privy Council in *Telecom v Clear* where the conduct of the alleged monopoliser was to be judged against a competitive counterfactual – a test which led the Council to essentially the same bright-line criteria.

Notoriously, thus, in the decade up to 2003, predatory pricing was difficult to establish in the eyes of New Zealand, Australian, and American courts. Since 2000, however, there has emerged a strong current of thinking which is critical of the approach of the United States Supreme Court in *Brooke Group*. This view was articulated forcefully by Brodley, Bolton and Riordan<sup>39</sup> and Edlin,<sup>40</sup> and became manifest in the landmark decision of the United States Supreme Court in June 2004<sup>41</sup> to refuse to reconsider the March 2003 decision of the United States Court of Appeals (Third Circuit) in the case of *LePage's v 3M*.<sup>42</sup>

The exclusionary practice of which Minnesota Mining (3M) was accused was its offer of a 'bundled rebate' to retailers who stocked a full range of 3M products, including 'private brand'<sup>43</sup> lines. LePage's was competing with 3M in the supply of private-brand adhesive tape, for which LePage's had secured an 88 per cent market share, while 3M enjoyed a monopoly in the market for Scotch-brand tape. 3M introduced a bundled rebate scheme which provided a large price incentive for retailers to stock a full line of 3M products, including a private-brand tape newly introduced as a fighting brand to drive out the LePage's product. A direct result was that several large retail chains ceased to stock LePage's tape in order to benefit from the 3M bundled rebate scheme.

The Third Circuit Appeal Court ruled in 2003 that 3M's conduct was exclusionary under section 2 of the Sherman Act, and \$68 million damages were awarded to LePage's Inc. The United States Supreme Court, before deciding whether to hear 3M's appeal, asked the United States Government for guidance. The response was an *amicus curiae* brief from Solicitor General Theodore Olsen and six other government lawyers, urging the Court to deny the petition for *certiorari*.<sup>44</sup> The Supreme Court accepted this advice two weeks before the Privy Council delivered its *Carter Holt Harvey* judgment, and the Third Circuit *LePage's* decision was allowed to stand.

37 *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp* 475 U.S. 574 (1986).

38 *Brooke Group Ltd v Brown & Williamson Tobacco Corp* 509 U.S. 209, (1993).

39 J F Brodley, P Bolton and M H Riordan, 'Predatory Pricing: Strategic Theory and Legal Policy,' (2000) 88 Georgetown L J 2241.

40 A Edlin, 'Stopping Above-Cost Predatory Pricing', (2002) 111 Yale L J 941.

41 *Certiorari* denied in *3M Co v LePage's Inc*, LEXIS 4768 (US, 2004).

42 *LePage's Inc v 3M* (2003) 324 F 3d 141 (3rd Cir).

43 That is, tape bearing the brand name of the retailer who sells the product, rather than of the manufacturer.

44 *3M v LePage: Brief for the United States as Amicus Curiae*, at <www.usdoj.gov> viewed 28 November 2006.

*LePage's v 3M* opened a devastating breach in the authority of the *Brooke Group* decision. A 'bundled rebate' scheme of the sort operated by 3M bears more than a mere family resemblance to the cross-subsidisation of Wool Line out of profits secured from INZCO's other product lines, including Pink Batts sold in geographic markets outside the Nelson region.

As several observers have noted, if a single-product firm is attacked by means of a bundled discount, offered to distributors by a multi-product predator with a full monopoly in all but one of the bundle of products receiving the rebate, then the full amount of the rebate may reasonably be attributed to the price of the one good supplied into a competitive market. If this approach is taken, the 3M price for its privately-labelled tape was not only below the price of the competing product supplied by *LePage's*, but may have been below the correctly-calculated 3M cost of supply also.<sup>45</sup>

The 3M pricing policy can be construed as a cross-subsidy from 3M's monopoly core business to a peripheral product facing competition. The Third Circuit Full Court clearly construed it in this way, as a means of excluding an equally-efficient rival:

Depending on the number of products that are aggregated [in the bundle on which rebates are offered] and the customer's relative purchases of each, even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce.<sup>46</sup>

The *amicus* brief from the US Government echoed this theme:

Unlike a low but above-cost price on a single product, a bundled rebate or discount can – under certain theoretical assumptions – exclude an equally efficient competitor, if the competitor competes with respect to but one component of the bundle and cannot profitably match the discount aggregated over the other products, even if the post-discount prices for both the bundle as a whole and each of its components are above cost.<sup>47</sup>

The *amicus* brief rather coyly concluded that 'the applicability of the *Brooke Group* approach to this business practice would benefit from further judicial and scholarly analysis.'<sup>48</sup>

The ground has therefore shifted significantly under the *Matsushita* and *Brooke Group* precedents, insofar as those precedents were understood to say that a combination of below-cost pricing and subsequent high probability of recoupment constitute necessary as well as sufficient bright-line tests for price predation, and that absence of either of these essential components constitutes a sufficient defence against a predatory-pricing charge. It is now clear in the United States that pricing behaviour which is (i) exclusionary in its effect in the relevant market (in the *Carter Holt Harvey* case, exclusionary of NWP in the market for wool-based insulation products) and (ii) sustainable only by virtue of a cross-subsidy from some other line of business or activity undertaken by the predator but not the victim, and in which the predator enjoys market power, can be in breach of section 2 of the Sherman Act, the (imperfectly substitutable) New Zealand equivalent for which is section 36 of the Commerce Act 1986.

The wording of section 36 explicitly includes the notion of power in one market being used to exclude competitors 'in that or any other market', which clearly foreshadows the possibility of a

45 Below-cost pricing was not, however, alleged in the *LePage's* case, which was decided on other grounds. R W Davis, 'Pricing With Strings Attached – At Sea in *Concord Boat* and *Lepage's*', (2000) 14 Antitrust 70, notes that *LePage's*, like New Wool Products, survived the predation episode and the issue was simply the anti-competitive damage done.

46 *LePage's Inc v 3M*, above n 42, 155, citing Philip Areeda and Herbert Hovenkamp.

47 Above, n 44, 12-13.

48 *Ibid*, 15.

multi-product, multi-market firm leveraging off its wider market power to achieve an anti-competitive purpose in a particular market or submarket.

#### IV. THE LITERATURE AND AMERICAN LAW ON PREDATORY PRICING AND BUNDLED DISCOUNTS

Until very recently both the legal position in the United States on price predation, and the theoretical position in much of the economics and law literature both there and in New Zealand, rested upon the three analytical pillars discussed above, namely:

- (i) the assumption that both predator and prey were single-product firms;
- (ii) the Areeda-Turner test; and
- (iii) the recoupment rule that predation could not be rational without subsequent recoupment, generally interpreted as an increase in price to a supra-competitive level once the predator had achieved its kill.

##### A. *Changed Landscape*

The past three years have radically changed this landscape in three ways. Firstly, the focus of debate now is on situations where a multi-product predator attacks a single-product prey: Minnesota Mining's attack on LePage's in the United States sticky-tape market, where the Third Circuit Court in 2003 spotted the problem, whereas the Privy Council in *Carter Holt Harvey* missed it entirely. The new term of art for predatory pricing is 'bundled discounting', also known as loyalty rebates.<sup>49</sup>

Secondly, the Areeda-Turner test of price below marginal (or average variable) cost has turned out neither necessary nor sufficient to identify price predation, partly because of its single-product focus, and partly because it assumes precisely the competitive conditions (constant industry-wide average variable cost and prevalence of a long-run perfectly-competitive market equilibrium) that are usually missing in interesting real-world predation events.<sup>50</sup> In particular, in situations where underlying average variable cost curves slope down for both players, the interests of consumers are not served by determining victory on the basis of financial strength, nor willingness and ability to cross-subsidise, nor the respective qualities of the law firms and QCs involved. The long-run interests of consumers (and of the economy as a whole) require that the market be dominated by whichever firm can achieve the lowest long-run cost – and there can be no presumption that this will be the more powerful firm.

49 For a wide range of recent commentary on 'bundled discounting', 'exclusionary bundling', 'loyalty rebates' and the fallout from the *LePage's* judgment, see the Fall 2005 issue of *Antitrust Bulletin* 50(3), which contains papers by Ray Hartwell, Barry Nalebuff, Joseph Farrell, Richard Posner, Patrick Greenlea and David Reitman, Alan Meese, and Roy T Englert. On the economics of constructing legal tests for when rebates are exclusionary see especially Patrick Greenlea and David Reitman, 'Distinguishing Competitive and Exclusionary Uses of Loyalty Rebates' (2005) 50 *Antitrust Bulletin* 441.

50 The initial attack on Areeda-Turner was led by Aaron S Edlin, 'Stopping Above-Cost Predatory Pricing' (2002) 111 *Yale L J* 941, and Brodley, Bolton, and Riordan, above n 35. The conventional riposte by Einar Elhauge, 'Why Above-Cost Price Cuts to Drive Out Entrants are Not Predatory – and the Implications for Defining Costs and Market Power' (2003) 112 *Yale L J* 681, was so full of qualifications and apparently minor concessions as to leave the main thrust of Edlin's critique unscathed – see, e.g., Edlin's contributions to the 'Roundtable on Recent Developments in Section 2', (2003) 18 *Antitrust* 15.

Thirdly, the recoupment rule was controversial from the outset,<sup>51</sup> and has died with the single-product predator and the dumping of *Brooke Group* by the *LePage's* court. Unambiguous quantitative definition and measurement of recoupment becomes intimidatingly difficult once the single-value measure of post-predation single-product price has been dropped. Qualitative evaluation of the strategic payoffs from the conduct complained of remains, inescapably, part of a court's analysis of allegedly anti-competitive business conduct.

### B. From *Brooke Group* to *LePage's*

For a decade after *Brooke Group*, defendants in US antitrust cases, and lawyers advising clients on bundled discounting, appealed to the *Brooke Group* decision as a defence in law against a wide variety of charges of anti-competitive behaviour. 3M took refuge behind *Brooke Group* and lost. Davis gives a helpful checklist of the core propositions in *Brooke Group*:

*Brooke Group* teaches that:

- even a dominant firm may deliberately choose to forego short-term profits and instead price low in order to gain market share, so long as the price charged is above an appropriate measure of cost, 509 U.S. 209, at 222-223 ...;
- such strategic pricing is not, necessarily and always, pro-competitive (beneficial to consumers in the long run), but to distinguish between procompetitive above-cost pricing and anticompetitive above-cost pricing would be “beyond the practical ability of a judicial tribunal ... without courting intolerable risks of chilling legitimate price cutting”, id. at 224;<sup>52</sup>

and hence

- injury in fact caused to a smaller player resulting from a dominant firm's strategic pricing is not actionable unless that pricing is below cost and unless there is an objective likelihood of recouping monopoly profits. *Id.* at 224-25.<sup>53</sup>

Four particular points stand out here, and it is in these areas that the American position has shifted sharply, or at least come under renewed pressure, since *LePage's*.

#### 1. *False-Positive-Aversion*.

The Supreme Court's view in *Brooke Group* was not that judicial tribunals should presume that above-cost price cuts are never predatory. The *Brooke Group* position was that courts should avoid getting into the issue of considering allegations of above-cost price predation because of the risk of error (striking a ‘false positive’), and because of the allegedly chilling effect of this risk on legitimate competition. This is no more than a practical criticism of the efficiency and analytical capacity of judicial tribunals – not an affirmative statement of principle that strategic price cuts are necessarily pro-competitive. This fear of false convictions stands in stark contrast to the Euro-

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51 Jessica L Goldstein ‘Single Firm Predatory Pricing in Antitrust Law: the ‘Rose Acre’ Recoupment Test and the Search for an Appropriate Judicial Standard’ (1991) 91 Columbia L Rev 1757.

52 Ronald W Davis ‘Pricing With Strings Attached – At Sea in *Concord Boat* and *LePage's*, (2000) 14 Antitrust 69.

53 *Ibid.*, 69.

pean approach to predation under Article 86 of the Treaty of Rome, which is more concerned with 'false negatives' and correspondingly far more activist with respect to predatory pricing.<sup>54</sup>

The *Brooke Group* judgment said that '[a]s a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.'<sup>55</sup> The Court did not specify what exactly was meant by 'a relevant measure of cost', and this opens a gap into which it is potentially possible to slide the cost/price implications of bundling and other tying arrangements, so that cost could be measured as the aggregate incremental cost incurred by a predator to sell one more unit of the target good, including revenue foregone across sales of all product lines due to the effect of a bundled rebate kicking in.

As Davis says:

In *Brooke Group* the Supreme Court recognized that above-cost pricing, with no strings attached, across the board, may sometimes be anticompetitive. The safe harbor that the Court established for above-cost pricing was not based on the perception that all such behavior is procompetitive, but rather on the belief that giving the courts license to separate the competitive from the anticompetitive would chill, and hence discourage, too much procompetitive behavior, and impose too great a burden on the courts.<sup>56</sup>

Edlin remarks, in discussing the same safe-harbour approach in the case of *United States v AMR Corp*, that:

The safe harbor is very large when there is a lot of market or monopoly power, so that the firm's demand is very inelastic, and marginal revenue is far below price. In contrast, the safe harbor is very small when price is close to marginal revenue because the firm has very little market power. That's a peculiar kind of safe harbor. It is the opposite of what one would expect to avoid false positives. There may be a reason for a safe harbor, but it's strange to put it in by comparing a marginal concept like marginal cost with an average concept like price.<sup>57</sup>

So how should a court proceed? Davis in 2000 pointed out the implausibility of a court's being entirely unable to make progress on cases where predation was alleged in a bundled-discount context:

If business people are rational, it follows that any complex program of package pricing or structured discounts must be based on some analysis, leading the relevant business people to conclude that adopting the plan is likely to be more profitable in the long run than not adopting it. Discovering or reconstructing

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54 The Privy Council acknowledged at *Carter Holt Harvey v Commerce Commission* above n 21, para 37 that recoupment had been rejected by the European Court in *Tetrapak* as a test for predation; and at paras 61-66 reviewed the European approach and identified crucial differences in the wording of Article 86 versus section 36 of the Commerce Act 1986. The Treaty of Rome does not require proof that market power has been 'used' (nor 'taken advantage of'), and the European Court does not accept the Privy Council's counterfactual test which places monopolist and non-monopolist on an equal footing before the law. On the contrary, monopolists are considered to have a 'special responsibility' not to behave in ways that might be acceptable for non-monopolists. In October 2004 (after both *Carter Holt Harvey* and *LePage's*) the OECD Competition Committee held a Round Table on Predatory Foreclosure, the proceedings of which were published in March 2005 as: OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Predatory Foreclosure*, DAF/COMP(2005)14, Paris, March 2005, available at <www.oecd.org>. This document includes an interesting New Zealand delegation paper on the *Carter Holt Harvey* decision, and several fairly biting (albeit discreetly indirect) points about s 36 and the New Zealand case law from the Committee secretariat.

55 Above n 4, 223, emphasis added.

56 Davis, 'Pricing With Strings Attached', above n 52, 72.

57 'Roundtable: Recent Developments in Section 2', (2003) 18 Antitrust 18.

that business analysis should be relatively easy, as litigation goes, particularly given that many people are likely to have been involved in developing and approving the program. In particular, it should not be beyond the ability of the plaintiff and the trier of fact to figure out whether defendant's plan either (a) is likely to be profitable even if the plaintiff does not exit the business, e.g., because the defendant is simply giving up margin on some sales in order to gain volume and market share, or, alternatively, (b) depends for its profitability on the assumption that the defendant's competitors will exit, permitting it to raise its prices. Deciding which of the assumptions underlies the plan in question ought not to be rocket science.<sup>58</sup>

## 2. *The Bright Lines are No Longer Bright.*

*Brooke Group* promised two bright-line tests, below-cost pricing (*Areeda-Turner*), and recoupment. Warren describes the erosion of the *Brooke Group* bright-line tests in *LePage's*:

Prior to the *LePage's* decision, many practitioners and scholars read the case law to hold that, while there were few bright lines to follow, strategic pricing practices such as price-cutting and bundling would not be found to violate section 2 of the Sherman Act as long as prices did not drop below a certain measurement of cost. In particular, the most recent Supreme Court case on predatory pricing, *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, contained strong language indicating that "above-cost prices that are below general market levels or the costs of a firm's competitors [do not] inflict injury to competition cognizable under the antitrust laws." However, in *LePage's*, the Third Circuit allowed a finding of illegal monopoly maintenance in the absence of a showing of below-cost pricing.<sup>59</sup>

There is thus nothing special about pricing above or below marginal cost, other than the convenience of judges trying to avoid judging hard cases. The issue is not whether Firm 1's price is above or below its own marginal cost, but whether it is above or below the shut-down price (average total cost) for its rivals. There is no need for recoupment unless the price prior to predation was already competitive. There is no presumption that price-cutting by a dominant firm is good or bad for consumers in the long run. The world of anti-competitive predatory conduct has become more complex, more interesting, and more difficult to adjudicate.

## 3. *Single-Product Predation*

The *Brooke Group* decision dealt only with single-product price predation. *Brooke Group* arguably had no effect on earlier Supreme Court precedents regarding anti-competitive behaviour by multiproduct firms. Contemplating its relationship with the then-in-progress *LePage's* case, Davis commented that "[t]he *Brooke* Court considered only the question when strategically low pricing, as such, might violate the antitrust laws: it was not asked to think about the consequences, if any, of a "string" attached to a low price."<sup>60</sup>

Where a strategic price has strings attached – for example, where a dominant multiproduct firm uses bundled discounts across a range of products (in some of which it has a monopoly) to squeeze a smaller competitor in a single-product market (as was the case in *LePage's v 3M* and in

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58 Davis, above n 52, 72

59 Joanna Warren 'Comment: *LePage's v. 3M*: An Antitrust Analysis of Loyalty Rates', (2004) 79 New York U L R 1605, 1606.

60 Davis, above n 52, 69.

*Carter Holt Harvey*) – the result can be anti-competitive,<sup>61</sup> and it is no defence for the defendant to claim that its single-product price was above cost, as 3M did in *LePage's*. Davis again:

LePage's problem was not predatory pricing, it was that if a customer bought any substantial amounts of its private label tape, the customer would lose the rebate not only on the buyer's purchases of Scotch™ and other 3M tape, but also on the PostIt™ notes purchases as well. To meet such a deal, LePage's would have had to cut its price substantially ... The issue was not the low price but rather the string attached to the low price.<sup>62</sup>

This does point to a test that might be used: assuming a hypothetical equally-efficient competitor in the private-label market, what price cut would such a competitor have to make in order to match the bundled discount incentive on buyers to switch?<sup>63</sup> If the required price is clearly below cost, then the bundled discount is anti-competitive.

Some authors (including Davis in the passage quoted above) have made a terminological distinction between the narrow concept of 'predatory pricing' (the single-product case) and 'exclusionary conduct' (the bundled-discount case). The latter can be defined as:

conduct that intentionally, significantly and without business justification excludes a potential competitor from outlets (even though not in the relevant market), where access to those outlets is a necessary though not sufficient condition to waging a challenge to a monopolist and fear of the challenge prompts the conduct.<sup>64</sup>

As the United States Supreme Court had noted in *Aspen Skiing Co v Aspen Highlands Skiing Corp*:

[t]he question ... whether conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [the plaintiff-competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency', it is fair to characterize its behavior as predatory.<sup>65</sup>

An example of the new writing in this field is Nalebuff's model of 'exclusionary bundling':

Under exclusionary bundling, a firm with market power in good *A* and facing actual (or potential) competition in good *B* prices an *A-B* bundle in a way that makes it impossible for equally-efficient one-good rivals selling *B* to compete. Exclusionary bundling has a foreclosure effect similar to that of [single-product] predatory pricing, but the two practices have important differences. Unlike traditional predatory pricing, the exclusionary behavior need not be costly to the firm. The intuition is that under predation, the firm actually has to charge a price below cost and thus loses money that it later has to recoup. Under exclusionary bundling, the firm has only to threaten to raise its unbundled prices if the bundle is not bought. All customers are led to buy the bundle and so the threat need never be carried out.<sup>66</sup>

61 For an in-depth review of the recent literature on bundled discounts, see T A Lambert, 'Evaluating Bundled Discounts' (2005) 89 Minn L Rev 1688. See also B Kobayashi, *Not Ready for Prime Time? A Survey of the Economic Literature on Bundling* (Law and Economics Working Paper Series 05-35, George Mason School of Law, available at <www.ssrn.com>).

62 Davis, above n 52, 70

63 Warren, above n 59, 1631, has proposed a test along these lines to apply to above-cost loyalty rebates: 'The plaintiff should be allowed to show that an equally efficient producer of the competitive product would find it unprofitable to continue producing. This requirement addresses the fundamental exclusionary aspect of loyalty rebates: foreclosure of equally efficient single-product rivals due to discounts aggregated across multiple products.'

64 Eleanor M Fox, 'What is Harm to Competition? Exclusionary Practices and Anti-competitive Effect' (2003) 70 Antitrust L J 371, 390, commenting on *Microsoft*.

65 472 US 585 (1985), 605.

66 Barry Nalebuff, 'Exclusionary Bundling' (2005) 50 Antitrust Bulletin 321, 321.

Nalebuff goes on to argue that the courts have always implicitly accepted this line of argument, and that numerous cases before *LePage's* rested on such reasoning. He concludes that:

The theory of exclusionary bundling brings together tying and predation. Exclusionary bundling is akin to predation in that when prices and costs are calculated correctly, the implied price of *B* to the customer is below cost. But, unlike predation, an implied price below cost need not imply any actual or even potential profit sacrifice. This is because the implied price is based on the alternative a la carte price of *A*, a price that might never be charged to a customer ... The primary difference between exclusionary bundling and predation pricing is that there is no need to establish recoupment.<sup>67</sup>

#### 4. Monopolists and Recoupment

The *Brooke Group* requirement for recoupment implicitly starts from a competitive price. The District Court Judge in *LePage's* (Judge Padova), however, determined that:

There is no separate recoupment requirement when the defendant is *already* a monopolist ... In other words, if the theory of the case is that the defendant is trying to protect its ability to price monopolistically, not gain the ability to charge a monopoly price, it seemed to make no sense to require the plaintiff to prove that the defendant would recoup its predatory investment by charging even higher prices in the future.<sup>68</sup>

Similarly, the Third Circuit decision said:

Assuming *arguendo* that *Brooke Group* should be read for the proposition that a company's pricing action is legal if its prices are not below its costs, nothing in the decision suggests that its discussion of the issue is applicable to a monopolist with its unconstrained market power. ... 3M is a monopolist; a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.<sup>69</sup>

Admittedly, on this particular issue, the Third Circuit Court attracted a direct rebuttal in the United States Government *amicus* brief:

But this Court's language [in *Brooke Group*] plainly applies to a monopolist. The Court stated, without qualification, that in a "claim alleg[ing] predatory pricing under s 2 of the Sherman Act ... a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." 509 U.S. at 222. Whether to extend *Brooke Group* to bundled pricing properly depends on considerations other than whether the defendant is a monopolist.<sup>70</sup>

Nevertheless, it is clear that the Third Circuit position contains a very significant acknowledgment of the validity of the European view that monopolists are not to be treated analytically as on a par with non-monopolists – an inescapable corollary of which is that the Privy Council's 'counterfactual test' in *Telecom v Clear* and *Carter Holt Harvey* is unsound.

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67 Ibid, 365.

68 Davis, above n 52, 71.

69 *LePage's Inc v 3M*, above n 42, 151-152.

70 Above n 44, footnote 11.

## V. CONCLUDING REMARKS

The recent literature has rediscovered a number of long-familiar reasons why the predatory-price claim of the Chicago School (that the phenomenon makes no economic sense) loses validity once simplistic neoclassical perfectly-competitive assumptions are dropped.<sup>71</sup>

The first problem with Chicago is the static cross-section nature of the story, when in practice strategic behaviour must rest upon expectations of the discounted present value of future cash-flows. The neoclassical comparative-static treatment of predatory pricing in legal discussions is too often divorced from the dynamic considerations that drive strategic behaviour. If the relevant issue is ‘damage to competition,’ then the appropriate way to think about it is the long-run quality-adjusted price that consumers will have to pay for the product.

By ‘quality-adjusted price’ I mean the benefit consumers derive from each dollar spent on the product in the relevant market. This depends not just on the number on the price label, but also on the characteristics embodied in the product to which the label is attached. An improvement in technology, workmanship or reliability has the effect of lowering the true price even if the nominal price remains the same.<sup>72</sup> The true price in the future will depend not only on the degree of monopoly power in the market post-predation, but also on the impact of short-run exclusionary contests on technical progress. A court should worry more about a powerful firm which kills a highly innovative new start-up competitor, than about one which merely puts a slow-moving laggard to sleep. Yet there seems to be little in-depth analysis before the courts of the effect on the pace of technical progress of strategic behaviour in defence of market shares.

The second problem is the Chicago assumption of a single-product predator in a world where virtually all actual cases have involved both multi-product predators and some degree of bundling. *Carter Holt Harvey* was not about a single-product firm. Had the Privy Council judges read *LePage’s* before pronouncing, they might have decided quite differently – because *Carter Holt Harvey* was an example of a ‘bundled discount’, of the sort the Third Circuit Court punished in *LePage’s*, and the European Court of First Instance in *Michelin II*.<sup>73</sup>

A third problem is the rhetorical imagery. Predation brings a vertical dimension to the horizontal competitive process determining market shares. Antelopes compete horizontally for space in their environmental niche (market) while their predators coexist in the same niche, but vertically – surviving by feeding off those below them in the food chain. What the predator exercises is not superior ability at the activities of horizontal competition (eating faster, running faster, breeding better, digesting better ...) but superior power in head-to-head combat. Power is intrinsic to the predator’s success, by definition. But while predation is inherently vertical, the complaints most often heard in so-called ‘predatory pricing’ cases have more to do with horizontal brutality than with vertical culling. The word ‘predation’ itself may have got us off to the wrong start in competition-law thinking.

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71 For an entertaining alternative critique from an Austrian point of view, not further discussed in the present paper, see W Anderson, ‘Pounding Square Pegs into Round Holes: Another Look at the Neoclassical Theory of Predatory Pricing’ (2003) 6 Quarterly Austrian Journal of Economics 23.

72 A well-known example is the price of personal computers. The computing power acquired per dollar of purchase price has risen dramatically while the nominal shelf price of a PC has fallen only gradually.

73 See B Sher and A Ojala, ‘Abuse of Dominance: Effects and Inherent Effects Under Article 82: Michelin 2 and Van den Bergh Foods’ (2003-2004) Competition Law Insight 7.

A fourth problem is the false-positives-aversion arising from a misapplication of the doctrine of innocent-until-proven-guilty. Adam Smith long ago pointed out that rights of the individual such as presumption of innocence should be radically reversed as soon as the individual changes roles to become a 'businessman' or a 'merchant'. Smith's reasoning was that the ever-present incentive for any business is to eliminate competition, and consolidate market power, by whatever means are available. This translates to a presumption of guilt whenever one sees businesspeople congregating together or behaving in ways that seem directed to the acquisition and maintenance of power to exploit consumers. The Europeans, it seems to me, have correctly understood the two sides of the Enlightenment, namely liberty of the individual and restraint on corporatist power.<sup>74</sup> It is ironic that New Zealand, a tiny economy in which market power hangs like low fruit from the trees in many markets, should have adopted the false-positive-aversion of the United States whose market of 300 million people virtually guarantees space for new species to get a fair crack of the evolutionary whip.

While overseas developments since 2000 should have greatly improved the prospects of success with a claim of predatory pricing of the INZCO sort, it cannot be said that New Zealand's legislators have covered themselves with glory. Section 36 of the Commerce Act has been amended to replace 'dominance' with 'a substantial degree of market power', and 'use' with 'take advantage of'. Neither of these changes has, on the face of it, made it any easier to prove exclusionary or predatory behaviour, and neither has brought New Zealand any closer to the philosophy and wording of the Treaty of Rome's Article 86.

Because the Privy Council decision in *Carter Holt Harvey* was under the old wording of 'dominance' and 'use', and because of the blessedly vigorous dissent by two of the five Law Lords, the way is nevertheless open to test the waters under the amended wording as to whether the change in wording has had a material effect on the scope of section 36. In particular a ray of hope is offered by the fact that section 36 has always been worded to include the use of power in one market to exclude persons from any other market.

Section 36 of the Commerce Act 1986 has failed the test of the sole New Zealand predatory-pricing case to date. It is unfortunate that after taking ten weary years to wind its way slowly through the courts, the *Carter Holt Harvey* case reached the Privy Council at the same time as *3M v LePage's* was being decided by the United States Third Circuit, and the Privy Council judges were writing their opinions before the United States Supreme Court denied *certiorari*. The absence of any reference to *LePage's* in the Privy Council judgment (in particular, by the dissenting two) raises the question how different the outcome in *Carter Holt Harvey* might have been had it been decided six months later by the same bench of judges, or alternatively if the Commerce Commission's legal team had been able to run the *LePage's* case in argument.

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74 For recent discussion of the Europe-US contrast in competition law, see the colloquium in Antitrust Bulletin Spring-Summer 2004; e.g. W Kolasky 'What is Competition? A Comparison of U.S. and European Perspectives', (2004) 49 Antitrust Bulletin 29, and G Niels and A Ten Kaate 'Introduction: Antitrust in the U.S. and the EU – Converging or Diverging Paths?', (2004) 49 Antitrust Bulletin 1.

# THE FIRST FOUR YEARS: NEW ZEALAND'S PERSONAL PROPERTY SECURITIES ACT IN PRACTICE

BY THOMAS GIBBONS\*

## I. INTRODUCTION

New Zealand's Personal Property Securities Act 1999 (PPSA) came into force on 1 May 2002, and in the period leading up to that date it was recognized as being a development of considerable significance.<sup>1</sup> The PPSA repealed a number of statutes which previously regulated personal property securities, and has created a unitary notice system for these securities based on the notion of a 'security interest' – a term, in essence, for a charge over another person's assets or undertaking, and one of many key concepts introduced to New Zealand jurisprudence by the PPSA. Another fundamental concept in the PPSA is 'perfection'; a perfected security interest will take priority over an unperfected security interest. 'Perfection' is achieved by a combination of 'attachment' and registration. Registration is achieved by registering a 'financing statement' summarising the nature of the security interest on the Personal Property Securities Register established by the PPSA. In simple terms, 'attachment' occurs when a first party has given value to a second party, and the first party has rights in certain collateral (eg goods) – such that the collateral can be regarded as charged to the second party. But this is by way of background only. As we will see, considerable judicial effort has gone into understanding and interpreting these key concepts, which were, before the introduction of the PPSA, entirely unknown in New Zealand law.

This article begins by examining the PPSA 'in practice' through a review of the first five reported cases on the PPSA.<sup>2</sup> These cases show the kinds of issues that have come before the courts on PPSA matters, the kinds of arguments presented, and the ways in which the courts have applied the PPSA to specific factual and practical situations.

The second part of the article considers four phenomena from these cases which deserve particular attention. First, the shift from key conceptual issues to more operational points of PPSA law provides an indication of the kinds of matters which are likely to lead to PPSA disputes in future. Second, the relationship between the PPSA and other statutes shows how the PPSA has introduced some inconsistencies into New Zealand's statute book, and dealing with them is likely to require the opinion of the courts in future. Third, the kinds of precedent used in interpreting the

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- 1 See eg D W McLauchlan, 'Fundamentals of the PPSA: An Introduction' (2000) 6 NZBLQ 166; and D Webb, 'Commercial Law' [2000] NZ Law Review 175; M Gedye, R C C Cuming, R J Wood, *Personal Property Securities in New Zealand* (Wellington: Brookers Ltd, 2002) vii.
- 2 Unreported cases include *McTainsh v REM Holdings Ltd* (HC Tauranga, CIV 2005-470-000024, 27 January 2005, Harrison J) – see particularly para 7; and *Houston v ANZ National Bank Ltd* (HC Auckland, CIV 2004-404-6932, 9 December 2004, Heath J). However, the reported cases are likely to have greater precedent value than any unreported cases and so deserve greater attention. For other minor judicial reference to the PPSA, see *Otago Finance Ltd v District Court* [2003] 1 NZLR 336 and *Commissioner of Inland Revenue v Agnew* [2000] 1 NZLR 223.

PPSA illustrate an unusual discomfort on the part of some judges in dealing with useful Canadian judgments. Fourth, the cases provide a strong indication that the courts will interpret security agreements broadly and flexibly under the PPSA regime. Through this analysis, the article provides a guide to how the PPSA works in practice, how the courts have interpreted it so far, and how they might interpret it in the future.

## II. GRAHAM V PORTACOM NEW ZEALAND LTD

### A. *Introduction and Facts*

*Graham v Portacom New Zealand Ltd*<sup>3</sup> was the first case on the PPSA. Portacom New Zealand Ltd (Portacom) leased portable buildings to NDG Pine Ltd (NDG) between 1998 and 2002 under Portacom's standard terms of trade. These terms provided that NDG would not part with possession of the buildings or sell to attempt to alienate them, and also stated that Portacom obtained (or retained) a security interest in the buildings that was registrable in the Personal Property Securities Register. NDG was to do all things required to give NDG a perfected first priority security.

In addition to entering into this arrangement with Portacom, NDG also granted a debenture over its assets to the Hong Kong and Shanghai Banking Corporation Ltd (HSBC). Soon after the PPSA came into force on 1 May 2002, HSBC registered its interest under the debenture on the Register. Portacom however did not register its security interest, and had not done so when NDG went into receivership in June 2003. The receivers appointed by HSBC sought directions from the Court as to whether HSBC had priority over Portacom in respect of the buildings and whether the receivers therefore had the power to sell them.<sup>4</sup>

### B. *Perfection*

The Court began by noting how the PPSA was intended to provide a comprehensive system for determining the enforceability and priority of security interests, and observed that the leases from Portacom to NDG were of more than one year, and so created a security interest under section 17 of the PPSA. The Court then went on to comment on the importance of 'perfection', which occurs when a security interest has both attached to collateral and a financing statement has been registered in respect of that security interest. Because a financing statement recording HSBC's security interest had been registered, the key issue was whether this security interest had also attached to the buildings leased to NDG.

### C. *Attachment*

Section 40 of the PPSA broadly provides for attachment if value has been given, if the debtor has rights in the collateral, and the security agreement is enforceable against third parties. On this basis, HSBC's security had attached and so was perfected. Under section 66 of the PPSA, which determines priority between security interests in the same collateral, HSBC's perfected security interest would therefore have priority over Portacom's unperfected security interest.<sup>5</sup> Portacom

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3 [2004] 2 NZLR 528. Hereinafter '*Portacom*'.

4 *Portacom*, paras 1-6.

5 *Portacom*, paras 7-16.

argued that HSBC's interest in the buildings could not have attached, as NDG had only a possessory interest in the buildings and could not by a debenture confer on HSBC a right to sell them. The Court disagreed. A lessee of goods could grant a security interest over its possessory interest in those goods, as section 40 provided for a debtor to have rights in goods leased to that debtor. As section 17 provided for the lease of the buildings (being of more than one year) to be deemed to be a security interest, NDG was to be treated as the owner of the goods for registration and priority purposes.<sup>6</sup> This approach was 'confirm[ed]' by Canadian authority and scholarship.<sup>7</sup> In the Court's view:

The rights of a lessor in leased goods referred to in s 40(3) of the Act are not therefore confined to the lessee's possessory rights. As against the lessee's secured creditors, the lessee has rights of ownership in the goods sufficient to permit a secured creditor to acquire rights in priority to those of the lessor.<sup>8</sup>

NDG therefore had both a possessory and a proprietary interest in the buildings, the latter arising by virtue of section 40(3). NDG could as a result grant a security interest in the buildings themselves, not just its leasehold interest in them. Furthermore, the terms of HSBC's debenture gave HSBC a charge over both the leasehold and proprietary interests of NDG in the buildings.<sup>9</sup>

#### D. Security Agreement

Portacom also sought to argue that HSBC's security agreement was not enforceable under section 36 of the PPSA, as the debenture did not contain a statement that it was over all 'present and after-acquired property' of NDG. The Court found that while the debenture did not use these precise words, the substance was the same, and the debenture was therefore enforceable against Portacom in respect of NDG's possessory and proprietary rights in the buildings. Ultimately, HSBC's perfected security had priority over Portacom's unperfected security, and the receivers were authorized to sell the buildings.<sup>10</sup>

### III. NEW ZEALAND BLOODSTOCK LTD V WALLER

#### A. Introduction and Facts

*New Zealand Bloodstock Ltd v Waller*<sup>11</sup> was the first Court of Appeal decision on the PPSA. On 17 November 1999, Glenmorgan Farm Ltd (GFL) granted a debenture to SH Lock (NZ) Ltd (Lock) over all 'present and future assets' of GFL. The charge was fixed and floating in respect of certain assets, and was registered under the Companies Act 1993 on 19 November 1999.<sup>12</sup> Some time afterwards, on 31 August 2001, GFL entered into a lease to purchase agreement with Bloodstock<sup>13</sup> under which GFL acquired a racehorse called Generous. Under this agreement, title

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<sup>6</sup> *Portacom*, paras 17-19.

<sup>7</sup> *Portacom*, para 20.

<sup>8</sup> *Portacom*, para 28.

<sup>9</sup> *Portacom*, paras 29-33.

<sup>10</sup> *Portacom*, paras 34-38.

<sup>11</sup> (2005) 9 NZCLC 263,944. Hereinafter '*Bloodstock*'.

<sup>12</sup> *Bloodstock*, paras 1-3.

<sup>13</sup> This term is used in this article as 'New Zealand Bloodstock' was used in the decision to refer to both New Zealand Bloodstock Ltd and New Zealand Bloodstock Finance Ltd.

to Generous remained with Bloodstock until 31 July 2004, at which time GFL would complete the purchase of Generous. In August 2003, the agreement was varied to extend the lease to 28 March 2005, but at no stage did Bloodstock register a financing statement. Lock registered a financing statement under the PPSA on 1 May 2002, while Generous came to be leased to a third party. However, GFL defaulted on its lease agreement and it was terminated by Bloodstock on 6 July 2004, with Bloodstock taking possession of Generous one day later. Lock gave notice to GFL of default under its debenture on 23 July 2004 and appointed receivers one day later.<sup>14</sup>

### B. Title versus Perfected Security Interest

The parties' main arguments could be broken into two: Bloodstock had argued that Bloodstock retained title to Generous and GFL could therefore not confer on Lock a security interest in Generous; while the receivers had argued that the PPSA regime meant GFL could, through its deemed ownership of Generous, give Lock an interest in Generous that could have priority over Bloodstock's interest.<sup>15</sup>

The majority of the Court found that Lock's perfected security interest (through its debenture) took priority over Bloodstock's title to Generous. With GFL's lease being more than one year in duration, Bloodstock's title became a 'security interest' under section 17 of the PPSA. Section 40(3) gave GFL rights in Generous, and Lock's debenture was effective on its terms under section 35. GFL's rights in Generous were therefore part of Lock's security, had 'attached' for the purposes of section 40, and had been perfected by registration. As Bloodstock's security interest was not perfected, Lock's security interest took priority.<sup>16</sup> While Bloodstock had argued that this finding would go against the rule *nemo dat quod non habet*, that no one can give that which they do not have, the majority pointed out that there have always been exceptions to this principle.<sup>17</sup> By virtue of section 17 of the PPSA, Bloodstock's title became a 'security interest'. This was part of the policy behind the PPSA, as many lease to purchase arrangements are, in reality, similar to hire purchase agreements or conditional sale contracts.<sup>18</sup>

William Young J saw Bloodstock's argument as 'consistent with legal notions as they were prior to the PPSA'.<sup>19</sup> However, while there was no express provision in the PPSA that a chattel in the possession of a debtor and subject to a retained title security was to be treated as *owned* by the debtor and therefore potentially subject to other securities, the intention of the PPSA had been to equate 'true' security interests and arrangements that were security interests in substance. Priority was to be determined in accordance with the rules under the PPSA. Furthermore, the policy of the PPSA was to encourage registration, and finding for the receivers would create incentives for this.<sup>20</sup> In essence, William Young J agreed with the majority in giving priority to a perfected security interest.

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14 *Bloodstock*, paras 5-11.

15 *Bloodstock*, para 85, per William Young J. Though it is derived from the minority judgment, this description of the main issues is more useful than any summation in the majority's decision.

16 *Bloodstock*, para 51.

17 *Bloodstock*, paras 52-53.

18 *Bloodstock*, para 54.

19 *Bloodstock*, para 87.

20 *Bloodstock*, paras 87-89.

### C. Security Agreement

Bloodstock further argued that under section 35 of the PPSA, a security agreement is effective according to its terms. Bloodstock's agreement with GFL provided that Bloodstock retained title to Generous and GFL therefore had no interest in Generous, proprietary or possessory, on which Lock could base a claim to Generous.<sup>21</sup> In the alternative, Bloodstock argued that the language of Lock's debenture was insufficiently explicit.<sup>22</sup> The receivers pointed out that section 35 actually states that a security agreement is effective according to its terms '[e]xcept as otherwise provided by this Act...'. The receivers relied on this in arguing that, when the PPSA came into force on 1 May 2002, Lock's registration of a financing statement perfected its interests over all GFL's assets, and that Bloodstock's failure to register its interest meant it lost priority in Generous to Lock.<sup>23</sup>

The majority held that while Lock's security agreement was not specifically expressed to be over 'all present and after-acquired property' of GFL, it did cover 'all present and future assets'. The difference between these phrases was not seen as material, particularly in light of section 17, which requires the form of the transaction to be disregarded as long as the transaction substantially secures payment for performance of an obligation.<sup>24</sup>

While he had agreed with the majority on the previous point, William Young J disagreed with the majority over the interpretation of the security agreement. Before the PPSA came into force, in his view, the debenture could not have conferred security over assets not owned by GFL. The charging clause was drafted with reference to the legal regime at the time of its execution and not the prospective regime of the PPSA.<sup>25</sup> Furthermore, the transitional provisions of the PPSA did not directly address whether a security agreement signed before the PPSA came into force, and which did not 'on its true interpretation' extend to assets not actually owned by GFL, could extend to assets owned by a third party.<sup>26</sup>

### D. Future Applicability of the PPSA

There was also an argument as to the applicability of the PPSA. Bloodstock argued that Lock's debenture, being signed on 1 November 1999 before the PPSA came into force, was limited to GFL's present and future assets measured by the law in force as at November 1999, and could not create a security interest under future law.<sup>27</sup> To the receivers, section 40 was the key to the matter. In terms of this section, they argued that (i) Lock's security interest had attached to Generous when Lock gave value; (ii) GFL had rights in Generous through possession of it; and (iii) the security agreement was in writing and so enforceable against third parties. Registration of a financing statement on 1 May 2002 perfected Lock's security interest, and, the receivers argued, gave Lock priority over Bloodstock's unperfected security interest under section 66 of the PPSA.<sup>28</sup>

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21 *Bloodstock*, paras 31-32.

22 *Bloodstock*, para 45.

23 *Bloodstock*, paras 33-34.

24 *Bloodstock*, paras 61-63.

25 *Bloodstock*, para 102.

26 *Bloodstock*, para 104.

27 *Bloodstock*, para 35.

28 *Bloodstock*, paras 37-39.

As to the 'future application' argument, while GFL had no proprietary rights in Generous before 1 May 2002, from that date section 40 created new rights to this effect. Generous was 'after-acquired property' and within the scope of Lock's debenture, and so attached to the debenture from that date.<sup>29</sup> As to giving value under section 40, the majority held that while the value Lock gave predated the PPSA coming into force, this did not effect the enforceability of Lock's charging clause: the PPSA regime was 'of general application' once the transitional period allowed by the PPSA had passed. This was reflected in the transitional provisions themselves.<sup>30</sup>

In its conclusion, the majority noted that 'with respect to priority of competing security interests under the PPSA the *nemo dat* rule is ousted'.<sup>31</sup> GFL had rights to Generous that came within the scope of Lock's debenture, even though Bloodstock had purported to retain title. Bloodstock therefore lost priority to GFL. This result followed the intention of Parliament, expressed in the PPSA, that Bloodstock's retention of title was merely a 'security interest' which required registration to be perfected.<sup>32</sup>

William Young J again disagreed with the majority, taking issue with the notion that the coming into force of the PPSA on 1 May 2002 gave Lock rights in Generous which it did not have before this date. This would give Lock greater rights against GFL, but prejudice GFL's position as against Bloodstock. There was 'nothing specific' in the PPSA supporting this 'statutory inflation of rights'.<sup>33</sup> GFL did not acquire greater rights in Generous from 1 May 2002, and section 40 could not apply as value was given prior to the passage of the PPSA. Lock did not obtain rights in Generous beyond the contractual rights of GFL, and the securities between Lock and Bloodstock were not in competition.<sup>34</sup> Overall, however, the majority's findings on these latter points were determinative, and Lock's perfected debenture had priority over Bloodstock's 'title'. As should be clear, while William Young J agreed with the majority on the priority to be granted to a perfected security interest, he disagreed on the latter two points, and would have reached a different outcome.

#### IV. AGNEW V PARDINGTON

##### A. Introduction and Facts

*Agnew v Pardington*<sup>35</sup> hinged less on the interpretation of the PPSA than on section 30A of the Receiverships Act 1993. Section 30A read as follows: '30A Extinguishment of subordinate security interests – If property has been disposed of by a receiver, all security interests in the property and its proceeds that are subordinate to the security interest of the person in whose interests the receiver was appointed are extinguished on the disposition of the property.'

Pardington and Jarrold were the receivers of The Building Depot Ltd (BDL), and were appointed by ANZ Banking Group (New Zealand) Ltd (ANZ), the first ranking general security holder, on 8 September 2004. Fletcher Distribution Ltd (Fletcher) held a second ranking general security

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29 *Bloodstock*, para 64.

30 *Bloodstock*, paras 65-68.

31 *Bloodstock*, para 74.

32 *Bloodstock*, para 75.

33 *Bloodstock*, paras 106-107.

34 *Bloodstock*, paras 109-117.

35 [2006] 2 NZLR 520 (CA). Hereinafter, 'Agnew'.

agreement, pursuant to a deed of subordination and priority, and appointed Agnew and Waller as receivers of BDL on 24 September 2004. BDL was placed in liquidation on 14 February 2005, with the Official Assignee as liquidator. After payment of the ANZ and those preferential creditors and secured parties with interests ranking ahead of the ANZ, there was around \$2,800,000 remaining to pay Fletcher and the other secured creditors, with this amount being insufficient to cover all payments. Pardington and Jarrold applied to the Court for directions as to payment of the surplus, there being a dispute as to the effectiveness of Fletcher's security instrument.<sup>36</sup>

The High Court Judge had held that section 30A was clear in its wording: once the secured property had been disposed of (so as to allow realization of the relevant assets), all subordinate security interests were extinguished. This extinguishment meant Fletcher lost its priority in the surplus, and Pardington and Jarrold were therefore directed to pay the balance of the proceeds to Fletcher's receivers or the Official Assignee, without any subordinate security interests having any effect.<sup>37</sup>

### *B. The Arguments*

On appeal by Fletcher's receivers, Fletcher argued that section 30A was intended to provide clear title, not eliminate the priority of subordinate security holders. The Official Assignee, however, thought section 30A could not be read any way other than to eliminate the priority of subordinate security holders, and that if this was an error in the legislation then Parliament, not the courts, should correct this.<sup>38</sup> In other words, did s 30A mean a first ranking general security interest was effective to extinguish all subsequent securities?

### *C. The Decision*

The Court noted that section 30A had come into force at the same time as the PPSA, and must be read in the context of the PPSA. The Court paid particular attention to the enforcement provisions in Part 9 of the PPSA, and especially section 115, which mirrors section 30A, and section 106, which provides that Part 9 does not apply to receivers.<sup>39</sup>

While acknowledging that a bill to amend section 30A was (at the time of the proceedings) before Parliament, the Court observed that it was 'rarely permissible' to rely on subsequent legislation, even as an interpretive aid.<sup>40</sup> The language of section 30A was therefore key, and the Court favoured an interpretation which meant that upon the sale of property by a receiver, only subsequent security interests in the property and any future proceeds from that property were extinguished.<sup>41</sup> This reflected the words of the statute, and the intentions of Parliament. Parliament, the Court found, only intended that clear title be passed to a purchaser, not to entirely remove the security interest of subordinate security holders. This interpretation was a legitimate 'reading down' of the statute and fitted best with other provisions of the Receiverships Act (notably section 40D, which provides a special payment regime for local authorities), and the PPSA, Companies

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<sup>36</sup> *Agnew*, paras 1-9.

<sup>37</sup> *Agnew*, paras 11-12. It appears the High Court's view was that payment to either of these would have been correct in law.

<sup>38</sup> *Agnew*, paras 14-15.

<sup>39</sup> *Agnew*, paras 17-23.

<sup>40</sup> *Agnew*, para 28.

<sup>41</sup> *Agnew*, paras 29-31.

Act, and Land Transfer Act as well.<sup>42</sup> The parties' substantive matter was remitted to the High Court – a victory for Fletcher's in interpretation.

## V. SERVICE FOODS MANAWATU LTD V NZ ASSOCIATED REFRIGERATED FOOD DISTRIBUTORS LTD

### A. *Introduction and Facts*

The issue in *Service Foods Manawatu Ltd (in rec & liq) v NZ Associated Refrigerated Food Distributors Ltd*<sup>43</sup> was whether NZ Associated Refrigerated Food Distributors Ltd ('Distributors') had a perfected purchase money security interest (PMSI) in respect of goods supplied by Distributors to collateral held by the receivers of Service Foods Manawatu Ltd ('Service Foods'). The receivers of Service Foods had asked the Court whether Distributors had a security interest in goods supplied by Distributors to Service Foods, whether this was perfected by registration of a financing statement, and whether this financing statement was invalid on the basis of being 'seriously misleading'.<sup>44</sup> The financing statement in question had been registered against 'all present and after-acquired property' of Distributors in December 2003. Westpac had registered a similar financing statement in October 2003. The critical question was whether Distributors' financing statement contained an adequate description of the property it secured; if not, its security interest would be unperfected.<sup>45</sup>

### B. *Security Agreement: Arguments and Findings*

Section 36 of the PPSA provides that a security agreement must be signed or assented to in writing to be enforceable against third parties, and the written terms of trade between Distributors and Service Foods provided that Distributors retained a security interest in all goods supplied to Service Foods. The receivers for Service Foods argued that these terms did not accurately reflect the contractual arrangements between the parties as to payment, which was often delayed. However, indulgences given by Distributors in obtaining payment from Service Foods were found not to be a waiver of the terms or to automatically make them void. The fact that the terms expressly granted Distributors a security interest over the goods supplied and their proceeds, as well as the provision for Distributors' retention of title, meant that the terms of trade gave Distributors a Purchase Money Security Interest (PMSI) in goods supplied to Service Foods and their proceeds.<sup>46</sup>

### C. *Financing Statement*

The critical issue was of course whether the description of the collateral in Distributors' registered financing statement was 'seriously misleading'. Under section 149 of the PPSA, a defect or error in a financing statement does not affect the financing statement's validity unless it is 'seriously misleading'. Section 150 provides that, without limitation, a seriously misleading defect or irregu-

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42 *Agnew*, paras 32-43.

43 (2006) 9 NZCLC 263,979. Hereinafter, '*Service Foods*'.

44 *Service Foods*, paras 1-2.

45 *Service Foods*, paras 3-7.

46 *Service Foods*, paras 8-22.

larity or omission in the name of any debtor or the serial number of the collateral will invalidate the registration.<sup>47</sup>

In interpreting these sections, the Court turned to the purpose of the Register established by the PPSA. The Register was used by those registering financing statements and those searching for prior interests, and the Court agreed with academic commentary that '[t]he PPSA does not penalise overly broad collateral descriptions in financing statements. The security agreement, not the financing statement, governs the terms of the security.'<sup>48</sup> Distributors' description of its collateral type was acceptable, as anyone searching the register would be able to see there was a security in place. The description of collateral was broad, but the actual security interest was restricted to goods supplied under the terms of trade and their proceeds. In conclusion, the defect in the financing statement was not 'seriously misleading', and Distributors was entitled to enforce its security interest.<sup>49</sup>

## VI. RE KING ROBB LTD

### A. Introduction

*Re King Robb Ltd (in liq); Sleepyhead Manufacturing Co Ltd v Dunphy*<sup>50</sup> examined two matters relating to insolvency law: the first related to section 36 of the PPSA and the nature of the relationship between a liquidator, a company, and its creditors; and the second, the relationship between a security interest under the Personal Property Securities Act 1999 (PPSA) and a charge under the Companies Act 1993.

### B. Facts

Sleepyhead supplied King Robb with beds and other goods under its standard terms and conditions. From 2002, Sleepyhead's invoices provided for it to retain a security interest over the goods which was registrable on the Register. King Robb never signed these invoices, and over 12 years of trading, there was no signed agreement between the parties. In 2004, King Robb was placed in liquidation, and the liquidators refused to return certain goods supplied by Sleepyhead to King Robb but not paid for. After sale of the goods and payment of the first ranking security holder (BNZ) and the liquidator's fees, only around \$2,500 remained for distribution among all remaining creditors, including Sleepyhead.<sup>51</sup>

### C. Issue One: Liquidators a Third Party?

The first key issue was whether the liquidators were a 'third party' for the purposes of section 36 of the PPSA – if so, the security agreement would be unenforceable against them as it was not signed or assented to in writing as required by that section. Relying on the Companies Act and

<sup>47</sup> *Service Foods*, paras 23-31.

<sup>48</sup> *Service Foods*, paras 32-36, quote from para 36, citing L Widdup, and L Mayne, *Personal Property Securities Act: A Conceptual Approach* (2<sup>nd</sup> ed, 2002) para 20.19.

<sup>49</sup> *Service Foods*, paras 37-43.

<sup>50</sup> (2006) 9 NZCLC 264,000. Hereinafter, '*King Robb*'. This section draws on an earlier note by the author on this case, published in (2006) *Waikato Bay of Plenty District Law Society Newsletter* No 8, 7.

<sup>51</sup> *King Robb*, paras 4-8.

English and Australian authority, the Court held that a liquidator acts as an agent of a company: '[t]he express juxtaposition of the liquidator's appointment and cessation of the director's powers confirms ... [t]here could be no rational basis for the law treating the relationships of a director and a liquidator with the company differently'.<sup>52</sup> As the liquidators were agents of the company and not 'third parties', they were therefore bound by the security agreement, and in breach of it when they sold the goods supplied subject to Sleepyhead's security interest.<sup>53</sup>

#### *D. Issue Two: 'Security Interest' also a 'Charge'?*

The consequential argument for Sleepyhead was that Sleepyhead's goods were subject to a PMSI under sections 16-17 of the PPSA, and that Sleepyhead therefore retained rights in that collateral that survived liquidation, including the right to reclaim the goods. King Robb argued that the security interest did not constitute a charge binding on the company or its liquidators under the Companies Act. In this view, a security interest must confer priority in the subject goods over preferential and unsecured creditors to qualify in a charge – in other words, a charge under the Companies Act will always be a security interest under the PPSA, but a security interest may not always be a charge. It was argued that Sleepyhead's security interest conferred no preferential payment rights and so was not a charge.<sup>54</sup>

The Court did not agree with King Robb's argument. Sleepyhead's security interest had been 'perfected' by attachment to the goods and registration of a financing statement on the Register. While a signed security interest would have been better in that it would have been enforceable against third parties, third party enforceability was not at issue here. In the Court's view, there could be no 'halfway' security, whether under the PPSA or the Companies Act. An interest was either secured, and therefore a charge, or not. Sleepyhead's security interest gave it the right to claim payment for goods from the proceeds of sale of those goods in priority to unsecured creditors. As such, its security interest was a charge within the meaning of the Companies Act.<sup>55</sup>

#### *E. Concluding Comments*

The Court concluded that Sleepyhead had a right to immediate possession of its goods supplied but not paid for both at the time of demand, and when sold by the liquidators. These rights were enforceable against King Robb (through its agents the liquidators), and not any third party. Its security interest further constituted a charge under the Companies Act and gave Sleepyhead the right to preferential payment from the net proceeds of sale. The Court therefore found for Sleepyhead.

## VII. THE SHIFT

Sections II to VI of this article have traced the first five reported cases on the PPSA. Sections VII to X now tease out four threads of analysis illustrated by the cases reviewed above. In summary, these are: first, the shift from key conceptual issues to more operational points of PPSA law; second, the relationship between the PPSA and other statutes and the difficulties of inconsistency; third, the use of precedent used in interpreting the PPSA; and fourth, the flexibility with which

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<sup>52</sup> *King Robb*, para 19.

<sup>53</sup> *King Robb*, paras 13-29.

<sup>54</sup> *King Robb*, paras 30-33.

<sup>55</sup> *King Robb*, paras 34-39.

the courts have interpreted security agreements. *Portacom* and *Bloodstock* were cases about the underlying application of the PPSA. In both cases, the key issue was whether good title or a perfected security interest was more important. In both cases, the decision was the same; the Court took the view that the PPSA had largely done away with traditional notions of title, and a perfected security interest was essential in determining priority. As the majority in *Bloodstock* expressed it: 'with respect to priority of competing security interests under the PPSA the *nemo dat* principle is ousted',<sup>56</sup> and as one commentator on this decision expressed it: 'the concept of a title-based security over goods has for all practical purposes been removed from New Zealand law'.<sup>57</sup> In addition, the majority judgment in *Bloodstock* made the important point that the PPSA applies to *all* personal property security arrangements from 1 May 2002, not simply those arrangements and agreements that envisaged its application.<sup>58</sup> In both cases, section 40 of the PPSA, which covers the attachment of security interests, and section 41, which covers perfection, are given considerable attention. Much less attention is given to these key concepts in latter cases.

The importance of various concepts – such as 'attachment', 'perfection',<sup>59</sup> and 'security interest' – is illustrated first by the fact that the first New Zealand book on the PPSA was called *The PPSA: A Conceptual Approach*<sup>60</sup> which analysed the PPSA not on how the statute is set out, but on the basis of the new concepts it introduced to New Zealand's personal property securities law; and second by the stress placed on these concepts by other pre-PPSA commentators.<sup>61</sup> Under the PPSA, it is concepts, and not the common law, which come to the forefront of analysis. The decisions in *Portacom* and *Bloodstock* show the courts embracing these concepts and giving effect to the significant reforms contemplated by the PPSA.

This is not to say that more 'mechanical' or operational matters were not important in *Portacom* and *Bloodstock*. As we will see below, *Bloodstock* is also important for its analysis of issues relating to the wording of security agreements and other terms of trade.<sup>62</sup> It is however significant that none of the cases following *Bloodstock* have considered the fundamental title versus perfection issue. This fundamental title/perfection issue was of course not before the court in the latter cases: but it is reasonable to surmise that this is because the parties and their lawyers viewed these issues as resolved and no longer worth arguing. And while *Bloodstock* is a Court of Appeal decision and its decision on this issue could potentially be overturned by the Supreme Court in a future case, this possibility seems scarcely conceivable. The reasoning in *Bloodstock* is sound, and it is worth noting that the entire Court agreed that the PPSA makes title subservient to a perfected security interest.

The latter three cases, on the other hand, focus on issues that, while important to the PPSA and in some respects fundamental, are decided against a background in which the title versus perfection issue is taken as settled. *Agnew* focuses on subordinate security and the relationship between the Receiverships Act and the PPSA. *Service Foods* focuses on security agreement and registration issues. *King Robb* focuses on the role of a liquidator and the relationship between a security interest under the PPSA and a charge under the Companies Act. This shift from conceptual to

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56 *Bloodstock*, para 74.

57 D Webb, 'Commercial Law' [2006] NZ Law Review 337, 348.

58 See section II above.

59 Webb, above n 1 at 179 described attachment and perfection as the 'central concepts' of the PPSA.

60 L Widdup and L Mayne, *Personal Property Securities Act: A Conceptual Approach* (2000).

61 See eg McLauchlan, above n 1 at 171-173.

62 See section X below.

operational issues is likely to continue in future: while many provisions of the PPSA still remain to be interpreted in the light of particular factual situations, the courts may well never hear another argument on whether title can override a perfected security interest. From the first five cases, all decided over the last two years or so, we see a shift from cases on fundamental conceptual issues to cases on more specific points of law – a shift, one might say, from cases on constitutional matters to administrative law, or from decisions on what the PPSA is *about* to decisions on what it *means* in practice.

### VIII. THE PPSA AND OTHER STATUTES

No law is an island, and the PPSA does not exist in a vacuum. As noted above, it establishes certain concepts – such as attachment, perfection, and the priority of a perfected security interest. But perhaps the key reason why these concepts are important is because they are essential to determining priority between competing security interests. A perfected security interest is only important inasmuch as it has priority over an unperfected interest, and this issue will really only become a matter of litigation in the event of insolvency. As such, the relationship between the PPSA and other statutes dealing with insolvency – such as the Companies Act and the Receiverships Act – is of some significance.

As noted above, *Agnew* focused on the interpretation of section 30A of the Receiverships Act. Another significant issue, however, was the relationship between the PPSA and the Receiverships Act. In interpreting section 30A, the Court found it significant that section 30A had come into force at the same time as the PPSA, and must be read in the context of the PPSA. The Court paid particular attention to the enforcement provisions in Part 9 of the PPSA, particularly section 106, which provides that Part 9 does not limit the rights, powers and obligations of a receiver, and that the Receiverships Act is to prevail over Part 9 of the PPSA in the event of any inconsistency.<sup>63</sup>

In turn, *King Robb* focused on the relationship between the PPSA and the Companies Act and, in particular, whether a ‘security interest’ under the PPSA was a ‘charge’ for the purposes of the Companies Act. The Court found that a security interest and a charge are, in this context, one and the same, and noted in its judgment that:

[N]either the PPSA nor the Companies Act allows for gradations of quality. An interest is either secured, and is thus a charge, or it is not ... [t]he PPSA introduced a new concept into securities law ... In my judgment Sleepyhead’s interest was a right or interest relating to property owned by King Robb by virtue of which the company is entitled to claim payment of the proceeds of sale in priority to unsecured creditors. Accordingly, it is a charge within the statutory definition.<sup>64</sup>

The Court in *King Robb* also held that a liquidator is not a ‘third party’ for the purposes of section 36 of the PPSA. Section 36(1) reads as follows:

- (1) A security agreement is enforceable against a third party in respect of particular collateral only if—
  - (a) The collateral is in the possession of the secured party; or
  - (b) The debtor has signed, or has assented to by letter, telegram, cable, telex message, facsimile, electronic mail, or other similar means of communication, a security agreement that contains—
    - (i) An adequate description of the collateral by item or kind that enables the collateral to be identified; or

63 *Agnew*, paras 17-23. For commentary on receiverships and the PPSA written before *Agnew*, see TGW Telfer, ‘Enforcement of Security Interests under the Personal Property Securities Act 1999’ (2000) 6 NZBLQ 192, para 2.3.

64 *King Robb*, paras 37 and 39.

- (ii) A statement that a security interest is taken in all of the debtor's present and after-acquired property; or
- (iii) A statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

The key part of this provision is that a security agreement must be signed to be effective against a third party; the secured party cannot simply rely on a course of conduct to establish an effective security agreement against parties other than the debtor. It was therefore of some significance whether an unsigned security agreement was binding on a liquidator.

Academic commentary had been divided on this point. The first New Zealand text on the PPSA argued that a liquidator was a third party for the purposes of the PPSA,<sup>65</sup> while a later commentator argued that the liquidator was merely an agent of the relevant company rather than a third party for the purposes of section 36.<sup>66</sup> (In turn, subsequent commentary has taken issue with the Court's position and has argued that a liquidator cannot be seen as a company's agent.<sup>67</sup>) While a liquidator is a statutory position under the Companies Act, the issue of whether a liquidator is a third party is largely irrelevant to that legislation. It was only when it came to interpreting the PPSA that this matter had to be determined. There are probably any number of provisions in other statutes which, while uncontentious in the context of the statutes of which they are part, will create difficulties and disputes when they must be interpreted in the light of the PPSA.

Fortunately, the relationship between the PPSA and *some* other statutes has been covered in the PPSA itself. Section 53(2) of the PPSA, for example, provides that the PPSA prevails over section 3 of the Mercantile Law Act 1908 and section 27 of the Sale of Goods Act 1908. However, even where it is clear which statute should prevail, there can still be disputes about how a particular statutory provision should be interpreted, as *Agnew* shows. The relationship between the Sale of Goods Act (which puts particular emphasis on notions of title) and the PPSA (which subordinates title to a perfected security interest) may well lead to disputes in future, particularly in relation to Part 9 of the PPSA, which relates to the enforcement of security issues. Indeed, Part 9 deserves special attention, as one commentary has noted:

[D]espite the objective of creating a single, conceptually-unified enforcement regime, Part 9 is not a code regulating all types of enforcement procedure in all types of security interest. Enforcement of security interests in 'consumer goods' is regulated by the Credit (Repossession) Act 1997 ... enforcement of security interests through the appointment of a receiver remains regulated by the Receiverships Act 1993 ... [and] Part 1 of the Credit Contracts Act 1981 [now superseded by the Credit Contracts and Consumer Finance Act 2003 in relation to credit contracts entered into after 1 April 2005], relating to oppressive conduct, also remains relevant.<sup>68</sup>

To give some further examples of where future disputes may arise, it has been observed that in drafting the PPSA '[o]nly a token attempt was made to reconcile relevant provisions of the Property Law Act with the concepts introduced by the PPSA',<sup>69</sup> and a number of commentators have also identified issues with the PPSA and the provisions of the Distress and Replevin Act 1908 (DRA). It has been noted that 'the concept of distress [under the Distress and Replevin Act 1908] falls within the substantive definition of "security interest" in the PPSA but remains outside the

65 See Widdup and Mayne, above n 61 paras 30.6 – 30.11.

66 See Gedye et al, above n 1 at 149.

67 Webb, above n 58 at 344.

68 Gedye et al, above n 1 at 380.

69 Ibid, 381.

scope of the rules in that Act',<sup>70</sup> and that landlords may lose priority to other secured parties where they attempt distraint.<sup>71</sup> In short, the relationship between the PPSA and a number of other statutes remains unclear, and these issues are more than likely to attract the attention of the courts again in future.<sup>72</sup>

## IX. PRECEDENT? WHAT PRECEDENT?

### A. Canadian Case Law

The New Zealand PPSA had drawn heavily on North American models, particularly Article 9 of the United States Uniform Commercial Code and the Personal Property Securities Acts of the Canadian provinces of British Columbia and Saskatchewan. As we have seen, there are relatively few cases on the New Zealand PPSA. Quite reasonably, therefore, it was argued before the PPSA came into force that there was considerable benefit in using '25 years of Canadian case law' in interpreting the New Zealand legislation.<sup>73</sup>

Perhaps most notably, *Portacom* was decided at a time when there was no New Zealand precedent. As such, the only precedents that could be relied on were from overseas. And fortuitously for the Court, there was a Canadian case almost precisely on point. In *Re Giffen*,<sup>74</sup> a decision of the Supreme Court of Canada, an automobile had been leased to Giffen for a term of more than one year, which under the relevant legislation meant the lessor's interest was a security interest. This security had not been perfected when Giffen went bankrupt. The Court held that the British Columbian Personal Property Securities Act had in large part set aside traditional concepts of title and ownership. In the Canadian Court's words: '[T]he property rights of persons subject to provincial legislation are what the legislature determines them to be ... [t]he rights of the parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional concepts of title'.<sup>75</sup> In *Portacom*, as in *Giffen*, the Court took the view that the matter could not be resolved by reference to title, because the dispute related to priority and not ownership.<sup>76</sup> Under the British Columbia legislation, the lessee of the goods obtained both a possessory and a proprietary interest in the goods, and both interests could pass to a secured third party.<sup>77</sup> A decision of the Court of Appeal of Alberta that had interpreted similar legislation

70 J Gordon, 'Personal Property Securities Act 1999' in NZLS Seminar, *Rural Transactions – Getting it Right* (2005) 6. See also Gordon's article at 8 on the relationship between the PPSA and resource consents under the Resource Management Act 1991.

71 N Moynagh and G Towers, 'Commercial Leasing – Practical Tips of Key Procedures' in (2004) NZLS Property Law Conference: *Maintaining the Momentum* 329, 333. For comment on attempts to resolve these difficulties by the Distress and Replevin Amendment Act 2004, see D Webb, 'Commercial Law' [2004] NZ Law Review 367, 369.

72 The relationship between personal property securities legislation and other statutes has also been an issue overseas – see for example *Royal Bank of Canada v Sparrow Electric Corp* (1997) 143 DLR (4th) 385, noted in B Allan, 'PPSA showdown: Owners 0, Lenders 1' [2004] NZLJ 316, 317.

73 Gedye, above n 1 at 19.

74 (1998) 155 DLR (4th) 332 (SCC). Hereinafter '*Giffen*'.

75 *Giffen*, para 26, cited in *Portacom* at para 22. The second part of the quotation comes from *Re International Harvester Credit Corp of Canada Ltd and Touche Ross Ltd* (1986) 30 DLR (4th) 387, 398, cited in *Giffen* at para 36.

76 *Giffen* para 28, cited in *Portacom* at para 22.

77 *Giffen*, para 36 cited in *Portacom* at para 23.

to mean that the lessee could not give an enforceable security interest was examined but largely ignored.<sup>78</sup>

*Bloodstock* also relied on *Giffen*, but to a much lesser extent. The Court in *Bloodstock* was instead focused on the *concepts* underlying the PPSA. The majority referred to *Giffen*, but was careful to note that: ‘the present decision must turn on the effect of the New Zealand legislation, which is not wholly identical to that of the various Canadian jurisdictions’,<sup>79</sup> and that ‘[o]ur decision turns on the legislation adopted by the Parliament of New Zealand’.<sup>80</sup>

While these comments are undoubtedly true, they also represent a needless rejection of much of the rich Canadian jurisprudence on PPSA issues. Many sections of the New Zealand PPSA contain reference to similar Canadian statutes, and as we will see below, the majority in *Bloodstock* made reference to the concepts underpinning the New Zealand PPSA on many occasions. It could almost be argued that the Court took this approach at least partly to avoid engaging with the Canadian jurisprudence, which, as the judge in *Portacom* identified, is in some respects contradictory. This view is supported by the majority’s statement that while the policy choices shown in the PPSA are important, comment on *Giffen* and other Canadian authorities is ‘unnecessary’ in light of the New Zealand PPSA.<sup>81</sup> However, a better approach would have been for the Court to accept the importance of the Canadian cases as *reflecting* the policy choices on which the PPSA is based. That said, later courts have been more relaxed than the majority in *Bloodstock* about Canadian authority,<sup>82</sup> and notwithstanding the Court of Appeal’s comments, reliance on Canadian jurisprudence is likely to continue in future.

### B. North American Legislation and Concepts

But if the court in *Bloodstock* largely avoided Canadian precedent, then what did it rely on? The answer is – nearly everything else! The Court begins with reference to a North American article also cited in *Portacom*.<sup>83</sup> Interestingly, in the writer’s view this article is less an explanation of the policies undergirding PPSA legislation than a deconstruction of them; the writers of the relevant article are critical of what they see as a number of inconsistencies in the supposedly ‘unitary’ registration system of PPSA systems, and come to the defence of English law (which has so far rejected PPSA legislation) and the Canadian province of Quebec, which has taken an entirely differ-

78 *Portacom*, paras 24 – 28. The rejected decision was *Sprung Instant Structures Ltd v Ernst & Young Inc* [1999] ABCA 15; (1999), 74 Alta. L.R. (3d) 30. This had earlier been criticized in eg Gedye et al, above n 1 at 156.

79 *Bloodstock*, para 16.

80 *Bloodstock*, para 76.

81 *Bloodstock*, paras 75-76.

82 See eg *Service Foods*, para 39, citing *Kelin (Trustee of) v Strasbourg Credit Union Ltd* (1992) 89 DLR (4th) 427 (Sask CA).

83 M G Bridge, R A Macdonald, R L Simmonds, and C Walsh, ‘Formalism, Functionalism and Understanding the Law of Secured Transactions’ (1999) 44 McGill LJ 567, cited in *Portacom* at para 28 and *Bloodstock* at paras 12 (by the majority) and 90 (by William Young J). William Young J cites a range of New Zealand scholarship at para 92.

ent path to PPSA-style legislation in regulating personal property securities.<sup>84</sup> Reference is made to New Zealand law reform projects,<sup>85</sup> and – at some length – to those of England and Wales.<sup>86</sup> Quite why English law reform proposals (which are, after all, proposals and not law) are given more attention than Canadian case law almost directly on point is never satisfactorily answered. Perhaps it is to introduce the beneficial economic incentives created by placing emphasis on registration of security interests without explicitly entering into a law and economics analysis.<sup>87</sup> Or perhaps it is because the Court considers the policies underlying the PPSA as more important than any other court's views on the subject. The only real indication is given in the majority's comment that '[the] argument that we prefer ... squares with the English Law Commission's perception of the common approach underlying the US, Canadian and New Zealand legislation',<sup>88</sup> but this does not answer the question as to why this English 'perception' of our legislation is more important than good Canadian precedent.

The latter three cases – *Agnew*, *Service Foods* and *King Robb* – rely on various precedents on various points, but not on useful PPSA jurisprudence to any great extent. *Agnew* and *King Robb*, of course, were cases about the relationship between New Zealand statutes, so were always less likely to have useful overseas precedent to rely on. So if we are to look into the New Zealand courts' approach to a lack of PPSA precedent, the majority decision in *Bloodstock* contains the only clear statements on this point: the New Zealand statute is everything. But it remains difficult not to feel that the majority in *Bloodstock* went too far. We do not have to ignore Canadian precedent (and focus on English law reform proposals!) to take the view that ultimately the wording of the New Zealand PPSA must be determinative. Furthermore, the New Zealand legislation differs from the Canadian PPSAs in some important respects. But this is not something the courts should be too precious about. As has been noted in one commentary:

The drafters of the New Zealand Act valued New Zealand drafting conventions more highly than uniformity with the Canadian legislation. This has resulted in many of the New Zealand provisions being worded differently to the Canadian equivalent when there was no intention of departing from the accepted interpretation of the Canadian provision. It raises the possibility that a New Zealand court called on to interpret a section of the New Zealand Act worded differently to the Canadian equivalent will be tempted to assume that Parliament intended to depart from the Canadian law. It is hoped that the courts will resist this temptation.<sup>89</sup>

In the future, we will undoubtedly see the courts rely on a mixture of sources – Canadian and United States precedent, law reform proposals and reports, academic writing, and whatever else is available. However, *Bloodstock* is a Court of Appeal decision which will probably be of considerable importance to future courts interpreting the PPSA, and what we must hope is that fu-

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84 See generally Bridge et al, *ibid*. It is acknowledged that Quebec operates under a system of civil law rather than common law, and therefore under different legal principles in the first place. However, an article which states (at 663) that 'the decision of the National Assembly of Quebec to organize the province's formal categories [of security] so as to give the best functional coherence with the aims and ambitions of contracting parties suggests the conclusion that Article 9 [on which the Canadian PPSAs and, by extension, the New Zealand PPSA are based] may be addressing the wrong problem' can hardly be seen as a strong defence of the conceptual framework on which the New Zealand PPSA is based. It is therefore unclear why the New Zealand courts have been eager to refer to it in some detail.

85 *Bloodstock*, para 15.

86 *Bloodstock*, paras 60 and 72.

87 See particularly *Bloodstock* para 60.

88 *Bloodstock*, para 72.

89 Gedye et al, above n 1 at 19.

ture courts will feel more comfortable with Canadian precedent than the Court in *Bloodstock* did – though of course the New Zealand PPSA must be interpreted in congruence with New Zealand methods of statutory interpretation and in line with the remainder of the statute book.

## X. SECURITY AGREEMENTS

As the cases reviewed above make clear, there are two elements to a perfected security interest. The first is attachment. The second is registration. A combination of the two leads to perfection. For attachment to occur in terms of section 40 of the PPSA, there must be a security agreement – enforceable between the parties and, in some if not most circumstances, enforceable against third parties under section 36. As important as the concepts of attachment and perfection are to understanding the PPSA, the role of the security agreement in PPSA law deserves close attention – particularly when we consider that issues relating to the interpretation of security agreements have been important both before and after *Bloodstock* and the ‘conceptual shift’ described in part 7 above.

In *Portacom*, an argument was made that HSBC’s debenture did not attach to *Portacom*’s buildings because it did not satisfy the requirements of section 36(1)(b)(ii) in that it did not contain a statement that a security interest was taken over all of the debtor’s present and after-acquired property. The debenture was over all the debtor’s ‘right, title and interest (present and future, legal and equitable) in, to, under or derived from the secured assets’, while the secured assets covered ‘all assets of the [debtor] of whatever kind and wherever situated’. The Court, without relying on any precedent, found that this wording was ‘clearly apt to cover all of [the debtor’s] present and after-acquired property’.<sup>90</sup> The relevant security agreement was also at issue in *Bloodstock*. In this case, the debtor charged to the debenture holder ‘all its present and future assets as continuing security’. The majority held that “‘future assets’” clearly captures “‘after-acquired property’”, and went on to observe that the case did not turn on ‘the fine nuances of how the charging clause was drafted’. Rather, what mattered was that the transaction in substance secured payment for the performance of an obligation.<sup>91</sup> William Young J took a different view, arguing that references in the debenture to assets that were the property of the debtor could not fairly extend to assets which were the property of third parties, as in the pre-PPSA environment, a security of this kind could not be created.<sup>92</sup> Furthermore, in interpreting a security agreement:

[T]he governing consideration should be the terms of the security agreement. If the terms of such a security agreement (when properly construed) do not confer a security interest in particular property, that should be the end of the case.<sup>93</sup>

The decision of the majority has of course prevailed, but *Bloodstock* is not the last word on security agreements. In *Service Foods*, the terms of trade between the parties contained a retention of title clause in all goods supplied by Distributors to Service Foods and a provision that Service Foods granted a security interest under the PPSA to all goods supplied and their proceeds.<sup>94</sup> These terms were found to be effective even though there were certain indulgences as to payment.<sup>95</sup> The

<sup>90</sup> *Portacom*, paras 30, 34-37.

<sup>91</sup> *Bloodstock*, paras 62-63.

<sup>92</sup> *Bloodstock*, para 102.

<sup>93</sup> *Bloodstock*, para 110.

<sup>94</sup> *Service Foods*, para 10.

<sup>95</sup> *Service Foods*, paras 12-13.

registered charge of Distributors was however registered against 'all present and after-acquired property' of Service Foods. This financing statement, which was broader than the security agreement, was found not to be 'seriously misleading' in terms of section 149 of the PPSA.<sup>96</sup> A security agreement was also formed by the parties' terms of trade in *King Robb*, though these terms were not signed (or otherwise assented to) for the purposes of section 36 and so were not binding on third parties.<sup>97</sup>

So a security agreement is crucial to determining attachment under section 40 of the PPSA. Read together, however, these cases show there is some flexibility in the New Zealand courts' interpretations of security agreements. A charge over all a debtor's 'present and after-acquired personal property' need not use those precise words, as *Portacom* and *Bloodstock* show. Indulgences as to payment – and possibly even the variation of particular terms – will not invalidate the security agreement, as shown in *Service Foods*. And a security agreement that is not in writing will still bind the parties and, by extension, the debtor's liquidator, as shown by *King Robb*. Furthermore, *Service Foods* shows that registration of a financing statement on terms which are broader than the security agreement will not invalidate or 'imperfect' the security. That is, a security agreement can be read beyond its terms, and a financing statement can be read within them.

## XI. FINAL COMMENTS

This article began by identifying the significance of the PPSA as a commercial law reform. The manner in which the PPSA has required a departure from earlier law, both conceptually and in practice, is a consistent theme of the first cases on the PPSA. It has been argued that (i) the key issue of the priority of a perfected security interest over title has been settled, probably for good; (ii) the relationship between the PPSA and other statutes is far from settled, and is likely to be a source of further litigation in future; (iii) the courts have relied on odd sources of precedent, being prepared to ignore a rich Canadian jurisprudence and instead rely on law reform proposals from jurisdictions with very different personal property security regimes; and (iv) a security agreement is essential to achieving a perfected security interest, though the courts will allow some flexibility in this. In short, the courts have much to add to our understanding of the PPSA and how it works in practice.

Though all the matters examined are significant, the last perhaps deserves special attention as a legacy of the first four years of the PPSA. The discussion on security agreements illustrates that it is almost as if the first five reported cases on the PPSA have brought the statute full circle. If the lessons of *Portacom* and *Bloodstock* are that an attached and registered (ie, perfected) security interest will override traditional notions of title, these same cases, when read alongside *Service Foods* and *King Robb*, show that the courts will allow some flexibility in attachment via a security agreement and in registration. In other words, you must have attachment and registration to have a perfected security interest, but both attachment and registration may be imperfect! It is with this paradox in mind that we draw the curtain on the first four years of PPSA jurisprudence and look ahead to the future of the Act.

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96 *Service Foods*, para 42.

97 *King Robb*, para 6.

# CORPORATE CRIMINAL LIABILITY: A PARADOX OF HOPE

BY REBECCA ROSE\*

## I. INTRODUCTION

Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill.<sup>1</sup>

Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?<sup>2</sup>

Corporate criminal liability emerged and developed as a product of the courts' struggle to overcome the difficulty of attaching criminal blame to fictional entities in a legal system based on the moral accountability of individuals.<sup>3</sup> Surprisingly, however, despite the ubiquity of international corporate criminal liability regimes, legislative and judicial statements and commentary regarding the *raison d'être* for corporate criminal liability are relatively limited.<sup>4</sup> New Zealand's current system of corporate criminal liability, based upon vicarious liability and the identification doctrine, is a reflection of the individualist conceptions of criminal law. The requisite characteristics for an actor to be treated as blameworthy, as well as the nature of the concepts of *actus reus* and *mens rea*, are accordingly based on a distinctly human model.<sup>5</sup> Consequently, through its non-recognition of corporate culpability – a free standing culpability that need not be derived from the faults

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1 Hazlitt (1821) 1901 cited in C Wells, *Corporations and Criminal Responsibility* (2<sup>nd</sup> ed) (Oxford: Oxford University Press, 2001) 1.

2 Attributed to Edward, First Baron Thurlow, cited in J Clough and C Mulhern, *The Prosecution of Corporations* (Melbourne: Oxford University Press, 2002) 183.

3 For a discussion and analysis of the historical development of the criminal liability of legal bodies see eg L H Leigh, 'The Criminal Liability of Corporations and Other Groups: A Comparative Overview' (1982) 80 Mich L Rev 1508; K Brickey, 'Corporate Criminal Accountability: A Brief History and an Observation' (1982) 60 Wash ULQ 393; C Wells, *Corporations and Criminal Responsibility* (Oxford: Oxford University Press, 1993) 94-122.

4 See D Fischel and A Sykes, 'Corporate Crime' (1996) 25 J Legal Stud. 319 at 320: 'the doctrine of corporate criminal liability has developed ... without any theoretical justification'.

5 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (JCPC); *Tesco Supermarkets v Natrass* [1972] AC 154 (HL).

of individuals – the current regime arguably fails in its ability to acknowledge the unique nature of corporate offenders.<sup>6</sup>

In recent years, corporate criminal liability has featured as a prominent item on the agenda for law reformers internationally, the dissatisfaction with the identification doctrine as traditionally applied within Commonwealth jurisdictions being starkly illustrated by proposals and legislative responses involving deliberate and sharp breaks from the structure of corporate liability fashioned by the courts.<sup>7</sup>

Having regard to the common law's unfalteringly 'nominalist' approach to corporate criminal liability, that is, an approach which treats the corporation as 'nothing more than a collection of individuals',<sup>8</sup> and the articulated resistance to moving radically beyond identification theory as a means of grounding liability in cases of serious crime,<sup>9</sup> this paper examines whether New Zealand companies<sup>10</sup> ought to be made subject to a more extensive and clearly defined criminal liability regime. In light of the recent legislative developments in Australia, England and Wales, and Canada, the question of whether introduction of a separate corporate homicide offence is desirable in New Zealand is explored as a secondary issue.

## II. OUGHT LIABILITY ATTACH TO COMPANIES AS WELL AS INDIVIDUALS?

... the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of a corporation as in the case of the natural person.<sup>11</sup>

The law speaks of a company as 'a legal entity in its own right',<sup>12</sup> as a subject of rights and duties capable of entering into contracts, owning real property and suing and being sued in its own name.<sup>13</sup> Nevertheless, much debate continues in terms of the social reality and legal status of

6 See generally P A French, *Collective and Corporate Responsibility* (New York: Columbia, 1984) at 30-65: 'the structure and practice of decision-making in companies may constitute a distinctive form of corporate intentionality which is not reducible to the mental states, past and present, of human agents associated with companies'; A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Oregon: Hart Publishing, 2000) 234-255. Indeed, in its holding of companies liable in the absence of organisational fault, the present system arguably runs contrary to the criminal law's general unwillingness to hold a person responsible for the actions of another person: *R v City of Sault Ste Marie* [1978] 2 SCR 1299 (SCC).

7 The Australian Criminal Code Act 1995 (Cth); Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organisations) (Canada); Law Commission (UK), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237 (1996); *Corporate Manslaughter: The Government's Draft Bill for Reform* (2005) available at <www.home-office.gov.uk > viewed 12 October 2005 provide pertinent examples.

8 E Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 Crim LF at 1-2.

9 See e.g. *Attorney-General's Reference (No 2 of 1999)* [2000] 3 All ER 182 (CA); *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 5.

10 This paper does not distinguish between 'companies' and 'corporations.' The two terms are used interchangeably. See *R v Church of Scientology at Toronto* (1997) 116 CCC (3d) 1 (Ont CA) at 69-73 emphasising that, generally, corporations other than companies will be held criminally liable in the same way as companies.

11 *Canadian Dredge and Dock Co Ltd v The Queen* [1985] 1 SCR 662 at 692 (SCC).

12 Companies Act 1993, s 15.

13 As *R v Murray Wright Ltd* [1970] NZLR 476 at 484 affirms, a company is considered a 'legal person' and may therefore in theory be criminally liable to the same extent as a natural person. See also *Salomon v Salomon* [1897] AC 22; *R v IRC Haulage Ltd* [1944] KB 551 at 556; *P & O Ferries (Dover) Ltd* (1991) 93 Cr App R 73; *S & Y Investments (No 2) Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1986) 85 FLR 285 at 306-307.

the corporation and what constitutes the ‘essence’ of that ‘soulless’ and ‘bodiless’<sup>14</sup> entity.<sup>15</sup> In any discussion as to whether liability ought to attach to corporations in their own right, the recurrent dispute between nominalist<sup>16</sup> and realist<sup>17</sup> theories of corporate personality is inevitably engendered.

The comments of Clarkson<sup>18</sup> and Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission*,<sup>19</sup> favouring a more ‘atomistic’ view of the corporate entity – that is, treating the corporation simply as an aggregate of individuals,<sup>20</sup> are acknowledged. Nevertheless, it is argued that, particularly in light of the growing recognition of companies’ ‘distinct capacity for collective action’<sup>21</sup> and citizens’ interpretation of firms as ‘autonomous and distinctive collectives operating in the social world and orientated to risk’,<sup>22</sup> it is theoretically proper and pragmatically justifiable for liability to attach to corporations as well as individuals.<sup>23</sup> Indeed, as the international authorities demonstrate,<sup>24</sup> increasingly, in many cases where serious harm has been caused, there is no individual alone who has committed a crime. Rather, the crime arises from intra-organisational defects such as sloppy practices or non-existent policies. Accordingly, prosecution ought to be directed at the real wrongdoer, namely the company. As Wells<sup>25</sup> notes, even where it is accepted that many criminal offences are individualistic in nature, the prosecution of

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- 14 J C Coffee, ‘No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79 Mich LR 386.
- 15 There is an extensive body of writing on this controversy. Some eminent works include: J Machen, ‘Corporate Personality’ (1911) 24 Harv L Rev 253; M Radin, ‘The Endless Problem of Corporate Personality’ (1932) Colum L Rev 643; H L A Hart, ‘Definition and Theory in Jurisprudence’ (1954) 70 LQR 37; M Dan-Cohen, *Rights, Persons and Organizations* (California: University of California Press, 1986); C Schane, ‘The Corporation is a Person: The Language of a Legal Fiction’ (1987) 61 Tul L Rev 563. See also R B Stewart, ‘Book Review: Organizational Jurisprudence’ (1987-88) 101 Harv L Rev 371 – reviewing Dan-Cohen’s book and describing alternative normative conceptions of intermediate organisations.
- 16 Corporate nominalists believe that the company is a contractual association of individual shareholders whose legal personality is no more than an alternative way of writing their names together for legal transactions: Jeffrey S. Parker, ‘Doctrine for Destruction: The Case of Corporate Criminal Liability’ (1996) 17 Managerial & Decision Economics 381.
- 17 Corporate realists assert that the company is a full-fledged organisational entity whose legal personality is no more than an external expression of its real personality in the society: K Mann, ‘Punitive Civil Sanctions: The Middle-ground Between Civil and Criminal Law’ (1992) 101 Yale LJ 1795.
- 18 C M V Clarkson, ‘Kicking Corporate Bodies and Damning Their Souls’ (1996) 59 MLR 557 at 563: ‘Crimes can only be committed by human, moral agents. One might wish to attribute their wrongdoing to a company, but ultimately it is the individual within the company who is the culpable agent deserving punishment.’ See also G R Sullivan, ‘Expressing Corporate Guilt’ (1995) 15 OJLS 281.
- 19 *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 5 at 507: ‘There is no such thing as a company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as a company as such’.
- 20 M Dan-Cohen, *Rights, Persons and Organizations* (California: California University Press, 1986) at 15.
- 21 G R Sullivan, above n 18.
- 22 N Lacey, ‘Philosophical Foundations of the Common Law: Social not Metaphysical’ in J Horder (ed), *Oxford Essays in Jurisprudence* (2000) 33.
- 23 Note J C Coffee, ‘Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions’ (1980) 17 Am Crim LR 415, 422; J Salmond, *Jurisprudence* (7<sup>th</sup> ed) (London: Sweet & Maxwell, 1924) 285.
- 24 *P & O European Ferries (Dover) Ltd*, above n 13; *Attorney-General’s Reference (No 2 of 1999)*, above n 9.
- 25 Wells (2001), above n 1 at 14-16.

corporations remains appropriate, the law, in a broad sense, making a symbolic statement as to the acceptability of particular behaviours.<sup>26</sup>

In a similar fashion, the law's object of ensuring the safety of employees, the public and the environment provides additional justification for requiring that companies, as a counterweight to the liberty and ever-expanding rights which are conferred to them,<sup>27</sup> also assume responsibility for their serious transgressions.<sup>28</sup> Indeed, 'there is no single, broadly accepted theory of corporate blameworthiness that justifies the imposition of criminal penalties on corporations'.<sup>29</sup> However, as McConvill and Bagaric<sup>30</sup> have observed, the pervasive presence of corporations within contemporary society and the potential for their actions to impact on a much wider group of people than are affected by individual action, dictates that their ability to cause economic and physical harm is significant.<sup>31</sup> Consequently, the relevance of any distinction between criminal liability for harm perpetuated by natural persons and juristic persons is at best minimal, and it is both just and congruent with the principle of equality before the law<sup>32</sup> to treat companies like natural persons and hold such entities liable for offences they commit.<sup>33</sup>

Whilst it may be argued that the perceived benefit in prosecuting the company rather than the individuals concerned is illusory in the case of small, private companies,<sup>34</sup> it is well demonstrated that, in the context of corporations generally, to only prosecute individuals is unfair and inefficient.<sup>35</sup> Furthermore, concentrating liability on individuals does little to address 'society's interest

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26 See also W S Laufer and S D Walt, 'Why Personhood Doesn't matter: Corporate Criminal Liability and Sanctions' (1991) 18 Am J Crim L 263 at 276: 'Finding moral responsibility and criminal responsibility does not depend on first determining whether an entity is a person. ... Rather, conditions for the ascription of both sorts of liability are needed. Liability is assigned to an entity when those conditions are satisfied. Personhood plays no part in the assignment'. Compare W H Jarvis, 'Corporate Criminal Liability – Legal Agnosticism' [1961-62] U West Ont LR 1.

27 *R v Wholesale Travel Group* [1991] 3 SCR 154 (SCC).

28 See generally, P Fauconnet, *La Responsabilité: Etude de Sociologie* (Paris: Librairie Félix Alcan, 1920), cited in J Quaid, 'The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis' (1998) 43 McGill LJ 67: 'Responsibility is commonly understood to be the capacity of a person to be legitimately subjected to punishment: usually, the terms *responsible* and *justly punishable* are synonymous'. Note also comments of C Wells (2001), above n 1 that in the aftermath of *P & O European Ferries (Dover) Ltd*, above n 13, the relatives of the 193 victims who died in the ship's capsizing were more interested in a successful prosecution of P & O Ferries than the prosecution of the individuals involved.

29 Clough and Mulhern, above n 2 at 5. See also B Fisse and J Braithwaite, *Corporation, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) at 122.

30 J McConvill and M Bagaric, 'Criminal Responsibility based on complicity among corporate officers' (2004) 16 AJCL 5.

31 The law's ability to impose at least a fine commensurate with the gravity of the harm caused when this might be out of proportion to the means of the individual(s) concerned is thus important.

32 P J Henning, 'The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions' (1996) 63 Tennessee LR 793.

33 See also R Edwards, 'Corporate Killers' (2001) 13 AJCL 231; G R Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 CLJ 515.

34 V S Khanna, 'Corporate Criminal Liability: What Purpose Does it Serve?' (1996) 109 Harv L Rev 1477 at 1495; J Smith, *Smith & Hogan Criminal Law* (9th ed) (London: Butterworths, 1999) 186: in respect to all forms of corporate criminal liability, including regulatory law, 'the necessity of corporate criminal liability awaits demonstration'.

35 See generally G Stessens, 'Corporate Criminal Liability: A Comparative Perspective' [1994] 43 ICLQ 493; Quaid, above n 28 at 84-87; Clough and Mulhern, above n 2 at 6-9.

in eliminating dangerous and criminogenic corporate practice'.<sup>36</sup> Accordingly, it is submitted that the imposition of corporate liability is complementary to, and ought to attach at least in tandem with, individual liability.<sup>37</sup>

### III. OUGHT COMPANIES BE HELD CRIMINALLY LIABLE?

There is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose.<sup>38</sup>

Judge Learned Hand

That civil and criminal liability share many of the same features and that 'it is not clear that corporate criminal liability is the best way to influence corporate behaviour'<sup>39</sup> is a recurrent argument cited in support of eliminating criminal liability for corporations. The assertion that criminal liability is economically inefficient as a deterrent to unlawful acts is acknowledged.<sup>40</sup> However, it is submitted that adoption of such a standpoint, advocating civil liability's superiority in terms of social desirability solely on this ground, overlooks retribution as a normative basis for criminal liability and consequently neglects to properly appreciate the fact that, even in the corporate context, moral condemnation remains a valid object of the criminal law.<sup>41</sup> Indeed, as Wells emphasises, at a broad level, criminal laws can be viewed as 'either instrumental or symbolic', that is, criminal laws can be seen as existing to effect a purpose or to make a moral statement.<sup>42</sup> Furthermore, the attributes of contemporary corporations support the submission that such entities can, and should be, morally condemned where their actions violate the law.

36 Individuals are expendable. Thus the potential for scapegoating is high. Structural flaws in an organisation will not disappear because a company member is brought to trial: J Gobert and M Punch, *Rethinking Corporate Crime* (London: Butterworths, 2003) 253-282. Note also that in many cases complex organisational structures will bury responsibility at many different layers within the corporate hierarchy, making it difficult, if not impossible, to determine where the true fault lies: Wells (2001), above n 1.

37 As the Australian Criminal Law and Penal Reforms Committee has observed: 'The aim of corporate criminal responsibility is not to provide a complete alternative to individual criminal responsibility but merely a complementary approach to cover situations where guilty personnel enjoy some sanctuary or where there has been some wrongdoing not attributable to individual fault': *The Substantive Criminal Law* (Fourth Report, 1978) 365.

38 *United States v Nearing* 252 F. 223 at 231 (SDNY, 1918).

39 V S Khanna above n 34 at 1478.

40 See generally, Khanna, *ibid*; Fischel and Sykes, above n 4; Mann, above n 17: 'Civil liability is efficient because it avoids criminal law's costly procedural protections, including the jury trial right and the beyond-reasonable doubt standard of proof'; civil liability is better because it imposes less stigma – 'an inherently wasteful means of inflicting disutility: no one receives the corporation's lost reputation, whereas someone (government or a private party) receives the fine'.

41 O Wendell Holmes, *The Common Law* (New York: Brown Publishers, 1881) 42 at 45: 'the fitness of punishment following wrong-doing [can be regarded as] axiomatic'. As H L A Hart has observed, even those who reject retribution as sufficient justification for punishment (eg Kant) accept retributionist arguments as a limitation on punishment. As criminal punishment is about blame, as opposed to harm, retributionist limitations are important: Hart, *Punishment and Retribution* (1968) 8-13.

42 C Wells (1993), above n 3 at 14. See also F Haines and A Hall, 'The Law and Order Debate in Occupational Health and Safety' (2004) 19 *Journal of Occupational Health and Safety* – Australia and New Zealand at 268.

In recent years, commentators have emphasised the criminal law's important socialising role as a system for moral education.<sup>43</sup> Undeniably, the stigmatic effects of criminal punishment have critical relevance in defining the criminal law's unique character.<sup>44</sup> Precisely for this reason, however, the criminal law should not be over-utilised.<sup>45</sup> Similarly, its moral nature should not be denigrated by permitting the criminal punishment of persons who cannot fairly be blamed for their actions.<sup>46</sup> Nevertheless, it is equally important to recognise that the definition of conduct as criminal has potential to advance as well as document social consensus regarding standards of appropriate behaviour.<sup>47</sup>

Whilst attaching criminal liability to corporations themselves inevitably instigates some difficulties for a theory of punishment grounded in morality and stigma, it is submitted that Cooter's<sup>48</sup> 'pricing'/'prohibiting' deterrence dichotomy provides compelling support for the proposition that corporations ought to be held criminally responsible. As Coffee<sup>49</sup> reasons, the difference between civil and criminal liability in terms of the law's deterrence function can essentially be seen as the difference between 'optimal'<sup>50</sup> and 'total' deterrence.

The imposition of civil liability effectively functions as a tax that brings public and private costs into equilibrium by forcing the actor to internalise the costs that that actor's activity imposes on others.<sup>51</sup> Criminal liability, by contrast, effects a significantly discontinuous increase in the expected cost of the relevant conduct with the intention of dissuading the actor from engaging in the conduct at all. Thus, through its identification of conduct wholly lacking in social value where the community is not prepared to accept a 'price' for that behaviour, the criminal law has a unique expressive retribution function.<sup>52</sup> Indeed, where the possibility of criminal liability is removed, the law's and society's ability to acknowledge the proper valuation of the relevant persons or property is lost.<sup>53</sup>

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43 See generally G Lynch, 'Crime and Custom in Corporate Society: The Role of Criminal Law in Policing Corporate Misconduct' (1997) *Law & Contemp Prob* 23; L Friedman, 'In Defence of Corporate Criminal Liability' (2000) 23 *Harv JL & Pub Pol* 833; D Kahan, 'Social Norms, Social Meaning and the Economic Analysis of Law: Social Meaning and the Economic Analysis of Crime' (1998) 27 *J Legal Stud* 609.

44 Lynch, *ibid*, 39.

45 Khanna, above n 34.

46 S Kadish, 'The Decline of Innocence' (1968) 26 *CLJ* 273.

47 Lynch, above n 43 at 44.

48 R Cooter, 'Prices and Sanctions' (1984) 84 *Colum L Rev* 1523.

49 J C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models and What Can be Done About It' (1992) *Yale LJ* 1875.

50 Optimal deterrence of corporate misconduct requires that the law 'offer incentives up to the point at which ... marginal social cost would exceed the marginal social gain in the form of reduced social harm' from the unlawful activity: Fischel and Sykes, above n 4. See also S Shavell, *Economic Analysis of Accident Law* (Melbourne: Oxford, 1987) 147-148.

51 Coffee, 'Paradigms Lost', above n 49.

52 Where society desires not to proscribe an activity, but wishes only to reduce its level, the use of 'prices' is appropriate. Alternatively stated, 'The choice depends on whether it is less costly to determine the correct standard of behaviour or to determine the social costs caused by a departure from that standard': Cooter, above n 48. Note also L Batnitzky 'A Seamless Web? John Finnis and Joesph Raz on Practical Reason and the Obligation to Obey the Law' (Summer 1995) 15 *OJLS* 153; J C Coffee 'Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 *Boston ULR* 193.

53 W S Laufer and A Strudler 'Corporate Intentionality, Desert and Variants of Vicarious Liability' (2000) 37 *Am Crim LR* 1285.

Whilst a civil liability regime might declare a company negligent, or even reckless, ultimately, both the company and the community will eventually come to view pecuniary penalties simply as a cost of doing business.<sup>54</sup> Where such a liability regime parallels ordinary civil liability for individuals charged with the same wrongdoing, the absence of corporate criminal liability would allow companies to purchase exemption from moral condemnation. Consequently, the condemnatory effect of criminal liability on individuals in respect to similar conduct would be undermined, and the moral authority of the criminal law as a guide to rational behaviour, substantially diminished.<sup>55</sup>

In the context of corporate actors, the importance of certainty in the law additionally provides strong support for a proposition advocating the attachment of criminal liability to corporations. As Coffee has observed, 'in all common law countries, advance legislative specification today constitutes a fundamental prerequisite to criminal prosecution'.<sup>56</sup> It is suggested that identification of behaviours requiring 'total' deterrence is fundamentally a legislative task. Indeed, whilst the courts should be entitled to some discretion in pursuing 'optimal' deterrence, such discretion is inappropriate in the context of deciding when to pursue 'total' deterrence, the decision that the benefits derived by the defendant are so immoral, perverse or otherwise unacceptable as to justify 'prohibition' requiring greater social consensus than a jury or judicial decision represents.<sup>57</sup>

Given the law's critical role in legitimising or illegitimising certain behaviour<sup>58</sup> and the recognised tendency to view corporate illegality treated civilly not as real crime,<sup>59</sup> but rather a regulatory offence, it is argued that the imposition of criminal liability is important in terms of clarifying the content of what society expects contemporary corporations to be responsible for, that is, what conduct will or will not be tolerated.<sup>60</sup> Whilst civil liability may have efficiency attractions, it is important to recognise that deterrence and efficiency are not the only interests underpinning liability regimes.<sup>61</sup>

Similarly, it is equally important to remember that criminal liability is just one aspect of the entire framework employed to regulate corporate behaviour. Indeed, as Fisse and Braithwaite acknowledge, regulation of corporate conduct is at its most effective when a 'dynamic and integrated approach to enforcement' is made available, that is, when a range of sanctions, civil and criminal, individual and corporate can potentially be applied.<sup>62</sup> Furthermore, acknowledging Khanna's conclusion that 'the purpose served by corporate criminal liability is almost none',<sup>63</sup> it is contended that, primarily due to legislatures' and the courts' piecemeal responses to specific areas of corporate activity, rather than focusing on corporations as a distinct class of offender, corporate criminal liability is arguably under-developed internationally.<sup>64</sup> Compensation does not ex-

54 Coffee 'Paradigms Lost', above n 49.

55 Friedman, above n 43 at 858.

56 Ibid.

57 Mann, above n 17.

58 Kahan, above n 43.

59 R Quinney, 'Class, State and Crime' in J Jacoby (ed), *Classics of Criminology* (New York: Waveland Press, 1994) 106-115 has argued that 'corporate crime is not seen as truly criminal because corporate practices are essential to developing a capitalist political economy'. Quinney's approach highlights that corporations are largely protected from scrutiny because they are central to the functioning of capitalist society.

60 Clough and Mulhern, above n 2 at 10-15.

61 Cooter, above n 48.

62 Fisse and Braithwaite, above n 29.

63 Khanna, above n 34 at 1534.

64 Mann, above n 17. See generally C Wells (2001), above n 1.

haust the purposes of criminal punishment.<sup>65</sup> Thus, whilst ‘society’s capacity to focus censure and blame is among its scarcest resources’,<sup>66</sup> if moral force is the distinguishing feature of criminal law, criminal liability has an important and significant role to play in society’s attempt to police corporate wrongdoing. Accordingly, as recognised by legislatures and the courts internationally, the availability of compensation outside the criminal justice system does not eliminate the need for criminal liability to attach to corporations.<sup>67</sup> Indeed, as Friedman states, if the law is to avoid sending the message that the right to engage in prohibited activities can be purchased, it is only the criminal law that can provide both the incentives necessary to prevent crime and a vehicle for the message that certain activities are prohibited and variances cannot be purchased.<sup>68</sup>

#### IV. WHAT’S WRONG WITH THE CURRENT LAW?

All that has been done thus far in the field amounts to little more than a superficial adaptation of existing principles of criminal law to corporations. The assumption underlying such an adaptation, that there is a direct analogy between the abstract concept called a corporation and the states of mind and actions of a natural human being, is a considerable and unhelpful oversimplification.<sup>69</sup>

Approaches toward the imposition of corporate criminal liability vary considerably between jurisdictions, the differences between common law and continental European jurisdictions being particularly dramatic.<sup>70</sup> Corporate criminal liability is widely accepted within the common law world, especially in the context of liability for regulatory infractions.<sup>71</sup> However, as international attempts at achieving a suitable level of organisational criminal accountability vis-à-vis corporate liability for true crimes make clear, important differences exist between common law jurisdic-

65 W Wilson, *Central Issues in Criminal Theory* (Oxford: Hart Publishing, 2002) 16-77; *US v Hilton Hotels Corp* 467 F. 2d 1000 (9<sup>th</sup> Circ, 1972); *DPP v Esso Australia Pty Ltd*, unreported, Supreme Court of Victoria, 30 July 2001; *P & O European Ferries (Dover) Ltd*, above n 13; *Attorney-General’s Reference (No 2 of 1999)*, above n 9; Law Commission (UK) (1996), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237; D Goetz (2003), *Bill C-45: An Act to Amend the Canadian Criminal Code (Criminal Liability of Organisations): A Parliamentary Briefing*.

66 Coffe ‘Paradigms Lost’, above n 49 at 1877.

67 *US v Halper* 490 US 435 (1989) (USSC).

68 Friedman, above n 43.

69 Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law*, Fourth Report, (1978) at 355.

70 See generally G Stessens, above n 35 at 496-497; S Field and N Jörg, ‘Corporate Liability and Manslaughter: Should we be Going Dutch?’ [1991] Crim LR 156. The continental European systems’ penal codes are based on findings of individual guilt. Consequently, the inclusion of corporate criminal liability into penal codes in these jurisdictions has received wide-ranging criticisms. Interestingly, whilst France had not recognised corporate criminal liability since the French Revolution, the new penal code in 1992 made specific reference to this concept, albeit with rather tight restrictions. Whilst the German approach does not take recourse to criminal law itself, an elaborate structure of administrative sanctions, including provisions on corporate criminal liability, is employed: § 30 Ordnungswidrigkeitengesetz – calling for the imposition of fines on corporations. Compare also Japanese position whereby ‘corporate criminal liability is an integral part of Japanese law’: I Kensuke, ‘Criminal Protection of the Environment and the General Part of Criminal Law in Japan’ *International Review of Penal Law* (1999) 65(3) 1043. Dutch law provides for a form of vicarious liability for the acts or omissions of an employee where the relevant act or omission belongs to a category of conduct that the company has accepted as part of its normal operations and that it has the power to control: S Field and N Jörg above.

71 Wells (2001), above n 1.

tions in terms of how such liability is recognised and its theoretical underpinnings.<sup>72</sup> Whilst the two major theories of vicarious liability and identification liability have attracted prominence in this regard, the appropriateness and adequacy of each model has been extensively criticised, particularly in recent years whereby an increasing incidence of serious and tragic accidents has been manifest and, in the eyes of the public, the ostensibly ‘blameworthy’ corporations have escaped any form of sanctioning.<sup>73</sup>

#### A. Vicarious Liability (*‘respondeat superior’*)

Applied to corporations, the doctrine of vicarious liability imposes accountability such that a company may be liable for the acts of its employees, agents, or other persons for whom it is responsible.<sup>74</sup>

In New Zealand and other Commonwealth jurisdictions, vicarious liability has generally been rejected in criminal law.<sup>75</sup> In the United States, however, corporate liability for criminal offences, including those requiring mens rea, is squarely grounded in vicarious liability, a company’s criminal liability potentially arising by way of the criminal act of any employee – supervisory, menial or otherwise – acting within the scope of his/her employment and having the intention of benefiting the company.<sup>76</sup>

Vicarious liability is frequently criticised as a basis of corporate criminal liability on grounds that the doctrine is both under-inclusive in terms of being activated only through the criminal liability of a particular individual,<sup>77</sup> and over-inclusive in terms of corporate liability attaching upon the finding of individual liability despite a complete absence of corporate fault in some instances.<sup>78</sup>

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72 See generally Mann, above n 17, and compare Fauconnet’s theory relying on a corporation’s distinct legal personality: above n 28. Note also, P A French, above n 6, arguing that legal personality alone is inadequate and articulating a theory of a corporation as a moral/intentional actor; Fisse and Braithwaite, above n 29, and Wells (2001), above n 1, arguing in favour of organic theory and that it is unnecessary to frame corporate responsibility in terms of moral notions that apply to humans.

73 Ibid.

74 See generally *Alphacell v Woodward* [1972] AC 824 (HL). Note there is debate as to whether such individuals will bind the company when their actions are outside the scope of authority.

75 See for example, *Canadian Dredge & Dock Co Ltd v The Queen* [1985] 1 SCR 662 (SCC); Estey J provides a brief historical account of the importation of this common law doctrine, noting, inter alia, that ‘the notion of vicarious liability is alien to criminal law’.

76 *New York Central and Hudson Ry v United States* 212 US 481 (1909); *United States v Hilton Hotels Corp* 467 F. 2d 1000 at 1007 (1972, 9<sup>th</sup> Circ). Note that some state courts, in contrast to their federal counterparts, have nevertheless preferred to base corporate criminal liability on the identification theory inspired by the English cases: *People v Canadian Fur Trappers Corp* 248 NY 159 (1928) (NYCA); Wells (1993), above n 3 at 116-120.

77 The doctrine is cited as being overly restrictive in so far as the requirement of a relationship of subordination between the company and the individual who committed the offence appreciably reduces the potential reach of the criminal law: B Fisse, ‘The Attribution of Criminal Liability to Corporations: A Statutory Model’ (1991) 13 Sydney LR 277 at 278; E Colvin, above n 8.

78 W S Laufer, ‘Corporate Bodies and Guilty Minds’ (1994) 43 Emory LJ 647. Because the respondeat superior standard focuses solely on the relevant individual’s intent and automatically imputes that intent to the company, a company’s efforts at preventing such conduct are irrelevant. Consequently, under this approach, all companies, honest or dishonest, good or bad, are convicted if the State can prove that even one maverick employee committed a criminal offence.

Indeed, as Colvin has observed, 'vicarious liability in criminal law ... divorces the determination of liability from an inquiry into culpability'.<sup>79</sup>

Whilst vicarious liability is attractive in that it avoids identification theory's major problem, namely identification of a sufficiently senior employee that can be identified with the crime, it is submitted that vicarious liability, a principle 'borrowed' from the civil law of torts, seriously distorts the doctrine of *mens rea* and as such is incongruent with the fundamental precepts of a justice system based on the punishment of individual fault.<sup>80</sup>

That corporate criminal liability as it stands, whether based on 'respondeat superior'<sup>81</sup> or identification liability, necessarily implies some, albeit rather broad, application of the doctrine of vicarious liability is acknowledged, corporations only being able to act through the natural persons of whom they are comprised.<sup>82</sup> However, it is argued that recognition of the distinction between vicarious liability and direct liability remains important. Indeed, as Fisse states:

The function of the notion of imputation or attribution is not to provide criteria for distinguishing between superior and inferior servants and agents of a corporation. Rather, it is to enable the imposition of liability upon a corporation in circumstances where this is considered to be desirable. The distinction attempts to find a compromise between ensuring that corporations are amenable to prosecution for regulatory offences, while not being unduly exposed to prosecution for offences that are truly criminal.<sup>83</sup>

Accordingly, given the growing recognition by commentators<sup>84</sup> and the Courts that vicarious liability is not only too broad in its attributing of the wrongdoings of any employee to the company,<sup>85</sup> but simultaneously also too narrow as it leaves little opportunity to explore company policies and as such is usually imposed for reasons of enforcement rather than blameworthiness,<sup>86</sup> it is submitted that the doctrine is arguably of limited value in its ability to serve as an adequate basis per se for corporate criminal liability in New Zealand law.

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79 E Colvin, above n 8.

80 *R v City of Sault Ste Marie* above n 6; Y Stern, 'Corporate Criminal Personal Liability – Who is the Corporation?' (1987) 13 J Corp L 125 at 126: 'It is axiomatic that individuals are responsible only for their own actions'; C Walsh and A Pyrich, 'Corporate Compliance Programmes as a Defence to Criminal Liability: Can a Corporation Save its Soul?' (1995) 47 Rutgers L Rev 605 at 641. Compare also C Wells 'Corporations, Culture, Risk and Criminal Liability' [1993] Crim LR 551 at 560 advocating that the identification doctrine (see below) 'ties the boundaries of corporate fault to notions of individual liability'.

81 'Let the principal answer.' As to history of this doctrine see K F Brickey, above n 3 at 416.

82 Clough and Mulhern, above n 2 at 100; *Meridian Global Funds Management Asia Ltd v Securities Commission*, above n 5; *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715 at 718-719.

83 B Fisse, 'The Distinction between Primary and Vicarious Corporate Criminal Liability' (1967) 41 ALJ 203 at 205. See also L Dunford and A Ridley, 'Corporate Liability for Manslaughter: Reform and the Art of the Possible' (1994) 22 Intl Jnl of the Sociology of the Law 309 at 314.

84 See for example, S Beale and A Safwat, 'White Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002: What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability' (2004) 8 Buff Crim LR 89.

85 Vicarious liability is not excluded even if management has expressly forbidden employees from engaging in the acts/omissions in question: *Coppen v Moore (No 2)* [1898] 2 QB 306. Consequently, a company may be deemed criminally liable for the conduct of one maverick employee even if it has taken reasonable steps to ensure compliance with the law: J Gobert 'Corporate Criminality: Four Models of Fault' (1994) 14 Legal Studies 393 at 398-399. To this extent, the doctrine's unfairness may impede the development of effective sanctions.

86 Clough and Mulhern, above n 2 at 80: 'Vicarious liability is accordingly generally only applied to offences characterised as 'regulatory in substance although criminal in form', for example, laws relating to consumer protection, fair trading and the environment.

## B. *The Doctrine of Identification*

The doctrine of identification equates the corporation with the persons who constitute its ‘directing mind and will’.<sup>87</sup> As such, the theory is attractive to those who assert that companies can neither act nor do anything otherwise than through their human agents.<sup>88</sup> Under the identification doctrine, the commission of an offence by a sufficiently senior individual or group of individuals who can be ‘identified’ with the company is treated as also constituting an offence by the company itself.<sup>89</sup> In this sense, a company’s criminal liability, consistent with that of natural persons, is primary and not actually based on an application of vicarious liability theory.<sup>90</sup>

*Tesco Supermarkets v Natrass*,<sup>91</sup> adopted into New Zealand law in *Nordik Industries Ltd v Regional Controller of Inland Revenue*,<sup>92</sup> authoritatively outlines the identification doctrine’s application in English law. However, it is contended that it is *HL Bolton (Engineering) Co Ltd v TJ Graham & Son Ltd* which articulates the principle most clearly:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. *The state of mind of these managers is the state and mind of the company and is treated by the law as such* [emphasis added] ... in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or managers will render the company itself guilty.<sup>93</sup>

Consistent with vicarious liability, identification theory requires that the individuals identified with the corporation must be acting within the scope of their employment or authority, that is, the

87 *HL (Bolton) Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172 (CA); *Tesco Supermarkets v Natrass*, above n 5. ‘It may well be inevitable that guilt of the directing mind is a condition precedent to corporate guilt, but this has yet to be stated judicially’: *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11 at 686.

88 C M V Clarkson, ‘Corporate Culpability’ [1998] 2 Web JCLI 8 at 13. ‘There is no fiction that a company is acting in its own right as an intelligent machine’: G R Sullivan (1996), above n 18 at 518; *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713 (HL): ‘a corporation is an abstraction. It has no mind of its own any more than it has a body of its own’.

89 A company cannot, however, be ‘identified’ with a crime committed by an individual lower down the corporate hierarchy. In such cases, his/her acts, even if within the scope of employment, will not be recognised as the company’s acts and a prosecution can thus only be brought against the individual concerned: *Tesco Supermarkets v Natrass*, above n 5; Sullivan (1996), above n 18 at 518. As Quaid, above n 28, observes, the issue of voluntariness does not arise in the corporate context as corporate liability is premised on individual action and the issue thus subsumed by the requirement for voluntary individual action.

90 A Foerschler, ‘Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct’ (1990) 78 Cal L Rev 1287 at 1290. Whilst the doctrine is not limited to regulatory or quasi-criminal offences and may apply to serious mens rea offences including homicide, the identification doctrine does not apply to OSH statutes: *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 (CA); *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78; Clough and Mulhern, above n 2 at 75. Where such liability is in issue, the offence is personal to the organisation and requires no measure of mens rea: J Gobert and M Punch, *Rethinking Corporate Crime* (London: Butterworths, 2003) 55-59. As stated by the Court at para 45 in *Linework Ltd*, ‘the analysis does not depend on [the foreman’s] status within the employer company, nor upon concepts of agency of vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practical step to ensure the employee’s safety, the employer is responsible for that failure’.

91 [1972] AC 154 (HL).

92 *Nordik Industries v Regional Controller of Inland Revenue* [1976] 1 NZLR 194 at 199-201 (SC).

93 *HL (Bolton) Engineering Co Ltd v TJ Graham & Sons Ltd*, above n 87.

relevant conduct must occur within an assigned area of operation despite the particulars being unauthorised.<sup>94</sup> Nevertheless, by way of variations in the accepted range of individuals from whom corporate liability can be derived, the form of identification liability differs among jurisdictions.<sup>95</sup> However, in Australia,<sup>96</sup> New Zealand, England and Wales,<sup>97</sup> the courts have generally taken a very narrow, and arguably unrealistic, approach in defining the parameters of which individuals' acts can be classified in law as acts of the corporation.<sup>98</sup>

It is accepted that in its narrowing of the scope of corporate liability by restricting the range of persons who can render the company criminally liable, the identification doctrine eliminates much of the over-inclusive effect of vicarious liability and, in the eyes of its proponents, more appropriately addresses culpability issues than does vicarious liability.<sup>99</sup> However, it is argued that in its linking of the company's liability to the wrongful acts of its senior officials, the identification doctrine is counterproductive as it inherently encourages those who control or manage company affairs to ensure that they are unaware of any doubtful practices by the corporation.<sup>100</sup>

In its focus on the conduct or fault of directors or high-level managers, it is similarly argued that the identification doctrine is insensitive to the diverse structures of contemporary corporations and the fact that many such companies now have 'flatter structures' with greater delegation being given to relatively junior officers and the consequence that offences committed on behalf of large corporations increasingly occur at the level of middle or lower-level management.<sup>101</sup> In this sense, a discriminatory rule is created in favour of larger corporations.<sup>102</sup> Indeed, particularly in light of the English Court of Appeal's recent rejection in *Attorney-General's Reference (No 2 of 1999)*<sup>103</sup> of the proposition that it is proper to aggregate the acts and states of mind of two or more controlling officers (none of whom could individually be criminally liable) so as to render the cor-

94 *Nordik Industries v Regional Controller of Inland Revenue*, above n 92; *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11.

95 Identification theory as traditionally applied by the Canadian Supreme Court adopted a middle course between the extremely broad principle of vicarious liability and the especially restrictive identity doctrine recommended by the English courts: *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11; *The Rhone v The Peter AB Widener* [1993] 1 SCR 497; *Tesco Supermarkets v Natrass*, above n 5. Note, however, that Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organisations) 2003 changes the theoretical Canadian position somewhat. See discussion below. See also G Ferguson, 'The Basis for Criminal Responsibility of Collective Entities in Canada' in A Eser, G Heine and B Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (Freiburg: Ius Crim, 1999).

96 Note Australia's legislative amendments to its federal Criminal Code 1995 specifically aimed at addressing the limitations of the identification theory of corporate liability. See below.

97 Note Law Commission Report No 237 *Legislating the Criminal Code: Involuntary Manslaughter* and Corporate Homicide Bill and potential consequences of proposed reforms. See below.

98 As Wells (2001), above n 1 notes at p101: 'The relatively narrow doctrine [identification] ... had as its governing principle that only those who control or manage the affairs of a company are regarded as embodying the company itself'. For comment as to the doctrine's limitations in terms of establishing exactly which individuals can ground corporate criminal liability see G Forlin, 'Directing Minds: Caught in a Trap' (2004) NLJ 326. Note also P Cartwright, 'Corporate Fault and Consumer Protection: A New Approach for the UK' (2000) 21 Jnl of Consumer Pol. 71.

99 *Ibid.*

100 P H Bucy 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 Minnesota L Rev 1095 at 1104ff; C Wells 'Corporate Liability and Consumer Protection: *Tesco v Natrass* revisited' (1994) 57 MLR 817. Note outcome in *P & O European Ferries (Dover) Ltd*, above n 13, for example.

101 Sullivan, above n 18.

102 J Freedman, 'Small Businesses and the Corporate Form: Burden or Privilege?' (1994) 57 MLR 555.

103 *Attorney-General's Reference (No 2 of 1999)*, [2000] 3 All ER 182..

poration liable, the identification doctrine insulates large corporations from liability for decisions made at branch or unit levels.<sup>104</sup> As Glasbeek writes:

Often, distinct legal entities operate under the same general corporate umbrella, so that, in the end, a multitude of people – not always legally linked – play a role in the things and doing that, together, make up the corporate conduct that is the object of investigation. The authorities find it difficult to identify any one person, let alone the requisite senior person, as having had the legally required intention and hands-on participation.<sup>105</sup>

At a more fundamental level, it is suggested that the identification doctrine is arguably also problematic in its inability to acknowledge the essence of what constitutes corporate wrongdoing.<sup>106</sup> Indeed, as Sullivan has observed, in its drawing of a rather narrow association between corporate guilt and the guilt of a mere individual, identification theory has potential to obscure the fact that in some instances offences may be committed as a result of systemic or organisational pressure originating directly from the corporate context.<sup>107</sup>

Whilst *Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>108</sup> represents a clear attempt to ‘free-up’ principles of corporate criminal liability and as such has been welcomed by numerous commentators<sup>109</sup> for its ‘clarity and flexibility’ in contrast to *Tesco*,<sup>110</sup> attention is drawn to the fact that in its failure to reflect corporate blameworthiness, the decision is defective as a theoretically sound statement of workable principle able to deliver social justice when applied to assess the culpability of contemporary corporations. Furthermore, as previously stated, identification of behaviour requiring ‘total deterrence’ is fundamentally a legislative task.<sup>111</sup> The un-

104 W Brookbanks, ‘Corporate Manslaughter: *Attorney-General’s Reference (No 2 of 1999)* [2000] 3 WLR 195’ (2000) 6 NZBLQ 228.

105 H Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law and the Perversion of Democracy* (2002) at 147. Compare the comments of Morland J in *National Rivers Authority v Alfred McAlpine Homes East* [1994] 4 All ER 286 at 298 – a case dealing with pollution offences by larger companies and recognising the unlikelihood of senior managers actually committing the actus reus of an offence with the accompanying mens rea: ‘In almost all cases the act or omission will be that of a person such as a workman, fitter or plant operative in fairly low position in the hierarchy of the industrial, agricultural or commercial concern. With offences that cause death or serious injury, it is even more unlikely that a senior official will directly have ‘blood on his hands’.’

106 Sullivan, above n 18. See generally, Clough and Mulhern, above n 2.

107 Identification theory does not address the extent to which corporate policies or systems expressly, tacitly or impliedly permit the commission of the offence in question, for example, where a company has structured its business in a manner that exposes persons (employees and customers) or property to harm, or where the company’s systems for controlling or monitoring its employees to ensure their compliance with relevant laws is adequate: *ibid*; *P & O European Ferries (Dover) Ltd*, above n 13. The above criticisms borrow from the works of social science researchers, which predominantly demonstrate that, to some degree, corporations have a personality of their own that transcends individuals: Wells (2001), above n 1. Accordingly, it is inappropriate to view corporations simply as the sum of their natural parts. Such criticisms take for granted that it is inappropriate to attempt to transpose the individual model to the corporate context – corporations having knowledge, a mode of operation, decision-making powers and processes that differ from those of natural persons: Mann, above n 17.

108 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (JCPC).

109 S P Robert-Tissot, ‘A Fresh Insight into the Corporate Criminal Mind: *Meridian Global Funds Asia Management Ltd v Securities Commission*’ (1996) 17 Co Law 99 at 100; C A Ong and R J Wickins, ‘Confusion Worse and Confounded: The End of the Directing Mind Theory?’ (1997) JBL 524; R Grantham, ‘Corporate Knowledge: Identification of Attribution?’ (1996) 59 MLR 732.

110 *Tesco Supermarkets v Natrass*, above n 5.

111 See discussion above.

certainty and lack of clarity in the test articulated in *Meridian*<sup>112</sup> is accordingly unacceptable, not only running counter to the fundamental principles of criminal law, but also weakening the law's ability to serve as a system for moral education in terms of clearly defining social expectations as to the responsibility of modern corporations.<sup>113</sup>

The indiscriminate 'spillover'<sup>114</sup> effects of corporate sanctions on persons such as shareholders who are removed from the commission of the offence at issue is an additional recognised deficiency of identification liability and as such further strengthens the submission that corporate fault ought to be sought in a company's corporate culture.<sup>115</sup>

That *Attorney-General's Reference (No 2 of 1999)*<sup>116</sup> demonstrates that there is some resistance to moving radically beyond identification theory as a means of grounding corporate liability in cases of serious crime is acknowledged. However, given that it is impossible for any formulation of the identification doctrine to equate with the true culpability of corporations,<sup>117</sup> it is contended that development of independent schemes of corporate fault, which do not rely on the traditional notions of mens rea developed in order to determine the criminality of individuals, is imperative. Indeed, as Wells has observed, the greater interests of society in the creation of a corporate 'culture of safety' may well force such change.<sup>118</sup>

### C. *Manslaughter and OHS Offences: A Comparison*

In recent years, a series of large-scale disasters have tested the present law regarding corporate manslaughter<sup>119</sup> and stimulated significant discussion internationally in terms of current approaches to the use of the criminal law in OHS regulation. Wells and other commentators have argued that the capsizing of the Herald of Free Enterprise off Zeebrugge, which saw the death of 193 passengers and crew, marked a fundamental shift in public perceptions in terms of the failure of current regulatory offences to sufficiently respond to the increased role of corporations in causing industrial injury or death and to ensure adequate accountability for, punishment and denunciation of, and prevention of harm.<sup>120</sup> Nevertheless, as *Attorney-General's Reference (No 2 of 1999)*<sup>121</sup> demonstrates, current judicial and legislative responses toward OHS breaches and corporate man-

112 *Meridian Global Funds Asia Management Ltd v Securities Commission*, above n 5.

113 Note Douglas (1985) as cited in C Wells (2001), above n 1 at 107: 'the cultural coding of responsibility is also the coding for perceived risks'.

114 *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11; L Friedman above n 43; E Colvin, above n 8.

115 See generally French, above n 6; Friedman, *ibid*; B Fisse and J Braithwaite, 'Accountability for Corporate Crime' (1988) 11 Sydney LR 468 at 485-486.

116 *Attorney-General's Reference (No 2 of 1999)*, [2000] 3 All ER 182 (CA).

117 A Hainsworth, 'The Case for Establishing Independent Schemes of Corporate and Individual Fault in the Criminal Law' (2001) 65 JoCL 420 at 424.

118 Wells (2001), above n 1; C Wells 'Corporate Criminal Developments in Europe' (2001) Law Society Jnl 62. See also F Haines and A Sutton, 'The Engineer's Dilemma: A Sociological Perspective on Juridification and Regulation' (2003) 39(1) Crime, Law and Social Change 1.

119 G Forlin and M Appleby (eds), *Corporate Liability: Work Related Deaths and Criminal Prosecutions* (Melbourne: Oxford, 2003).

120 See generally Wells (2001), above n 1 and sources cited in Part II.

121 Above n 116.

slaughter offences do not reflect this alleged shift, such violations often continuing to be regarded as regulatory and ‘not truly criminal’ with the consequence that only small fines are imposed.<sup>122</sup>

Hall and Johnstone argue that, from a legal perspective, manslaughter offences differ markedly from regulatory OHS offences, particularly in terms of the requirement for evidence of criminal fault on behalf of the personality prosecuted, and also in terms of the elements of offences embodied in OHS statutes and in the crime of manslaughter.<sup>123</sup> Indeed, modern OHS standards are constitutive,<sup>124</sup> that is, they attempt to use legal norms to constitute structures, procedures and routines which are mandated to be adopted and internalised by regulated corporations so that such structures, procedures and routines become part of the Corporation’s ordinary operating activities.<sup>125</sup> By contrast, manslaughter is a response to fatality and as such is outcome focused, with death, as opposed to the mode of behaviour leading to that death per se, being the central issue of concern.<sup>126</sup>

The identification doctrine has traditionally served as the relevant legal test in determining whether a company should be prosecuted for manslaughter, the critical question in any case being whether there is sufficient evidence of manslaughter performed by an individual who can be identified as the company’s ‘directing mind and will’.<sup>127</sup>

More recently, however, the doctrine’s failure to achieve organisational accountability has been increasingly obvious. Recognition of the practical impossibility of prosecuting and achieving successful conviction of all but the smallest and structurally and organisationally simplest companies for corporate manslaughter<sup>128</sup> has provided an impetus for numerous proposals for legislative reform internationally.<sup>129</sup> Whilst some jurisdictions have made a clear attempt to pursue dramatic reform,<sup>130</sup> these changes have varied in effectiveness. Accordingly, should New Zealand consider that the serious gaps in, and legal barriers encountered under the current law justify a change the way in which corporate criminal liability is attributed to companies (and potentially also to other

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122 The distinction between regulatory offences and ‘truly criminal’ offences was introduced by Wright J in *Sherras v De Rutzen* [1984] 3 All ER 577 at 588 and was subsequently cited by Scarman LJ in *Wings Ltd v Ellis* [1985] 1 QB 918 at 922: ‘no sort of stigma attaches to their offence on the basis of its regulatory character.’ See generally Hainsworth, above n 117.

123 A Hall and R Johnstone, ‘Exploring the Re-Criminalisation of OHS Breaches in the Context of Industrial Death’ (2005) 8 FJLR 57.

124 H Glasbeek, ‘Occupational Health and Safety Law: Criminal Law as a Political Tool’ (1998) 11 Australian Journal of Labour Law 95.

125 Ibid.

126 It is, however, recognised that a failure to manage OHS systematically provides some evidence of the kind of negligence that must be ‘gross’ enough to support a successful corporate manslaughter prosecution: Hall and Johnstone, above n 121 at 63.

127 The absence of such evidence was the major factor resulting in the prosecution’s failure to secure a manslaughter conviction of the company in *P & O European Ferries (Dover) Ltd*, above n 13, and other high-profile public transport disasters.

128 For example, as the English Government’s Draft Bill for Reform acknowledges, ‘since 1992 there have been 34 prosecution cases for work-related manslaughter, but only six small organisations have been convicted’.

129 Hall and Johnstone, above n 123.

130 Australia, Canada, England and Wales for example.

organisations),<sup>131</sup> it is important that any such change goes beyond the ‘mere tinkering’<sup>132</sup> of questionable effectiveness, which is evident in some jurisdictions. Furthermore, whilst the dangers of emphasising manslaughter prosecutions at the expense of the prosecution of regulatory criminal offences are acknowledged,<sup>133</sup> it is submitted that simply enhancing the role of OHS law in bringing companies to account for, and preventing, corporate-related deaths is insufficient if the objective of any reform undertaken is to provide sufficient incentives for larger companies to address questions of human safety.<sup>134</sup> Contemporary legislative responses aimed at allowing the criminal law to better achieve its objectives both in relation to corporate criminal liability generally and specifically in terms of introduction of a separate corporate manslaughter/corporate killing offence are examined below.

### 1. Australia

The Criminal Code Act 1995 (Cth) represents the starting point for Australian developments in the law of corporate criminal liability, Division 12<sup>135</sup> of the Code introducing a new basis for attributing criminal responsibility to the corporate entity and one that is fundamentally different from the common law.<sup>136</sup> The Code’s approach hinges on the notion of ‘corporate culture’, or the policies and practices adopted by companies as their method of operation.<sup>137</sup> As such, the regime casts ‘a much more realistic net of responsibility over corporations than the unrealistically narrow *Tesco*<sup>138</sup> principle’.<sup>139</sup> As Field and Jörg state, the rationale for holding companies liable on this basis is that:

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131 Particularly in light of the courts’ view that the *Meridian* approach cannot be applied in manslaughter prosecutions: *R v AC Hatrick Chemicals Pty Ltd*, unreported, Supreme Court of Victoria, Criminal Division, 8 December 1995, Hampe J; *Attorney-General’s Reference (No 2 of 1999)* [2000] 3 All ER 182 (CA). See also W Brookbanks, ‘Corporate Manslaughter: *Attorney-General’s Reference (No 2 of 1999)* [2000] 3 WLR 195’ (2000) 6 NZBLQ 228.

132 H Glasbeek, ‘More Criminalisation in Canada: More of the Same?’ (2005) 8 FJLR 39, regarding perceived ineffectiveness of proposed changes in England and Wales under the Draft Corporate Manslaughter Bill considered to simply ‘tinker’ with the application of the identification doctrine and to likewise fail to provide sufficient incentives for large companies to address the question of human safety. See also D J Roberts, ‘Westray Response Flawed Legislation’ *The Chronicle-Herald* [Halifax], 24 June 2003, p B2.

133 Mann, above n 17.

134 Friedman, above n 43.

135 The Criminal Code Act 1995 (Cth) came into effect in the Commonwealth jurisdiction on 15 March 2000. For a helpful discussion of Division 12 and the Act generally see T Woolf, ‘The Criminal Code Act 1995 (Cth) – Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21 *Crim LJ* 257.

136 The provisions of the Code owe much to the work of Professor Fisse. See generally Fisse ‘Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions’ (1983) 56 *S Calif L Rev* 1141; Fisse ‘Corporate Criminal Responsibility’ (1991) 15 *Crim LJ* 166; Fisse, above n 77; Fisse and Braithwaite, above n 29. Note also T Woolf, *ibid*.

137 ‘Corporate culture’ is defined in s 12.3(6) of the Criminal Code Act 1995 (Cth) as ‘an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place’.

138 *Tesco Supermarkets v Natrass*, above n 5.

139 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992) *Model Criminal Code Chapter 2 – General Principles of Criminal Responsibility* (AGPS, Canberra). Section 12.2 provides that harm caused by employees acting within the scope of their employment is considered harm caused by the body corporate. Section 12.3 establishes new methods for establishing the mens rea of ‘corporations’ where the fault element is other than negligence; offences such as manslaughter by gross negligence which form the basis of corporate manslaughter prosecutions are covered under s 12.4.

The policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the organisation.<sup>140</sup>

Like Canada,<sup>141</sup> the Criminal Code Act 1995 (Cth) attempts to steer a middle course between overly narrow and overly broad interpretations of corporate criminal liability. Whilst the new regime continues to lean heavily on identification theory since a company is prima facie liable for the commission of offences by high-level managerial agents,<sup>142</sup> the reforms expand the concept of fault through a collective notion of corporate culture but mitigate it through the defence of due diligence.

In their attempt to formalise a notion of genuine corporate fault, the Australian reforms clearly represent the most original and refined effort to adapt the general principles of criminal liability to the especially complex circumstances of contemporary corporations. Nevertheless, the Criminal Code Act 1995 (Cth) highlights a fundamental conceptual weakness in the notion of 'corporate fault'. Despite considerable efforts having been made to maintain a clear distinction between subjectively-assessed faults and negligence, it is argued that it is difficult to refrain from consistently returning to negligence as the true foundation for corporate criminal liability.<sup>143</sup> Whilst corporate culture can provide the basis for a company's criminal liability, any contention that a company's conviction of a crime of intention may be secured by establishing only that a deficient corporate culture led to the commission of the relevant offence, or that a company was defective in maintaining a corporate culture that encouraged respect for the law, surely cannot be supported.<sup>144</sup> Indeed, it must be proved that the prevailing corporate culture encouraged, instigated or influenced commission of the relevant offence, or that the failure to maintain a law-abiding milieu was deliberate.<sup>145</sup>

The provisions of the Criminal Code Act 1995 (Cth) indeed go some way to ensuring increased corporate accountability, and as such the legislation is positive in terms of developments in corporate criminal liability generally. However, the criticisms of theorists that under the 'corporate culture' approach rule breaking is both expected and condoned within companies as a consequence of ideals such as market efficiency must be noted.<sup>146</sup> Furthermore, restriction of the Code's application only to federal offences means that prosecution of the offence of industrial manslaughter is exceptionally difficult, States' and Territories' adoption of similar provisions into their own

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140 S Field and N Jörg, above n 70.

141 See discussion of Bill C-45 reforms below and note D L MacPherson, 'Extending Corporate Criminal Liability?' *Some Thoughts on Bill C-45* (2004) 30 *Man LJ* 253.

142 In s 12.3(6), a company's board of directors is defined as 'the body exercising the corporation's executive authority, whether or not the body is called the board of directors'. Similarly, high managerial agent is defined as 'an employee, agent or officer of the corporation whose conduct may fairly be assumed to represent the corporation's policy because of the level of responsibility of his or her duties'.

143 See generally, A Boisvert, 'Corporate Criminal Liability' *Paper Presented at the Uniform Law Conference*, Montreal, Canada, (2003) available at <www.ulcc.ca > viewed 12 October 2005.

144 See generally R Sarre and J Richards, 'Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate' (2005) 8 *FJLR* 93; Criminal Law Officers Committee of the Standing Committee of Attorneys-General, above n 139.

145 *Ibid.*

146 See for example A Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law* (2nd ed) (London: Butterworths, 2001) at 105; Wells (2001), above n 1; Clough and Mulhern, above n 2.

criminal codes or legislation being a prerequisite for prosecution and potential conviction.<sup>147</sup> To date, notwithstanding various proposals for reform in numerous States/territories, it is only ACT, Australia's smallest territory, which has implemented such legislative change. A brief outline of models explored in selected States follows below.

(a) *Australian Capital Territory (ACT)*

In 2004, by way of the Crimes (Industrial Manslaughter) Act 2003, ACT became the first Australian jurisdiction to introduce an industrial manslaughter offence.<sup>148</sup>

The Act defines 'industrial manslaughter' as causing the death of a worker whilst either being negligent about causing the death of that, or any other, worker; or being reckless about causing serious harm to that, or any other, worker.<sup>149</sup> Section 51 is particularly critical in its provision that: (1) In deciding whether the fault element of intention, knowledge or recklessness exists for an offence in relation to a corporation, the fault element is taken to exist if the corporation expressly, tacitly or impliedly authorises or permits the commission of the offence.

Whilst section 52<sup>150</sup> allows for a company's negligence to be attributed by aggregation, there is much conjecture as to how the new provisions will be interpreted and applied. The courts' considerable discretion in the imposition of sanctions upon convicted corporate offenders, inter alia including the ability to order that the company take specific remedial action and to publicise the violation, has been raised as an issue of significant concern.<sup>151</sup> The unique issues associated with the application of sanctions against corporate actors will thus need to be navigated cautiously.

(b) *Victoria*

The notion of 'corporate culture' and criminal responsibility has long been debated by the Victorian Government. In 2001, arguably as a response to the *Carrick* case,<sup>152</sup> the Crimes (Workplace Deaths & Serious Injuries) Bill was introduced into the Victorian Parliament. The Bill provided that where a company's conduct 'materially contributed' to a death or serious injury, liability of up to \$5 million and \$2 million would respectively attach. Additionally, the Bill allowed for the imprisonment of senior officers found party to the relevant offence for terms of up to five and two years respectively.

Persistent pressure from the Victorian Employers Chamber of Commerce and the Australian Industry Group saw the Upper House reject the Bill in 2002. The current Government has indicated an intention not to reintroduce the Bill and to instead focus on increasing regulatory penalties within current OHS legislation. The ability to aggregate negligent conduct rather than requiring proof of negligence on behalf of the company's 'directing mind' has received a positive

147 B McSherry and B Naylor, *Australian Criminal Law: Critical Perspectives* (Melbourne: Oxford University Press, 2004); A Hall and R Johnstone, 'Exploring the Re-Criminalising of OHS Breaches in the Context of Industrial Death' (2005) 8 FJLR 57.

148 Note references to Criminal Code 2002 (ACT), particularly Chapter 2 which incorporates the Commonwealth Criminal Code and its notions of 'corporate culture': Crimes Act 1900 (ACT), s 7A.

149 Crimes Act 1900 (ACT), ss 49C and 49D.

150 Criminal Code 2002 (ACT), s 52.

151 See Workplace OHS, *OHS and Workers Compensation in 2004 – Part 1: Challenges* available at <www.ohsim.ocpe.sa.gov.au> viewed 28 August 2005; Sarre and Richards (2005), above n 144. Note that the Act provides for a maximum fine of \$1 million for large companies; \$200,000 for individual senior officers, or 20 years imprisonment, or both.

152 R Sarre and J Richards 'Criminal Manslaughter in the Workplace: What Options for Legislators?' (2004) 78 Law Institute Jnl 58.

response.<sup>153</sup> Accordingly, amendment of existing OHS legislation, as opposed to introduction of a new regime, may well be the direction pursued in Victoria.

(c) *South Australia*

OHS legislation review and reform is currently occurring in South Australia as part of an extensive review of employment law generally.<sup>154</sup> Results to date include the Stanley Report, significantly emphasising the primacy of safety as the dominant aim of the legislation.<sup>155</sup>

The Report notes a certain level of support among employee groups for the inclusion of an industrial manslaughter offence, but opines that in light of existing common law manslaughter provisions under the Criminal Law Consolidation Act 1935, any such creation of a new offence would merely create duplication. Accordingly, consistent with the Stanley recommendations, the Occupational Health, Safety and Welfare (SafeWork SA) Bill attempts only to implement a more extensive range of non-pecuniary penalties designed to provide 'flexibility in sentencing, and to ensure that the penalty fits the circumstances of the offender'<sup>156,157</sup>

(d) *New South Wales (NSW)*

Whilst the Crimes Amendment (Industrial Manslaughter) Bill 2004 proposed corporate culpability for offences of industrial manslaughter and gross negligence causing serious injury, the NSW Government has since ruled out criminalising industrial manslaughter.<sup>158</sup> Nevertheless, in situations where practical measures could have been taken to avoid an accident and the risks of injury or death were reasonably foreseeable, negligent employers may still be fined heavily and jailed for up to five years. Such liability is, however, established under existing OHS legislation.<sup>159</sup>

2. *Canada*

Like Australia and England and Wales, Canada has experienced politically discomfiting outcomes in the aftermath of disasters involving neglect of, or indifference to, dangerous conditions by corporations and their associated actors.<sup>160</sup> C-45: An Act to Amend the Criminal Code (Criminal Liability of Organisations) 2003<sup>161</sup> represents a direct legislative response to the perceived and pragmatic inability to apply the criminal law and achieve corporate accountability under the

153 Sarre and Richards (2005), above n 144. Note also Victorian Trades Hall Council, *Corporate Accountability Campaign Statement* (2003) available at <www.vthc.org.au> viewed 17 August 2005.

154 For further discussion see Sarre and Richards, *ibid*.

155 B Stanley, F Meredith and R Bishop *Review of the Occupational Health, Safety and Welfare System in South Australia Vol III* at 89 available at <www.workcover.com> viewed 6 August 2005.

156 Statement made by the Hon Michael J Wright, Minister for Industrial Affairs, during Question Time, SA House of Assembly, Monday 28 April 2003.

157 Significant, and arguably very positive, proposed non-pecuniary penalties include mandatory training programmes for employers (or responsible officers of a corporate offender) and an actor's publication of its breach(es) of the Act, eg by notifying shareholders.

158 T McLean, 'NSW: Govt to Introduce Tougher Laws for Negligent Employers' Australian Associated Press Report, 27 October 2004.

159 Liability for imprisonment for first-time offenders is restricted to two years. Pecuniary penalties are set at up to \$1.65 million for corporate offenders and up to \$165,000 for individual managers. For further discussion see generally Sarre and Richards (2005), above n 144.

160 See for example accounts of the Westray mining affair: S Comish, *The Westray Tragedy* (1993); H Glasbeek and E Tucker, 'Death by Consensus: The Westray Story' (1993) *New Solutions* 3 at 4; Justice K P Richards (1997) *The Westray Story – A Predictable Path to Disaster, Report of the Westray Mine Public Inquiry*.

161 Bill C-45 received the Royal Assent in November 2003 and was proclaimed on 31 March 2004.

identification doctrine as developed judicially,<sup>162</sup> use of the 'guiding mind' principle as a basis of liability being recognised as 'failing to reflect the reality of corporate decision-making and delegation of operational responsibility in complex organisations'.<sup>163</sup> Whilst the C-45 reforms do not discount the possibility of criminal liability attaching to companies for negligence resulting in employee death, significantly the Canadian Government has decided that a separate corporate manslaughter offence is unnecessary. Furthermore, in affirming that liability may attach to individual officers of the company, the Canadian reforms are also significant for their introduction of a separate sentencing regime unique to corporate offenders,<sup>164</sup> although imprisonment has not been included as a penalty.<sup>165</sup>

In addition to the traditional means by which companies may be held criminally responsible, that is, via vicarious and identification liability, the C-45 legislation imposes new criminal liabilities regarding workplace safety.<sup>166</sup> These liabilities are grounded in a specific set of new legal duties written into the Criminal Code. Thus, it may be stated that the Canadian reforms attempt to change the rules for attributing all forms of criminal liability to organisations whilst also utilising existing criminal offences such as murder and gross negligent manslaughter following for example an industrial death. The effectiveness of the reforms is yet untested.

Recognition that the Canadian reforms have particular significance for their attempt to steer a middle ground that moves away from the narrower, individualistic 'directing mind' principle but stops short of punishing a company which is not, in fact, morally blameworthy for the actions of its officers or managers, is important. On this point, it is accepted that the explicit legal duty on the part of those with responsibility for directing the work of others, requiring such individuals 'to take reasonable steps to prevent bodily harm arising from such work'<sup>167</sup> is positive, particularly in terms of fostering workplace 'cultures of safety'<sup>168</sup>. However, it is argued that, notwithstanding Government endorsement of an approach for negligence offences that permits the aggregation of the acts and omissions and state of mind of the company's representatives and senior officers in

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162 Despite the identification doctrine having a somewhat wider application in Canada: *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11; compare *The Rhone v The Peter AB Widener*, above n 95: commentary and judicial statements make clear that the doctrine's inherent weaknesses continue to prevent adequate corporate accountability: G Ferguson, 'Corruption and Corporate Criminal Liability' (1998), *Paper presented at the International Colloquium on Criminal Responsibility of Collective Legal Entities*, Berlin, Germany, May 1998.

163 Department of Justice, Canada, *Government Response to the Fifteenth Report of the Standing Committee on Justice and Human Rights – Corporate Liability* (2002) available at <www.canada.justice.gc.ca> viewed 16 October 2005. Whilst ostensibly dramatic, the C-45 reforms are the product of discussions stemming back to at least 1976.

164 Canadian Criminal Code 1985, s 735(1)(a). Ten factors of mandatory consideration are specified. This inclusion is notable as Sarre and Richards emphasise, above n 144: 'even once the appropriate characterisation of criminal liability has been determined, the issue of a suitable penalty scheme invites an additional set of questions'.

165 The Government's position is that, given that individual directors, supervisors or managers whose conduct establishes the general offence of manslaughter were already able to be charged with and potentially convicted for that offence, such provision was also unnecessary. See generally, Department of Justice, Canada, *Corporate Criminal Liability: A Discussion Paper* (2002) available at <www.canada.justice.gc.ca> viewed 18 August 2005; R Sarre and J Richards 'Responding to Culpable Corporate Behaviour – Current Developments in the Industrial Manslaughter Debate' (2005) 8 FJLR 93. Whilst the structure includes non-pecuniary penalties similar to those being introduced in Australia, hefty fines, set at the court's discretion, nevertheless continue to provide the basis of the regime.

166 For a historical perspective, see generally H Glasbeek and S Rowland, 'Are We Injuring and Killing At Work Crimes?' (1979) 17 Osgoode Hall LJ 506.

167 Canadian Criminal Code, s 217.1.

168 See Wells (2001), above n 1.

fixing liability, the C-45 reforms do not go far enough in securing the criminal accountability of corporate directors and officers, the ‘corporate culture’ model<sup>169</sup> perhaps being prematurely dismissed.<sup>170</sup> Indeed, where bankrupt companies or actions against parent or successor corporations are at issue, the sentencing provisions are likely to be of limited value.<sup>171</sup> The C-45 reforms’ raising of the threshold to convict a corporate accused by now allowing the company to argue that it was not intended to benefit from the criminal wrongdoing of its officers or representatives is also of concern.<sup>172</sup>

In a similar fashion, it is contended that it must be questioned whether, ‘elaborate as they are and innovative as they seem’,<sup>173</sup> the C-45 reforms actually change the substance of corporate criminal liability or proffer little more than a set of variants of the identification doctrine. Indeed, as Gobert argues, it is still necessary to identify one or more individuals who have committed a true criminal offence and such persons must be of the right status, albeit that this is now defined differently, to render it sensible to hold the company – the complex organisation – responsible.<sup>174</sup>

### 3. *England and Wales*

In 1994, the Law Commission, in accordance with statutory provision,<sup>175</sup> reviewed the law of manslaughter and found English law as it applied to corporations in need of dramatic reform.<sup>176</sup> In 1996, the Commission recommended the creation of a new offence of corporate killing based on management failure falling well below what could reasonably be expected of the company in the particular circumstances where death had ensued.<sup>177</sup> Despite articulated Government commitment to introducing such a law, it was only in March 2005, after nearly a decade of review and consultation,<sup>178</sup> that the draft Corporate Manslaughter Bill was finally published.<sup>179</sup> As the con-

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169 This model is applied in Australia. For discussion, see above.

170 Compare Boisvert, above n 143.

171 See generally, Roberts, above n 132.

172 In this respect, the reforms make it more difficult for the prosecution to convict companies than did the common law, where *Canadian Dredge and Dock Co Ltd v The Queen*, above n 11, prevailed as the relevant test – the defence to liability applying only if no benefit was conferred either by design or result. See generally, D L MacPherson, above n 141.

173 J Gobert, ‘The Politics of Corporate Manslaughter – The British Experience’ (2005) 8 FJLR 1.

174 J Gobert, ‘Corporate Criminality: New Crimes for the Times’ (1994) Crim LR 722; Gobert (2005), above n 173; Glasbeek (2005), above n 105.

175 Law Commissions Act 1965 (UK).

176 Law Commission, *Criminal Law: Involuntary Manslaughter*, Consultation Paper No 135 (HMSO 1994) Part IV.

177 Law Commission Report, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237 (HMSO, 1996) Part VIII.

178 Much of the delay in introducing the new offence can be attributed to arguments about the extent to which there ought to be immunity carved out for the Crown: K Bridges, ‘Corporate Manslaughter – the New Landscape’, available at <[www.pinsetmasons.com](http://www.pinsetmasons.com)> viewed 8 October 2005. See also Gobert (2005), above n 173.

179 Draft *Corporate Manslaughter Bill* (Cm 6497). It is noted that, subsequent to this paper’s writing, the Corporate Manslaughter and Corporate Homicide Bill was introduced into Parliament on 21 July 2006. The Bill, explanatory notes, the regulatory impact assessment, and other pertinent documents regarding the policy development of the Bill are available at: <[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)> viewed 12 September 2006. Whilst further discussion of the introduced Bill is outside the scope of this paper, the comments of the Home Office that the Bill is not expected to be enacted in the immediate future, and that it will be carried over to the next session of Parliament are noted: available at <[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)> viewed 12 September 2006.

temporarily-released Government Consultation Paper<sup>180</sup> states, a critical part to the proposed reforms is 'striking the right balance between a more effective offence and legislation that would unnecessarily impose a burden on business'.<sup>181</sup>

(a) *The new offence*<sup>182</sup>

The Consultation Paper declares that the Draft Bill is primarily aimed at securing a broader range of cases in which a successful conviction can be achieved 'for a specific, serious criminal offence that properly reflects the gravity and consequences of the conduct involved'.<sup>183</sup> Accordingly, under the Draft Bill, an organisation<sup>184</sup> may be prosecuted if a senior manager's gross failure to take reasonable care for the safety of the organisation's employees or members of the public results in a fatality.<sup>185</sup>

1. The Offence<sup>186</sup>

- (1) An organisation to which this section applies is guilty of corporate manslaughter if the way in which any of the organisation's activities are managed or organised by its senior managers –
  - (a) Causes a person's death; and
  - (b) Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (4) An organisation that is guilty of corporate manslaughter is liable on conviction on indictment to a fine.

As a specifically styled offence aimed at overcoming the problems of the identification principle by including both a different definition of culpability and a new route to attribution,<sup>187</sup> the proposed reform provides evidence of the movement away from wholly individualistic notions of organisational criminal liability and as such is positive for its recognition of the contemporary

180 Home Office, *Corporate Manslaughter: The Government's Draft Bill for Reform* (March 2005). Consultation on the draft bill closed 17 June 2005. Reactions have been mixed, and Government response is awaited: Gobert, above n 173; K Sutton, 'UK Corporate Killing' (2005) *Ethical Corporation Online* available at <[www.ethicalcorp.com](http://www.ethicalcorp.com)> viewed 22 September 2005.

181 *Ibid.*, 6.

182 If implemented, the proposed Corporate Manslaughter Act 2005 (UK) will codify the law and in doing so abolish the common law offence of manslaughter by gross negligence in so far as it applies to operating corporations and deaths occurring within England and Wales. See also discussion of *R v Admako* [1995] 1 AC 171 (replacing 'recklessness' with 'gross negligence' as the mens rea of manslaughter) in J Gobert and M Punch, above n 90 at 92. It should be noted, however, that Scotland and Northern Ireland are currently active in reforming the law in those jurisdictions.

183 *Ibid.*, 7.

184 The proposed offence applies not only to corporations, but also to Crown bodies, police, and perhaps somewhat dramatically also to parent companies. Core public functions, bodies setting regulatory standards, unincorporated bodies and individuals are, however, exempted from the regime.

185 *Corporate Manslaughter: The Government's Draft Bill for Reform*, 'Introduction' at 6.

186 Clause 1 Corporate Manslaughter Bill 2005. Clauses 2-5 provide supplementary information on specific aspects of the offence, including the level of management responsibility at which it will operate, how an organisation's culpability is to be assessed and the sort of activities and functions to which it will apply. 'Senior manager', 'gross breach', 'relevant duty of care' and 'corporation' are each defined in cl 2-5.

187 Whilst gross negligence has been applied as the relevant fault element and encompasses failures to act to protect the health and safety of workers and members of the general public, compare the equally innovative reforms proposed regarding criminal offences where fault elements of intention and recklessness have been advocated: A Hall, R Johnstone and A Ridgway *Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths* (2004) Working Paper No 33, Australian National Research Centre for Occupational Health and Safety, available at <[www.ohs.anu.edu.au](http://www.ohs.anu.edu.au)> viewed 20 October 2005.

and social symbolic importance of corporate accountability.<sup>188</sup> Nevertheless, the Draft Bill is not without its potential difficulties.

(b) *'Management Failure'*

An organisation's senior management is defined as a person who 'plays a significant role in' –

- (a) The making of decisions about how the whole or substantial part of its activities are to be managed or organised; or
- (b) The actual managing or organising of the whole or a substantial part of those activities.<sup>189</sup>

Whilst the Draft Bill makes clear that senior management conduct is able to be 'considered collectively, as well as individually',<sup>190</sup> it is at least arguable that it remains possible for a company to delegate all its health and safety responsibilities to lower-level management and thereby avoid prosecution.<sup>191</sup>

The potential effects of the very wide drafting of the term 'management failure' are similarly of concern, notwithstanding the fact that the majority of people would generally support prosecution in especially egregious cases.<sup>192</sup> Furthermore, acknowledging that many companies already take their health and safety obligations particularly seriously, it is submitted that the proposed legislation has potential to undermine and weaken the extremely important place health and safety compliance has within efficient, well-run corporations.<sup>193</sup>

(c) *Sanctions*

The sanctions for violation of the proposed corporate manslaughter offence are largely analogous to those applicable for breach of present health and safety laws.<sup>194</sup> As Gobert observes, the absence of more stringent penalties clearly raises questions as to the effectiveness of a separate offence, particularly in terms of the level of actual deterrence likely to be achieved by prosecution under the new regime.<sup>195</sup>

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188 See generally, Wells (2001), above n 1 at 122.

189 Draft *Corporate Manslaughter Bill* (Cm 6497).

190 Ibid.

191 The Consultation Papers' statement that the provision 'is intended to cover, for example, management at regional level within a national organisation, such as a company with a national network of retail outlets, factories or operational sites' is acknowledged as is the document's statement that the provision 'is targeting those responsible for the overall management of each division'.

192 See generally, R Baldwin and R Anderson, *Rethinking Regulatory Risk* (London: Sweet & Maxwell, 2002); P R Glazebrook, 'A Better Way of Convicting Businesses of Avoidable Deaths and Injuries' (2002) 61 CLJ 405.

193 R Baldwin, 'The New Punitive Regulation' (2004) 67 MLR 351 at 356-360; T Hill 'Directors' Duties – Safety First?' (Winter, 2003) Dickinson Dees Newsletter of the Commercial Disputes Group: available at <www.dickinson-dees.com> viewed 3 October 2005.

194 Health and Safety at Work Act 1974 for example. Note also Government's recent introduction of the Health and Safety at Work (Offences) Bill 2004, which is aimed at increasing current penalties for violations of Health and Safety legislation.

195 Gobert (2005), above n 173 at 34. See also S Simpson, *Corporate Crime, Law and Social Control* (2002) at 22-84.

## V. HOW MIGHT EXISTING DIFFICULTIES BE RECONCILED OR RESOLVED?

It is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience.<sup>196</sup>

Henry David Thoreau

The difficulties associated with assigning mens rea to corporate actors in criminal prosecutions have troubled the courts and commentators alike for many years. It is submitted that consideration of the aggregation/‘collective knowledge’ doctrine and ‘corporate culture’/‘corporate fault’ models is most useful in evaluating whether a departure from, or a reconceptualisation of, the identification doctrine is beneficial, particularly in terms of furthering the criminal law’s aims of deterrence, retribution and rehabilitation. An examination of such models accordingly follows below.

### A. Aggregation/‘Collective Knowledge’

The aggregation model extends the identification and vicarious liability doctrines by, in the face of culpable corporate conduct,<sup>197</sup> collectivising into one criminal whole the conduct of two or more individuals acting as the company (or for whom the company is vicariously liable) in order to attach corporate criminal liability to the corporation where the relevant individuals’ acts combined establish that liability but each act per se is insufficient to do so.<sup>198</sup> Accordingly, where an offence requires a specific level of negligence or knowledge, this can be found in the collective by way of an aggregation of the negligence or knowledge of multiple individuals.<sup>199</sup>

Authority for the proposition that aggregation is a workable and effective model is provided by the 1987 decision of the United States First Circuit Court of Appeals in *United States v Bank of England*<sup>200</sup> where the Court stated:

A collective knowledge is entirely appropriate in the context of corporate criminal liability. ... Corporations compartmentalise knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one part of the operation know the specific activities of employees administering another aspect of the operation.

It is contended that the express inclusion of the aggregation principle in the Criminal Code Act 1995 (Cth),<sup>201</sup> notwithstanding the doctrine’s rejection at common law in England<sup>202</sup> and Australia<sup>203</sup> on the ground that the principle is ‘contrary to the interests of justice’ in its supplying of guilt on behalf of the company where in fact there was not guilt on behalf of an individual or

196 H D Thoreau, *Civil Disobedience* (1983) 387.

197 Including, for example, a company’s wilful blindness to factual information and legal requirements: A Simester and G R Sullivan, *Criminal Law: Theory and Doctrine*, above n 6 at 253.

198 E Lederman, ‘Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self Identity’ (2000) 4 Buffalo Crim LR 641 at 662; E Colvin ‘Corporate Personality and Criminal Liability’ (1995) 6 Crim LF 1 at 18.

199 Colvin, above n 8 at 19.

200 *United States v Bank of England* 821 F.2d 844 (1987) (1<sup>st</sup> Circ).

201 Criminal Code Act 1995 (Cth), s 12.4(2).

202 *R v HM Coroner for East Kent* (1989) 88 Cr App R 10; *Attorney-General’s Reference (No 2 of 1999)*, above n 9: ‘The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such’. See also Law Commission, above n 177.

203 *R v Hatrick Chemicals Pty Ltd*, unreported, Court of Appeal, Victoria, (No 1485 of 1995) Hampel J, 29 November 1995; *R v Hatrick Chemicals Pty Ltd*, unreported, Supreme Court, Victoria, Criminal Division, 8 December 1995.

individuals who could satisfy the ‘directing mind and will’<sup>204</sup> test, serves as a clear statement of the dissatisfaction with identification theory and provides more recent evidence of the aggregation model’s growing acceptability.

Commentators and the courts have argued that the aggregation model is especially useful in negligence cases, a series of minor failings by relevant officers or agents of the corporation perhaps collectively constituting a gross breach by the corporate actor of its duty of care.<sup>205</sup> Furthermore, the doctrine is also positive in that it can deter companies from burying responsibility deep within their corporate hierarchy.<sup>206</sup>

Whilst it is accepted that it may be argued that the aggregation doctrine contains a fundamental weakness in its ignoring of the reality that the real essence of corporate wrongdoing is frequently the fact that the company had no organisational structures or policy to prevent the injury or death at issue,<sup>207</sup> it is suggested that where the principle is applied in tandem with that of ‘corporate culture’/‘corporate fault’, corporate accountability for criminal wrongdoing is likely to be enhanced. Indeed, there is ongoing debate as to whether the aggregation principle applies to, and is an adequate test of, liability in those forms of corporate crime that require proof of intent or will.<sup>208</sup> Likewise, it is recognised that the aggregation doctrine provides no justification for the expansion of the identification and vicarious models of corporate criminal liability.<sup>209</sup> Nevertheless, it is submitted that such justification can be found in broader considerations of corporate blameworthiness or fault.<sup>210</sup>

### B. ‘Corporate Culture’/‘Corporate Fault’

In contrast to other models of corporate criminal liability, the ‘corporate fault’ model attempts to discover a ‘touchstone of liability’ in the behaviour of the corporate actor per se rather than in the attribution to the company of the conduct or mental states of individuals within the firm.<sup>211</sup> The touchstone of liability is the blameworthy organisational conduct, the ‘fault’ of the corporation, for example, the failure to take precautions or to exercise due diligence to avoid committing a particular offence.<sup>212</sup> Determination of a corporate actor’s liability requires a focus on the interplay between the relevant infringement and a company’s structures, policies, practices, procedures and ‘corporate culture’, such elements representing the aggregate ‘will’ of the corporation.<sup>213</sup>

Bucy<sup>214</sup> has proposed a standard of corporate criminal liability that turns on whether there is a ‘corporate ethos’ which can be held to have encouraged the commission of crime. In such cases,

204 *Tesco Supermarkets v Natrass*, above n 5.

205 T Hagemann and J Grinstein, ‘The Mythology of Aggregate Corporate Knowledge: A Deconstruction’ (1997) 65 *Geo. Wash. L. Rev.* 210. See generally, E Colvin, above n 8; Clough and Mulhern, above n 2; Lederman, above n 198.

206 Clarkson, above n 18. See also discussion above at Parts II, III and IV.

207 Compare *P & O European Ferries (Dover) Ltd v R* (1991) 93 Cr App R 73.

208 For a helpful discussion see Lederman, above n 198; Wells (2001), above n 1, and Wells (1993), above n 3.

209 A Ragozino, ‘Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Corporate Mens Rea: The Duty Stratification Approach’ (1995) 24 *Southwestern University LR* 423.

210 Gobert and Punch, above n 90 at 82-86.

211 *Ibid*; D Stuart, ‘Punishing Corporate Criminals with Restraint’ (1995) 6 *Crim LF* 219.

212 *Ibid*.

213 See generally Fisse and Braithwaite (1993), above n 29; B Fisse (1991), above n 136.

214 P Bucy ‘Corporate Ethos: A Standard for Imposing Corporate Criminal Liability’ (1991) 75 *Minn L Rev* 1095.

the inquiry is not limited to whether the relevant actors were sufficiently high in the corporate hierarchy, but rather also delves into aspects such as company goals and practices, responses to previous offences, and the existence and adequacy of any compliance programmes.<sup>215</sup> Indeed, it is these views which are reflected in the Australian Criminal Code Act 1995 (Cth).

It is submitted that the corporate fault model is attractive for its recognition that companies possess collective knowledge, have a distinct public persona, and are capable of committing offences in their own right, that is, via the collective.<sup>216</sup> In its assumption that a company, particularly a larger firm, is not only 'a collection of people who shape and activate it', but also 'a set of attitudes, positions and expectations' which influence or determine the modes of thinking and behaviour of persons who operate the firm,<sup>217</sup> the 'corporate fault' model's basis for imposing liability is likewise attractive as it is better equipped to regulate and respond to the contemporary, and often decentralised, corporation. Indeed, as Gobert<sup>218</sup> has observed, harm from corporate offending frequently now has more to do with systems that fail to address problems of risk and less to do with the misconduct or incompetence of individuals.<sup>219</sup>

The legislative model of corporate fault contained in the Criminal Code Act 1995 (Cth), providing that if an offence requires fault, 'the fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence', marks a fundamental shift in the conception of corporate criminal liability, that is, the transition from derivative to organisational liability. As such it is therefore argued that the model adds much to the development of corporate criminal liability generally and provides further support for the proposition that corporate criminal liability should cease to be viewed merely as an offshoot of personal criminal liability,<sup>220</sup> attention instead directed to the development of separate principles to govern these legal entities.

## VI. PENALTIES AND SANCTIONS: EFFECTIVE MEANS OF HOLDING COMPANIES TO ACCOUNT?

The issue of appropriate penalties and sanctions for corporate actors following conviction is an issue which has troubled commentators and the courts for much of the last century. Whilst the proliferation of considerations and material on the topic largely renders such issues outside the scope of this work, for completeness I offer a short comment on several of the more pertinent issues.

It is submitted that Fisse and Braithwaite's<sup>221</sup> pyramid framework of punishment, progressing from advice, warnings, fines and voluntary discipline or remedial investigation through to court-ordered disciplinary investigation, community service, corporate criminal sanctions and corporate capital punishment such as incapacitation or restraint, has particular value.<sup>222</sup> In the event that New Zealand elects to follow some of its comparative counterparts and implement a corporate

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215 *Ibid.*

216 Stuart, above n 211.

217 A Amoroso, 'Organisational Ethos and Corporate Criminality' (1998) *Campbell LR* 17 at 22.

218 J Gobert, 'Coping with Corporate Criminality – Some Lessons from Italy' [2002] *Crim LR* 619 at 621.

219 Compare J C Coffee 'Beyond the Shut-eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response' (1977) 63 *Virginia LR* 1099.

220 Note discussion and references above at Parts II, III and IV.

221 Fisse and Braithwaite (1993), above n 29.

222 See generally discussion in Wells (2001), above n 1; Clough and Mulhern, above n 2.

manslaughter offence, it is suggested that clear definition in the Crimes Act 1961 or at least the Companies Act 1993 of the range of penalties and sanctions companies are potentially subject to is likely to become increasingly important.

Similarly, in terms of providing greater clarity and coherence to New Zealand's criminal law, it is contended that inclusion in the Sentencing Act 2002 of aggravating and mitigating factors that a Court is required to have regard for specifically in the context of corporations would be beneficial.<sup>223</sup> In this sense, such provisions would also provide acknowledgment of the fundamental differences between companies and natural persons.

## VII. CONCLUSION AND RECOMMENDATIONS

There are serious gaps in the way in which corporate criminal liability is currently attributed to companies in New Zealand. Accordingly, there is a clear need for New Zealand companies to be made subject to a wider, more comprehensive and flexible regime of criminal liability. This could perhaps be detailed within the Crimes Act 1961, or alternatively the Companies Act 1993. Whilst there are dangers associated with emphasising manslaughter prosecutions at the expense of the prosecution of regulatory criminal offences, it is important that any reforms undertaken do not simply constitute 'mere tinkering' with the current regime.

Retention of the identification doctrine or amendment of existing OHS statutes are clearly potential alternatives that remain available. Nevertheless, the significant legal barriers encountered in prosecuting and securing conviction of corporate offenders means that a decision to retain the status quo is likely to be viewed unattractive.

Whilst both the Australian Criminal Code Act 1995 (Cth) and the Canadian C-45 legislative reforms each represent positive developments in the law of corporate criminal liability generally, particularly in terms of their consideration and combination of the aggregation and corporate fault doctrines, blind adoption of any one particular scheme is undesirable should New Zealand decide legislative reform is appropriate. Indeed, as the controversy surrounding the recently published Draft Corporate Manslaughter Bill in England demonstrates, any decision to introduce a separate corporate manslaughter offence must be carefully considered.

The criminality of companies has largely been a neglected topic in New Zealand law. However, notwithstanding the *Meridian* decision, the difficulties inherent in the identification doctrine will almost certainly require that New Zealand give careful consideration to the introduction of a new regime of corporate criminal liability at some future point. Indeed, as Snider argues, the ongoing dialectic process regarding corporate criminal liability will continue to gradually transform society's expectations of what constitutes legitimate corporate behaviour.<sup>224</sup> Through the process the 'price of legitimacy' – the standards of corporate behaviour necessary to secure public acceptance – will be irreversibly raised.<sup>225</sup>

Recent international developments in the evolving ideological climate suggest that corporate conduct that results in serious injury or death is increasingly unlikely to be lightly tolerated.<sup>226</sup> Indeed, explanations that a workplace death is simply the result of misfortune, an 'act of God' or an 'unavoidable accident' are already becoming more tenuous. Whilst steps in the dialectic process

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223 A range of 'aggravating' and 'mitigating' factors are currently specified in ss 8 and 9 of the Sentencing Act 2002.

224 L Snider 'Towards a Political Economy of Reform, Regulation and Corporate Crime' (1997) 9 Law and Policy 37.

225 Friedman, above n 43; Snider, *ibid*.

226 Gobert (2005), above n 173.

generally tend to be small and incremental, a fundamental reassessment of the crimogenic capacity of companies may well prove timely, a redefinition of what constitutes acceptable corporate conduct in turn affecting how company directors and other officials perceive and conceptualise workplace risk.<sup>227</sup>

The 'aggregation' and 'corporate fault' models may well provide a useful framework in attempts to reconceptualise the basis by which corporate criminal liability ought to attach to companies in New Zealand. Nevertheless, regardless of whether the New Zealand legislature elects to pursue general reform of the law of corporate criminal liability and the associated development of a corporate manslaughter offence, how the criminal law's aims of deterrence, retribution and rehabilitation can be furthered in the context of serious corporate wrongdoing is a question that will continue to require much careful consideration. Indeed, as Wells observes:

There is no magic answer to corporate power, to issues of personal safety and their interrelationship with criminal law and justice. For, in truth, this debate tells us more about ourselves as human beings and citizens, with our fears and insecurities, than it does about criminal law.<sup>228</sup>

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227 See Baldwin and Anderson, above n 192.

228 Wells (2001), above n 1 at 168.

# PARLIAMENTARY PRIVILEGE AND THE POLARISATION OF CONSTITUTIONAL DISCOURSE IN NEW ZEALAND

BY GUY FITI SINCLAIR\*

## I. INTRODUCTION

This essay explores two key issues of constitutional significance arising out of a report of the Privileges Committee of the New Zealand House of Representatives, issued in May 2005, entitled *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings* ('the Report'). The first issue concerns the preservation of freedom of speech, in relation to both parliamentary proceedings and public political debate. The second issue concerns the proper constitutional relationship of Parliament to the courts.

In the course of a debate in the House of Representatives in December 1997, Owen Jennings MP alleged (among other things) that the New Zealand Wool Board had arranged sponsorship of a rugby tour so that two senior officials, one from each side of the agreement, 'could continue an indulgence in an illicit relationship'. These allegations received widespread media coverage. Some weeks later, an article in *The Independent* newspaper set out Jennings's allegations and reported that he 'did not resile from his claim about the officials' relationship'.

Roger Buchanan sued Jennings in defamation. Buchanan claimed that Jennings's statement that he did not resile from his claim, as reported in *The Independent*, 'referred to, adopted, repeated and confirmed as true and [were] understood to refer to, adopt, repeat and confirm as true the [earlier parliamentary] statement and subsequent reports of the statement'. Jennings defended the action on the basis of absolute privilege, and argued that no statement he had made outside the House of Representatives founded a cause of action in defamation.

Three judgments in the High Court supported the view that, although absolute privilege barred Buchanan from suing Jennings directly on the basis of his comments in the House of Representatives, Jennings had effectively repeated his defamation outside Parliament and therefore could be sued on the basis of those extra-parliamentary statements.<sup>1</sup> Two further judgments – by the Court of Appeal and the Privy Council<sup>2</sup> – confirmed the decisions in the High Court, and upheld the doctrine of 'effective repetition'.

This essay examines the perhaps surprisingly heated controversy surrounding the judgments in *Buchanan*. In this essay, I do not rehearse all of the arguments put forward in those judgments,

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1 *Buchanan v Jennings* [1999] NZAR 289; [2000] NZAR 113; and [2001] 3 NZLR 71.

2 *Buchanan v Jennings* [2002] 3 NZLR 145 ('*Buchanan (CA)*'); and [2005] 2 All ER 273 (at the Privy Council).

as others have done so at length elsewhere.<sup>3</sup> Suffice it to say that the Court of Appeal majority judgment saw little value in general statements of principle regarding parliamentary privilege. Instead, the Court focussed on the particular words of article 9 of the Bill of Rights 1688 (Imp)<sup>4</sup> – which declares that ‘the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’ – and relied heavily on: ‘its purpose and related principle (even if the particular understanding of both may shift over the centuries), and the actual rulings in, and facts of, the leading cases, as well as the particular facts of the case before the Court.’<sup>5</sup>

Both the Court of Appeal majority and the Privy Council found confirmation for the ‘effective repetition’ doctrine in earlier Australasian cases where defamation proceedings had been founded on non-privileged statements and where the earlier parliamentary record had been called on to complete the non-privileged statement.<sup>6</sup> In contrast Tipping J – the sole dissenter in the Court of Appeal – relied more on passages in earlier cases that emphasised a broader principle of mutual restraint between the courts and Parliament.<sup>7</sup>

Whereas the judgments in the High Court received relatively little attention, the Court of Appeal and Privy Council decisions provoked considerable academic reaction, and the Report itself refers to and at times explicitly draws on the scholarly articles that emerged in the wake of those decisions. In Parts II and III of this essay, I outline the published responses to the Courts’ judgments that appeared in academic journals prior to the Report, and in the Report itself, with particular attention to their treatment of the two key issues described above.<sup>8</sup> At this point in the essay I make some initial comments on the Report’s recommendation, pointing out what I consider to be significant flaws in the drafting of that recommendation.

In Part IV, which focuses on the freedom of speech issue, I offer a broad outline of the theoretical justifications of free speech, some of the problems with each of those various justifications, and the common themes that can be identified in each. In considering the application of theory to practice, I suggest that the Privileges Committee’s treatment of the freedom of speech issue is superficial and short-sighted, taking into account only a limited range of interests and disregarding the Courts’ concerns with maintaining an equilibrium among the various free speech interests in society. Finally, Part V relates the long history of disagreement over the ambit of parliamentary privilege to the broader controversy concerning parliamentary sovereignty.

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3 See, for example, J Burrows and U Cheer, *Media Law in New Zealand* (5th ed, Oxford University Press, Melbourne, 2005) 86-87 and J Allan ‘Parliamentary Privilege: Will the Empire Strike Back?’ (2002) 20 NZULR 205.

4 In force in New Zealand by virtue of the Imperial Laws Application Act 1988 s 3 and sch 1 and the Legislature Act 1908 s 242.

5 *Buchanan* (CA), above n 2, para 50.

6 *Ibid* paras 55-60. The cases were: *Hyams v Peterson* [1991] 3 NZLR 648, *Beitzel v Crabb* [1992] 2 VR 121 and *Laurance v Katter* (1996) 141 ALR 447.

7 In particular, Lord Browne-Wilkinson’s judgment in *Prebble v Television New Zealand* [1995] 1 AC 321 (hereafter, ‘*Prebble*’).

8 Several academic articles have appeared since the publication of the Report, but for the purposes of this essay I concentrate mainly on those that were published before the Report.

## II. ACADEMIC CRITICISM OF *BUCHANAN*

The earliest commentaries on the High Court decisions in *Buchanan* were relatively moderate in tone, and barely even expressed any dissenting views. Professor Joseph's *Constitutional and Administrative Law in New Zealand*,<sup>9</sup> written after the Full Court's review of the strike-out application but before trial, acknowledged that 'effective repetition is an established principle of the law of defamation' but deplored its 'chilling effect' on 'members' freedom of speech through the media'.<sup>10</sup> That effect was simply assumed without either argument or analysis; Joseph did not express any concerns over the implications for freedom of speech in Parliament or the constitutional relationship between Parliament and the courts.

Professor Burrows's review of media law developments in 2001 made no criticism of the decision at all, noting only that there had been a 'deliberateness' about Jennings's reassertion of his parliamentary allegations 'that will not always be present' in other cases.<sup>11</sup> A similar review by Ursula Cheer simply recited the facts and the decision at trial and stated that the High Court thought the case 'clear enough not to have any chilling effect on members of parliament'.<sup>12</sup>

The Court of Appeal decision provoked more of a reaction. The only editorial comment in Rosemary Tobin's half-page note on the Court's decision was that Tipping J's 'careful and closely reasoned dissent ... is to be preferred'.<sup>13</sup> In contrast, however, James Allan's lengthy and highly critical response argued that that decision reduced the scope of parliamentary privilege,<sup>14</sup> and derided the majority's reasoning in relation to the sequence of statements (according to which an 'identifying' statement in Parliament is acceptable after non-specific allegations have been made, but not before). He also reinforced the concern expressed by Tipping J that the majority's decision created uncertainty because it gave no clear rule for determining where 'effective repetition' would take place, and politicians would find it difficult to determine exactly how much they could say in response to journalists' questions. Perhaps worse still, the decision vested too much discretionary power in judges who would decide similar cases.

Allan's article castigated the Court for distinguishing *Prebble* and thus, in his view, 'defeating the very purpose of the doctrine of precedent',<sup>15</sup> and took the Court to task for considering the possibility of abuse of parliamentary privilege without assessing its benefits, a policy consideration which he says is 'unacceptable, indeed unconstitutional'.<sup>16</sup> Allan concluded: 'We should all hope the Privy Council overturns the majority judgment and prefers the dissent of Tipping J.'<sup>17</sup>

In a note on constitutional law,<sup>18</sup> Professor Joseph praised Tipping J's 'substantive assessment' of the issues, and argued that political discourse outside the House of Representatives would be impoverished if Members were unable to contribute to it. Joseph also lamented the majority's disregard for the need 'to avoid the courts from becoming enmeshed in inquiries that might involve

9 P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, Wellington: Brookers Limited, 2001).

10 Ibid 411.

11 J Burrows 'Review: Media Law' [2002] NZ Law Review 217, 222.

12 U Cheer 'New Zealand Media & Arts Law Update – Recent Developments' (2001) 6 MALR 247.

13 R Tobin 'Student Companion – Torts' [2002] NZLJ 326.

14 Allan, above n 3, 205 and 207-210.

15 Ibid 210.

16 Ibid 217.

17 Ibid 219.

18 Joseph 'Constitutional Law' [2003] NZ Law Review 387, at 430.

scrutinising the truth of or motives behind members' statements in debates'.<sup>19</sup> In spite of these 'troubling implications', Joseph concluded rather mildly, saying that it would be 'disappointing' if the Privy Council decision on appeal 'did not address the broader implications of the effective repetition doctrine'.<sup>20</sup>

Another article following the Court of Appeal decision, by the Clerk of the House of Representatives, David McGee,<sup>21</sup> addressed the broader issue of the constitutional relationship between the courts and Parliament in more depth. McGee argued persuasively for the role of parliamentary privilege in conferring autonomy on Parliament and 'effecting a modus vivendi between the legislature and the other two branches of government'.<sup>22</sup> Identifying a set of rules relevant to freedom of speech, he downplayed the significance of article 9 and instead placed high value on the 'wider legal policy of avoiding judicial involvement in parliamentary proceedings'.<sup>23</sup>

Two arguments presented by McGee are noteworthy for their originality. First, McGee argued that parliamentary privilege should be narrowly defined, so that the distinctiveness of parliamentary debate is not eroded and the 'legal incentive to members and witnesses to debate publicly important issues in Parliament' is not lost.<sup>24</sup> McGee therefore expressed little interest in or concern with freedom of speech in public debate, in marked contrast to what appeared to be Joseph's concern with the chilling effect on political speech.

Secondly, McGee argued that the sequence of statements was irrelevant because the issue of freedom of speech was not decisive. In McGee's view, concern with freedom of speech underpinned article 9, but that article did not require proof that freedom of speech had actually been impaired in a particular case: 'That would make art 9 dependent on a case by case judicial assessment of the impact of the use of parliamentary material on freedom of speech. It is not intended that art 9 depends on such a judicial assessment, the legislation determines that it does'.<sup>25</sup> This argument suggests that by linking parliamentary privilege too closely to freedom of speech, the courts are tempted to intervene in particular cases and the broader principle of Parliament-court relations is vitiated. Extrapolating only a little, one might conclude from McGee's comments that freedom of speech, whether within or outside Parliament, should be disregarded as a basis for absolute privilege.

Three academic pieces in 2004 responded to the Privy Council judgment. Firstly, a new edition of Professor Burrows's text on media law<sup>26</sup> described the case and the decision in some depth, but contained little commentary, other than noting that the judgment included 'a long and compelling dissent from Tipping J'<sup>27</sup> and suggesting that the case was one of a series that 'indicate a steady undermining of parliamentary privilege'.<sup>28</sup>

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19 Ibid 430-431.

20 Ibid 432.

21 D McGee 'The Scope of Parliamentary Privilege' [2004] NZLJ 84.

22 Ibid 84.

23 Ibid 85.

24 Ibid 85.

25 Ibid 88.

26 Burrows and Cheer, above n 3 at 86-88.

27 Ibid 87.

28 Ibid 87.

Another media law review by Burrows in the same year went further in describing the judgment as ‘less than satisfactory’, and again expressed concern that the outcome would affect freedom of speech in public.<sup>29</sup>

Finally, an article by Andrew Geddis<sup>30</sup> described the courts’ task in defining parliamentary privilege as ‘somewhat fraught’.<sup>31</sup> Referring to an ‘ongoing constitutional minuet’ involving the courts and Parliament, he argued that the courts’ concern in each case is to guard individual rights against possible abuses of power by institutions.<sup>32</sup> In particular, he acknowledged the Court’s concern for ‘the reputational rights of individual citizens’ and observed that ‘the Court in each instance cabins, or restricts, the ambit of [parliamentary] privilege so as to “let the Courts do their job”’.<sup>33</sup> While noting that some doubt remains about when an effective repetition will arise, he appeared to have some sympathy for the view that ‘an MP who publicly continues to raise false accusations outside of the House, even if only obliquely, should have to account in Court to the citizen they have thereby harmed’.<sup>34</sup>

In summary, the critical commentary published prior to the Report focussed broadly on the two key issues, but differed in emphasis. Joseph’s – and to a lesser extent Burrows’s – primary interest, for example, appeared to be the chilling effect of the courts’ decisions on freedom of expression in public political debate. On the other hand, McGee downplayed freedom of speech concerns and instead emphasised the importance of ensuring that judges do not stray into the proper sphere of Parliament. Tipping J’s judgment and several of the academic pieces demonstrated concern for both key issues, as well as a preference for straight-forward principles that could be easily applied.

### III. THE PRIVILEGES COMMITTEE’S REPORT

#### A. *Academic Input to the Committee*

In the Report, the Committee refers to three of the scholarly contributions outlined above that criticised the Court of Appeal and Privy Council decisions.<sup>35</sup> The Committee also acknowledges having met with and received advice from four individuals who had already published scholarly commentary on *Buchanan*: the Clerk of the House of Representatives, and three academics – Burrows, Joseph and Geddis.<sup>36</sup>

29 J Burrows ‘Review: Media Law’ [2004] NZ Law Review 787, 790.

30 A Geddis ‘Privilege, Parliament, and the Courts’ [2004] NZLJ 302. Geddis has written two more articles touching on this subject, both after the Report, and therefore not considered in this part of the essay. The articles are: ‘Comments – Defining the Ambit of the Free Speech Privilege in New Zealand’s Parliament’ (2005) 16 PLR 5 (12-17) and ‘Parliamentary Privilege: *Quis Custodiet Ipsos Custodes?*’ [2005] PL 696. Other recent articles commenting on *Buchanan* and effective repetition include: U Cheer ‘New Zealand Media Law’ (2005) 10 MALR 325; P Joseph ‘Scorecard on our Public Jurisprudence’ (2005) 3 NZJPIL 223; and M Hollard ‘Members of Parliament and defamation’ (2005) 86 Parliamentarian 260.

31 Geddis ‘Privilege, Parliament’, above n 30, 302.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 Page 4 of the Report. The three articles are: Allan, above n 3; Joseph, above n 18; and McGee, above n 21.

36 Named in Appendix A to the Report.

The notes of the latter three are appended to the Report.<sup>37</sup> Burrows's notes are consistent with his earlier published comments; his main concern continues to be freedom of speech in public, for witnesses and the media as well as for Members of Parliament. Burrows comments that witnesses in particular 'may be dangerously ready to be interviewed about submissions they have made which may be critical of some person';<sup>38</sup> journalists and politicians alike will be likely to err on the side of caution. His rather equivocal comment that the Privy Council's decision 'appears to infringe parliamentary privilege'<sup>39</sup> seems to indicate that he does not regard constitutional relationships to be particularly threatened by the decision.

Joseph's notes appear rather more definitive and assertive than his earlier comments on the case. He briefly addresses both key issues, noting that the effective repetition principle 'represents a departure from the absolute privilege of parliamentary free speech' and 'infringes the Article 9 prohibition' insofar as it requires 'questioning' of proceedings in Parliament.<sup>40</sup> He also refers again to the 'corrosive effect' of the effective repetition principle on public political speech by politicians.<sup>41</sup>

Geddis also appears to be more willing than before to criticise the Privy Council's decision.<sup>42</sup> He suggests that the decision 'reduced the scope of article 9 to a policy that participants only need remain free to speak in an uninhibited fashion while directly involved in the proceedings of Parliament'<sup>43</sup> and says that the effective repetition doctrine is built on a 'fiction'.<sup>44</sup> Like Joseph, he appeals to the 'reality of our media society' and argues that complete silence is not a realistic option for individuals who are called on to defend their parliamentary statements.

### *B. The Key Issues in the Report*

A close reading of the Report suggests that the Privileges Committee was above all concerned with the ability of Members of Parliament to speak to the media about their parliamentary statements without fear of legal action. Under the heading 'Chilling effect on public debate', the Committee warns that media will become cautious about following up and challenging parliamentary statements, and argues that Members of Parliament and witnesses will be 'reluctant to submit themselves to subsequent interview for fear of losing their parliamentary immunity. This would be so even if they were prepared to modify, clarify or restrict their parliamentary statement ... It is hard to see how this promotes the public interest in facilitating discussion of public affairs'.<sup>45</sup>

Even under the heading 'Effect on free speech itself', where the Report begins to discuss the impact of the Privy Council's decision on the contributions of participants to parliamentary proceedings, it notes that the media and the public expect Members who say something controversial in Parliament to 'respond, at least minimally, in an interview'.<sup>46</sup> Finally, in its brief 'Conclusions', the Committee again returns to this theme, reporting that 'Members are being challenged in media

37 As Appendices C, D and E respectively.

38 Report 14.

39 Ibid 13.

40 Ibid 17.

41 Ibid 18.

42 Geddis 'Comments', above n 30, expands on the arguments set out in his notes.

43 Report 26.

44 Ibid 27.

45 Ibid 5-6.

46 Ibid 5.

interviews in terms directly derived from the “effective repetition” principle’, and arguing that ‘[u]nless public debate is to be stymied, this must be addressed’.<sup>47</sup>

The Committee’s principal concern appears to be shared by other Members of Parliament. Of the ten who spoke to the Report in a parliamentary debate on 1 June 2005, eight mentioned their concerns with the effect of the *Buchanan v Jennings* ruling on freedom of speech in public, five specifically mentioned the difficulties that arise when Members are questioned by the media concerning their parliamentary statements, and only two spoke against the Report.<sup>48</sup> The parliamentary vote was 105-13 in favour of taking note of the Report. Perhaps most tellingly, Russell Fairbrother MP made the following statement:

Of course, every time a member of Parliament is engaged by the media, every person who votes tries to make an assessment on the veracity or reliability of that member. If that then puts a member in the position whereby he or she prevaricates, or tries to avoid the issue, that member is in the very difficult position of having made a statement that he or she believes should be made in the House but that can then reflect badly on his or her public persona outside the House.<sup>49</sup>

### C. *The Recommendation*

In addition to commenting generally on the Privy Council’s decision, it is apparent that the three academics who assisted the Committee were also invited to consider possible legislative responses. Both Joseph<sup>50</sup> and Geddis<sup>51</sup> suggested that the Legislature Act 1908 could be amended. Joseph suggested that the Act could be amended to state: ‘No person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statements would not, but for the proceedings in Parliament, give rise to criminal or civil liability’.

Joseph’s wording was adopted without amendment by the Committee, and constitutes the Committee’s recommendation. However, it is worth noting the tentative tone of Joseph’s recommendation: he says that a ‘general amendment to the Legislature Act 1908 *may* be preferable than [sic] simply amending the Defamation Act 1992’<sup>52</sup> and that his draft provision ‘*might* provide a suitable override to negate the [effective repetition] principle’<sup>53</sup> (emphasis added to both quotations).

The dangers inherent in legal drafting may explain the other two experts’ reluctance to offer specific wording. In his notes, Burrows does not even mention the possibility of amending the Legislature Act, instead recommending that the narrowest solution – an amendment to the Defamation Act – be adopted.<sup>54</sup> In Burrows’s view, this approach is preferable for three reasons; it would be the easiest to draft, the easiest to pass, and – most significantly – because it would make ‘the least inroads into established principle’.<sup>55</sup>

47 Ibid 9.

48 New Zealand House of Representatives Parliamentary Debates (Hansard), First Session, Forty-Seventh Parliament, 2002-2005, Wednesday 1 June 2005 (for inclusion in Volume 626), 20890-20910.

49 Ibid 20904.

50 Report 18-19.

51 Ibid 29.

52 Ibid 18.

53 Ibid 19.

54 Ibid 15.

55 Ibid 16.

#### D. *Some Initial Comments on the Recommendation*

How effective, then, is the legislative amendment recommended by the Committee? Undoubtedly it would act as a bar to criminal and civil liability arising from the 'effective repetition' of parliamentary statements outside Parliament. However, several problematic features may be noted at the outset.

First, it is arguable that if the intention is to negate the doctrine of effective repetition entirely, then the wording does not go far enough. The Report itself expresses concern that the principle of effective repetition may extend to words spoken under the protection of absolute privilege in court proceedings.<sup>56</sup> Nevertheless, the recommendation refers only to 'words written or spoken in proceedings in Parliament'; if enacted, it would therefore not prevent courts from continuing to develop the principle of effective repetition altogether.

Secondly, the recommendation, if enacted, would not have the presumed effect of conferring credibility on Members' extra-parliamentary comments on issues raised in Parliament. A retired judge of the Court of Appeal has described the Committee's recommendation as aiming to spare MPs who are interviewed outside Parliament 'the personal embarrassment of having to decline to comment when they are not prepared to be held legally accountable for that they have said in Parliament'.<sup>57</sup> According to this argument, the only way the public is able to assess the true convictions of a Member is if she fully repeats her parliamentary statements outside Parliament, thus exposing herself to an action in defamation. However, if statements that effectively repeat the defamation outside Parliament (without actually repeating the defamatory 'sting') are to be protected by absolute privilege, then the public will come to know this and will give exactly the same weight to those statements as to the original statements made in Parliament. It is difficult to see how the recommendation would help the public to hold Members to account for their parliamentary statements.

Thirdly, the proposed amendment to the Legislature Act would easily give rise to abuses. If the amendment were enacted, a journalist could, in an interview with a Member of Parliament, read extract after extract of defamatory statements made in Parliament by that Member, and it would be perfectly permissible for the Member to repeatedly affirm, endorse and adopt those statements. The Court of Appeal majority described precisely this scenario as a policy consideration supporting their decision to follow the Australian cases on effective repetition.<sup>58</sup>

Allowing that the Privileges Committee took this possibility of abuse into consideration, the proposed wording is still too permissive with respect to *who* would be allowed to effectively repeat a privileged statement outside Parliament. The recommendation allows *any* person – not just the individual who spoke or wrote the original words in Parliament – to affirm, adopt or endorse those words. Conceivably, then, a newspaper journalist would be permitted to quote a parliamentary speech at length, no matter how defamatory (this is already protected by qualified privilege), and immediately afterwards affirm that the words quoted are true. It is not difficult to see how this could give rise to the most egregious abuses.

A related concern is that if such abuses did arise, Parliament may feel the need to intervene and discipline the offender for breach of privilege. Such action would have the unfortunate conse-

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56 Ibid 6.

57 Rt Hon T Thomas 'Extended Privilege Wrong Both in Principle and Law' *New Zealand Herald* (9 June 2005) A.15.

58 *Buchanan* (CA), above n 2, para 62.

quence of bringing Parliament's disciplinary powers into potential conflict with the proper sphere of the judiciary.

Finally, the proposed wording would not necessarily remove parliamentary privilege out of the Courts' reach. The enactment of the proposed clause would, like any legislative provision, require the Courts' interpretation. For example, the phrase 'proceedings in Parliament' would need to be interpreted by the courts.<sup>59</sup> If the Committee hopes to re-establish a *modus operandi* of 'mutual restraint' between the courts and Parliament, then, it may be well advised to reconsider its recommendation.

The Report, its analysis and its recommendation are problematic for other, more fundamental reasons. The next two Parts of this essay delve more deeply into the theoretical foundations of the two key issues, and the controversies currently surrounding them, in an effort to reveal how and why the Report raises more questions than it answers.

#### IV. FIRST KEY ISSUE: FREEDOM OF SPEECH

##### A. *Free Speech Justifications*

For all of the academic and political references to the importance of freedom of speech and expression that are surveyed in Parts II and III of this essay, it is remarkable that none of them undertake more than a highly cursory discussion of *why* that freedom is important or even justified. For most of those concerned, it seems, the importance of freedom of speech was not in dispute, and therefore did not require justification. It is true that in most cases the application of a free speech principle will probably not turn on how we choose to justify that principle.<sup>60</sup> Nevertheless, I would suggest that there are occasions on which our rationales for freedom of speech do have consequences for how that freedom is applied and understood in a particular case.

##### 1. *Three free speech justifications*

The most commonly articulated freedom of speech arguments rely on the value of free speech in enabling the discovery of truth, full participation in democratic society and individual self-fulfilment.<sup>61</sup> Other justifications have been attempted, but most appear to be variations on these themes. Of the three, the argument from truth, which has been identified especially with JS Mill,<sup>62</sup> is 'the predominant and most persevering',<sup>63</sup> but has taken a variety of forms. Mill himself constructed a utilitarian argument based on an objective distinction between falsity and truth, claiming that false speech of all kinds should be permitted because it ensured that the ability to defend the truth would not decline.<sup>64</sup> American judges have supported freedom of speech on the basis that a free market in ideas would allow the best ideas to emerge.<sup>65</sup> Another variation on the argument from

<sup>59</sup> This phrase is undefined in the Bill of Rights 1688, the Legislature Act 1908 and the Interpretation Act 1999.

<sup>60</sup> G Marshall 'Press Freedom and Free Speech Theory' [1992] PL 40, 47.

<sup>61</sup> E Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press, 2005) treats these as the three principal arguments for freedom of speech.

<sup>62</sup> *Ibid* 7.

<sup>63</sup> F Schauer, *Free Speech* (Cambridge: Cambridge University Press, 1982) 15.

<sup>64</sup> Barendt, above n 61, 9.

<sup>65</sup> *Ibid* 11.

truth begins from the premise that truth is an 'autonomous and fundamental good' whether or not it has utilitarian value, and freedom of speech is a necessary condition for that good to flourish.<sup>66</sup>

The argument from democracy assumes, of course, that liberal democratic principles are generally accepted and applied.<sup>67</sup> In a democratic society, the argument goes, freedom of speech ensures that the electorate has all the information it needs to exercise to engage in democratic processes and thus enables the ideals of popular sovereignty and democratic self-government to be realised.<sup>68</sup> Free speech also helps to keep government officials accountable.<sup>69</sup> In this sense, the argument from democracy relates to the idea that free speech can be a check on the abuse of authority, as officials are less likely commit such abuses if they believe that their wrongs may be publicly exposed.<sup>70</sup> The arguments from democracy and truth are thus closely related.<sup>71</sup> Another argument, based on the inherent value of diversity arising from individual differences, has elements in common with the argument from truth<sup>72</sup> and may be related to the liberal democratic idea that freedom of speech is necessary to ensure that competing interests and desires are accommodated.<sup>73</sup>

The argument from individual self-fulfilment, in turn, is closely related to both of the preceding arguments. Freedom of speech enables both intellectual self-development and provides the conditions for individuation, individual freedom and individual choice – all liberal democratic ideas.<sup>74</sup> From a deontological rather than utilitarian point of view, the universal human right to dignity requires freedom of speech, and restrictions on that freedom inhibit the growth of individual personality.<sup>75</sup> Free speech is thus itself an integral part of human nature and self-realisation, quite apart from any other benefits it may supply to the individual.<sup>76</sup> A related rights-based argument is that government should always treat people as if they are rational and autonomous, which demands that full information is available so that individuals can make rational and autonomous decisions.<sup>77</sup>

## 2. *Problems with the free speech justifications*

Each of the justifications for free speech outlined above is problematic in one way or another. For example, the argument from truth may mistakenly assume a prevalence of reason among humanity, and that truth has an 'inherent ability to gain general acceptance'.<sup>78</sup> Certain forms of the argument are circular, as they posit that an open marketplace of ideas promotes truth, yet simultaneously define truth as whatever survives that marketplace.<sup>79</sup> Most significantly perhaps, these forms

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66 Ibid 7.

67 Schauer, above n 63, 36.

68 C R Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) xvii and xx.

69 K Greenawalt 'Free Speech Justifications' (1989) 89 Colum L Rev 119, 143.

70 Ibid 143.

71 TRS Allan 'Common Law Constitutionalism and Freedom of Speech' in Jack Beatson and Yvonne Cripps, *Freedom of Expression and Freedom of Information* (Oxford: Oxford University Press, Oxford, 2000) 17.

72 Schauer, above n 63, 66.

73 Greenawalt, above n 69, 141.

74 Schauer, above n 63, 62.

75 Barendt, above n 61, 13.

76 Schauer, above n 63, 48.

77 Greenawalt, above n 69, 150. Also see Richard H Fallon 'Two Senses of Autonomy' (1994) 46 Stan L Rev 875 for a classification of two different kinds of autonomy.

78 Schauer, above n 63, 26.

79 Ibid 19-20.

of the argument from truth disregard asymmetries in market access; the marketplace of ideas is 'skewed to afford status quo views greater opportunity for public exposure and acceptance'.<sup>80</sup>

On closer examination, the argument from democracy is similarly problematic. One problem is the paradox that a democratically-elected and sovereign Parliament can enact legislation to restrict freedom of speech.<sup>81</sup> It is arguable that the rights of citizens to participate in representative and participative democratic processes are 'so fundamental that [they] cannot be surrendered to the powers of the elected majority'.<sup>82</sup> Another awkward anomaly is that it is sometimes necessary to suppress free speech in order to preserve the values of democracy – for example, by enacting laws to restrict hate speech or incitement to violence.<sup>83</sup> Most theorists allow that freedom of speech is not absolute, but disagree on exactly where to draw the line. Finally, versions of the argument from democracy often beg the question whether freedom of speech is an inherent human right; if free speech is fundamental to democratic society, is it conversely unimportant or unjustified in a non-democratic society?

### 3. *Distrust of authority – a golden thread?*

Despite these disagreements around the fringes, the ideal of freedom of speech persists and is frequently invoked by more than one party to a dispute (as we have seen in *Buchanan v Jennings*). Greenawalt describes a 'subtle plurality of values that ... govern[s] the practice of freedom of speech'<sup>84</sup> and has argued that the free speech does not in practice 'depend on a single systematic version of liberal political theory'.<sup>85</sup> Each of the arguments for freedom of speech may apply to a greater or lesser extent in different circumstances, and sometimes in conflicting ways. However, Schauer identifies as a golden thread running through them all the idea of the separation between individuals and government, based in large part on;<sup>86</sup> 'distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense'.

As an overarching principle, distrust of authority appears to be overly negative,<sup>87</sup> and probably does not give enough weight to individual fulfilment. Nevertheless, Schauer's 'argument from governmental incompetence'<sup>88</sup> provides a useful starting point when specific cases arise involving freedom of speech. Although each of the justifications cannot alone provide guidance to resolve specific cases, consideration of their various perspectives can help to 'delineate what interferences with expression are most worrisome and that operate as counters, sometimes powerful ones, in favour of freedom'.<sup>89</sup>

In cases involving parliamentary privilege, then, first principles might suggest that we should give attention to power imbalances between parliamentarians and individual members of society.

80 S Ingber 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke LJ 1, 48.

81 Schauer, above n 63, 40.

82 Barendt, above n 61, 19.

83 See the essays in D Kretzmer and F Kershman Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague: Kluwer Law International, 2000).

84 Greenawalt, above n 69, 119.

85 Ibid 123.

86 Schauer, above n 63, 86.

87 Ian Cram, *A Virtue Less Cloistered* (Portland, Oregon: Hart Publishing, 2002) 19-20.

88 Schauer, above n 63, 86.

89 Greenawalt, above n 69, 154.

The greater access to media enjoyed by the former – even setting aside parliamentary privilege – should arouse our suspicions. Applying the ‘argument from distrust’, we should ask whether absolute privilege gives too much power to parliamentarians; whether it puts individual rights at risk; and whether a report by a parliamentary committee on privilege is too self-interested to be trusted. In a forthcoming article, Andrew Geddis acknowledges that unlike Parliament the courts focus above all on preventing privilege from ‘becoming a shield for the abuse of an individual right by institutional power’.<sup>90</sup> However, he argues that these factors prevent the courts from taking a wider view, and he argues that Parliament is better suited to taking into account ‘wider structural concerns’ such as the ‘possible flow-on consequences’ of a particular decision.<sup>91</sup>

It would be too simplistic to end our inquiry here. As the Privy Council noted in *Buchanan v Jennings*, the law places a number of limits on freedom of speech that impact on the power imbalances described above.<sup>92</sup> One such limit consists in the law of defamation.

### B. Freedom of Speech and Defamation

Despite the Privy Council affirming it to be so,<sup>93</sup> it is not self-evident that the law of defamation in New Zealand is a ‘reasonable limit’ on freedom of speech. Although perhaps less so than in England, defamation law in New Zealand is relatively plaintiff-friendly; for example, the defence of honest opinion (equivalent to ‘fair comment’) is not destroyed by malice,<sup>94</sup> but untrue allegations of fact are nonetheless unprotected.<sup>95</sup> One text on rights and freedoms in New Zealand describes defamation law as establishing extensive limitations on freedom of expression,<sup>96</sup> and calls for reform to that law, concluding that ‘the [l]aw’s strong preference for personal reputations can no longer be maintained’.<sup>97</sup>

By way of comparison, freedom of speech is much more highly valued under American law.<sup>98</sup> From *New York Times v Sullivan*<sup>99</sup> onwards, the law in the United States has provided a broad qualified privilege for any criticism of politicians, government officials and other public figures. In contrast to the position under English common law, defamatory speech directed against a public figure in the United States will only incur damages liability if the speaker had actual knowledge that the speech was false, or was recklessly indifferent to its truth or falsity. A second, less ‘speech-protective’ rule applies to suits brought by people who are not public figures; in such cases, knowledge of falsity or recklessness as to falsity need not be demonstrated.<sup>100</sup>

In a fascinating treatment of the subject, Frederick Schauer examines the differences between English and United States defamation law at the time (1980). He argues that the American ap-

90 Geddis ‘Parliamentary privilege’, above n 30, 705.

91 Ibid.

92 *Buchanan* (PC), above n 2, para 6.

93 Ibid.

94 Burrows and Cheer, above n 3, 143.

95 Ibid 132-135.

96 G Huscroft ‘Defamation, Racial Disharmony, and Freedom of Expression’ in G Huscroft and P Rishworth (eds), *Rights and Freedoms* (Wellington: Brookers Limited, 1995) chapter 5, 176.

97 Ibid 191.

98 Ibid 174.

99 376 US 254 (1964) (*Sullivan*).

100 Sunstein, above n 68, 9-10.

proach is 'rather more behavioural';<sup>101</sup> it recognises that social commentators exercise self-censorship because they know that judicial determinations of factual truth or falsity are sometimes wrong, and therefore 'a rule penalizing factual falsity may penalize truth'.<sup>102</sup> The American law takes into account the reality that publishers of criticism may not always be able 'to verify every statement to a demonstrable certainty',<sup>103</sup> and it also recognises that litigation is both expensive and inconvenient, thus magnifying the deterrent effect, 'because a publisher may be effectively penalized even if he ultimately prevails in the legal system'.<sup>104</sup> In contrast, the English defence of fair comment appears to ignore or minimise the danger of self-censorship. Schauer concludes that, under the *Sullivan* rule, '[f]alsity is not protected because it has any value. It is protected because, in an imperfect world, it is the only way to protect truth from self-censorship'.<sup>105</sup>

The United States law of defamation is certainly more consistent with the argument from democracy than the corresponding law in England. According to Schauer, the differences between defamation law in the United States and England may be explained by the social observation that United States politics focuses more on individuals and personalities whereas politics in England focuses more on questions of policy.<sup>106</sup> The American law also reflects the traditionally important role of the press in resolving public issues, while English law reflects the high value placed on individual reputation and privacy.<sup>107</sup> Following the same reasoning, one might venture that the New Zealand law of defamation, sitting as it does somewhere between the two, points towards a political culture that contains elements in common with both.

As we have seen, McGee argued that absolute privilege should be narrowly circumscribed so as to ensure that the value of parliamentary debate is not compromised. However, there is also as persuasive an argument to be made in favour of extending the protection of absolute privilege to ordinary citizens engaged in public political discourse.<sup>108</sup> Less radically, at least one person has argued that section 14 (concerning 'freedom of expression') of the New Zealand Bill of Rights Act 1990 supports the idea that the law of defamation should be modified in this country to provide a qualified privilege for defamation of public figures such as in the United States.<sup>109</sup> The Court of Appeal's decisions in *Lange v Atkinson*<sup>110</sup> come closer than ever before in doing this,<sup>111</sup> and may indicate a gradual movement towards the United States position, perhaps influenced by the American dominance of free speech theory.<sup>112</sup>

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101 Schauer 'Social Foundations of the Law of Defamation A Comparative Analysis' (1980) 1 *Journal of Media Law and Practice* 3, 10.

102 *Ibid.*

103 *Ibid.* 11.

104 *Ibid.*

105 *Ibid.*

106 *Ibid.* 15.

107 *Ibid.* 18.

108 Barendt, above n 61, 201.

109 M Harris 'Sharing the Privilege: Parliamentarians, Defamation, and Bills of Rights' (1996) 8 *AULR* 45.

110 [1998] 3 *NZLR* 424 and [2000] 3 *NZLR* 385.

111 See Burrows and Cheer, above n 3, 96-97.

112 See I Loveland 'A Free Trade in Ideas – and Outcomes' in Ian Loveland (ed), *Importing the First Amendment* (Oxford: Hart Publishing, 1998) 1-21.

### C. *Freedom of Speech in Parliament*

It was not disputed at any level of *Buchanan v Jennings* that absolute privilege is necessary to enable Parliament, its members and officials to carry out their functions effectively. The United Kingdom Parliament's Joint Committee on Parliamentary Privilege ('the UK Joint Committee') articulated this necessity in its 1999 report<sup>113</sup> when it described freedom of speech as 'central to Parliament's role'.<sup>114</sup> According to the UK Joint Committee, without the protection of absolute privilege 'the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of its citizens would be ... diminished'.<sup>115</sup> Acknowledging the need for absolute privilege – and even agreeing on the basis for privilege – does not, of course, guarantee agreement on the extent of that privilege. The UK Joint Committee sought to clarify the boundaries of the article 9 immunity,<sup>116</sup> and said that Parliament should be 'vigorous in discarding rights and immunities not strictly necessary for its effective functioning in today's conditions'.<sup>117</sup>

Two academic responses to *Prebble* argued that absolute privilege should be restricted beyond what the Privy Council judgment in that case had ruled. Concerned that the defendant in that defamation action had not been permitted to refer in its defence to statements made in Parliament by the plaintiff MP, Geoffrey Marshall argued that parliamentary privilege should not be used to trump freedom of speech concerns.<sup>118</sup> He suggested that the historical motivation of article 9 had become confused with other concerns, and proposed that: 'The freedom of debate is sufficiently protected if members enjoy absolute privilege from criminal and civil actions directed at what they say in the course of debate or proceedings in the House. There is no need to inflate claims of privileges beyond that'.<sup>119</sup>

A second academic critique of *Prebble* went even further. Drawing explicitly on the argument from democracy, Loveland and Sharland supported the principle that 'judicial interpretation should be guided by the principle of enhancing rather than restricting the public's right to disseminate and receive political information'.<sup>120</sup> On these grounds, they argued that parliamentary proceedings should attract only a qualified privilege, similar to that articulated in *Sullivan*, such that Members would be held liable for defamatory statements made in Parliament if they deliberately or recklessly publicised untrue facts. In their view, absolute privilege actually had a chilling effect on freedom of speech, because some people 'might hesitate to engage in political controversies if their arguments and assertions could not compete on equal terms with those disseminated by officials under the cloak of privilege'.<sup>121</sup> On the other hand, applying qualified privilege would only prevent 'robust and spirited debate and inquiry' in Parliament to the extent that it encouraged

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113 United Kingdom Joint Committee on Parliamentary Privilege *Parliamentary Privilege – First Report* (March 1999) available at <[www.publications.parliament.uk](http://www.publications.parliament.uk)> (at 16 November 2005).

114 *Ibid* para 12.

115 *Ibid* para 3.

116 *Ibid* 'Executive Summary'.

117 *Ibid* para 4.

118 G Marshall 'Impugning Parliamentary Impunity' [1994] PL 509, 512.

119 *Ibid* 513.

120 I Loveland and A Sharland 'Absolutely fatuous: defamation of MPs, freedom of speech and Article 9 of the Bill of Rights – Part II' (1997) 2 Communications Law 24, 28.

121 *Ibid* 26.

Members 'to ensure that they had some plausible basis for believing the information with which they seek to sway out political judgment to be true'.<sup>122</sup>

#### *D. Reflections on Freedom of Speech and the Report*

The critiques and alternative approaches to parliamentary privilege mentioned above remind us of yet another 'balance' that the courts try to maintain. Any particular case will probably involve a variety of free speech interests, and these interests will often come into conflict with each other. In his text on freedom of speech, Eric Barendt offers an approach to analysis of the justifications for free speech based on an exploration of different interests involved; the speaker, the audience, and the public.<sup>123</sup> Although the speaker's interests may intuitively seem to be the most important,<sup>124</sup> other interests may be just as significant where parliamentary privilege is concerned. Indeed, the values of truth and democracy both arguably require an approach to privilege that gives priority to the public's interests over those of the individual Member and Parliament collectively, so that citizens are collectively able to reach informed decisions about their elected representatives.<sup>125</sup>

Returning to the criticisms surveyed in Parts II and III of this essay, it is remarkable that none of them considered this aspect. The Report itself focuses primarily on the interests of the speaker – Members of Parliament and parliamentary witnesses – and to a lesser extent on the interests of the media and the public, but only insofar they act as an 'audience' to the pronouncements of parliamentary participants. In fact, the Privileges Committee's discussion of freedom of speech in public entirely ignores two factors: firstly, that members of the public are themselves engaged in public debate; and secondly, that the interests of the public include the interests of individual members of the public who may be defamed by parliamentary speakers. Already, some members of the public may be discouraged from such participation if they feel that any parliamentarian with whom they disagree can attack them from behind the shield of absolute privilege; any such discouragement will be exacerbated if the parliamentarian is also permitted effectively to carry that privilege into the public arena. In short, great care must be taken to ensure that all the conditions of effective democracy are maintained.

I would not go so far as to replace parliamentary privilege with qualified privilege. However, I do consider that the Report's view of freedom of speech is both blinkered and myopic. It is blinkered because it takes into account only a limited range of interests. It is myopic because it does not anticipate the most likely outcome of its recommendation in the long term; that the courts' decisions in future cases will readjust the balance of interests between politicians and other public officials, the public as a whole and defamed individuals. Such a readjustment may well have the result of allowing greater criticism of Members of Parliament in the course of public political debate.

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122 Ibid 28-29.

123 Barendt, above n 61, 23.

124 Ibid 23.

125 I Loveland and A Sharland 'The Defamation Act 1996 and Political Libels' [1997] PL 113, 120.

## V. SECOND KEY ISSUE: THE CONSTITUTIONAL RELATIONSHIP OF PARLIAMENT TO THE COURTS

### *A. Border Skirmishes: Exclusive Cognisance and Mutual Restraint*

According to Tipping J's dissent in the Court of Appeal, the dominant principle with respect to parliamentary privilege is that certain matters fall within Parliament's exclusive sphere of jurisdiction, and that the courts should exercise restraint to ensure that their proceedings do not stray into that sphere.<sup>126</sup> This principle of 'exclusive cognisance' is widely supported. The UK Joint Committee describes freedom of speech as only 'one facet of the broader principle that what happens within Parliament is a matter for control by Parliament alone',<sup>127</sup> and states that the courts have 'a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and immunities' but no 'power to regulate and control how Parliament shall conduct its business'.<sup>128</sup>

The same principle is often expressed as 'mutual restraint'. The UK Joint Committee thus reports that, for its part, Parliament 'is careful not to interfere with the way judges discharge their judicial responsibilities'.<sup>129</sup> Patricia Leopold ascribes the absence of any significant dispute between the legislature and judiciary for the past 150 years to 'a mutual respect and understanding of each other's rights and privileges'.<sup>130</sup> Professor Joseph's leading text on constitutional and administrative law in New Zealand describes the present relationship between the courts and Parliament as 'one of comity and mutual forbearance and restraint', in which each 'is astute not to trench on the autonomy and sphere of action of the other'.<sup>131</sup>

These statements of principle give little sense of any ongoing tensions between the two branches of government. But there are reasons to doubt that the depiction of mature equilibrium found in these accounts is entirely credible. First, the 'mutual respect' described above looks decidedly lop-sided: Leopold notes that the Courts' decisions have generally been favourable to Parliament, enlarging the definition of 'proceedings in Parliament', and that the courts have deliberately 'excluded a variety of matters from their [own] jurisdiction'.<sup>132</sup> Secondly, a more nuanced picture emerges from a closer examination of the relationship between Parliament and the courts over the past several hundred years.

Erskine May describes an ongoing conflict between the courts and Parliament, starting in the early seventeenth century when the major source of disagreement concerned whether the *lex parliamenti* was part of common law such that courts could judge it.<sup>133</sup> During the nineteenth century, judges came to regard the law of Parliament as part of the common law, and therefore 'wholly within their judicial notice'; nevertheless, a sphere remained in which the jurisdiction of the

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126 *Buchanan* (CA), above n 2, para 167.

127 United Kingdom Joint Committee on Parliamentary Privilege, above n 113, 'Executive Summary'.

128 *Ibid* para 23.

129 United Kingdom Joint Committee on Parliamentary Privilege, above n 113, para 23.

130 P Leopold "'Proceedings in Parliament": the Grey Area' [1990] PL 475, 476.

131 Joseph, above n 9, 392.

132 Leopold, above n 130, 476.

133 W McKay (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed, LexisNexis UK, London 2004) 176 and 178-183.

House of Commons was absolute and exclusive.<sup>134</sup> This period included the ‘last serious clash’<sup>135</sup> between Parliament and the courts – over the case of *Stockdale v Hansard*,<sup>136</sup> which involved an attempt by the House of Commons to assert that its resolutions had the force of law.<sup>137</sup> This and other cases from the same period demonstrated that judges at the time ‘were prepared, when necessary, to adopt a robust approach if they felt Parliament had overstepped the mark and to express their views forcefully’.<sup>138</sup>

By the mid-twentieth century, judges had developed a certain deference to Parliament, and appeared generally to have taken the view that a matter is outside the jurisdiction of the courts when it is clearly a proceeding of Parliament, but uncertainty remained about where that line should be drawn.<sup>139</sup> Through most of the twentieth century, the conflict remained dormant as relatively few cases required the courts to decide on where the border lay between their own jurisdiction and that of Parliament.<sup>140</sup> A major crisis almost erupted in 1958 when a parliamentary committee concluded that certain correspondence had constituted a ‘proceeding in Parliament’.<sup>141</sup> Fortunately, that finding was overruled by the House of Commons after voluntarily seeking an opinion on the issue from the Privy Council.<sup>142</sup>

Finally, in an increasing number of cases concerning parliamentary privilege towards the end of the twentieth century, the courts began to give greater emphasis to the rights of individuals, balanced against a continuing desire to avoid outright conflict with Parliament.<sup>143</sup> Commenting on a ‘grey area’ of ‘proceedings in parliament’, Leopold observed evidence ‘that some judges are willing to take a more robust line against claims of privilege which appear to restrict the access of citizens to the courts’.<sup>144</sup>

What emerges from this narrative, then, is an ongoing dialectic regarding parliamentary privilege that is multi-dimensional and dynamic; guided by certain principles to be fair, but nevertheless far from being a settled order. If intermittent disputes over the precise boundaries of parliamentary privilege are in a sense the border skirmishes of constitutional law, then the past two decades have witnessed the development of a much more fundamental conflict over the nature and validity of the doctrine of parliamentary sovereignty. In what follows, I want to draw linkages between the two disputes, and to situate the disagreement over the outcome in *Buchanan v Jennings* in relation to the larger conflict, which stretches beyond the shores of New Zealand jurisprudence.

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134 Ibid 176 and 183-188.

135 G F Lock ‘Parliamentary Privilege and the Courts: the Avoidance of Conflict’ [1985] PL 64, 64-66.

136 (1839) 9 Ad & Ell 96; 112 ER 1112.

137 Lock ‘Statute law and case law applicable to Parliament’ in D Oliver and G Drewry (eds) *The Law and Parliament* (Butterworths, London 1998) chapter IV, 51.

138 Ibid 52.

139 McKay, above n 133, 188-190.

140 Ibid 177.

141 See S A de Smith ‘Parliamentary Privilege and the Bill of Rights’ (1958) 21 *The Mod L Rev* 465 and Lock, above n 135, 66-68.

142 Lock, above n 135, 67.

143 McKay, above n 135, 177 and Lock, above n 137, 54.

144 Leopold, above n 130, 476.

## B. Parliamentary Sovereignty

### 1. *The Diceyan view and its critics*

According to Professor A.V. Dicey, the dominant characteristic of the English constitution was the sovereignty of Parliament. The legislature derives its sovereignty from the democratic electoral process, and therefore has the right to 'make or unmake any law whatever'; no person can set aside any law made by Parliament.<sup>145</sup> Even as a matter of history, it is clear that parliamentary sovereignty is inextricably bound up with the idea of parliamentary privilege. According to this 'orthodox' view, Parliament's sovereignty was 'put beyond effective challenge' by the Glorious Revolution and the Bill of Rights 1688,<sup>146</sup> at the same time that parliamentary privilege was confirmed in article 9.<sup>147</sup> However, the Parliament's supremacy is not simply a creature of statute, but is 'constitutionally established'.<sup>148</sup>

The Diceyan concept of parliamentary sovereignty has been subjected to close scrutiny and challenge over the past decade, including by eminent members of the English judiciary.<sup>149</sup> In his short 1995 article, 'Droit Public – English Style', Lord Woolf identified the rule of law as resting upon two principles: the supremacy of Parliament and the role of the courts as 'the final arbiters as to the interpretation and application of the law'.<sup>150</sup> Affirming the existence of mutual respect between the two branches of government, the Master of the Rolls described the courts and Parliament as 'partners both engaged in a common enterprise involving the upholding of the rule of law'.<sup>151</sup> Nevertheless, he felt that it was necessary to state clearly that there are 'limits of the most modest dimensions' on the supremacy of Parliament, and that the courts had the 'inalienable responsibility' to 'identify and uphold' these limits: 'if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent'.<sup>152</sup> Others have argued that the idea of parliamentary sovereignty – indeed, the very concept of statute as law – is a creation of common law, since it is not logically possible for Parliament to confer law-making authority, much less supremacy, on itself.<sup>153</sup> Sir John Laws, notably, has developed the idea of the 'rule of law' as a basis for limiting the law-making powers of Parliament.<sup>154</sup>

Nor does the challenge to parliamentary sovereignty rely on entirely hypothetical scenarios in which Parliament passes legislation permitting gross abuses of human rights. The United Kingdom has been a member of the European Union since 1973, and in 1998 incorporated the Eu-

145 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, London: MacMillan & Co Ltd, 1960) 39.

146 Philip Norton 'The Glorious Revolution of 1688: Its Continuing Relevance' (1989) 42 *Parliamentary Affairs* 135, 138.

147 See L G Schwoerer *The Declaration of Rights, 1689* (Baltimore: Johns Hopkins University Press, 1981) for a thorough account of the drafting of the Bill of Rights 1688.

148 R Blackburn and A Kennon *Griffith & Ryle on Parliament Functions, Practice and Procedures* (2nd ed, London: Sweet & Maxwell, 2003) section 3-007.

149 See Lord Woolf 'Droit Public – English Style' [1995] PL 57. Also see Sir John Laws 'Law and Democracy' [1995] PL 72 and Sir Stephen Sedley 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386.

150 Woolf, above n 149, 68.

151 *Ibid* 69.

152 *Ibid*. Also see Woolf 'The Rule of Law and a Change in the Constitution' [2004] CLJ 317.

153 Sir John Laws 'Meiklejohn, the First Amendment and Free Speech in English Law' in Loveland (ed), above n 112, 131; also see M Elliot 'United Kingdom: Parliamentary Sovereignty under Pressure' (2004) 2 *Int'l J Const L* 545, 551.

154 Laws, above n 153, 134.

ropean Convention on Human Rights into English law by way of the Human Rights Act 1998. These actions have had an inevitable impact on the courts' interpretation of domestic legislation. The courts have had to adopt ever more sophisticated explanations of how European law can take priority over Acts of Parliament (see, for example, *Thoburn v Sunderland City Council*)<sup>155</sup> while retaining 'the formal veneer of parliamentary sovereignty'.<sup>156</sup> According to one scholar, the trend of European jurisprudence is to suggest that the United Kingdom Parliament abdicated legislative sovereignty when it passed the European Communities Act in 1972.<sup>157</sup>

Academic lawyers have not failed to see the connections between the debate over parliamentary sovereignty and the long history of conflict over the ambit of parliamentary privilege. Arguing that legal systems contain multiple unranked sources of law, Barber identifies parliamentary privilege as an area that 'has long been a source of perplexity for constitutional lawyers',<sup>158</sup> given that '[t]he Commons and the courts have never reached agreement on who should be the ultimate arbiter of the scope of privilege'.<sup>159</sup> Barber suggests that it may be possible for two doctrines of privilege to exist at the same time – one held by Parliament and the other by the courts. Concluding that it is 'perfectly possible for a mature legal system to contain contradictory norms',<sup>160</sup> he nevertheless identifies a unifying belief, held by both judges and parliamentarians, 'that they are part of a single legal system, and that they are under a legal obligation to apply the same set of rules'.<sup>161</sup>

## 2. *The debate in New Zealand*

As relevant as it may be to legal developments in the United Kingdom, the modern debate over parliamentary sovereignty probably began in earnest with an article by a New Zealand judge, Lord Cooke.<sup>162</sup> Even before his short but seminal article, Philip Joseph and Gordon Walker argued that British parliamentary sovereignty had been acquired in particular historical and political circumstances far different from how New Zealand's legislative authority had been acquired: 'progressively, without incident, from a superior authority'. Joseph and Walker therefore questioned whether it was appropriate or necessary for New Zealand to 'assume the shackles of English sovereignty theory – of immutable, illimitable and perpetual powers of law-making'.<sup>163</sup>

The debate over parliamentary authority in New Zealand has continued ever since. More recent articles by prominent New Zealand judges such as Justice Thomas<sup>164</sup> and the Chief Justice, Dame Sian Elias<sup>165</sup> have proposed additional reasons to question whether parliamentary sovereignty was in fact absolute. Drawing on the human rights-based arguments of Cooke, Lord Woolf and others, Elias and Thomas have argued that the rights conferred by the Treaty of Waitangi may

155 [2002] EWHC 195 (Admin).

156 Elliot, above n 153, 551.

157 G Marshall 'Parliamentary Sovereignty: New Horizons' [1997] PL 1, 4.

158 N W Barber 'Sovereignty Re-examined: The Courts, Parliament, and Statutes' (2000) 20 OJLS 131, 137.

159 Ibid.

160 Ibid.

161 Ibid.

162 R Cooke, in 'Fundamentals' [1988] NZLJ 158. Lord Woolf described his own approach as 'a shadow reflection of a trail blazed by Sir Robin Cooke': above n 149, 68.

163 P Joseph and G Walker 'A Theory of Constitutional Change' (1987) 7 OJLS 155, 169.

164 E W Thomas 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium' (2000) 31 VUWLR 5.

165 S Elias 'Sovereignty in the 21st century: Another spin on the merry-go-round' (2003) 14 PLR 148.

be 'beyond the reach of Parliament to amend or revoke'.<sup>166</sup> Like Joseph and Walker, they have also questioned the assumption that the British doctrine of parliamentary sovereignty should apply in New Zealand, and suggested that it may be irrelevant to 'the fundamentals of the New Zealand constitution'.<sup>167</sup>

Noting that the introduction of the mixed member proportional system ('MMP') had created a wider appreciation that significant constitutional changes can and do occur, Thomas has suggested that the uncertainties of MMP had also made politics less certain and could result in unacceptable laws being passed by Parliament.<sup>168</sup> He has also pointed to the evolving basis of judicial review, and in particular the recognition that the ultra vires principle does not explain all cases of judicial intervention, as another indication that the courts can and do develop laws independently of – and at times in tension with – the legislative will.<sup>169</sup>

Both Thomas and Elias have offered alternative descriptions of the proper roles of the courts. Preferring to locate sovereignty in the people rather than in a 'dynamic settlement' between different arms of government, Thomas has argued that a strong and independent judiciary supported the sovereignty of the people.<sup>170</sup> In his view, too much deference to Parliament has 'strangled the development of the law',<sup>171</sup> and for practical reasons he prefers to leave open the question of when the courts might review the validity of 'extreme legislation': 'The resulting uncertainty or inconclusiveness itself serves the constitutional function of ensuring a balance in the distribution of public power between Parliament and the courts'.<sup>172</sup>

Elias's conclusions are similarly subtle. She has not recommended a formal amendment to the current relationship between Parliament and the courts, even were one possible. Rather, she has argued that our constitutional thinking has been 'impoverished' by our 'fixation with parliamentary sovereignty and the relative democratic merits of Parliament and the courts to the exclusion of a wider perspective'.<sup>173</sup> She has suggested that we move past overly simplistic formulations of that relationship, abandon our 'quest for the power that trumps',<sup>174</sup> and instead see the protection of human rights as a 'co-operative enterprise between parliament and the courts'.<sup>175</sup>

### C. Reflections on Parliamentary Sovereignty and the Report

It is not necessary for the purposes of this essay to weigh all of the arguments for and against parliamentary sovereignty. Suffice it to say that the judicial writings explored above have not gone unanswered.<sup>176</sup> However, it is interesting to note the extent to which the antagonists in the New Zealand debate overlap with the participants in and commentators on *Buchanan v Jennings*. Thus, Elias CJ sat on the Board of the Privy Council that unanimously denied Jennings's appeal,

166 Thomas, above n 164, 9.

167 Ibid 10; also see Elias, above n 165, 153-157.

168 Thomas, above n 164, 11-12.

169 Ibid 13-14. Lord Woolf had expressed doubt over ultra vires as a basis for judicial review: Woolf, above n 164, 65-67. Also see Joseph 'The Demise of Ultra Vires – Judicial review in the New Zealand Courts' [2001] PL 354.

170 Thomas, above n 164, 19.

171 Ibid 35.

172 Ibid 36.

173 Elias, above n 165, 149.

174 Ibid, 150.

175 Ibid, 159.

176 See, for example, J Goldsworthy, *The Sovereignty of Parliament* (Oxford: Clarendon Press, 1999).

and Thomas J has written in support of that decision.<sup>177</sup> Philip Joseph (who himself commented on the decision and supplied the wording to amend the Legislature Act that was recommended by the Privileges Committee) has noted that Tipping J, the sole dissenter in the Court of Appeal, is also the only New Zealand judge to have ‘mounted a rearguard action in defence of ultra vires’.<sup>178</sup> And finally, both James Allan (who wrote the most vehement criticism of the Court of Appeal majority’s decision) and Michael Cullen (who sat on the Privileges Committee, and is currently Attorney-General) have published recent articles in defence of parliamentary sovereignty and attacking judicial activism in this area.<sup>179</sup> The involvement of these politicians, judges and academics in the ongoing debate over parliamentary sovereignty helps to explain why the appeal decisions in *Buchanan v Jennings* have stirred up such strength of feeling. It gives context to the Privileges Committee’s recommendation and may also provide insights into why the Report has received such overwhelming support in the House.

The contemporary debate over parliamentary supremacy is part of what one commentator has described as ‘a cauldron of quietly simmering constitutional issues’.<sup>180</sup> Other such issues include the Court of Appeal’s controversial decision to allow the Maori Land Court to investigate Maori claims to ‘Maori land’ in the foreshore and seabed,<sup>181</sup> which Parliament quickly reversed by legislation.<sup>182</sup> Also relevant is the public disagreement between the Prime Minister and the Chief Justice over judicial independence and activism.<sup>183</sup>

The Report appears, then, at a time of strained relations between the government and New Zealand’s most senior judges – and a perceived general threat to parliamentary sovereignty – as well as in direct response to judicial decisions involving a Member of Parliament. Unfortunately, the Report itself does not explicitly refer to this wider context, and so the reader is left to speculate on the deeper reasons for the Privileges Committee’s recommendation. In my view, the biggest problem with the Report is that it is a product of, and feeds into, the excessively polarised political and academic discourse on parliamentary sovereignty and related constitutional issues in New Zealand.

Instead of confronting these issues head-on and acknowledging the possibility of their own bias, the members of the Privileges Committee opted to present their findings in terms of a dispassionate analysis of a single case, supported by the scholarly credentials of three academic lawyers. I agree with Harris that the constitutional issues in contemporary New Zealand society are politically and legally complex and deserve community-wide dialogue within generous timeframes.<sup>184</sup> But the Report’s approach is piecemeal, rather than comprehensive. The inquiry is not widened to

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177 Thomas, above n 57.

178 Joseph, above n 169, 358.

179 Allan ‘Moonen and McSense’ [2002] NZLJ 142; Hon Dr Michael Cullen ‘Parliamentary sovereignty and the Courts’ [2004] NZLJ 243.

180 B V Harris ‘The Treaty of Waitangi and the Constitutional Future of New Zealand’ [2005] NZ Law Review 189, 189. It is interesting to compare the situation in the United Kingdom, where Lord Woolf notes that there has been a ‘torrent of constitutional changes’ under the present Government: Lord Woolf, above n 152, 319.

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

182 The Foreshore and Seabed Act 2004.

183 See, for example, A Young ‘Avoid the political fray, PM advises Dame Sian’ New Zealand Herald (27 July 2004) and F O’Sullivan ‘Top judge takes a new swing at the PM’ New Zealand Herald (29 October 2004).

184 Harris, above n 180, 191 and 215.

include other aspects of absolute privilege; there is no attempt to codify parliamentary privilege as a whole. Such an approach does not make for good policy, much less for effective law.

## VI. CONCLUSIONS

This essay has indicated several specific problems with the wording of the Privileges Committee's recommendation. I have also outlined and discussed some more philosophical difficulties with the Report. Specifically, the Report fails to offer a thorough treatment of two key issues raised in the case of *Buchanan v Jennings*; freedom of speech and the proper relationship between Parliament and the courts. In exploring these difficulties, it has become clear that the issues addressed by the Report cannot be considered in isolation from the wider discourse on constitutional issues taking place in New Zealand society. The polarisation of that discourse has had an unacknowledged impact on the Privileges Committee's reasoning and recommendation.

Ostensibly ignoring that wider context, the Report attempts to treat the issues it addresses in a piecemeal, isolated way. In focussing primarily on the free speech concerns of parliamentarians and (to a lesser extent) those of the media, both the Committee and the academic critics fail to take into consideration the deeper justifications for freedom of speech, both inside and outside Parliament, and in relationship to the law of defamation. Similarly, in interpreting and describing the judgments in *Buchanan* as problematic for the proper constitutional relationship between Parliament and the courts, these critics do not explore satisfactorily the fundamental democratic principles that that relationship should sustain.

The debate surrounding *Buchanan v Jennings* tends to conceive parliamentary privilege and sovereignty as being in stark conflict with individual rights, such as the right to reputation. In my view, framing the debate in this manner is unhelpful and does not assist the resolution of genuinely difficult issues. Those who begin with the view that Parliament is sovereign will be predisposed to a certain conclusion; those who start with the belief that individual rights are paramount, and parliamentarians need restraining, will conclude the opposite. Both sides would do better to examine the underlying reasons for both parliamentary sovereignty and individual rights, and to explore how the two are intimately connected. What part does parliamentary privilege play in upholding individual rights and freedoms? How does uninhibited freedom of speech – of all, not only parliamentarians and the media – bolster the authority and contribute to the healthy functioning of Parliament? How do both principles work together to provide the necessary conditions for democratic governance?

Like most legal issues that have a constitutional dimension, the scope of parliamentary privilege requires a comprehensive, coherent and principled approach. In my view, the issue deserves broad public consultation, highlighting and further exploring the issues discussed in this essay. Of course, even the most thorough and dispassionate consultation on these issues will not necessarily reconcile deep-seated differences of opinion. However, it will have at least two salutary effects. First, it will foster greater freedom of speech, and make that freedom meaningful – by providing opportunities for all to be heard, including those who currently feel excluded and unable to contribute to the currently polarised debate. Second, it will strengthen the foundations of parliamentary sovereignty, because Parliament's ultimate decision will have been more fully informed, and those who participate in the consultation will have greater comfort that their elected representatives have at least understood and appreciated the complexity of the issues at stake.

# CONTEMPORARY ISSUES IN MĀORI LAW AND SOCIETY: MANA MOTUHAKE, MANA WHENUA

BY LINDA TE AHO\*

Te Arikinui, Dame Te Atairangikaahu passed away on 15 August 2006 and thousands came to mourn her with eulogies beautifully articulating those attributes that saw her become beloved across cultures. During her reign as Māori Queen,<sup>1</sup> Te Arikinui headed the Kīngitanga, the King Movement, which had emerged from calls for tribes to unite as Māori in order to resist land alienation in the nineteenth century. Te Arikinui's passing is a defining moment in the history of this country and has inspired this review of recent developments in Māori law and society that have occurred during the course of the year to be in the context of two founding principles of the King Movement: *mana motuhake* and *mana whenua*. *Mana motuhake* encompasses the authority of distinctive and dynamic tribal groups to make their own choices and determine their own destiny. *Mana whenua* encompasses tribal authority exercised over land and signals the importance of land retention. The review begins with a background of the King Movement to provide some context for a discussion of current developments in Treaty of Waitangi claims processes. Aspirations of *mana motuhake* are evident in the midst of settlement negotiations concerning the Waikato River, and Ngā Kaihautū o Te Arawa, and figure in a recent Waitangi Tribunal report concerning Te Wānanga o Aotearoa. Issues about Māori governance have become prominent recently, and the review ends by considering the Law Commission's proposed Waka Umanga legislation that would standardise Māori governance entities and which might be viewed as posing a threat to *mana motuhake*. As regards *mana whenua*, the impacts of early native land laws designed to effect land alienation combined with vigorous Crown land purchasing policies are still evident in the provisions of Te Ture Whenua Māori Act 1993 aimed at land retention, and the application of some those provisions in recent Māori Land Court judgments are summarized in the latter part of this review. The effects of those early laws and purchase policies are also a particular feature of the long-awaited Waitangi Tribunal report on the Hauraki claims, also reviewed here.

## I. TE KĪNGITANGA – THE KING MOVEMENT

The Kīngitanga began in the 1850s, some years after the arrival of Europeans, and largely as a unified response by a number of tribes to the upsurge of unauthorised land sales.<sup>2</sup> It was also designed to bring an end to intertribal warfare, and to achieve *mana motuhake*, or separate authority.<sup>3</sup> While the movement enjoyed the support of many tribes, it became centred in the Waikato region in the central North Island. Tribes from all over the country, including the South Island, had

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1 The term *Te Arikinui* means The Great Chief, though the term bestowed upon Dame Te Atairangikaahu at her coronation was *Kuini* or Queen.

2 See M King, *The Penguin History of New Zealand* (2003) chapter 15 for historical accounts of the King Movement.

3 D McCan, *Whatiwhatihoe: The Waikato Raupatu Claim* (2000) 32.

debated who should be offered the kingship, and those debates resulted in the reluctant agreement of Waikato chief, Pōtatau Te Wherowhero, who was raised up as King in 1858. Pōtatau was soon succeeded by his son, Tāwhiao and it was during Tāwhiao's term as King that the settler Government, seeing the Kīngitanga as a threat to its stability, sent its forces across the Mangatawhiri River in July 1863, labeling the Waikato people as rebels and subsequently confiscating Waikato lands and driving people away from their villages alongside their ancestral river.<sup>4</sup> Tāwhiao's people were embattled, weak and destitute, when he declared:

Mākū anā hei hanga i tōku nei whare,  
Ko ngā pou o roto he māhoe, he patatē, ko te tāhuhu he hīnau.  
Ngā tamariki o roto me whakatupu ki te hua o te rengarenga,  
me whakapakari ki te hua o te kawariki.

I shall fashion my own house,  
The poles within will be made of mahoe and patatē,  
and the ridge pole made of hīnau.  
The children within will be raised on the fruit of the rengarenga  
and strengthened on the fruit of the kawariki.

Tāwhiao is remembered for such visionary prophecies and this particular saying expresses leadership, responsibility and resourcefulness. The three specific trees that Tāwhiao would use to fashion his 'house' were not traditionally used to build houses. The two plants referred to were not commonly used as food. One could gather from this that, regardless of the humble resources available to him, Tāwhiao assumed responsibility for providing shelter and sustenance for his house of followers.<sup>5</sup> Issues about governance are addressed under separate headings below, and one could also interpret Tāwhiao's prophecy more broadly as a governance strategy that aligns with *mana motuhake*; that Māori affirm and draw upon their own unique knowledge base, leadership practices, and resourcefulness, to bring about their own future prosperity.<sup>6</sup>

#### A. *Te Paki o Matariki – A Coat of Arms Propheying Peace and Calm and Asserting Mana Motuhake*

Symbols of the Kīngitanga demonstrate how Waikato has adopted traditions from other cultures whilst holding fast to concepts of tribal sovereignty. The King Movement itself, for example, is fashioned upon the English monarchy. Tāwhiao also imagined that his ambitions for his people could be reflected in a coat of arms and he commissioned one in 1870. It is known as *Te Paki o Matariki* – the widespread calm of Pleiades. The Matariki constellation rises just after the mid-winter solstice – the time when Māori celebrate the dawning of the New Year and the coming of fine weather. In the context of the land wars and the confiscation that occurred during Tāwhiao's reign, by naming his coat of arms *Te Paki o Matariki*, he prophesied that peace and calm would return to Waikato and Aotearoa/New Zealand. There are many significant features of the coat of arms such as, for example, the presence of the Christian cross. Another is the inscription of words at the bottom – *Ko Te Mana Motuhake*.<sup>7</sup>

4 By Orders in Council under the New Zealand Settlements Act 1893, the Crown unjustly confiscated approximately 1.2 million acres of land from Tainui iwi.

5 P Papa and L Te Aho (eds), *He Kete Waiata A Basket of Songs* (2004) 76.

6 Amohaere Houkamau, Presentation to Waikato University Māori Land Law Class, August 2006 'Perspectives of Governance and Leadership (Past, Present and Future)'.

7 See C Kirkwood, *Tawhiao: King or Prophet* (2000) 110.

### B. *The Waikato Raupatu Settlement*

The confiscation of lands in the Waikato became known as *raupatu*, land taken at the blade of a weapon, and became a notable feature of King Tāwhiao's reign. The settlement of major grievances that arose principally from those confiscations became a notable feature of the reign of Te Arikinui, Dame Te Atairangikaahu, as Māori Queen. The combined efforts of generations of leaders over many years seeking redress from the Crown culminated in the Waikato Raupatu Claims Settlement Act 1995. The Act incorporates an apology by the Crown to Waikato for the Crown's breach of the Treaty of Waitangi in its dealings with the Kīngitanga and Waikato. The settlement that ensued from direct negotiation with the Crown is said by some to represent a mere two per cent of the value of lands confiscated. Any more would have been unacceptable to non-Māori and the Government's imposition of an unofficial fiscal cap upon Treaty settlements in the nation's best interests overrode the entitlements of tangata whenua.<sup>8</sup> Making the best of a bad deal, Tainui Group Holdings Ltd, a limited liability company formed in 1998 to manage the commercial assets of the Waikato-Tainui people,<sup>9</sup> has recently announced a record net operating profit of \$17.8 million for the year ended 31 March 2006, an increase of 43 per cent from the previous year, and representing a doubling of the initial value of the settlement from \$170 million to \$340 million. Distributions to its shareholder, the Waikato Raupatu Lands Trust, increased to \$10.6 million from \$7.4 million in 2005.<sup>10</sup> Many other iwi have watched the Waikato-Tainui experience closely and have followed its lead in submitting to the Crown's settlement agenda. The settlement process divided the people of Waikato on the issue of whether to accept what was viewed by many as a miserable offer by the Crown. As will be seen below, whether conducted through the Waitangi Tribunal, or via direct negotiations with the Crown, there is little, if any, room for any real 'negotiation' in these Treaty claims settlement processes, and they continue to erode the ability of iwi to exercise mana motuhake.

## II. TREATY OF WAITANGI CLAIMS PROCESSES

### A. *Waitangi Tribunal*

Waikato chose to progress its raupatu settlement with the Crown by way of direct negotiations rather than via the Waitangi Tribunal. Under the Tribunal process, any Māori person who claims to be prejudicially affected by the actions, policies or omissions of the Crown in breach of the Treaty of Waitangi may make a claim to the Waitangi Tribunal.<sup>11</sup> Contemporary claims such as those that relate to Te Wānanga o Aotearoa<sup>12</sup> arise as a result of alleged contemporary breaches of

<sup>8</sup> A Mikaere, 'Settlement of Treaty Claims: Full and Final or Fatally Flawed?' (1997) 17 NZULR 425.

<sup>9</sup> Tainui is the name of the waka (canoe) that travelled to Aotearoa from Hawaiki. Tribal confederations that affiliate to the Tainui waka are Waikato, Maniapoto, Raukawa, and Hauraki. The raupatu settlement centred around Waikato but affected all of these tribal groups. Also, while the governance structure that facilitated the raupatu settlement, the Tainui Maori Trust Board, contained representatives mainly from Waikato, it was also representative of certain hapū from Raukawa and Maniapoto in particular who are named beneficiaries of the Waikato Raupatu Lands Trust – hence the reference to Waikato-Tainui.

<sup>10</sup> Available <[www.tgh.co.nz](http://www.tgh.co.nz)>, accessed 21 September 2006.

<sup>11</sup> Treaty of Waitangi Act 1975 s 6.

<sup>12</sup> The recent Waitangi Tribunal Report concerning Te Wānanga o Aotearoa is referred to in section G below.

the Treaty,<sup>13</sup> while historical claims relate to Treaty breaches dating back to 6 February 1840, and focus primarily on the loss of ancestral lands via Crown purchases, land confiscation, early Native Land Court transactions, public works takings, and land consolidation and development schemes. Historical claims require claimants, most commonly through oral histories, to convey to the Waitangi Tribunal how they established their interests in a particular area, and how those interests were maintained. Claimants must also demonstrate that they suffered harmful consequences as a result of a Treaty breach by the Crown. Evidence such as this, together with the various research reports presented in relation to a claim, is gathered over a number of years.<sup>14</sup> Based on this information the Waitangi Tribunal decides whether, on the balance of probabilities, that claim is well founded and reports its findings.<sup>15</sup> The Tribunal cannot resolve or settle claims – it can only make recommendations. The Crown is not generally bound to follow those recommendations, and to date, the Crown has not implemented many of the Tribunal's recommendations made in favour of claimants.

### B. Direct Negotiations

Where a claimant group lodges a claim with the Tribunal and is able to satisfy the Crown that it is the correct claimant group to make a claim, the Crown may agree to negotiate directly with the claimants to achieve settlement.<sup>16</sup> The major advantage of direct negotiations is that it is usually a speedier and less expensive process for claimants. According to the Chief Negotiator for Te Atiawa:

Knowing what I know now about the Tribunal process, I'd cut that out and get into direct negotiations. There is benefit in going through the Tribunal but you've got to make a decision on whether that benefit outweighs the loss of asset, and if you can get your asset quicker and make money off it, it probably outweighs the value of taking the time to go through the Tribunal.<sup>17</sup>

The direct negotiations process has, however, a number of serious shortcomings. The Crown's marked advantage in terms of bargaining power means that it unilaterally decides the conditions of negotiation, and claimants are expected to negotiate within those conditions if they want their claim resolved.

Well in our experience the whole notion of negotiation itself requires to be looked at. Very often, there is no negotiation, but rather there is a statement that this is the Crown's policy, and this is what you have to live with.<sup>18</sup>

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13 Contemporary claims are those that relate to Crown acts or omissions occurring on or after 21 September 1992. This arbitrary date reflects the date on which the former National Government confirmed its general policy for settling Treaty of Waitangi claims. Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2nd ed, 2002) 7.

14 For example, the Hauraki claims discussed below were first lodged in 1988, the first Tribunal hearing was held in 1998 and the resultant report was issued in 2006.

15 Treaty of Waitangi Act 1975, s 13. See also G Melvin, *The Claims Process of the Waitangi Tribunal: Information for Claimants* (2000); and Waitangi Tribunal Practice Note, *Guide to Practice and Procedure of the Waitangi Tribunal* (2000).

16 If either party prefers not to negotiate, or the negotiations fail, claimants may still apply to the Tribunal for a hearing.

17 Crown Forestry Rental Trust, *Māori Experiences of the Direct Negotiations Process* (2003) para 1.4.

18 *Ibid*, at para 1.3 per Professor Hirini Mead, chief negotiator for Ngāti Awa; see also para 5.5, per Greg White, chief negotiator for Ngāti Tama; and para 1.4 per Peter Addis on behalf of Te Atiawa for similar statements about the notion of negotiation.

One such condition of negotiation that has caused particular unrest within Māoridom is the Crown's preference to settle with 'large natural groupings' or clusters of hapū and iwi. This policy forces Māori into clusters rather than allowing Māori to choose suitable alliances for themselves.<sup>19</sup> Other disadvantages when compared with the Tribunal process are that anonymous Government officials rather than independent Tribunal officers make decisions about settlement, and claimants can be denied the opportunity to air the grievances that they have carried for many years.<sup>20</sup> Unofficially, the Crown has also set a limit on the overall amount it is willing to spend on settling Treaty claims (the 'fiscal envelope') and early settlements such as the Waikato Raupatu and Ngāi Tahu settlements serve as benchmarks.<sup>21</sup> Both claims were initially thought (by the claimants at least) to be worth billions of dollars, and both settlements were for approximately \$170 million, these experiences illustrating that claimants must be prepared to compromise considerably. Yet despite such significant shortcomings of the direct negotiations process, a number of claimant groups have resolved to negotiate directly with the Crown to settle their historical claims.<sup>22</sup>

### C. *Ngā Kaihautū o Te Arawa*

One such claimant group consists of a number of hapū and iwi of Te Arawa<sup>23</sup> that decided to pursue direct negotiations to settle their historical Treaty of Waitangi claims. The cluster of hapū and iwi has become known as Ngā Kaihautū o Te Arawa (Ngā Kaihautū). Formerly, Ngā Kaihautū had been part of the so-called VIP project – a project initiated by prominent tribal figures in the volcanic interior plateau of the central North Island to advance the settlement of Treaty claims relating to the substantial amount of forestry land in the district. The Minister in Charge of Treaty of Waitangi Negotiations sought to progress the VIP claim as part of a more comprehensive settlement project with the tribes of the central North Island, subject to mandate. The original VIP project became divided and some iwi and hapū withdrew from direct negotiations choosing instead to progress their claims via the Waitangi Tribunal. A large number of Te Arawa iwi and hapū continued to deal with Crown officials and in April 2004 the Crown formally recognised the mandate of Ngā Kaihautū o Te Arawa Executive Council (the Council) to negotiate the settlement of all Te Arawa claims.<sup>24</sup> The Crown's decision to recognise the Council's mandate became the subject of the Waitangi Tribunal's *Te Arawa Mandate Report 2004*. Many iwi and hapū were vehemently opposed to being part of the larger cluster. The Tribunal found that the Crown had failed to adequately identify and address critical issues surrounding representation and the accountability of the executive council and that the mandating process had not allowed the people of Te Arawa adequate opportunity to debate and discuss these important matters. Accordingly, the Tribunal recommended a process by which the Council could reconfirm its mandate, and, while a number of those recommendations as to process were very specific, the Tribunal also recognised that it was for the iwi and hapū of Te Arawa themselves to decide how best to develop a reconfir-

19 Waitangi Tribunal, *The Te Arawa Mandate Report* (Wai 1150, 2004). See also Mikaere, above n 8.

20 Although, in the case of Ngā Kaihautū o Te Arawa, part of the direct negotiations settlement process involved time spent over two days where oral histories were recounted before Government Officials and recorded, providing claimants with the opportunity to publicly express their grievances and to record their history on their own terms.

21 Mikaere, above n 8 at 426.

22 Mikaere, *ibid* at 454, 455 for stinging criticism of those that are 'succumbing one by one' to the 'Crown-driven agenda' in the fear of missing out on the ever-shrinking fiscal envelope.

23 A confederation of tribes in the central North Island in and around Rotorua.

24 Waitangi Tribunal, *Te Arawa Mandate Report Te Wāhanga Tuarua* (Wai 1150, 2005) 2.

mation strategy which accorded with tikanga.<sup>25</sup> The opportunity remained, however, for the claimants to return to the Tribunal if the Crown failed to make an adequate response to the Tribunal's recommendations. The Council decided not to follow all of the Tribunal's recommendations as to the reconfirmation strategy, choosing instead to determine its own process. A number of claimants returned to the Tribunal, arguing at a further hearing in January 2005, that the reconfirmation process was flawed. In its report issued in March 2005, the Tribunal found that although the reconfirmation process departed from the Tribunal's suggestions as to process, the Crown had not breached the Treaty of Waitangi in its monitoring of the reconfirmation process. Those Te Arawa groups who reconfirmed the Council's mandate have exercised their tino rangatiratanga<sup>26</sup> and they were open to negotiate their claims with the Crown. But the Tribunal also recognised that the Council's mandate had clearly diminished. The withdrawal of certain large iwi and hapū<sup>27</sup> from the Council's mandate together with the non-participation of others from the outset<sup>28</sup> means that just over half of Te Arawa have reconfirmed their support for the Council's mandate. With the significant overlap between core Te Arawa claims the Crown's negotiations seriously disadvantage groups who choose to remain outside the Council. The Crown's insistence on limiting settlements and its refusal to negotiate concurrently with or to afford priority status to certain groups that decided not to participate in Ngā Kaihautū's cluster (as recommended by the Tribunal in the 2004 report) has created intense division within the Te Arawa confederation and will inevitably lead to new Treaty breaches and prejudice, and further division.

In the meantime, Ngā Kaihautū have accepted the Agreement in Principle signed by the Council and the Crown in August 2005. The cultural redress contained in the Crown's settlement offer involves the return of sites that the Ngā Kaihautū tribes have identified as being culturally significant. Also offered are statutory acknowledgements and overlay classifications over certain geothermal fields and over the Waikato River from Huka Falls to Atiamuri which are said to provide stronger levels of protection than are provided for in the Resource Management Act 1991. Economic redress includes a quantum offer of \$36 million and rights of first refusal to buy back certain Crown forest lands and other properties. The Council and its supporters are clear that the benefits to be gained outweigh succumbing to the Crown imposed settlement framework. Reminiscent of the experiences of Waikato Raupatu and Ngāi Tahu, this settlement with the Crown is viewed, pragmatically, as making the best of a bad deal.<sup>29</sup>

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25 Māori laws, ethics, and customs.

26 Tino rangatiratanga is a term that is sourced from the word 'rangatira' which means chief. It is a term used in the Māori text of the Treaty of Waitangi 1840 that literally means unqualified exercise of chieftainship, and the corresponding term used in the English version of the Treaty is 'full and exclusive possession' of all resources and things valuable to Māori. An alternative translation is sovereignty. In the Declaration of Independence of New Zealand 1835, the word used for sovereignty had been mana.

27 Ngāti Whakaue, Ngāti Wahiao and Ngāti Rangiwewehi.

28 Ngāti Makino, Waitaha, and Tapuika.

29 Roger Pikia, representative for Ngāti Tahu-Ngāti Whaoa on the Ngā Kaihautū o Te Arawa Executive Council, Minutes of Hui-a-iwi Mangahoanga Marae, 19 March 2006.

#### D. *The Claim to the Waikato River*

Waikato taniwharau!

He piko he taniwha, he piko he taniwha.

Waikato, of a hundred chiefs! At every bend, a chief.<sup>30</sup>

The Crown's offer of a statutory acknowledgement to Ngā Kaihautū o Te Arawa overlaps with Waikato's claim regarding its tupuna awa (ancestral river) and illustrates the prejudice that can be suffered as a result of the Crown's Treaty of Waitangi Settlement policies that encourage a first in, first served approach rather than an approach which views the river as an ancestor and therefore indivisible. The nature of the special relationship between the Waikato people and their ancestral river can be seen in the following statement by the late Te Kaapo Clark, respected Tainui elder:

'Spiritually the Waikato River is constant, enduring and perpetual. It brings us peace in times of stress, relieves us from illness and pain, cleanses and purifies our bodies and souls from the many problems that surround us ...'<sup>31</sup>

In 1987 the late Sir Robert Mahuta filed a statement of claim on behalf of himself, and of the members of Waikato-Tainui, the Tainui Māori Trust Board and Ngā Marae Topū claiming that he was prejudiced by the acts, policies and omissions of the Crown:

- by which the ownership and the mana of the Waikato River is denied to Waikato Tainui;
- by which the waters of the Waikato River are desecrated, polluted and depleted;
- in failing to recognise and protect Waikato-Tainui fisheries and lands in the Waikato River;
- by which Waikato-Tainui fisheries in the Waikato River have been depleted by pollution, over-fishing, and spiritual desecration; and
- in providing a legislative framework for land use planning, water use planning, and resource planning which fails properly to take into account Waikato Tainui concerns for the Waikato River and which is inappropriate for the protection of Waikato-Tainui rights guaranteed by the Treaty.

Negotiations between the Crown and Waikato regarding the Waikato River disintegrated and the comprehensive claim was deliberately withdrawn from the negotiations for the Waikato Raupatu Settlement. Despite this, the Waikato River is referred to in the Deed of Settlement of 22 May 1995 as meaning:

The Waikato River from the Huka Falls to the mouth and includes its waters, banks and beds (and all minerals under them) and its streams, waterways, tributaries, lakes, aquatic fisheries, vegetation and floodplains as well as its metaphysical being.

Also in that Deed of Settlement the Crown acknowledged that raupatu was a breach of the Treaty of Waitangi and that the claim in respect of the River arises as a result of raupatu.

Waikato's parliament, Te Kauhanganui, confirmed the appointment of two co-negotiators to settle the claim to the River via direct negotiations with the Crown. A central focus of those negotiations currently taking place is described as 'Te Mana o te Awa'; seeking recognition of the status of the Waikato River to Waikato-Tainui as a tupuna awa. As an ancestor of Waikato-Tainui, the River has its own mana and is the lifeblood of the ancestor. For that reason, the claim seeks 'ancestral title' in the River from the Huka Falls to Port Waikato, just as had occurred when cer-

30 This proverbial saying pays tribute to the strong leadership in the many communities that live along the banks of the Waikato River, and also alludes to the metaphysical nature of the River.

31 Statement of Evidence of Te Kaapo Clark of Ngāti Korokī Kahukura, prepared on behalf of Waikato-Tainui for the Watercare Hearing before the Franklin District Council, Tuakau, December 1996.

tain sacred sites, such as Taupiri Mountain, were returned to the tribe. The river, like the mountain and certain landholdings, would be vested in the name of the first Māori King, Pōtatau Te Wherowhero. *Mana Whakahaere* or operational responsibility would remain with iwi and hapū with mana whenua rights along the river. Aspirations for mana whakahaere include the protection of customary rights, roles and responsibilities for monitoring and protection, and restoration and enhancing the health and wellbeing of the Waikato River. Waikato would seek to make the river inalienable from Karapiro to Port Waikato (the recognized confiscation area), while other tribes along the river would be free to exercise mana whakahaere and make their own decisions with regard to inalienability.<sup>32</sup>

(1) *Who owns the water? A question revisited*

According to Māori cosmogony, water has a mauri or life force of its own. Waterways are the veins of Papatūānuku, the Earth Mother, and iwi and hapū often align their very identity with their waterways. Indeed, according to Māori oral tradition, the Waikato River is life-giving water that Tongariro sent to the Maiden Taupiri. On this view of the world, waterways are connected, requiring integrated management of whole catchments. Too often, however, decisions about water have not prioritised Māori spiritual or cultural values, ideas, knowledge or wisdom. This was a point lamented during the Crown's consultation process with Māori on freshwater reviewed last year.<sup>33</sup> That review explored the question of who might own water.<sup>34</sup> In the context of the Waikato River negotiations, the Crown is unwavering in its position that any vesting of ancestral title in the rivers must be restricted to parts of the riverbed. Because of privately-owned land rights to the bed, the Crown claims not to have continuous title to the riverbed and therefore adopts the position that it cannot offer continuous title. As to ownership of the water, the Crown maintains that it does not own the water. Rather, it has authority and control over the river which is delegated to local authorities. For these reasons, past settlements such as the Te Arawa Lakes Settlement include the transfer of lakebeds,<sup>35</sup> yet tangata whenua have long reiterated their belief that the freshwater resource must belong to Māori. And while during the freshwater consultation process some iwi declared that they assumed ownership rights and merely wished to engage with the Crown to discuss co-management, others called for direct and immediate engagement with the Crown to discuss ownership. It was for reasons relating to ownership that many iwi were opposed to the Government's proposals for transferable water rights, as being too akin to property rights. The Crown's policy on freshwater that foreshadows privatising water will have a significant impact on the negotiations for the Waikato River. This is undoubtedly one of a number of factors contributing to the slow progress of the negotiations<sup>36</sup> – the anticipation around having some form of ancestral title vested in the name of King Pōtatau in time for Te Arikiniui's fortieth Coronation anniversary celebrations in May 2006 proving unrealistic.

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32 This information about the aspirations of the claim was presented at a public meeting held at Pōhara Marae, 5 August 2006 by the River Claim Management Team led by Donna Flavell.

33 L Te Aho 'Contemporary Issues in Māori Law and Society' (2005) 13 Wai L Rev 145, 158-163.

34 Ibid, 161.

35 Te Arawa Lakes Settlement Bill, Part 2.

36 See Crown Forestry Rental Trust, above n 17 for criticisms about the length of time negotiations took in relation to Ngāti Awa at para 1.3; in relation to Ngāti Tama, para 1.5; and in relation to Rangitaane o Manawatu, para 1.6.

## (2) *Guardianship Trust*

Waikato-Tainui's approach to negotiations is to assume ownership of the river, and to seek the return of the authority and control over the river, then work closely with local and regional authorities who would most likely continue to handle consent operational activities and associated costs, with a 'Guardianship Trust' providing direction to those authorities. Monetary compensation is being sought for the desecration and pollution of the river, which would be available to the envisaged Guardianship Trust to promote the health of the river. The framework of such a trust is a point for further deliberation, with the Waikato River Negotiation Team undertaking extensive research into various forms of joint management, both in Aotearoa and overseas, to inform the negotiations. Last year's review advocated the Orakei model<sup>37</sup> as best practice for such a Guardianship Trust. Under the Orakei model a reservation incorporating land, including foreshore, is jointly administered through a Reserves Board comprised of three representatives of the Ngāti Whatua o Orākei Māori Trust Board and three representatives from Auckland City Council. By statute, the land is managed, financed and developed at the expense of the Auckland City Council in view of the land, including foreshore, being kept for public as well as hapū enjoyment. The chairperson (and the casting vote) is reserved for a Ngāti Whatua representative in recognition of the hapū's title and mana whenua. This type of model recognises the mana of Ngāti Whatua as tangata whenua.

## E. *The Hauraki Report*

Whereas Ngā Kaihautū o Te Arawa and Waikato opted to negotiate directly with the Crown to settle their historical claims, Hauraki Māori chose to put their case to the Waitangi Tribunal. The Hauraki Māori Trust Board first lodged its Treaty claims in 1988, and the Waitangi Tribunal's inquiry began 10 years later in 1998. The resultant report is one of the Tribunal's biggest since its establishment in 1975 and traces the history and relationship between Hauraki Māori and the Crown and gives the Tribunal's findings on the many claims arising from this history. The Hauraki inquiry district comprises the southern part of Tikapa Moana (the Hauraki Gulf and its islands), the Coromandel Peninsula and the lower Waihou and Piako Valleys. By the early nineteenth century, Hauraki was occupied by an 'intricate patchwork of iwi groups' including those that trace their origins from before the arrival of the great waka (canoes), and those who trace their origins from those waka. The sixteenth century saw the settlement of the Marutuahu tribes, of Tainui origin. The Tribunal report deals with some 56 claims made by different tribes, all relating to the process of colonisation under the British Crown, the extraction of resources such as gold and kauri and the purchase of all but 2.6 per cent of the land in the district, a state of landlessness comparable to the Waikato and Taranaki regions.<sup>38</sup> The Tribunal examined Crown laws relating to Māori land and land purchase policies during the nineteenth and early twentieth centuries and concluded that as a result of deliberate laws and policies the Hauraki Māori have been marginalised in their own tribal areas by the transfer of land and resources to others (including other Māori).<sup>39</sup> Hauraki land was acquired by the Crown under pre-emptive (monopoly) right, and vendors had been badly advised, particularly in the sale of gold mining lands. Issues relating to gold were a central feature of the Hauraki claims and the Tribunal, predictably, found that gold, apart from land, was not considered

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37 Ibid, 164-165.

38 'Hauraki Hoping to Get Land Back' New Zealand Herald, 20 June 2006.

39 Waitangi Tribunal, *Report on the Hauraki Claim* (Wai 686, 2006) Executive Summary, xlvii.

a taonga in Māori culture. While Hauraki Māori quickly understood the importance of gold in the commercial economy, many of the negotiations for the freehold involved breaches of Treaty principles while some cession agreements involved elements of pressure and coercion. Moreover, because of strategic importance of Hauraki lands to the Crown in relation to their military action against the Kīngitanga, large areas of land were confiscated during the raupatu of the 1860s and received minimal compensation. Hauraki had suffered the impacts of a legislative regime that led to public works takings and the desecration and destruction of their wāhi tapu and taonga. Accordingly, the Tribunal concluded that 'a substantial restitution was due, and the quantum should be settled by prompt negotiation'. The Hauraki iwi are in the process of establishing a mandated body for the purposes of negotiations with the Crown to settle its claims.

The Hauraki claim demonstrates that Waitangi Tribunal processes take time. The Māori Purposes Bill which is currently being considered by the Māori Affairs Select Committee, among other things, limits the jurisdiction of the Waitangi Tribunal to inquire into historical claims submitted after 1 September 2008.<sup>40</sup> The arbitrary imposition of a final filing date for claims for historical breaches will seriously prejudice claimants who have not yet conducted their historical research, and there are many such claimants.<sup>41</sup>

#### *F. Claims Processes and the Erosion of Mana Motuhake*

When the King movement was established in the late 1850s, various tribes pledged mountains symbolizing their support – an attempt to come together willingly to resist the vigorous Crown land purchasing policies and early native land laws designed to effect the alienation of their land. In Hauraki, the Kohukohunui and Rātāroa mountains on the western side of the Firth of Thames, and Te Aroha and Moehau on the eastern side were pledged.<sup>42</sup> As a result of the settler Government perceiving the King Movement as a threat to its authority, tragically, both Waikato and their Hauraki kin were forced to endure the confiscation of vast tracts of their land, and all of the prejudicial consequences that followed. The Waitangi Tribunal's report on the Hauraki claim is yet another illustration of the corrosive impact of colonisation upon Māori laws and rights that existed in this country prior to colonization. Having endured that history, the very processes designed to resolve the grievances that arose from historical Crown breaches of the Treaty, while offering avenues for economic prosperity for the next generations of Māori, create new grievances. The recent Tribunal reports and experiences of direct negotiation reviewed here illustrate that Crown-driven Treaty settlement processes that impose negotiation frameworks and fiscal constraints, that compel certain tribal aggregations, and that now seek to impose unrealistic timeframes for the filing of historical claims, continue to seriously prejudice the ability of Māori to exercise mana motuhake.

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40 The Māori Purposes Bill is an omnibus piece of legislation that amends four statutes: Te Ture Whenua Māori Act 1993; Treaty of Waitangi Act 1975; Māori Fisheries Act 2004; Māori Commercial Aquaculture Claims Settlement Act 2004.

41 Te Hunga Roia Māori o Aotearoa (Māori Law Society) Submission: Māori Purposes Bill, 15 August 2006, lists seven inquiry districts that will be severely prejudiced, having not started their research. Three inquiry districts will be prejudiced where research has been commenced but is incomplete; and four districts have had their inquiries partly heard, but not all historical breaches are dealt with.

42 Available <[www.teara.govt.nz](http://www.teara.govt.nz)>.

### G. *The Aotearoa Institute's Claim Concerning Te Wānanga o Aotearoa*

Reminiscent of the Crown's reaction to the establishment of the Kīngitanga those many years ago, the tale of Te Wānanga o Aotearoa as told to the Waitangi Tribunal is another example of the Crown attempting to deny the authority of Māori to draw upon their own distinctive knowledge base, leadership practices, and resourcefulness, to ensure their own future prosperity. Wānanga provide innovative courses and methods of delivery of education that reach out to those (mainly Māori) who the primary and secondary education systems have failed. The success of the wānanga concept saw Te Wānanga o Aotearoa (TWOA) in particular grow rapidly. However, neither the Crown nor TWOA was fully prepared for such growth. With a shift in Crown tertiary education policy from access and participation to quality and relevance came greater emphasis on specialization and differentiation. To this end, the Crown imposed a cap on the growth of all Tertiary Education Institutions. This disproportionately impacted upon TWOA and in February 2005 TWOA announced a major and unpredicted financial difficulty. Allegations of financial impropriety at TWOA followed and the Government appointed a Crown observer who, shortly afterwards, was appointed as Crown manager in order to stabilize TWOA's financial situation. The Crown decided to restrict payments of money to TWOA that were intended for capital expenditure, fearing that TWOA would use the payments to fund its shortfall in cashflow. The Aotearoa Institute, the parent body from which TWOA developed, lodged an urgent claim with the Tribunal alleging that by these actions the Crown was taking over control of TWOA, thus denying its tino rangatiratanga over its present and future direction. In December 2005 the Waitangi Tribunal issued its report on the Aotearoa Institute Claim<sup>43</sup> setting out its finding that wānanga are expressions of the educational aspirations of Māori and that they are established by iwi to teach by Māori methods and in a Māori way all those who wish to learn by those methods and in that way. The Aotearoa Institute's claim was well founded. The Crown had breached the principles of the Treaty in failing to protect the rangatiratanga of TWOA as a wānanga, with resulting prejudice to the claimants by attempting to define wānanga in such a way as to confine wānanga to the teaching of the Māori language and knowledge to a predominantly Māori student body, and attempting to force TWOA to comply with that mistaken definition.<sup>44</sup>

### III. MĀORI GOVERNANCE – GENERAL

The Waitangi Tribunal's formal acknowledgement of the invaluable contribution made by wānanga illustrates what might be achieved if Māori are encouraged to draw upon their own resourcefulness to enable their own future success. The Tribunal's report also serves as a reminder of the importance of good governance. The Council of TWOA is its governing body and was first constituted in 1993. In mid 2002, the Crown appointed a development advisor to assist the Council to develop its governance role in accordance with good governance practice. The advisor identified two barriers to implementing a more robust governance structure; the reluctance of the chief executive officer to view good governance as important, and members of the council, many of whom were long-serving, having had limited exposure to good governance practices.<sup>45</sup> Ensuring

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43 Waitangi Tribunal, *The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa* (Wai 1298, 2005).

44 *Ibid.*, paras 5.2 and 5.3.

45 *Ibid.*, para 3.3.

that governance systems are in place to regulate important operational matters is critical where governance boards are dominated by managerial expertise.<sup>46</sup> It is possible that the damaging media coverage of the events that became the subject of the Aotearoa Institute's urgent claim, and the upheaval that followed for staff and students, may well have been avoided, or at least mitigated, had TWOA's Council implemented robust governance systems early on.

Governance broadly refers to how an organisation is run, including the processes, systems and controls that are used to safeguard and grow assets. Māori governance takes into account the special relationship that Māori have with certain resources, and objectives of Māori governance will most likely involve identifying a vision and values founded in tikanga Māori. While visions and values will often be similar across groups, Māori are diverse and dynamic so each will create their governance realities to reflect their own historical background – thus maintaining the authority to determine for themselves their pathway forward.

The ways in which Māori have expressed collective unity are many and varied – the Kīngitanga is but one enduring example. The types of governance entities used by Māori to achieve their visions have also been many. Māori Trust Boards currently regulated by the Māori Trust Boards Act 1955 have represented a number of tribes for decades. Charitable trusts have also been popular, mostly because, if approved by the Inland Revenue Department, they are not taxed on their charitable income. Some groups, usually non-tribally based, have opted to use incorporated societies which are based on subscription, and some Māori entities, such as Rūnanga, have been established under their own legislation either as a result of or as a precursor to Treaty of Waitangi settlements. Company structures created under the Companies Act 1993 are most popular for the advancement of commercial objectives, and as far as the administration of Māori land is concerned, trusts and incorporations under Te Ture Whenua Māori Act 1993 continue to play a major role.

#### IV. TRUSTS AND INCORPORATIONS UNDER TE TURE WHENUA MĀORI ACT 1993

As a result of a long and complicated legislative history, Māori freehold land currently constitutes just 6 per cent of the total landmass of Aotearoa, and the land that does remain in Māori hands is typically fragmented and uneconomic. For these reasons Te Ture Whenua Māori Act 1993 (Te Ture Whenua Māori) explicitly recognises that land is of special significance to Māori people and that retention of it should be promoted and the Act contains provisions for trusts and incorporations to administer and develop lands on behalf of multiple owners.

The 'progressive emancipation' of Incorporations under Te Ture Whenua Māori was reviewed last year in the context of Matauri X whose Committee of Management had given as security a mortgage over its land.<sup>47</sup> Upon default, the finance company sought to rely upon its security. The ensuing litigation brought to light the substantial increases in the objects and powers of incorporations under Te Ture Whenua Māori, available upon application following the passing of an appropriate resolution by shareholders.<sup>48</sup> In the light of this litigation, the Mangatawa Papamoa Blocks Incorporation successfully applied to the Māori Land Court to have its objects deleted from its 1957 Order of Incorporation allowing the incorporation to pursue a much wider range of

46 *AWA v Daniels* (1992) 7 ACSR 759.

47 Te Aho, above n 33 at 145-150.

48 See *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2004] 2 NZLR 792 (HC) and *Bridgecorp Finance Ltd v Proprietors of Matauri X Inc* [2005] 3 NZLR 193 (CA).

business activities to further the interests of their shareholders.<sup>49</sup> Mangatawa Papamoa lands are situated on the eastern side of the beautiful Tauranga harbour and, like the people of the Waikato, suffered land confiscation under the New Zealand Settlements Act 1863. Customary title was extinguished in the whole confiscated block, but some Mangatawa Papamoa lands within the block were returned after confiscation by way of Crown Grants. In the 1950s, these lands were administered under Part XXIV of the Māori Affairs Act 1953 by which blocks of Māori freehold land were vested in the Board of Māori Affairs for 'development purposes', and in Mangatawa's case, for farming.<sup>50</sup> Mangatawa Papamoa Blocks Incorporation (the Incorporation) was formed in 1957 under the Māori Affairs Act 1953. The main business of the Incorporation has been agricultural and horticultural, so it is vulnerable to fluctuations in the market and in the weather. But the lands are situated in the rapidly-developing Tauranga/Papamoa area and there is increasing pressure on the Incorporation to develop the land to fulfill its potential. The Incorporation had been bound by the objects as set out in the 1957 Order of Incorporation confining it to farming, agricultural or pastoral business, selling or leasing the land, or mining. These objects potentially restricted the Incorporation from broadening its business activities and investments. One block of land owned by the Incorporation comprising almost 51 hectares was purchased in 1966 and is known as the Asher Block. Confident of the potential to massively increase the revenue and shareholder value, the Committee of Management is currently planning to develop a multi-million dollar retirement village on an area of approximately eight hectares of its land on the Asher Block. This development is likely to involve a joint venture partner providing venture capital, and a very long-term lease (more than 100 years) under Te Ture Whenua Māori. Unlike the case of Matauri, the Mangatawa Papamoa land is not used as a security against any loan, the balance of land (once the land needed for the developed is partitioned out) is not intended to be alienated, but rather will remain under Māori freehold title.<sup>51</sup> With the original objects deleted, section 253 of Te Ture Whenua Māori gives incorporations like Mangatawa Papamoa greater flexibility for this type of commercial development of land. Accordingly, at the Incorporation's 2005 annual general meeting, the shareholders approved the omission of the objects. In percentage terms, those who voted in favour of the relevant resolution held 30.98 per cent of the shares and those who voted against 3.69 per cent. Based on this show of support, the Incorporation applied to the Māori Land Court to remove the objects from the Order of Incorporation. In determining whether to grant the application the Court applied the following principles:

1. The shareholders of the incorporation must have had sufficient notice of the resolution to omit the objects and sufficient opportunity to discuss and consider it.
2. The relevant information necessary for the shareholders to make an informed decision must be provided to them.
3. The shareholders must have passed the special resolution for omission of the objects at a duly notified and constituted annual or special general meeting.
4. That there are no compelling reasons for not granting the application.<sup>52</sup>

Section 17(2)(a) Te Ture Whenua Māori requires the Court to seek to ascertain and give effect to the wishes of the owners and here, despite some opposition, the owners passed a resolution to

49 *In re Mangatawa-Papamoa Inc* (2006) 84T Waikato-Maniapoto MB 185.

50 For a full discussion of the history of the Mangatawa Papamoa blocks, see Waitangi Tribunal, *Te Maunga Railways Land Report* (Wai 315, 1994).

51 Mangatawa Papamoa Blocks Incorporation Information for Shareholders, April 2006.

52 *In re Mangatawa Papamoa Inc*, above n 49 at para 43.

omit the outdated objects following a robust consultation process. In light of the opposition to the proposal by some shareholders, the Court noted some of the provisions in Te Ture Whenua Māori that may protect shareholders in respect of individual development proposals, such as the right under section 253A for shareholders to insert further limitations on the powers of the Incorporation if they so wish. The objects were outdated and an impediment to future development. There were good reasons to omit the objects and no compelling reasons not to. Accordingly, the Court ordered that the objects be omitted as requested.

Like the Mangatawa Papamoā Incorporation, the Tuaropaki Trust was also originally developed for farming. It is a particularly successful ahuwhenua trust under Te Ture Whenua Māori. Ahuwhenua trusts promote and facilitate the use and administration of land in the interests of the beneficial owners. The Tuaropaki lands were amalgamated in 1952. Currently there are 1700 owners of the 2,700 hectares of Māori freehold land at Mokai in the central North Island. The Tuaropaki Power Company Ltd operates a significant geothermal power station on its land, and a major extension to the power station was opened in February 2006. It also operates a geothermal-heated greenhouse. The Trust put forward a draft trust order to the Māori Land Court for approval proposing variations to the objects clause to reflect the Trust's current and future operations.<sup>53</sup> It also sought the appointment of a custodian trustee to improve business efficiency and the appointment of associates to the Trust as a means of identifying potential responsible trustees. The Māori Land Court confirmed the proposed variations to the objects clause and the appointments sought. It also confirmed the variations sought to increase directors' fees. However, the Court did not confirm proposed variations regarding the removal of court approval of trustee and directors' fees and stated that the 'statutory framework provided in the Act ensures that the Court retains an essential supervisory role'. It has been suggested that by its application 'the trust is pushing at the limits of the trustee provisions of Ture Whenua Māori 1993'.<sup>54</sup>

These two recent Māori Land Court cases demonstrate the increasing desire of Māori governance entities like Mangatawa Papamoā Incorporation and Tuaropaki Trust to remould their structural frameworks and processes to reflect their own unique development needs. It is a theme that is also reflected in recent cases concerning applications to change the status of Māori freehold land to general land.

#### A. *Māori Land Court Decisions on Changing the Status of Māori Land to General Land*

The Parininihi ki Waitotara Incorporation (PKW) is another particularly successful entity that recently sought an order to change the status of Māori land in order to on-sell that land to the lessees who had whakapapa connections to the land and to PKW.<sup>55</sup> Some shareholders who did not want any further loss of their lands opposed the application. The issue before the court was whether PKW had met the requirements of section 137 Te Ture Whenua Māori, and that depended upon whether the alienation of land was 'clearly desirable' for the purpose of rationalisation of the land base or any commercial operation of the Māori Incorporation under section 137(c) and whether that rationalisation involved the acquisition of other land by the incorporation under section

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53 *In re Tuaropaki E* (2005) 82 Taupo MB 206-211.

54 See Māori LRev, March 2006, 1.

55 *In re Parininihi ki Waitotara Inc – Section 53 Block IX, Opunake Survey District* (2005) 159 Aotea MB 146, noted in Māori LRev, Nov 2005, 3.

137(d). PKW had provided no valuation to show that the land was marginal, nor had it provided a detailed inquiry into historical and cultural considerations relevant to the land despite those opposing the order arguing that the land was historically and culturally significant. The Court was of the view that PKW was almost exclusively concerned with commercial imperatives, and that ‘permanent alienation of Māori Freehold land is a serious step that the Court does not undertake lightly.’ The Court took the opportunity to outline appropriate processes for PKW to follow:

- It must only sell land over which it is custodian where there is a clear and compelling business case and only after due and proper inquiry that there are no cultural and historical impediments to alienation.
- It must provide owners the opportunity to acquire the land on terms agreeable to both parties, particularly in districts ravaged by effects of land loss through confiscation or where little Māori freehold land remained.
- It must undertake a careful process of consultation and discussion with both the shareholders in general and those claiming interest in the former titles prior to incorporation.

The Court made it clear that under section 137 acquisition of replacement land is mandatory, a point reaffirmed in another recent case: *Re Whangaruru Whakaturia 1D6B9*.<sup>56</sup> This case also involved an application under section 137 to change the status of land from Māori freehold land to general land. All but one of the beneficial owners and trustees supported the application. The Trust’s intention was to sell the land as general land and use the proceeds for purchase of other Māori land. The Court stated that the five requirements in section 137 were cumulative and that section 137(1)(c) requires that: ‘the sale of land in question must be an option that obviously recommends itself to a reasonable and objective trustee of Māori land as a strategy for the elimination of unnecessary assets in order to render the land holdings of the trust or its business operation more efficient’.

All of these Māori Land Court cases illustrate the tension in Te Ture Whenua Māori between the need for retaining Māori land in Māori ownership, and the desire for Māori owners to exercise their own authority. The balance in the two change of status cases reviewed above came down in favour of the retention principle, the Court making it clear that section 137 is an exceptions process designed to allow trustees to avoid the usual protections against absolute alienation. But the requirements are to be strictly adhered to, unless there are peculiar and specific factual circumstances, such as in the case of *Te Reti*<sup>57</sup> which again involved an application to change the status of land from Māori freehold land to general land. The land in question had been received as a property settlement between de facto partners, based on the assumption that the land was general land. The change of status was sought as a precursor to sale with the intent to apply the proceeds of sale to the family trust that had been established for the benefit of descendants. The Māori Land Court had issued directions requiring notice to preferred alienees and to obtain an affidavit from the former de facto partner as to whether she objected and no objections were received. On these facts, the Court allowed the status of the land to be changed.

As noted earlier, one of the central reasons for establishing the King Movement was to provide a unified force to resist early native land laws designed to effect land alienation and the accompanying Crown land purchasing policies. These recent cases demonstrate the continued importance of those provisions of Te Ture Whenua Māori Act 1993 aimed at land retention. The cases also

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<sup>56</sup> *In re Whangaruru Whakaturia 1D6B9* (2005) 102 Whangarei MB 259, noted in Māori LRev, Oct 2005, 1.

<sup>57</sup> *In re Te Reti A37 Block* (2005) 159 Aotea MB 133, noted in Māori LRev, Oct 2005, 2-3.

illustrate, however, the growing desire of collective Māori owners to determine the way in which their land will be dealt with in a modern world.

## V. STANDARDISING MĀORI GOVERNANCE ENTITIES: WAKA UMANGA

The tribunal must firmly emphasise that it is not the function of this tribunal nor indeed, and with respect, the right of the Crown to determine the structure that Ngāi Tahu may require for their present and future needs. That must be a matter for Ngāi Tahu.<sup>58</sup>

The Law Commission proposes the establishment of new legal entities called Waka Umanga that would be designed to meet the organisational needs of tribal and other Māori groups that manage communally held assets, principally to assist the ready resolution of Treaty settlements processes.<sup>59</sup> The term describes a vehicle (waka) for a community undertaking (umanga). This proposal to standardise Māori governance entities might well pose a threat to mana motuhake, if past experience is anything to go by.

### A. *External attempts to standardise Māori*

Driven by the Crown policy of devolution, the Government attempted to provide general legislation that purported to develop a standard classification of iwi and hapū affiliation in the Rūnanga Iwi Act 1990. Māori resoundingly rejected the Act as an affront to their tino rangatiratanga and the Act was repealed in 1991. Some of the elements of the repealed Act survived, however, in processes for registering iwi for the purposes of fisheries allocation models, with serious consequences. Last year's review highlighted certain provisions of the Māori Fisheries Act 2004 that specify who may become mandated iwi organisations for the purposes of receiving fisheries settlement assets.<sup>60</sup> The review also summarised the well-known story of Rongomaiwahine, the principal ancestor of the people of Māhia Peninsula. Because of her mana, Rongomaiwahine's descendants hold strongly to their separate identity. While some identify themselves as both Rongomaiwahine and Ngāti Kahungunu, those who are descended from Rongomaiwahine's first husband identify themselves only as Rongomaiwahine. The consequences of the Crown refusing to identify Rongomaiwahine as an iwi separate from Kahungunu has meant that Rongomaiwahine has, for all but one fishing season, been denied its commercial fishing rights in its own tribal area since the national fisheries settlement of 1992.<sup>61</sup>

This is but one example of the dangers that can occur when external attempts are made to define iwi and hapū. Every iwi is unique in terms of tribal history, population, geography, and aspirations. Each will have its own notions of tino rangatiratanga and mana motuhake. The Law Commission's proposal is to allow tribes to form their own waka umanga with a set of standard obligations but also enable tribes to develop the model in a way that fits with their own culture, traditions and requirements. Yet, given Māori experiences of the Crown-driven direct negotiations processes,<sup>62</sup> Māori have good reason to suspect that the Crown will ultimately require the adoption

58 Waitangi Tribunal, *The Ngai Tahu Claim: Supplementary Report on Ngai Tahu Legal Personality* (Wai 27, 1991).

59 Law Commission, *Waka Umanga: A Proposed Law for Maori Governance Entities*, Report 92 (2006).

60 Te Aho, above n 33.

61 This became the subject of a debilitating history of litigation. See for example *Te Hau v Treaty of Waitangi Fisheries Commission*, unreported, High Court, Wellington 3 April 2000 (CP 12/00) Doogue J.

62 See Part II, section B above.

of waka umanga with certain criteria as a prerequisite to the settlement of Treaty Claims, thereby removing any real choice.

### *B. Towards the timely resolution of Treaty settlement*

It is clear that the proposed Waka Umanga legislation is intended to assist the speedy resolution of Treaty claims.<sup>63</sup> Like the Rūnanga Iwi Act 1990 before it, since repealed, the proposed legislation would enable certain entities to become the 'legitimate representative' of a tribe making it easier for the Crown to deal with claimants. Another significant feature of the Law Commission's proposal is its heavy emphasis upon providing systems for managing internal dispute resolution. Disputes would be dealt with by an expanded Māori Land Court, which has faster and less expensive procedures than those of the High Court. The emphasis on speed parallels the proposed new deadlines for lodging historical Treaty claims proposed in the Māori Purposes Bill mentioned briefly above.<sup>64</sup>

### *C. The Advantages of the Law Commission's Proposal*

The Law Commission's report emphasises its view that existing legal structures such as trusts and companies are inadequate to deal with the wide-ranging social and economic operations of Māori tribal organisations in a modern world, and that the need to legislate to provide a legal entity specifically shaped to meet those organisational needs is urgent. The report also recognises the public benefit in reducing the overall time and cost of forming a suitable post-settlement legal entity by providing a model with standards that ensure responsible and accountable governance. Meeting competing needs is a delicate balance, and was an issue of great concern for Ngāti Awa who during their negotiations process with the Crown went to great lengths to design a governance structure that:

meets the needs of our people and meets the concerns of tino rangatiratanga, and that is also supported by an Act of Parliament, rather than relying on present laws dealing with Trusts ... only to find that ... the Crown may not accept it. The Crown's new governance structure can be set, namely the people vote for it and therefore mandate it, but it's really not the most suitable kind of organisation that the people need.<sup>65</sup>

The chief negotiator for Ngāti Awa favoured the Crown developing models from which iwi could choose, so as to avoid the debates and delay that occurred with regard to their post-settlement governance structure, and the Law Commission's proposal seems to address that point of view. It also seems to address the concerns of Ngāi Tahu encapsulated in the quotation that introduces this part of the review. The intelligence and experience of the Law Commissioners involved, particularly the Honourable Justice Durie, combined with the consultation process that the Commission underwent before finalising its proposal, gives mana to the report. The justifications for the legislation are persuasive and seem sincere. Recommendations such as the inclusion of appropriate conflicts of interest policies are insightful. And other initial doubts about standardising Māori organisations such as whether and how the legislation could provide for minority interests,<sup>66</sup> and whether the proposal addresses the reality that the success of any organisation is dependant upon the quality

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63 Law Commission, above n 59 at 13.

64 See above n 40 and accompanying text.

65 Crown Forestry Rental Trust, above n 17 at 8.

66 Law Commission, above n 59 at 48-50.

of the *people* involved are also addressed.<sup>67</sup> The report explicitly recognises the need for iwi to be able to shape their own future structures to reflect their own uniqueness in terms of tribal history, population, geography, their approaches and aspirations as to their particular relationships with the Crown, other iwi and each other. By allowing an iwi to choose whether or not it adopts a waka umanga, the Law Commission's proposal recognises that different tangata whenua groups may well require quite different structures consistent with their own notions of tino rangatiratanga and mana motuhake. The concern that remains is about how the Crown will act in response to the Law Commission's proposals and recommendations. The notion of a 'legitimate representative' and the proposal's emphasis on speed appeases the Crown agenda of hastening the resolution of Treaty claims processes. Just as the Crown unilaterally imposes its own criteria and timeframes for the resolution and 'negotiation' of Treaty claims, it may well determine to require the adoption of waka umanga upon certain specified criteria as a prerequisite to the settlement of Treaty claims, thereby removing any real choice.

## VI. SUMMARY AND CONCLUSION

When King Tāwhiao determined to fashion his own house from his own resources it was an assertion of mana motuhake, the separate and independent authority of Māori to make their own choices in order to create their own prosperity. Those choices may involve entering into coalitions or aggregations willingly to protest against Crown policies or to progress Treaty claims. Or those choices may involve adopting governance models based on Crown objectives, or custom designing models. Problems arise however when Māori do not have a meaningful choice – where Treaty settlement processes are overly prescribed, when Māori are forced into unnatural groupings or the disincentives of making their own choice are so great that there is no real choice. Māori are still managing the delicate balance inherent in the Te Ture Whenua Māori Act 1993 between the need for retaining Māori land in Māori ownership, and the desire for Māori owners to exercise their own authority in terms of development. In all of these circumstances, Māori must be free to affirm and draw upon their own unique knowledge base, leadership practices, and resourcefulness, to make these choices, work through these tensions, and ensure their own future prosperity.

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67 Ibid, 244-245.

# INDIGENOUS CUSTOMARY RIGHTS AND THE CONSTITUTION OF AOTEAROA NEW ZEALAND

BY DAVID V WILLIAMS\*

## I. INTRODUCTION

The focus of this article is on the place of indigenous customary rights in the constitution of Aotearoa New Zealand. I use the term ‘indigenous customary rights’ in an attempt to ensure that the rights and obligations established by the legal practices of indigenous societies in this part of the globe are not equated with the rather static notion of local custom – established since ‘time immemorial’ – that once was important but now remains as only a very limited source of law in English law.<sup>1</sup> I am also happy to apply the term ‘custom law’ to tikanga Māori, as used by Durie and the New Zealand Law Commission.<sup>2</sup> I am not happy, however, to diminish and demean the significance of tikanga Māori by describing it as ‘lore’ rather than ‘law’ – with the implication that it is an inevitably inferior source of obligations that can always be trumped by ‘real’ law. I have long advocated the importance of legal pluralism to understand the role of law in society and I prefer the more far reaching and open-ended version of legal pluralism which holds that the concept of law ‘does not necessarily depend on state recognition for its validity.’<sup>3</sup> A similar view was advanced in a recent book by the film-maker Barry Barclay in relation to the protection of taonga, and the inability of intellectual property laws to perform that function.<sup>4</sup>

In Aotearoa New Zealand the indigenous tangata whenua are a minority of the population. The status in the New Zealand state’s legal system of customary rights based on tikanga Māori/Māori law is very different from the situation in the constitutions of other independent South Pacific island nations in which the indigenous peoples comprise the overwhelming majority of the population. In those nations constitutions with the status of supreme law generally proclaim the importance of indigenous customary rights. Moreover, Māori in Aotearoa were subject for more than a century to successive Crown policies of amalgamation, assimilation, adaptation and integration that were specifically designed to suppress and eliminate their cultural knowledge systems

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\* Professor of Law, University of Auckland. This article is a revised version of sections of a paper delivered to an International conference and workshop on *Constitutional Renewal in the Pacific Islands*, held at Emalus Campus, University of the South Pacific, Port Vila, Vanuatu, August 2005; and a paper delivered in July 2005 to an Auckland District Law Society seminar: ‘Whither the Treaty of Waitangi and its Principles?’ in *Customary and Indigenous Rights in an Evolving Constitution* (Auckland: Auckland District Law Society, 2005) 1-18.

1 See C K Allen, *Law in the Making* (7th ed) (Oxford: Clarendon, 1964).

2 Law Commission, *Māori Custom and Values in New Zealand Law* (Study Paper 9) (Wellington: Law Commission, 2001) 1-7.

3 A Griffiths, ‘Legal Pluralism’ in R Banakar & M Travers (eds), *An Introduction to Law and Social Theory* (Oxford: Hart, 2002) 289. See also H Arthurs, *Without the Law* (Toronto: Toronto University Press, 1985) 1-3.

4 B Barclay, *Mana Tuturu: Māori Treasures and Intellectual Property Rights* (Auckland: Auckland University Press, 2005).

and customary legal practices. I have described those policies in some detail, based on archival material, in a report published by the Waitangi Tribunal in 2001.<sup>5</sup> Colonialism no doubt severely distorted indigenous customary rights in the island nations of the Pacific, but at any rate partially intact custom laws systems continued to operate (and evolve) into the post-colonial era.

By way of background as to my interest in this topic, in the 1980s I was the co-ordinator for a course in Pacific Legal Studies at the University of Auckland and I used the collection of essays from the proceedings of the Canberra Law Workshop VI at the Australian National University on Pacific Constitutions, and also papers from the Canberra Law Workshop VII, which I attended, that were published as *Legal Pluralism* in teaching that course.<sup>6</sup> The conference on Constitutional Renewal in the Pacific Islands at Port Vila in 2005 was therefore of considerable interest to me. Most of the constitutions I had taught about in the 1980s were written constitutions put in place at independence during the decolonisation decades of the 1970s and 1980s. Under these constitutions the indigenous majority populations of the Pacific nations regained their rights of self-determination and political independence, even if neo-colonialist economic structures remained in place. In stark contrast, in Pacific Rim countries where the indigenous populations were decimated and subsumed during the course of European colonisation in the nineteenth and twentieth centuries, they became a minority group within their own lands and the United Nations decolonisation instruments were never applied to permit them to exercise a right of self-determination. Their (individualised) constitutional rights came to be defined by the settler majority populations, with a legal ideology dominated by centralist and legal positivist notions of law, and their collective customary values and practices were either extinguished completely or else redefined by imperial and colonial law within a doctrine known as aboriginal title.<sup>7</sup>

## II. CONSTITUTIONAL DIALOGUE

My interest in this article is with the notion of ‘constitutional dialogue and reform’ as proposed by the University of South Pacific conference convenors. In most Pacific Ocean nations constitutional dialogue as it affects traditional customary values may need to look at how Western-educated elites, international NGOs and aid and development agencies dialogue with or ignore populous local communities for whom traditional customary practices are of vital importance. In Pacific Rim nations, however, indigenous peoples generally have to strive very hard even to be heard in constitutional dialogues, let alone have their customary rights and practices valued and protected.

Looking at such matters from an Aotearoa New Zealand perspective ought in my view to lead to consideration of the status of the Treaty of Waitangi. To what extent is the Treaty of Waitangi the (or a) cornerstone of the constitution of the country? However, public lawyers in New Zealand hearing the words ‘constitutional dialogue’ would almost certainly think not of Treaty issues but of an ongoing debate as to the authority of Parliament in relation to the alleged ‘judicial activism’ of the courts. In academic debate, for example, Joseph has argued for a form of constitutional

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5 D V Williams, *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Wellington: Waitangi Tribunal, 2001).

6 P Sack (ed), *Pacific Constitutions* (Canberra: ANU, 1982); P Sack & E Minchin (eds), *Legal Pluralism* (Canberra: ANU, 1986).

7 B Slattery, ‘Understanding Aboriginal Rights’ (1987) 64 *Canadian Bar Review* 727. More generally on aboriginal title, see P G McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991); K McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989).

dialogue in which Parliament and the Courts exercise a co-ordinate, constitutive authority in a symbiotic relationship founded in political realities. Ekins has leapt to the defence of the doctrine of parliamentary sovereignty.<sup>8</sup> Oddly, in my view, this controversy was played out in the journal of an English academic journal – hardly a clear sign that we have yet arrived at the post-colonial era proclaimed by some to already exist. In addition to academic controversy, there have been a number of attacks by politicians of various persuasions on perceived challenges to Parliament's powers in court judgments and in extra-judicial utterances by leading members of the judiciary. In particular, as discussed below, the Deputy Prime Minister (who is also the Attorney-General) has taken deep umbrage over certain views expressed by the Chief Justice.

New Zealand retains perhaps the most 'pure' form of the unitary Westminster version of parliamentary sovereignty anywhere in the world. In addition, with a unicameral Parliament since 1950, the slim possibility of an upper house acting as a check on legislation being rammed through to meet the political needs and moods of the moment does not exist here. On the other hand, the parliaments in Australia and Canada have to operate within the restraints of federal constitutions, bicameral parliaments and judicial review of the constitutionality of duly enacted legislation. In Canada's case there is also the Canadian Charter of Rights and Freedoms 1982 as a form of supreme law. The United Kingdom Parliament is subject to supranational law and human rights conventions from the European Community, on the one hand, and has devolved certain powers to the Scottish Parliament and the Welsh Assembly on the other hand.

In New Zealand, however, we have the Constitution Act 1986 – which unlike most Pacific national constitutions and unlike almost every other national constitution in the world is merely an ordinary statute – and a very brief one at that. It has no protection from amendment (express or implied) or from repeal by ordinary parliamentary processes in a subsequent session of Parliament. Ours is an 'uncontrolled constitution' so that, as Lord Birkenhead LC observed in the Privy Council in 1920, 'it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter'.<sup>9</sup>

For the present, though, the Constitution Act 1986 stipulates baldly that 'the Parliament of New Zealand continues to have full power to make laws'.<sup>10</sup> That is a proposition that ministers of the Crown have been most anxious to reaffirm during controversies that have arisen since 2003. The Courts, the Waitangi Tribunal, indigenous rights claimants and human rights activists are perceived to have been challenging the right of Parliament to overturn inconvenient Court decisions and the right of the executive to reject Tribunal recommendations. The Deputy Prime Minister, Michael Cullen assiduously proclaimed the importance of parliamentary sovereignty in a series of speeches in 2004.<sup>11</sup> Indeed his contribution to a special sitting of Parliament, on the 150th anniversary

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8 P Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *Kings College Law Journal* 321; R Ekins, 'The Authority of Parliament: A Reply to Professor Joseph' (2005) 16 *Kings College Law Journal* 51.

9 *McCawley v The King* [1920] AC 691, 703 (PC). In that case it was declared that the legislature of Queensland could disregard a provision of the Queensland Constitution Act 1867 on the security of tenure for judges when enacting the Industrial Arbitration Act 1916 without reference to the Constitution Act.

10 Constitution Act 1986, section 15(1).

11 M Cullen, 'Waitangi Tribunal Report Disappointing', 8 March 2004; 'Address to Labour Party Conference, Wanganui', 15 March 2004; 'Waipukurau Rotary Club', 15 March 2004; 'Address to Otago District Law Society', 8 April 2004; 'Human Rights and the Foreshore and Seabed', 1 June 2004; 'Parliament: Supremacy over Fundamental Norms?' 29 October 2004, available at <[www.beehive.govt.nz/](http://www.beehive.govt.nz/)>

sary of its first session in 1854, was devoted to insisting upon the ‘settled doctrine that New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law, the highest expression of the will of the governed, and the body to which the Government of the day is accountable’.<sup>12</sup> This speech contained a very strong attack not only on ‘some radical Māori, who argue that sovereignty has never been legally acquired in New Zealand’, but also on judicial activism ‘from within the heart of New Zealand’s judiciary’. His strongest barb was directed at the incumbent Chief Justice. He attributed to her three key statements:<sup>13</sup>

Firstly, we have assumed the application of the doctrine of parliamentary sovereignty in New Zealand—why, is not clear. Secondly, whether there are limits to the lawmaking power of the New Zealand Parliament has not been authoritatively determined, which raises the interesting question of who has the authority to determine that. Thirdly, an untrammelled freedom of Parliament does not exist.

To those suggestions Cullen replied:

In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government. In our tradition the courts are not free to make new law. It is fundamental to our constitution that lawmakers are chosen by the electorate and accountable to the electorate for their decisions.

...

Governments, of whatever stripe, do not favour judicial activism. They almost inevitably favour a strict constructivist approach, because it involves far fewer political or fiscal risks. Activism does not always challenge parliamentary sovereignty, but it often does. And in New Zealand fundamental questions have been raised about that sovereignty. It is almost as if there is an emerging view that sovereignty is to be shared between Parliament and the judiciary, with Parliament being the junior and less-informed partner. That is so because where Parliament’s sovereignty is questioned it is usually accompanied by the assertion or implication that it is the courts that have the final say as to the rules.

The point I make in response is not merely that this is a trend for which there is no democratic mandate, and which has never been part of the political discourse in New Zealand, but that it cannot exist as a one-sided development. It will inevitably lead to the politicisation of the process of judicial appointments and of the judiciary itself—something to be avoided.

### III. NEW ZEALAND CONSTITUTION ACT 1852

The General Assembly of Parliament that first met 150 years earlier at Auckland (then the capital of the colony) in May 1854 was constituted by the New Zealand Constitution Act 1852, an Act of the United Kingdom Parliament acting as the supreme legislature for the British Empire. This brought New Zealand’s status as a directly ruled Crown Colony to an end and substituted a form of representative (then responsible) government comprising ministers drawn from parliamentarians elected by enfranchised members of the colony’s population. Māori still comprised a majority of the total population in 1854 – they first became a minority about 1858 when the pace of European settlement began to accelerate rapidly. Yet only a tiny number of Māori were enfranchised in 1854. The failure of New Zealand constitutional norms (apart from the never-utilised section 71 noted below) to take adequate account of the place of Māori as *tangata whenua*, or their customary

12 M Cullen, ‘Address to Her Excellency the Governor-General’ 24 May 2004, 150th Anniversary Sitting of Parliament, available at <[www.parliament.nz/](http://www.parliament.nz/)>.

13 For her own words, see S Elias, ‘Sovereignty in the 21st century: Another Spin on the Merry-go-round’ (2003) 14 *Public Law Review* 148.

values and practices, was a feature of the constitution from the outset of parliamentary governance. The franchise depended, until the Qualification of Voters Act 1879, on a property ownership qualification. Māori tribes collectively 'owned' the majority of land in the North Island under customary tenures in 1854 but the franchise depended on ownership of land in fee simple. Only those very few Māori who owned land under a Crown grant were eligible to vote. Most Māori were totally excluded from political society as then constituted. In a complicated deal that had more to do with the balance of power as between South Island settlers and North Island settlers, Māori were first admitted to Parliament in 1867. As a consequence of the Māori Representation Act 1867 four members were elected to represent Māori electorates representing about 50,000 Māori (at a time when 72 seats were allocated to represent the settler population that at the time comprised about 250,000 persons).<sup>14</sup>

Some Māori, especially the missionary school educated members of the Young Māori Party, actively participated in national politics from about the turn of the 20th century. The leadership of the more traditionalist Māori communities sought another route for what we might now call constitutional renewal. They focussed on section 71 of the 1852 Constitution Act. This provision allowed for Letters Patent to be issued for the creation of Native Districts in which 'the Laws, Customs, or Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other'. There were numerous instances of Māori petitions for the creation of Native Districts including the petitions directly to Queen Victoria and King George V in London by northern chiefs in 1882, and by the Kingitanga movement led by the Māori Kings Tāwhiao in 1883 and Te Rata in 1913. The Palace and the imperial government insisted that these were matters for the responsible ministers in New Zealand and those ministers consistently were profoundly deaf to submissions in favour of native districts. Section 71 was quietly dropped from New Zealand law when the Constitution Act 1986 was passed (despite my personal objections submitted to a select committee hearing on the Bill at the time).

There were many other vehicles chosen by Māori leadership to try to give Māori a voice in the nation's affairs. The 19th century Kotahitanga Movement held its own Parliaments at Waitangi and elsewhere and Kingitanga established its Great Council (Te Kauhanganui) in 1894. In the 20th century the Rātana Church Movement campaigned for the ratification of the Treaty of Waitangi first in a petition to King George V in 1924 and then by entering into a political covenant with the Labour Party. Closer to the present time, there has been a Māori cultural renaissance and this has included calls for the Treaty of Waitangi to be recognised as the foundation of the nation. Important pan-tribal hui held at Ngāruawahia in 1984 and at Hīrangī Marae in 1995 have declared that 'the Treaty of Waitangi is a document that articulates the status of Māori as tangata whenua of Aotearoa' and that there should be 'a Constitutional review jointly undertaken by Māori and the

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14 Waitangi Tribunal, *Māori Electoral Option Report* (Wellington: Legislation Direct, 1994) s 2.2. The electoral option available to persons of Māori descent since the introduction of the Mixed Member Proportional electoral system resulted in Māori electorate seats rising to five in 1996 and then to seven in 2002.

Crown for the purpose of developing a New Zealand constitution based on the Treaty of Waitangi and, among other things, fully recognising the position of Māori as tangata Whenua'.<sup>15</sup>

#### IV. THE FORESHORE AND SEABED LANDS DECISION, 2003 AND THE OREWA SPEECH, 2004.

Without directly addressing Māori calls for significant constitutional reforms, over the period since 1987 it had gradually become conventional and eventually almost uncontroversial to state that the Treaty of Waitangi is 'the founding document of New Zealand',<sup>16</sup> 'a constitutional document';<sup>17</sup> 'simply the most important document in New Zealand's history',<sup>18</sup> 'essential to the foundation of New Zealand' and 'part of the fabric of New Zealand society',<sup>19</sup> 'of the greatest constitutional importance to New Zealand'.<sup>20</sup> Passionate responses by many citizens and news media commentators to two particular events in 2003 and 2004, however, have severely challenged the continuing general political acceptability of such remarks.

The first event was the release of a long-awaited decision of the Court of Appeal on common law aboriginal title and customary law entitlements of Māori tribes to the lands beneath the foreshore and seabed. In June 2003 the Court of Appeal decided that the Māori Land Court had jurisdiction to inquire into customary entitlements to foreshore and seabed lands. The Court of Appeal media release stressed that the Court's decision

is a preliminary one about the ability of the iwi to bring their claims. The validity and extent of the customary claims in issue have yet to be decided by the Māori Land Court. The impact of other legislation controlling the management and use of the resources of maritime areas also remains to be considered'.<sup>21</sup>

The Court's decision in *Ngati Apa v Attorney-General* was a modest procedural victory for seven tribes from the north of the South Island.<sup>22</sup> They had resorted to litigation after years of unresolved difficulties over procedures to obtain permission to engage in commercial aquaculture activities on the foreshore and seabed lands of the Marlborough Sounds. The Court decision did not define their customary rights, if any, but merely enabled the plaintiffs to adduce evidence to the Land

15 A Blank & others (eds), *He Korero Mo Waitangi*, (Ngāruawahia: Te Runanga o Waitangi), 1985; M H Durie, 'Proceedings of a Hui held at Hirangi Marae, Turangi' in G McLay (ed), *Treaty Settlements: The Unfinished Business* (Wellington: Institute of Advanced Legal Studies, 1995); M H Durie, *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Auckland: Oxford University Press, 1998).

16 Government publications include: Te Puni Kokiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi*, Wellington, 2001, 14; 'Paths To Nationhood - Ngā Ara Ki Te Whenuatanga', available at <www.archives.govt.nz/>.

Scholarly contributions include B V Harris, 'The Constitutional Future of New Zealand' [2004] NZ Law Review 269; P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed) (Wellington: Brooker's, 2001) 42-86; F M Brookfield, *Waitangi and Indigenous Rights* (Auckland: Auckland University Press, 1999); M McDowell & D Webb, *The New Zealand Legal System* (2nd ed) (Wellington: Butterworths, 1998) 189-233; McHugh, above n 7.

17 G W R Palmer, *Constitutional Conversations* (Wellington: Victoria University Press, 2002) 22.

18 R Cooke, 'Introduction', (1990) 14 NZULR 1, 1-8; S Elias, 'The Treaty of Waitangi and Separation of Powers in New Zealand' in B D Gray & R B McClintock (eds), *Courts and Policy: Checking the Balance* (Wellington, Brooker's, 1995) 206-230. See also articles by D V Williams, K J Keith, A Frame, and A Mikaere in the special sesquicentennial issue on the Treaty of Waitangi and constitutional issues: (1990) 14 NZULR 9-101.

19 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (Chilwell J) (HC).

20 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 516 (Lord Woolf) (PC).

21 Court of Appeal of New Zealand, 'Media Release: Seabed Case', 19 June 2003.

22 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) hereinafter *Ngati Apa*.

Court because, despite statutory assertions of Crown ownership, there has been no unambiguous and explicit statutory extinguishment of indigenous customary rights. Despite its narrow jurisdictional focus, the Court ruling created a storm of controversy. The fierce condemnations of the Court by hosts and callers on talkback radio, in letters to editors, political party rallies and the like focused on 'public access to beaches' being threatened by Māori claims to exclusive rights. This rhetoric had little or no connection to the narrow findings of the Court of Appeal and none at all to the actual practical claims of the tribal plaintiffs.<sup>23</sup>

A second noteworthy event in reshaping national debate on Treaty issues was a speech by the then Leader of the Opposition, Don Brash, to the Orewa Rotary Club on 'Nationhood' in January 2004.<sup>24</sup> His notion of nationhood involved staunch criticisms of what he named as Māori 'racial privileges', 'two standards of citizenship' for Māori and non-Māori, and biculturalism policies based on the supposed Treaty principle of a partnership between the Crown and Māori. His message evidently struck a deep chord of resonance judging from the delighted responses of many New Zealanders. The Government did not stand up for its Treaty-based initiatives in partnership with Māori. Rather, ministers of the Crown rapidly reframed some of the health, education and capacity-enhancement policies focussed on Māori as if they had always been 'needs-based' and not 'race-based' or 'Treaty-based'.<sup>25</sup>

## V. THE ACADEMIC DEBATE INTENSIFIES

Meanwhile, debates on the Treaty and the historiography employed by the Waitangi Tribunal had become much more intense within academic circles. For a long time there were very few voices raised against the government moves away from assimilation and integration policies of the pre-1970s.<sup>26</sup> Biculturalism came to be in vogue from the 1970s. Then in the 1980s came the invention by the courts and the Tribunal of the meaning of 'the principles of the Treaty' and, incidentally, I use the term 'invention' in an entirely non-pejorative manner.<sup>27</sup> Parliament had not defined what it meant by 'the principles of the Treaty of Waitangi' so the courts as a matter of statutory interpretation necessarily had to invent appropriate meanings consistent with the purposes of the enactments. These decisions on the principles of the Treaty dramatically raised the status of the Treaty itself from being discarded as a 'simple nullity' to a quasi-constitutional document in the life of the nation. In a rather optimistic moment of reverie, sitting in the Codrington Library at All Souls College, Oxford, in 1990 Sir Robin Cooke (as he then was) imagined William Blackstone saying to him: 'And if the parliament and the judges are forever mindful of the restraint on the part of either which is fitting to preserve equilibrium in society, these questions may safely remain

23 For less sensational comments and material relating to the actual issues, see T Bennion, M Birdling & R Paton, *Making Sense of the Foreshore and Seabed* (Wellington: Māori Law Review, 2004); T Bennion, 'Lands Under the Sea: Foreshore and Seabed' in M Belgrave, M Kawharu & D Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005), hereinafter *Waitangi Revisited*, 233-47.

24 D Brash, 'Nationhood', Orewa Rotary Club, 27 January 2004, available at <[www.national.org.nz/](http://www.national.org.nz/)>.

25 T Mallard, 'First results of review of targeted programmes', 16 December 2004, available at <[www.beehive.govt.nz/](http://www.beehive.govt.nz/)>.

26 See Williams, above n 5.

27 See E Hobsbawm, 'Introduction: Inventing Traditions' in E Hobsbawm & T Ranger (eds), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) 1-14; J G A Pocock, 'Time Institutions and Action; An Essay on Traditions and Their Understanding' in *Politics, Language and Time: Essays on Political Thought and History* (London: Methuen, 1972) 233-46.

unagitated. I do not doubt but that your Treaty of Waitangi has become in some sense a grand constitutional compact akin to our Magna Charta'.<sup>28</sup>

If Cooke's dreams of the Treaty as a grand constitutional compact were not taken very seriously in government circles in the 1990s, neither, on the other hand, was any particular attention paid to harsh attacks on the Treaty by a few fierce critics, such as Stuart Scott.<sup>29</sup> Scott was so extreme in his fulminations against the Treaty of Waitangi and so shallow in his research that his views were given little or no credence. McHugh, for example, called Scott's work 'a popular book almost entirely bereft of any scholarship'.<sup>30</sup> Hardly more serious, even if written by an academic, was David Round's contribution to the debate.<sup>31</sup> There was only one serious and credible academic analysis of possible flaws in Treaty-based thinking. This came from the acute writings of an Auckland political philosopher, Andrew Sharp. He started with a detailed dissection of Māori claims to justice and reparation and then turned to questioning of the thrust of 'juridical history' as practised by the Tribunal.<sup>32</sup>

In the early years of the twenty-first century, however, a significant divide has opened up between 'Treaty industry' historians and lawyers on the one hand and a number of academics, historians in particular, on the other hand. To Sharp's criticisms of the Waitangi Tribunal's 'juridical history' has been added some stringent attacks by eminent historian Bill Oliver on the 'ahistorical' methodology of the Tribunal's report-writing with its reliance on 'counterfactual' assumptions to criticise Crown policy, acts and omissions. The Tribunal's common law style of history is said to provide a 'retrospective reconstruction' of a 'millennialist' history that has 'a utopian character' with 'elements of the religion of the oppressed and the promise of delivery from bondage to a promised land'.<sup>33</sup> In mid-2004 a former Tribunal historian turned academic, Giselle Byrnes, brought out a book suggesting that the Tribunal's attempts to write history have been a 'noble, but ultimately flawed experiment' owing to the Tribunal's political bent towards advocating Māori causes.<sup>34</sup> Recently an eminent expatriate New Zealander, the philosopher Jeremy Waldron, has mounted a powerful critique of Treaty jurisprudence. Relying on an aphorism from J S Mill, Waldron has argued that 'No treaty is fit to be perpetual' and that circumstances have changed so fundamentally since 1840 that the Treaty should have no modern application at all.<sup>35</sup> A historian writing a biography of the Wakefield family, many of whom came to live in New Zealand, introduces his book with the statement that it seeks to be a 'dispassionate biography'. According to this author: 'I decided to do the Wakefields the courtesy of attempting to treat them within the context

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28 R Cooke, 'Introduction' (1990) 14 NZ ULR 1, 8.

29 S C Scott, *The Travesty of Waitangi - Towards Anarchy* (Christchurch: Campbell Press, 1995).

30 P G McHugh, 'A History of Crown Sovereignty in New Zealand' in A Sharp & P McHugh (eds), *Histories, Power and Loss* (Wellington: Bridget Williams Books, 2001) 189, 202, 248.

31 D Round, *Truth or Treaty: Common Sense Questions About the Treaty of Waitangi* (Christchurch: Canterbury University Press, 1998).

32 A Sharp, *Justice and the Māori: Māori Claims in New Zealand Political Argument in the 1980s* (Auckland: Oxford University Press, 1990); A Sharp, 'History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa' in M Peters (ed), *Cultural Politics and the University in Aotearoa/New Zealand*. (Palmerston North: Dunmore Press, 1997) 158-81.

33 W H Oliver, 'The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia' in *Histories, Power and Loss*, above n 30, 13, 26-7; W H Oliver, *Looking for the Phoenix: A Memoir* (Wellington: Bridget Williams Books, 2002) 154-70.

34 G Byrnes, *The Waitangi Tribunal and New Zealand History* (Melbourne: Oxford University Press, 2004).

35 J Waldron, 'The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus' (2006) 11 *Otago Law Review* 161.

of their own times'.<sup>36</sup> The obvious implication of the views of this and other historians is that it is seriously discourteous to view the actors of the past from a presentist perspective. That perspective, however, is the norm of common law reasoning and it is certainly what informs the Waitangi Tribunal in its reports on historical grievances.

The flow of the debate is not in one direction only. Successive chairpersons of the Tribunal, Eddie Durie and Joe Williams, have sought to inform the public debate with careful comments on the importance of Treaty jurisprudence in modern New Zealand law.<sup>37</sup> Some lawyers, including Paul McHugh and Richard Boast, have been prepared to defend both the common law mode of reasoning and the 'presentism' of Tribunal reports.<sup>38</sup> My Auckland colleagues, Professors Brookfield and Harris, have made a number of interventions in the debates on the status of the Treaty that are reflected in the papers they presented to the Auckland District Law Society.<sup>39</sup> The distinguished expatriate historian, J G A Pocock, writes more cautiously than other historians of 'the histories in Aotearoa New Zealand' and urges all the peoples of the land to engage in 'recounting histories in one another's hearing'.<sup>40</sup> An excellent effort in that direction is a book written by Michael Belgrave and published in 2005.<sup>41</sup> Also there are a number of balanced essays in a 2004 review of the Tribunal's place in contemporary New Zealand society edited by Janine Hayward and Nicola Wheen.<sup>42</sup>

## VI. BICULTURALISM IN ONE NATION

The legal reasoning and advocacy history approach adopted by the Tribunal in its reports have made a powerful contribution to the notion of bicultural development within one nation. That notion is now under attack in some quarters as out of date 'racial' thinking that is inconsistent with notions of equality within a modern democratic state. Yet do leaders of the nation seriously want to return the country to the 'good old days' of integration? Do any of them remember what those policies looked like in practice in the post World War II period and how abject a failure they were to achieve the avowed intention of the Hunn Report 1960 – 'closing the gaps'?<sup>43</sup>

In looking at such questions, it needs to be acknowledged that the Waitangi Tribunal's support for policies of biculturalism is by no means fully embraced by many Māori now basking in a resurgent sense of Māori nationalism. Calls for recognition of tino rangatiratanga rights affirmed

36 P Temple, *A Sort of Conscience: The Wakefields* (Auckland: Auckland University Press, 2002) 3.

37 E Durie, 'Constitutionalising Māori' in G Huscroft & P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart, 2002) 241-64; J V Williams, 'The Māori Land Court – A Separate Legal System?', NZ Centre for Public Law, Wellington, Occasional Paper No 4, 2001; J V Williams, 'Truth, Reconciliation and the Clash of Cultures in the Waitangi Tribunal' [2005] ANZLH E-Journal 234-238.

38 P G McHugh, 'Law, History and the Treaty of Waitangi' (1997) 31 NZ Journal of History 38; R P Boast, 'Lawyers, Historians, Ethics and the Judicial Process' (1998) 28 VUWLR 87.

39 B V Harris, 'The Treaty of Waitangi and the Constitutional Future of New Zealand' and F M Brookfield, 'Popular Perceptions, Politician Lawyers and the Sea Land Controversy' in *Customary and Indigenous Rights in an Evolving Constitution* (Auckland: Auckland District Law Society, 2005) 19-49. See also their contributions to [2005] New Zealand Law Review, Part 2.

40 J G A Pocock, 'The Treaty Between Histories' in *Histories, Power and Loss*, above n 30, 75-95.

41 M Belgrave, *Historical Frictions: Māori Claims and Reinvented Histories* (Auckland: Auckland University Press, 2005).

42 J Hayward & N R Wheen (eds), *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington: Bridget Williams Books, 2004).

43 See Williams, above n 5, 72-100.

by te Tiriti o Waitangi – most explicitly the Māori text of the Treaty – at the very least require some major reforms of the monistic constitutional structures based on the Westminster system of government presently in place and, in the view of some Māori sovereignty advocates, involve revolutionary challenges to the current legal order.<sup>44</sup> However, there is some ambivalence for tino rangatiratanga advocates as between an emphasis on the Treaty's affirmation of Māori rights – 'a document which articulates the status of Māori as tangata whenua of Aotearoa'<sup>45</sup> – and an emphasis that it is for the nation as a whole – 'The Treaty of Waitangi is the Constitution of New Zealand'.<sup>46</sup> The Co-leader of the Māori Party, Tariana Turia, speaking in Parliament in 2005, inclines to the latter position:

A vision for a nation must be founded in its very origins. Our vision for this nation is based in the covenant by which its first people, the people of the land, tangata whenua, negotiated with the Crown, about a model for developing a unified nation. ... At its very core, the Treaty is about a relationship that has been entered into.<sup>47</sup>

Ani Mikaere, who teaches Māori laws and philosophy at Te Wananga o Raukawa, inclines to the former position:

[T]he facts surrounding the signing of the Treaty of Waitangi reveals a clear Māori intention to create a space for the Crown to regulate the conduct of its own subjects, subject to the overriding authority of the rangatira. This reaffirmation of Māori authority meant that the highly developed and successful system of tikanga that had prevailed within iwi and hapu for a thousand years would retain its status as first law in Aotearoa: the development of Pākehā law, as contemplated by the granting of kawanatanga to the Crown, was to remain firmly subject to tikanga Māori.<sup>48</sup>

The Waitangi Tribunal has chosen deliberately to adopt a middle-ground position somewhere between reliance on the Treaty as a basis for claims of separate Māori nationhood and marginalisation of the Treaty as a cession of sovereignty that has left the Crown (later the Crown in Parliament) with sole and absolute sovereign law-making power in the nation. The Tribunal position has long been that the sovereignty of the Crown is not in doubt but that nevertheless its sovereignty is qualified by reciprocal obligations to honour the rangatiratanga guarantees of the Treaty in a manner that recognises that the Treaty is always speaking. This is a theory of our national origins that depicts the Treaty as a contract or compact – Māori often call it a covenant – against which the Crown's treatment of Māori is to be assessed.<sup>49</sup> This middle ground, including the Tribunal's pragmatic reinterpretation of the 'partnership' nature of the Treaty relationship between the Crown and Māori, did appear to have achieved a significant degree of acceptance in political, legal and cultural discourse during the 1990s. Now, as noted above, that consensus is being seriously eroded from several directions.

Yet if, or when, formal steps are taken to move New Zealand from being a constitutional monarchy to becoming a republic, the status and future role of the Treaty of Waitangi will have to be

44 See C James (ed), *Building the Constitution* (Wellington: Institute of Policy Studies, 2000).

45 See Blank and others, above n 15, 2. A Blank, M Henare & H Williams (eds), *He Korero Mo Waitangi, 1984* (Ngāruawahia: Te Runanga o Waitangi, 1985) 2.

46 M H Durie, 'Proceedings of a Hui held at Hirangi Marae, Turangi' in G McLay (ed), *Treaty Settlements: The Unfinished Business*, (Wellington: NZ Institute of Advanced Legal Studies, 1995), 19-27.

47 T Turia, 'Opening of Parliament, 1 February 2005, Response to the Prime Minister's Statement to Parliament': available at <[www.maoriparty.com](http://www.maoriparty.com)>.

48 A Mikaere, 'The Treaty of Waitangi and Recognition of Tikanga Māori' in *Waitangi Revisited*, above n 23, 334.

49 For a useful collection of relevant Waitangi Tribunal statements, see P G McHugh, 'A History of Crown Sovereignty in New Zealand' in *Histories, Power and Loss*, above n 30, 202, 248.

resolved. This is a distinctive aspect of the New Zealand debate on republicanism that is absent from Australian or Pacific considerations of constitutional change issues. Is the Treaty really the foundation for the legitimacy of the modern state? Is it merely an item of historical interest? Thus far there has been no willingness by most Pākehā, including those otherwise disposed to favour significant constitutional reforms, to address (let alone resolve) questions about the inclusion of the Treaty as a cornerstone in any new republican legal order. This reluctance may in fact serve to delay considerably the day when fundamental constitutional reforms come to be addressed in this country. There has been no reluctance, on the other hand, to pose serious questions as to whether biculturalism will survive as an integral feature of national life in the twenty-first century, when compared with its predominant position in late twentieth century political and cultural discourse.

Of course, for most Māori biculturalism is not a matter of choice. Some individuals will accept assimilation into the majority culture as Hunn hoped for in his 1960 report on integration.<sup>50</sup> The post-1975 Māori cultural renaissance has ensured, however, that a very substantial proportion of the Māori population wish to promote and enhance their collective values and customs, their tribal rangatiratanga and their pride in being Māori. People who now positively identify themselves as Māori comprise substantially more than 10 per cent (perhaps 15 per cent) of the total population, and they perforce must be bicultural to survive in daily life. They cannot operate in a Māori-only world as our populations are too closely intertwined in all but the most remote rural settlements. So they must move between Māori and Pākehā cultural norms in their daily life.

For the non-Māori majority and especially for those who are the power-holders, however, there is a choice. It is perfectly easy to conduct one's daily affairs without care for or knowledge of Māori indigenous customary rights, language and cultural knowledge systems. Among the choices we Pākehā New Zealanders have is whether we wish to affirm the re-interpretive work of the Waitangi Tribunal since 1975 on the one hand, or to condemn it as a massive mistake, a blind alley, a cultural ghetto that we should be glad to escape from. We must consider whether the hopes encapsulated in the bicultural design featured on Tribunal reports are to be emblematic of a unique nation with a tolerance of cultural diversity. Will that diversity be built into our national vision and lived out in the daily lives of ordinary people, or will the Pākehā majority retreat back to the monocultural vision that 'we are all one people'?

## VII. A SUBTLE CULTURAL REPOSITIONING?

Paul McHugh has described the period after 1970, and especially the period following the 1987 Court of Appeal decision, as the demise of the 'Anglo-Whig constitutional dream of Crown sovereignty' at a time when the United Kingdom entered the European Community. He identified Māori opposition to the 1967 legislative reforms as 'a crucial beginning' for pan-Māori protest that 'challenged the paternalism of the Anglo-settler state'.<sup>51</sup> Our leading historian, James Belich, would concur. He described the 1960s as the period when New Zealanders began to move beyond the notion that this country was destined to be and to remain a 'Better Britain in the South Seas'.

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50 J K Hunn, 'Report on the Department of Māori Affairs', 24 August 1960, AJHR, 1961, G-10. See Williams, above n 5, 76-100.

51 P G McHugh, 'A History of Crown Sovereignty in New Zealand' in *Histories, Power and Loss*, above n 30, 199-203; P G McHugh, 'Tales of Constitutional Origin and Crown Sovereignty in New Zealand' (2002) 52 *University of Toronto Law Journal* 69, 86-91. See also P G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (New York / Oxford: Oxford University Press, 2004).

He commented that the 1967 Act was a 'naïve piece of land legislation' that laid 'the political fuse for an explosion of Māori radicalism'.<sup>52</sup> In McHugh's analysis, during the mid-1970s 'the history of the New Zealand constitution came to require revision' and a Lockean contractarian theme became dominant. The contest of ideas about Crown sovereignty had now shifted to varieties of contractarian dogma. The Tribunal's notions were of the Treaty as a contract by which 'two peoples amalgamated their powers under the Crown and set limits to the Crown's powers over Māori'. Critics preferred to see the Treaty contract as one that 'mattered only once – in 1840' with a full and final cession by Māori of their sovereignty. After that the Treaty became 'a historical curiosity bereft of any presence beyond its spent moment'. Even this most limited view of the Treaty, suggests McHugh, demonstrates 'the historiographical distance Pākehā thinking had come' because now 'one way or another, the Treaty of Waitangi was the foundation of the state'.<sup>53</sup> This ideological repositioning is now described by Belgrave as 'the making of a modern treaty': 'At different times and for different people the treaty has meant quite different things. So different are these interpretations that there can never be a "true" meaning, and even historically sound interpretations of the various signings can have only limited influence on what the treaty can be made to mean as a constitutional or legal document in the present.'<sup>54</sup>

Jane Kelsey is less than enthusiastic about claims that the repositioning that has taken place is truly significant. She does not see a paradigm shift or any obvious signs of power-sharing between Crown and Māori based on the Treaty. Rather she sees that there has been a 'subtle cultural repositioning' to defuse the potentially revolutionary threat posed by Māori nationalist activism in the 1970s and early 1980s.<sup>55</sup> Kelsey is right to emphasise that the tide towards the courts accepting a special constitutional status for the Treaty ebbed from the early 1990s. McHugh was premature, in my view, in asserting that the Treaty has already achieved recognition as the foundation of the state. Ironically, also, McHugh himself appeared as the Crown's expert witness in the Waitangi Tribunal's foreshore and seabed hearing in 2004. His expertise was drawn on to develop the policy whereby the 'full power' of the Parliament of New Zealand was utilised to enact the Foreshore and Seabed Act 2004. That Act was a classic example of the use of parliamentary sovereignty to extinguish indigenous customary rights and to replace them with statutory rights derived from a conservative definition of aboriginal title rights not sourced in tikanga Māori. The Robin Cooke Lecture 2004 by Michael Kirby, a Justice of the Australian High Court, helped to fuel the constitutional debate. Kirby argued for the notion of 'deep lying rights' that courts have an obligation to defend from encroachment. (And the lecture was delivered on the very day that the new Supreme

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52 J Belich, *Paradise Reforged: A History of New Zealanders from the 1880s to the Year 2000* (Auckland: Allen Lane / Penguin, 2001) 477.

53 See above n 51, and also McHugh, 'What a Difference a Treaty Makes – the Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15 *Public Law Review* 87 (where the legal transformation achieved by court decisions is described as 'seismic'); McHugh, 'New Dawn to Cold Light: Courts and Common Law Aboriginal Rights' [2005] *New Zealand Law Review* 485.

54 Belgrave, above n 41, 45.

55 J Kelsey, *Rolling Back the State* (Wellington: Bridget Williams Books, 1993) 279-85. See also J Kelsey, 'From Flagpoles to Pine Trees. Tino Rangatiratanga and Treaty Policy Today' in P Spoonley & others (eds), *Nga Patai: Ethnic Relations and Racism in Aotearoa / New Zealand* (Palmerston North: Dunmore Press, 1996); J Kelsey, 'Māori, Te Tiriti, and Globalisation: The Invisible Hand of the Colonial State' in *Waitangi Revisited*, above n 23, 81-102.

Court relied on human rights principles in deciding to allow bail for an alleged international terrorist held in indefinite detention.)<sup>56</sup>

### VIII. IS CONSTITUTIONAL ENTRENCHMENT OF THE TREATY ‘TOO HARD’?

In my view it is not desirable to continue to push the constitutional status of the Treaty into the ‘too hard basket’. I have made personal submissions to that effect to parliamentary select committees considering the Supreme Court Bill in 2003 and Constitutional arrangements in 2005. In 2003 I wrote that the proposed abolition of appeals to the Privy Council ‘necessarily impacts on the constitutional status of the Treaty of Waitangi – the founding document for the legitimacy of the Crown and Parliament ... there needs to be consideration of the appropriate governance structures to reflect the tino rangatiratanga/kawanatanga power relationships of the Treaty’.<sup>57</sup> In my view that Bill, and all Bills of constitutional importance, should not be able to be passed by a bare majority of votes in the House. My statement was quoted by the Justice and Electoral Select Committee in its 2003 report to the House in favour of its recommendation that ‘an inquiry into New Zealand’s constitutional arrangements is desirable’.<sup>58</sup>

I was less than impressed, however, with the terms of reference and the timeline allowed for the Constitutional Arrangements Committee that sat in 2005. I put in a brief submission nevertheless. I argued that:

the processes and procedures for constitutional reform should involve ‘bottom up’ rather than a ‘top down’ mechanisms for law reform. The New Zealand Constitution Act 1852 was a ‘top down’ imposition of the imperial parliament of the British Empire. The legitimacy of all the current Acts of Parliament and constitutional conventions that comprise our present constitutional arrangements derive from that “top down” imposition in 1852. In my view we need to reshape our constitutional arrangements taking the Treaty of Waitangi as the starting point and the foundation stone for the legitimacy of an autochthonous constitution that springs from all the peoples of this nation (that I prefer to call Aotearoa New Zealand). If we cannot agree on that starting point, then in my view we should not start at all. The system is not so seriously in need of reform that it cannot wait a few years to allow a deeper consideration of the appropriate governance structures to reflect the tino rangatiratanga/kawanatanga power relationships of the Treaty. Rather, I would prefer that time should be given to allow us to consider the success (or otherwise) of the instances of existing Treaty-based relationship structures in the provision of health services, educational opportunities, Treaty settlement protocols, local government arrangements, church and social service organisational structures, and the like. I am confident that in time – though certainly not in this particular year – a new consensus will emerge that putting the Treaty at the core of constitutional structures does speak directly to the unique circumstances of the life of this nation. This is a vision of a tolerant, culturally diverse, inclusive society based on the coming together of peoples rather than on an imperial imposition from the nineteenth century. The task of your committee should be to think of long-term processes that will be able to steer the citizens of this country to engage with a vision of that inclusive nature rather than to seek an artificial notion of national unity under slogans such as ‘We are all one people’.<sup>59</sup>

56 M Kirby, ‘Deep Lying Rights – A Constitutional Conversation Continues’, The Robin Cooke Lecture 2004, Victoria University of Wellington, 25 November 2004; *Zaoui v Attorney-General* [2005] 1 NZLR 577. See also *Zaoui v Attorney-General* (No 2) [2006] 1 NZLR 289.

57 D V Williams, ‘Personal Submission to the Constitutional Arrangements Committee, House of Representatives’ 14 April 2005, paras 4-5.

58 Justice and Electoral Committee, ‘Supreme Court Bill (16-2) (16 September 2003)’, 52-53, available <[www.parliament.nz](http://www.parliament.nz)>.

59 Williams, above n 57.

In assessing the future of our national constitution and the status of indigenous customary law we do need to be mindful of the real successes of sub-national exercises of Māori self-determination. A number of the chapters in *Waitangi Revisited* that I co-edited contain examples from diverse fields such as social policy, health services provision, museum policy, and fisheries management where Māori have been making decisions for Māori under a kaupapa Māori framework of decision-making, or have been moving in that direction.<sup>60</sup>

## IX. CONCLUDING REMARKS

In concluding, I should be clear that as a matter of colonial legal history it is not my view that the Treaty of Waitangi actually was crucial to the foundation of the colonial state in 1840. On the contrary, earlier in my career in my University of Dar es Salaam PhD thesis and in journal articles I argued strongly that the Treaty was peripheral to the acquisition of British sovereignty over New Zealand and that ‘re-evaluations of the Treaty and of the principles of international law serve only to obscure the actual historical context of the imposition of colonial rule on the indigenous peoples of Aotearoa’.<sup>61</sup> I wore political protest badges that declared ‘The Treaty is a Fraud’. In recent decades, however, the idea of the Treaty as the national foundation stone has been a very positive development for the emergence of a tolerant pluralistic society in which Māori status as *tangata whenua* has been acknowledged. This has contributed to empowering Māori tribes and groups to develop Treaty-based partnerships with Crown entities. It has enabled a process of cultural conciliation between Māori and Pākehā to be fostered, including in the Waitangi Tribunal hearings held throughout the country at rural and urban marae and in halls and convention centres.

Māori have no need of the Treaty to assert the legitimacy of their presence in this land. They were living here in organised social formations prior to the colonial state. That is the point that Ani Mikaere has stressed, and I agree with her on that. It is Pākehā and tauwi, those who have migrated here since 1840, who need to find legitimation for the right to belong here and be citizens of this country. Do we continue to rely for the legitimacy of our presence on the arrogance of imperialist chauvinism and the military might of colonialism in the nineteenth century? Do we just assume, as they did in the nineteenth century, that English law had to apply to all because English law was the epitome of modern civilisation: ‘Before, this land was occupied by evil, darkness and wrongdoing; there were no upholders of good, no preventers of evil’?<sup>62</sup> Such beliefs are anathema to most contemporary citizens. Do we rely on time and acquiescence as the basis for legitimation and seek to avoid too deep an inquiry into the merits of how the ‘revolutionary’ occupation of settlers was enabled? In my view that is as far as we get if we followed the thinking and the Treaty settlement policies of Simon Upton and Sir Douglas Graham who were ministers in the National governments of the 1990s.<sup>63</sup> That would be better than European monoculturalism, but it would still be a second-best account of constitutional legitimacy. The best grounds for legitimation, in

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60 See *Waitangi Revisited*, above n 23, passim.

61 Williams, ‘The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?’ (1985) 2 *Australian Journal of Law and Society* 41, 47; ‘The Foundation of Colonial Rule in New Zealand’ (1988) 13 *NZULR* 54; ‘The Use of Law in the Process of Colonization’, PhD thesis, University of Dar es Salaam, Tanzania, 1985.

62 F Fenton, *The Laws of England: Compiled and Translated into the Māori Language* (Auckland: Leighton, 1858) p. i (preface by the Governor, Browne) cited in Mikaere, *Waitangi Revisited*, above n 23, 334.

63 See the discussion of the views of Upton and Graham in F M Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: Auckland University Press, 1999) 136.

the ideology that has been crafted in recent years, is that Pākehā like myself are citizens who can and should count ourselves as ‘tangata Tiriti - people of the Treaty’.

We should not forget research and writing on the actual history of colonial imposition and, of course, historians should undertake that task in a conscientious and critical manner. But we need new stories of national origins to acknowledge the generosity of Māori in inviting us to come here and to explore how we can best meet the obligations of the rangatiratanga guarantees that accompanied that invitation. Some historians may want still to insist that the Treaty was a document signed by tribal peoples in a nineteenth century context with a consul of the British Crown, and that it has nothing useful to say about the multicultural identities of twenty-first century New Zealanders. I beg to differ. As Eddie Durie wrote in a 1990 sesquicentennial document: ‘But then we must not forget that the Treaty is not just a Bill of Rights for Māori. It is a Bill of Rights for Pākehā too. It is the Treaty that gives Pākehā the right to be here. Without the treaty there would be no lawful authority for Pākehā presence in this part of the South Pacific’.<sup>64</sup>

A view of the Treaty that makes sense to me here and now, especially in the light of the events of 2003 and 2004, is that the Treaty’s preamble and articles are an explicit immigration compact in which Māori welcomed those who wished to settle here. That welcome applies to all who came in the past, to their descendants and to all those who continue to come as immigrants and now wish to call Aotearoa New Zealand their home. Along with the welcome comes an obligation to honour the collective rights of the indigenous people. That means we need to find ways and means to continue to honour the Treaty in the circumstances of the present and the future. Again, to quote from Eddie Durie: ‘The principles of the Treaty are not diminished by time, rather it takes time to perfect them’.<sup>65</sup>

## X. WHAT DOES THE FUTURE HOLD?

The 2005 Constitutional Arrangements Select Committee Inquiry reported to Parliament just before the House was dissolved prior to the September general election. It concluded that New Zealand’s constitution is not in crisis and that the ‘risks of attempting significant reform could outweigh those of persisting with current arrangements’. This has not altogether stifled further public debate. A *Listener* writer in 2006 acknowledged that ‘New Zealand is in a constitutional coma. But’, he went on to argue, ‘if we’re going to weather the social storms ahead, as demographic and global changes impact on us, we urgently need a formal written constitution. Done right, it would not only strengthen human rights but also transform race relations. It would be our turangawaewae – a place for all of us to stand.’<sup>66</sup> The then Governor-General Dame Sylvia Cartwright, though, cautioned against haste in any constitutional reform involving the Treaty: ‘If we are to make changes to our constitution to reflect the role of the Treaty of Waitangi in New Zealand society, it is important that all New Zealanders walk together at more or less the same pace.’<sup>67</sup> Meanwhile, the Select Committee’s bland recommendation to the House of Representatives was ‘that it considers developing its capacity, through the select committee system, to ensure that changes with constitutional implications be specifically identified and dealt with as they arise in the course of

64 New Zealand 1990 Commission, *The Treaty of Waitangi: The Symbol of our Life Together as a Nation* (Wellington: NZ 1990 Commission, 1989) 14.

65 *Ibid.*, 16.

66 T Watkin, ‘Get It in Writing’ *New Zealand Listener*, 5 August 2006, 26.

67 A Young, ‘All March at Same Pace on Treaty’, *NZ Herald*, 10 May 2006.

Parliament's work.' One of four generic principles recommended by a majority of the Committee to the Government was 'there should be specific processes for facilitating discussion within Māori communities on constitutional issues'.<sup>68</sup>

If such discussions ever do take place, I would argue that one of the starting points for the constitutional dialogue must include an acceptance of tikanga Māori, Māori custom law, as a law of the land. Presently there is no constitutional recognition of that proposition and of course no entrenched protection from future repeal of the partial recognitions of tikanga Māori and the Treaty of Waitangi that are to be found in the judgments of courts and in Acts of Parliament. On the contrary, for example, a Principles of the Treaty of Waitangi Deletion Bill promoted by the New Zealand First Party as a private member's Bill received a first reading in 2006. It is unlikely to pass a second reading, but it is before a Select Committee for public submissions. If it fails to proceed, that will not be because a constitutional issue relating to the jurisdiction of the Waitangi Tribunal cannot be tampered with by ordinary parliamentary processes.

Māori calls for a much higher constitutional status to be accorded to the Treaty will continue. The Māori Party in and outside Parliament will certainly continue to highlight the need for that.<sup>69</sup> For Māori academic, Claire Charters, the Government's abrupt repudiation of recommendations from the Waitangi Tribunal, then the United Nations Committee on the Elimination of all forms of Racial Discrimination (UNCERD) and then the Special Rapporteur for the United Nations Commission on Human Rights highlighted the imbalance of constitutional powers in this country. An unchecked Parliament was able and willing to interrupt due process in the courts, retrospectively deprive Maori litigants of the fruits of their success in the Court of Appeal, and abrogate Maori customary rights when enacting the Foreshore and Seabed Act 2004. The report of the Special Rapporteur urged measures to strengthen the 'customary self-governance of Māori' and included a recommendation that 'The Treaty of Waitangi should be entrenched constitutionally in a form that respects the pluralism of New Zealand society, creating positive recognition and meaningful provision for Māori as a distinct people, possessing an alternative system of knowledge, philosophy and law'.<sup>70</sup> Charters concluded her remarks in an international journal promoting the rights, voices and visions of indigenous peoples with these sentences: 'And while Māori's political presence is still small, it is growing. Undoubtedly that trend will continue, perhaps one day even prompting a new constitution'.<sup>71</sup> On the other hand, the Attorney-General's firm determination to defend parliamentary supremacy remains undiminished. In August 2006 Dr Cullen was quoted for the view that 'critics (such as the United Nations) do not understand "the importance New Zealanders as a whole attach to Parliamentary sovereignty ... a deeply held belief that the democratically elected representatives of the people should have the final say over legislation, rather than the courts"'.<sup>72</sup>

What does the future hold? Time will tell.

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68 Report of the Constitutional Arrangements Committee, AJHR, 2005, I.24A, 5-10.

69 W Winiata, 'The Reconciliation of Kāwanatanga and Tino Rangatiratanga', Otaki, 30 January 2005; P Sharples, 'He iwi kotahi tatou - a shared frame of reference?' Wellington, 17 August 2006, available <[www.maoriparty.com](http://www.maoriparty.com)>.

70 R Stavenhagen, 'Mission to New Zealand' in United Nations Economic and Social Council, Commission on Human Rights, Indigenous Issues (62nd session, item 15), 13 March 2006, para 85.

71 C Charters, 'An Imbalance of Powers: Māori Land Claims and an Unchecked Parliament' Cultural Survival Quarterly, Issue 30.1, 27 March 2006: available at <[www.cs.org](http://www.cs.org)>.

72 D Haywood, 'Bill of Rights Unlikely to Grow Up', NZ Herald, 28 August 2006, A14.

# CASE NOTE: *POU v BRITISH AMERICAN TOBACCO (NZ) LTD* – A COMPREHENSIVE WIN FOR THE NEW ZEALAND TOBACCO INDUSTRY

BY KATE TOKELEY\*

## I. INTRODUCTION

In 2002 New Zealander Janice Pou died from lung cancer at the age of 52. She had been a heavy smoker since the age of 17. She claimed that the two tobacco companies that sold her the cigarettes she smoked had negligently caused her lung cancer, and sought approximately \$300,000 damages in compensation. Her children continued the proceedings after she died. In May 2006, in the judgment *Pou v British American Tobacco (NZ) Ltd*,<sup>1</sup> the New Zealand High Court found the defendants not liable.

The *Pou* case is the first time that a New Zealander has claimed damages for harm caused by smoking. Tobacco litigation is not new in the United States where there is a 50 year history of tobacco litigation with some substantial successes for smokers.<sup>2</sup> Cases filed outside of the United States have been less prolific and largely unsuccessful.

The plaintiff in *Pou* failed at virtually every hurdle. The case, in effect, forecloses the possibility of any New Zealand smoker ever successfully claiming damages from the tobacco industry for harm caused by smoking. The reason that the case failed was largely due to the following three factual findings made by the Court:

- The dangers of smoking were common knowledge in 1968.<sup>3</sup>
- The plaintiff's personality and the fact she was an adolescent in an environment where smoking was the norm meant that she would have started smoking even if the defendant's had warned her of the dangers.<sup>4</sup>
- The plaintiff knew about the dangers of smoking by 1974<sup>5</sup> at the latest, and did not make reasonable attempts to give up.<sup>6</sup>

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1 Unreported, High Court, Auckland CIV 2002-404-1729, 3 May 2006, Lang J.

2 Two recent judgments in the United States have been particularly favourable to smokers. In *Engle v Liggett Group Inc* [2006] NOS3-1856, 6 July 2006, the Florida Supreme Court, while ruling that a \$145 billion punitive damages award was excessive, upheld findings that cigarette manufacturers were negligent, that they concealed information and made misrepresentations regarding the health effects and addictive nature of tobacco and that their products are the cause of 16 major diseases. In September 2006 the District Court in Brooklyn, New York rejected a motion to dismiss a NZ\$302 billion class action alleging that tobacco companies deceived consumers into believing 'light' cigarettes were safer than others.

3 Above n 1 at paras 196 and 199.

4 Ibid para 316.

5 Ibid para 331.

6 Ibid para 389.

This note explains how these factual findings are relevant to the various legal tests that needed to be satisfied. It comments on various aspects of the judgment including the finding of common knowledge, the Court's analysis of the plaintiff's intervening conduct and the application of an individualist philosophy of the law. Finally, it examines whether there are any potential categories of injured smokers who, in light of the *Pou* decision, could succeed in a claim against the tobacco industry. It is concluded that there would be few or no smokers who would have a chance of success.

## II. FACTS

Janice Pou fits into a small subset of smokers who had a chance of succeeding in a claim against the tobacco industry. She started smoking in 1968 before the tobacco industry put warnings on cigarette packets. Within a year of starting to smoke she had become addicted to smoking, and smoked approximately 30 cigarettes a day until she died of lung cancer in 2002. The evidence suggested that Mrs Pou had an extremely high degree of addiction to tobacco. Apart from the first year, when she smoked cigarettes manufactured by WD & HO Wills (NZ) Ltd ('Wills'), she smoked only cigarettes manufactured by Rothmans. Mrs Pou also had the dubious advantage of having a low enough income to qualify for legal aid.

Other categories of smokers may not have had such a strong case as Mrs Pou. For example, smokers who started smoking after 1974, when the first warnings appeared on cigarette packets, would have been unable to say that the tobacco companies failed to warn of the dangers. Smokers who started smoking before 1960 would have found it difficult to prove that the tobacco companies knew at that stage that cigarettes were addictive and caused lung cancer. Smokers who could not show a strong addiction to tobacco may have had difficulties proving causation because their own voluntary action of continuing to smoke could be seen as breaking the causation chain. They may also have had difficulty overcoming the defence of voluntary assumption of risk. Smokers who smoked many different brands of cigarette would have faced the additional problem of being unable to identify which tobacco company's cigarettes caused their illness. In addition, smokers that suffered illnesses other than lung cancer may have had trouble establishing causation. Finally, smokers who had a higher income than Mrs Pou may not have qualified for legal aid and might have been dissuaded from pursuing a claim in light of the likely high legal fees and the risk of costs being awarded against them.

## III. THE CLAIM

In summary, the plaintiffs claimed that the defendants knew by 1968 that cigarettes were addictive and caused lung cancer. They therefore had a duty of care either to cease manufacturing cigarettes or to warn of these risks. Since they continued to manufacture cigarettes and failed to give any warnings they breached their duty of care. The plaintiffs argued that this breach caused Mrs Pou to commence smoking and become addicted. The addiction led to her continuing smoking and as a consequence she contracted lung cancer. The plaintiffs sought damages of \$310,966.

The Court held that there was not and never had been a duty on tobacco companies to cease manufacturing cigarettes.<sup>7</sup> The Court also made several other findings that are worth setting out in brief. It found that the claim was not barred by the Limitation Act 1950. It quickly dismissed the

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7 Ibid paras 20 to 29.

claim against Wills as it could not be established that Wills cigarettes caused Mrs Pou's lung cancer. The defences of contributory negligence and voluntary assumption of risk are not discussed in any great detail in the judgment because the Court did not need to consider these due to its finding that the defendants were not liable in negligence. The bulk of the judgment therefore deals with two issues. First, whether the defendants had a duty to warn of the risks of smoking and secondly whether a failure to warn caused Mrs Pou's lung cancer. Each of these is discussed below.

#### IV. DUTY TO WARN

The principles in *Donoghue v Stevenson*<sup>8</sup> have been developed over the years to include a duty on manufacturers to take reasonable steps to warn potential consumers about any dangers associated with their product.<sup>9</sup> Thus, the Court in *Pou* found that, given the level of knowledge about the risks of smoking that the tobacco companies must have had in 1968, there was a prima facie duty to warn consumers that cigarettes were a danger to smokers' health.<sup>10</sup>

##### A. Common Knowledge

The problem for the plaintiffs stemmed from the allegation by the defendants that the dangers of smoking were common knowledge in 1968 and that this knowledge negated liability. The Court agreed that if in 1968 the health dangers of tobacco were common knowledge to reasonable persons who were potential consumers of cigarettes then there could be no liability for failing to warn.<sup>11</sup>

The defendants employed a historian for over 2000 hours to produce a report about the public's level of knowledge of the health hazards of smoking from 1900 to 2000. The description of the contents of this report absorb over a quarter of the *Pou* judgment.<sup>12</sup> It was largely this report that convinced the Court that the health risks of smoking were common knowledge in 1968 and that this negated any duty to warn. The Court concluded that this common knowledge was a result of the information about tobacco dangers that was imparted to the community by various means including radio, school programmes, magazines and newspaper reports.<sup>13</sup> This information would have spread further via informal discussions on the topic amongst friends, family and colleagues.<sup>14</sup>

The plaintiffs argued that the messages received by the community about the dangers of tobacco were diluted by the tobacco industry's vigorous advertising of smoking as a glamorous and sporty activity and by its continued denials of the dangers. The result was a mixed message that left the community confused about the risks of smoking. The Court dismissed this argument in one paragraph by arguing that New Zealanders should have been able to weigh up compet-

8 [1932] AC 562 (HL).

9 See, for example, *Watson v Buckley* [1940] 1 All ER 174 (risk of serious reaction from using hair dye); *Hollis v Dow Corning* (1995) 129 DLR (4th) 609 (risk of breast implants rupturing) and *Carroll v Fearon & Others* [1998] PIQR 146 (risk of tyres exploding).

10 The Court had no doubt that the defendants were aware of the risks by 1962 when the Royal College of Physicians released its report 'Smoking and Health' that concluded that cigarette smoking causes lung cancer.

11 Above n 1 at paras 50 to 62.

12 *Ibid* paras 65 to 199 deal largely with the contents of the historical report.

13 *Ibid* paras 163 to 185.

14 *Ibid* paras 186 to 190.

ing arguments and messages and would not have been surprised to hear the tobacco industry's statements.<sup>15</sup>

The concept of common knowledge needs to be analysed in light of its significance to the duty to warn. Common knowledge is relevant because it means that people can be assumed to have made an informed choice on the facts and do not therefore need to be warned. The duty to warn should not be negated merely because people are making a choice on the basis of a realization that there is a debate about a topic. The Court acknowledged that members of the public in 1968 would have had to make decisions about smoking on the basis of competing and sometimes contradictory information.<sup>16</sup> Awareness that there is a debate about the possible dangers of smoking should not constitute knowledge of those dangers for the purposes of negating a duty to warn.

Given the fact that much tobacco advertising in 1968 was directed at the youth market, it might also have been appropriate to assess the common knowledge of teenagers at this time. Such an assessment is necessary in order to ascertain whether there was a duty on manufacturers to warn teenagers of the dangers of smoking. Teenagers in 1968 were presented with specific youth-targeted advertisements that showed smoking as 'cool', fun and healthy. They are also likely to have heard statements by the tobacco industry denying a link between smoking and cancer. In addition, given teenagers lack of maturity, they may not have been as capable as the adult population of weighing up the competing messages about the dangers of tobacco. Despite the media reports about the health dangers of tobacco it is questionable whether teenagers in 1968 could be said to have had sufficient common knowledge of the risks to negate a duty to warn. They may have needed a forceful warning on the cigarette packet in order to have made a fully informed decision. It is of some interest that the government today requires detailed warnings on cigarette packets, despite an almost universal knowledge of the dangers of smoking.

One particular difficulty for the plaintiffs was the view that the Court took of statements made by bodies other than the defendants, such as the Tobacco Institute of New Zealand. The Court, when assessing Mrs Pou's knowledge, made the comment that the defendants could not be held responsible for these statements.<sup>17</sup> This approach is somewhat confusing in that the plaintiffs were not claiming that the defendants were directly liable for any statements not made by them. These statements should, however, have been highly relevant to the issue of individual and common knowledge.<sup>18</sup> Whether or not the community, or Mrs Pou herself, are likely to have known about the dangers of cigarettes can be deduced, in part, by assessing the quality of information about those dangers that they received. Whether that information came from the defendants or from some other source should not have mattered.

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15 Ibid para 202. It is not until later in the judgment at paras 337 to 345, on the different issue of whether Mrs Pou knew of the risks after 1974, that the Court consider the effect of the tobacco industry advertisements in some more detail. In that respect the Court concluded that advertising, sponsorship and repeated denials of a causal connection between smoking and cancer, would not have negated warnings that were on the cigarette packets.

16 Ibid para 202.

17 Ibid para 344.

18 As has already been explained above, common knowledge is relevant because of its potential to negate a duty to warn. The knowledge possessed by Mrs Pou is relevant to issues of causation and voluntary assumption of risk which are discussed below in Part V.

## B. Policy

The Court also addressed the issue of whether, as a matter of policy, it would be reasonable retrospectively to impose a common law duty to warn on cigarette manufacturers in 1968. It concluded that it would be unreasonable because the government of the day had not seriously considered placing warnings on cigarette packets until the early 1970s.<sup>19</sup> The Court speculated that the reasons for this reluctance are likely to have included a concern about jeopardizing the livelihood of those employed in the tobacco industry, ambivalence about the effectiveness of warnings on packets, the social acceptability of smoking and an unwillingness to threaten the income received from taxes on tobacco.<sup>20</sup>

Understandably, the Court preferred to take a cautious approach when deciding whether to impose a duty in respect of behaviour that occurred a long time ago. However, the fact that the legislature at that time failed to impose a duty is insufficient reason for refusing to impose a common law duty. The objective of tort law is to make a morally blameworthy wrongdoer pay for the damage caused to the injured party. It should not matter that Parliament has not itself given the injured party protection under a statute. In fact, much of the common law consists of rights afforded to victims in situations where these rights are not provided by statute. As the Court in *Pou* pointed out, the main policy argument in favour of imposing a duty to warn on cigarette manufacturers is the desirability that consumers be placed in a position where they are able to make an informed choice.<sup>21</sup>

## V. CAUSATION

### A. *Did the defendant's conduct cause her to start smoking? - The 'but for' test*

The Court goes on to argue that even if it is wrong about common knowledge and there was a duty to warn, the defendants would not be liable because the failure to warn did not cause Mrs Pou's lung cancer.<sup>22</sup> The Court concluded that even if there had been warnings on the cigarette packets in 1968 Mrs Pou would have started smoking anyway. In other words the claim fails for not satisfying the 'but for' test of causation. The Court based its conclusion on several factual findings:

- Mrs Pou was intelligent and strong willed and in 1968 had very low self esteem;
- She saw smoking as a way of resolving her problems with self esteem;
- Smoking in 1968 was the norm;
- She was an adolescent at the time and research shows adolescents as a category of people most likely to take up smoking;
- When Mrs Pou was later warned about the dangers of smoking she continued to smoke.

The plaintiffs relied on the direct evidence from Mrs Pou to establish that the 'but for' test was fulfilled. In her affidavit filed in support of her claim she stated: 'Had I known in 1967 that smoking cigarettes was going to be so addictive and would cause me lung cancer and drastically shorten my life, I simply would not have started smoking.'<sup>23</sup>

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<sup>19</sup> Above n 1 at para 251.

<sup>20</sup> *Ibid* paras 241 to 250.

<sup>21</sup> *Ibid* para 221.

<sup>22</sup> *Ibid* paras 253 to 317.

<sup>23</sup> *Ibid* para 265.

The small, but fatal, flaw in this piece of evidence was the use of the word ‘would’ instead of ‘could’. The choice of the word ‘would’ may simply have been the result of the fact that she did indeed have lung cancer. However, the Court took the view that Mrs Pou was saying that she would not have started smoking only if she knew that she would get lung cancer rather than if she had merely been warned that she might get lung cancer.<sup>24</sup>

The Court was only prepared to give Mrs Pou’s direct evidence limited weight and relied instead on an examination of the circumstances that existed in 1968 and Mrs Pou’s personality.<sup>25</sup> Essentially, the Court did not believe Mrs Pou. Arriving at the conclusion that Mrs Pou would have started smoking even if there had been warnings necessarily involved a degree of subjectivity and speculation. No-one can say for sure what Mrs Pou would have done in 1968 if the tobacco company had warned her that the product was highly addictive and could cause her to die of lung cancer. The Court points out that when the tobacco companies did begin to produce warnings Mrs Pou did not give up smoking.<sup>26</sup> But of course by this stage she was highly addicted and giving up was no easy feat. The comparison between her actions at that point and her initial decision to begin smoking is perhaps a little unfair.

*B. Did the plaintiff’s intervening conduct break the causation chain?*

The Court went on to argue that even if it was wrong on the ‘but for’ ground, the defendants could not be said to have caused the injury because Mrs Pou’s failure to give up smoking once she found out about the dangers was an intervening act that broke the chain of causation.<sup>27</sup>

The Court concluded that Mrs Pou’s act of continuing to smoke was deliberate and voluntary. This was despite the fact that the evidence suggested Mrs Pou’s addiction was so severe that there was an extremely low chance of Mrs Pou being able to give up.<sup>28</sup> The Court decided that her actions were deliberate and voluntary because she failed to take immediate reasonable steps to stop smoking once she became aware of the risks.<sup>29</sup> Namely, she did not have a plan or strategy for giving up and she did not enlist the support or advice of her doctor, pharmacist, friends or family. Mrs Pou only ever gave up smoking for a few hours at each attempt. The Court, therefore, concluded that the defendant’s misconduct could no longer be treated as the cause of Mrs Pou’s injury. It did not take into account the possibility that Mrs Pou’s addiction and failure to quit were, at least in part, caused by the defendant’s misconduct; that is, creating a dangerous, addictive product and failing to warn about the dangers and the likelihood of addiction.

One useful question to ask when assessing causation in a case where a defendant’s misconduct is potentially linked to intervening conduct is to ask whether the original wrongdoing (in this case the failure to warn) posed a likely risk of the intervening conduct (either third party or plaintiff’s own conduct) occurring.<sup>30</sup> If it did pose such a risk there is no break in the chain of causation.

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24 Ibid para 266.

25 Ibid para 271.

26 Ibid paras 291 to 300.

27 Ibid paras 389 and 400.

28 Ibid para 362.

29 Ibid paras 373 and 400.

30 This was the approach taken in, for example, *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

Thus, there are a number of cases where the plaintiff's own conduct brought about the harm but the defendant's conduct is still regarded as the cause.<sup>31</sup>

It is arguable that the defendant's failure to warn in *Pou* posed a risk that the plaintiff would become addicted to smoking so that by the time she found out about the dangers she would continue to smoke and ultimately suffer an injury. In fact, the purpose of the defendant's business and probably also the purpose of its failure to warn, was to get people to start smoking and keep smoking. According to this risk analysis the chain of causation was not broken by the plaintiff's act of continuing to smoke.

The Court did not, however, analyse the issue of the plaintiff's intervening conduct in terms of risk. Instead, it held that the chain of causation would be broken if it could be said that the plaintiff's intervening conduct was voluntary and fully informed.<sup>32</sup> Addiction was only treated as relevant in so far as it affected voluntariness.

An alternative approach would have been to have accepted that the plaintiff's loss was within the scope of risk created by the defendant's misconduct and then to have treated the failure of the plaintiff to take reasonable steps to quit smoking as contributory negligence under the Contributory Negligence Act 1947. Section 3 of this Act provides that a claim for damage that is partly the result of the plaintiff's own fault and partly the fault of another person should not be defeated by reason of the plaintiff's fault. Instead the Court should reduce the damages recoverable to such an extent as it thinks just and equitable having regard to the plaintiff's share in the responsibility for the injury. In *Pou* the Court could have attempted to apportion responsibility for Mrs Pou's injury between Mrs Pou and the tobacco company.

#### IV. INDIVIDUALIST THEORY OF THE LAW

The Court briefly touched on the concept of the law reflecting individualist values as an alternative basis for analyzing Mrs Pou's conduct. It concluded that a theory based on individual values should be applied to the area of product liability since '[t]here is no reason why individuals who have the ability to control their own actions should not also be responsible for them'.<sup>33</sup> Two points can be made here. First, it is not entirely clear that a person suffering from a degree of addiction as severe as Mrs Pou's addiction could sensibly be said to have had the ability to control her own actions. Secondly, the field of product liability law is probably more accurately characterized as an area of law founded not on individualist values but on the idea that the law should hold powerful people accountable for harming vulnerable people.

#### VII. LIKELIHOOD OF SMOKER'S CLAIM SUCCEEDING AFTER *POU* DECISION

This Part of the article considers whether there are any categories of smoker who might be able to succeed in a claim against a tobacco company after the *Pou* judgment. The following factors would make a smoker's claim stronger than Mrs Pou's claim:

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31 See, for example, *Caterson v Commissioner for Railways* (1973) 128 CLR 99 (HCA) plaintiff saying goodbye to passenger in train jumps off train when it started quickly without warning and injures himself; *Russell v McCabe* [1962] NZLR 392 (CA) a volunteer firefighter injuring himself while attempting to put out a fire that had spread from defendant's land.

32 Above n 1 at paras 370, 373, 389, and 400.

33 *Ibid* para 392.

- Plaintiff started smoking in 1962 when the Court in *Pou* accepted that the tobacco industry would have known about the dangers of tobacco but there would have been no common knowledge.
- Strong evidence that plaintiff would not have started smoking if was warned of dangers.
- Plaintiff started smoking as an adult and not as an adolescent. Court in *Pou* considered fact that Mrs Pou started smoking as an adolescent made it more likely that she would have started smoking even if she had been warned of dangers.
- Plaintiff smoked only one brand of New Zealand cigarette for entire life.
- Addiction as severe or more severe than Mrs Pou's addiction.
- Reasonable attempts made to give up smoking when became aware of dangers when warnings written on packets (1974). For example, used professional help, nicotine patches and enlisted support of friends and family.
- Developed lung cancer not more than three years before filing claim so that claim not barred by the Limitation Act 1950.
- Plaintiff managed to quit smoking no more than 15 years before contracting lung cancer. Otherwise there would be difficulties proving causation.<sup>34</sup>

Nevertheless, a smoker who satisfies all the above criteria may still find the timing requirements set up by the Court in *Pou* almost impossible to satisfy. Suppose this smoker files his claim in 2006, three years after he first developed lung cancer in 2003. In order that there be a causative link between the cancer and his smoking he would have needed to have given up smoking not more than 15 years earlier. This takes the time back to 1988. This is 14 years after the first warnings were placed on cigarette packets in 1974. The Court in *Pou* required smokers at this time to take immediate reasonable steps to quit smoking. Thus, in order for our mythical smoker's claim to succeed he would have to have taken reasonable steps to quit 14 years prior to actually giving up. The Court in *Pou* does not consider the position of a smoker who takes reasonable steps to stop smoking but fails to give up smoking. It is not clear how long the smoker is required to continue to take the reasonable steps. Perhaps it would be assumed that if the smoker does not initially manage to quit smoking the steps were not reasonable because the smoker cannot have been determined enough or motivated enough to quit. Perhaps if our mythical smoker never manages to quit smoking his case would, ironically, be stronger because it can be argued that reasonable steps were taken but that he was one of the few unfortunate people unable to give up. In any case, even with the most favourable set of facts the chances of a tobacco company being found liable are at best minimal. The individualist philosophy of the law espoused in *Pou* and the level of resources that the tobacco industry are able to spend to defend a claim are both powerful impediments to any New Zealand smoker successfully claiming against a tobacco company.

## VIII. CONCLUSION

The Court in *Pou* took a cautious approach to determining liability. It covered all possible arguments even though its initial finding that any duty to warn was negated by common knowledge was a sufficient basis for denying the claim. Its overall approach was based on the notion of individual responsibility rather than the concept of consumer protection. Little consideration was given to the effect that tobacco advertisements and the tobacco industry's denials of the dangers

<sup>34</sup> Evidence presented in *Pou* suggested that a smoker who gives up smoking will have the same chance of contracting lung cancer after 15 years of abstinence as a person who has never smoked. See para 332.

of smoking had on the degree of knowledge that the community had about the risks of smoking in 1968.

In terms of causation the plaintiff failed in two respects. First, the Court found that Mrs Pou would have started smoking anyway even if she had been warned of the dangers. This is despite Mrs Pou's direct evidence that seems to suggest the contrary. Secondly, the Court held that the fact that Mrs Pou continued to smoke and did not take reasonable attempts to quit once she was aware of the risks constituted a deliberate choice that broke the chain of causation. It did not consider that the reason Mrs Pou continued to smoke was, at least in part, because she was addicted and that this addiction was arguably a risk posed by the defendant's misconduct. It may have been more appropriate to view the failure of the plaintiff to take reasonable steps to quit smoking as contributory negligence under the Contributory Negligence Act 1947. Responsibility for Mrs Pou's injury could then have been apportioned between the parties.

The Court in *Pou* found against the plaintiff on almost every aspect of the case. In the future, New Zealand smokers have very little chance of claiming any compensation from the tobacco industry for harm suffered by smoking.

## BOOK REVIEW

LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT by Lloyd Weinreb, Cambridge University Press, New York, 2005, vii, 184 pp, recommended price \$60.00.

Reasoning by analogy is fundamental to common law method, and yet until recently has been subject to relatively little theoretical analysis. Analogy involves treating like cases as like and is sometimes regarded as an imperfect form of induction. It is commonly used in case law reasoning but the extension of it to reasoning with statutes is problematic.

Theologians in the middle ages sometimes distinguished between three different types of analogy reasoning: *unius ad alterum*, *duorum ad tertium*, *plurium ad plura*.<sup>1</sup> *Unius ad alterum* is a simple relationship of similarity in a certain respect. *Duorum ad tertium* is based on proportion, that is a relationship in common to a third thing. *Plurium ad plura* is a relationship of proportionality – A is to B as C is to D.

In case law reasoning, reasoning by analogy is usually the first stage which involves comparison of cases and something like induction to a rule or principle which then can be used in a more deductive manner. However, the rule or principle is not fixed and categories in case law reasoning represent a shifting classification system subject to further analogical development. Here, the concept of *ratio decidendi* performs an interesting role in the sequence from analogical reasoning to inductive reasoning.

Although the term *ratio decidendi* was found in canon law it seems to have been first introduced into English Law by John Austin, the jurist, in the early nineteenth century and it is significant that a book written by James Ram *The Science of Legal Judgment* in 1834 – a practitioners' book – made no reference to the term.<sup>2</sup>

The main attempts by judges to describe the process of case law reasoning have been in the area of tort. In *Heaven v Pender*,<sup>3</sup> Brett MR attempted to formulate a methodology for establishing a duty of care which unfortunately was very confused and his induction was generally regarded as having produced too wide a rule. In *Donoghue v Stevenson*,<sup>4</sup> Lord Atkin rejected Brett MR's formulation and then set forth his famous neighbour principle as a new general principle or standard. The status of this has been constantly questioned in later cases. A further attempt to describe the methodology was made by Lord Diplock in *Home Office v Dorset Yacht Co*.<sup>5</sup> Lord Diplock regarded the identification of analogical relationships as a first step in an overall inductive process. However, he confessed that 'the analyst must know what he is looking for, and this involves his approaching the analysis with some general conception of conduct and relationships, which ought to give rise to a duty of care'. He recognised the role of policy in this process.

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1 See J H Farrar, 'Reasoning by Analogy in the Law' (1997) 9 Bond LR 149, 150.

2 Ibid, 151.

3 (1883) 11 QBD 503 at 509.

4 [1932] AC 562 at 578.

5 [1970] AC 1004 at 1058F to 1060E.

While there is still some equivocation about rules, principles, and policy, the judicial method in case law is reasonably settled. In the case of statutes the position is different and there seems to be a difference between common law and civil law jurisdictions.

Sir Robert Cross in his book *Precedent in English Law* thought that a legislative innovation is received fully into the body of the law to be reasoned from by analogy in the same way as any other rule of law.<sup>6</sup> However, this is to state the position far too boldly and is more qualified in the later editions,<sup>7</sup> although a similar view had been expressed by the American writer Dean Roscoe Pound in 1907.<sup>8</sup>

In an interesting article 'Statutes and the Common Law'<sup>9</sup> in 1992, Professor (now Justice) Paul Finn summarised the position in Australian law as follows:

Where a statute or statutory provision is consonant with or else builds upon a fundamental theme in the common law, then

- it should be interpreted liberally and in disregard of common law doctrines which would narrow its effect;
- subject to the natural limitations of judge-made law, it may be used analogically in the common law itself in its own development;
- but where it is cast in broad and general terms, it may be interpreted in the light of limiting consideration to be found in the relevant common law doctrines, where such doctrines are conducive to the attainment of justice in individual cases.

Where a statutory provision is antithetical (or else possibly inconsistent with) a fundamental theme in the common law, then:

- it will be interpreted strictly;
- it will not be used analogically in the common law, and
- it will be subjected to common law doctrines which serve to protect individual rights or to prevent unfairness.

This is essentially conservative doctrine. Historically, where a statute has been construed as remedial of the common law, it has been given a liberal interpretation. Also, the courts have been hesitant to identify fundamental themes or principles of the common law.

Although reasoning by analogy is discussed by all writers on legal reasoning, the main theories in recent years have been put forward by United States writers. Edward Levi in his book *An Introduction to Legal Reasoning*<sup>10</sup> emphasized that the basic pattern of legal reasoning is reasoning by example, reasoning from case to case: 'Similarities are seen between cases: next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case'.<sup>11</sup> He described the processes as involving a shifting classification system.

Melvin Eisenberg in *The Nature of the Common Law*<sup>12</sup> criticised Levi's approach. In his opinion, reasoning by example is, as such, virtually impossible. Reason cannot be used to justify a normative conclusion without first drawing a rule from the example. Eisenberg argues that reasoning by analogy in the common law is a special type of reasoning from standards.

6 3<sup>rd</sup> edition (1977), 169.

7 Cross and Harris, *Precedent in English Law* 4<sup>th</sup> ed (1991), 176-7.

8 'Common Law and Legislation' (1907) 21 Harv L Rev 383.

9 (1992) 22 UWA L Rev 7, 23-4.

10 (1948) 1.

11 See above n 1.

12 (1988) 88.

Two recent contributions in the Harvard Law Review have put forward new analyses. Cass Sunstein of the University of Chicago argues that the characteristics of analogical reasoning are a requirement of principled consistency, a focus on concrete particulars, incompletely theorised judgments and the creation and testing of principles at a low or intermediate level of generality.<sup>13</sup> Although he recognised the limitations of this kind of reasoning, he emphasised that there are also certain advantages. It does not require the development of full theories but enables moral evolution over time.

Scott Brewer analyses analogical reasoning at greater length in terms of a three step rule guided process.<sup>14</sup> This consists of an inference which he calls 'abduction' from chosen examples of a rule; confirmation or disconfirmation by a process of reflexive adjustment of the rule; and an application of a confirmed rule to the case. The problem is what is the meaning of 'abduction?' Brewer says it is not the same as deduction but shares some characteristics in common such as entailment. His theory seems to move from reasoning by analogy to reasoning with rule and precedent. At the same time, both Sunstein and Brewer seem to pay inadequate attention to the element of justification involved in case law reasoning.

Judge Richard Posner<sup>15</sup> is critical of reasoning by analogy. He argues that it belongs not to legal logic, but to legal rhetoric. Reasoning by analogy tends to obscure the policy grounds that determine the outcome of a case because it directs attention to the cases being compared rather than to the policy considerations that connect or separate the cases.

It is in this context that we now consider the new work by Lloyd Weinreb of Harvard Law School. Weinreb rejects the views of Levi, Sunstein, Posner, and others, which regard analogical reasoning as logically flawed. He argues that it is the same as the reasoning used in everyday life and is dictated by the nature of law which requires the application of rules to particular facts. He considers the arguments of Sunstein and Brewer at some length. The problem with Weinreb's book is that it seems to fall between two separate genres. One is an introduction to legal reasoning intended for new law students, and the other is jurisprudential theorising about the nature of legal reasoning and its jurisdiction.

Chapter 1 discusses Brewer's account at some length. Chapter 2 provides three sets of cases for discussion. Chapter 3 engages in more theoretical debate, and Chapter 4 discusses the role of analogical reasoning in legal education and law. While Weinreb makes some sound criticisms of his colleague, Brewer, he is rather weak on policy and questions of justification, and here Posner seems right in emphasizing the significance of policy argument in the case law process.

Where does all this leave us? Most practising lawyers and judges accept the practical utility of reasoning by analogy but accept its limitations. Secondly, most accept that it is difficult to fit it into a logical framework of either inductive or deductive reasoning, but differ in the ways in which they explain this. Thirdly, most people these days recognise the role of policy arguments in the justification of case law reasoning.

The diagram below attempts to depict the main factors operating in this aspect of case law. The inputs – *facts*, *rules* (which we use in a wide sense to cover principles and standards), the particular *stare decisis principles*, and *legal policy* – are all variables which, together with what one

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13 'Commentary on Analogical Reasoning' (1992-3) 106 Harv L Rev 741.

14 'Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy' (1996) 109 Harv L Rev 923.

15 *The Problems of Jurisprudence* (1990), 86-100.

American writer described as ‘within-puts’ (ie *judicial attitudes*) influence the decision-making by the court.<sup>16</sup>

*Legal policy* is a species of public policy which is hard to define in clear terms.<sup>17</sup> In legal policy there seem to be three sets of variables operating and interacting: *interests*, *legal values*, and what we shall call *other relevant factors* – ORFs for short.<sup>18</sup> *Interests* are the claims or expectations of individuals or groups which are perceived by the judges or the legislature to exist in society in respect of matters such as property, reputation and freedom from personal injury.<sup>19</sup> By claims we do not mean the enforcement of an *established* legal right but an attempt to establish the existence of such a right. In addition, in the words of the philosopher, Henry Sidgwick, there is a ‘borderland, tenanted by expectations which are not quite claims and with regard to which we do not feel sure whether Justice does or does not require us to satisfy them’.<sup>20</sup>

*Legal values* are the broad measures of social worth which are accepted and acted upon in the legal system. Examples are the rule of law, the freedom of the individual, justice and so on.

*ORFs* are a miscellaneous category which are mainly concerned with efficiency and include matters such as cost, convenience and political expediency which we do not normally think of as social values.

The main limitations here are that we do not know what influence the various variables have on the ultimate decision of a court. All that we know is that they do operate and that how they *will* operate in a particular case is to a degree a matter of intuition. One can state certain tendencies. Obviously the scope of the existing rules is very important and the closer the facts of two cases, the more likely one is to follow the other, all other things being equal. The higher the court, the more likely a later court is to follow it even where the rule is contained in *obiter dicta*. The all-pervasive concept of legal policy, although I have tried to simplify it in the above analysis, is, however, a fluid one which is difficult to tie down. It seems to be relevant to ascertaining the scope of the *ratio decidendi* of a case and in determining whether the facts of an earlier case are sufficiently analogous to justify following it in a later case. It seems to have some bearing on *stare decisis* in that a later court will be influenced by it in ascertaining the *ratio* of an earlier case for the purposes of considering whether it is bound by the earlier case or whether it can distinguish it. Legal policy is crucial to the process of distinguishing cases. We can describe it as a factor or variable in each of these situations. We cannot say more. The nature of judicial attitudes and their possible relationship to legal policy are also relatively uncharted seas. Any analysis of the role of analogy in legal reasoning that does not adequately address these questions is incomplete.

The common law evolved as a pluralistic system with no clear hierarchy of values and the very looseness of analogical reasoning served its purpose and may add something to philosophi-

16 Glendon Schubert, *Judicial Policy Making* (1963), 139. Compare his *Systematic Model of Judicial Policy Making* at 140. Schubert categorizes the three major attitudes as (1) *political liberalism and conservatism* (2) *social liberalism and conservatism* and (3) *economic liberalism and conservatism*.

17 Cf. D. Lloyd, *Public Policy* (1953), Lord Radcliffe, *Law in its Compass* (1961), Chap.II and Clive Symmons ‘The Duty of Care in Negligence: Recently Expressed Policy Elements’ (1971) 34 MLR 394, 528.

18 Cf. Benjamin N Cardozo, ‘The Paradoxes of Legal Science’ in M. Hall (ed), *Selected Writings of Benjamin Nathan Cardozo*, (1947), 251, 298-9.

19 See Roscoe Pound, *An Introduction to the Philosophy of Law* (1954) 89 *et seq.* See also J Stone, *Social Dimensions of Law and Justice* (1966), 164-469.

20 *The Methods of Ethics* (1901), 270.

cal method. Indeed, the distinguished Belgian philosopher, Chaim Perelman in his book *Justice et Raison* put it this way:

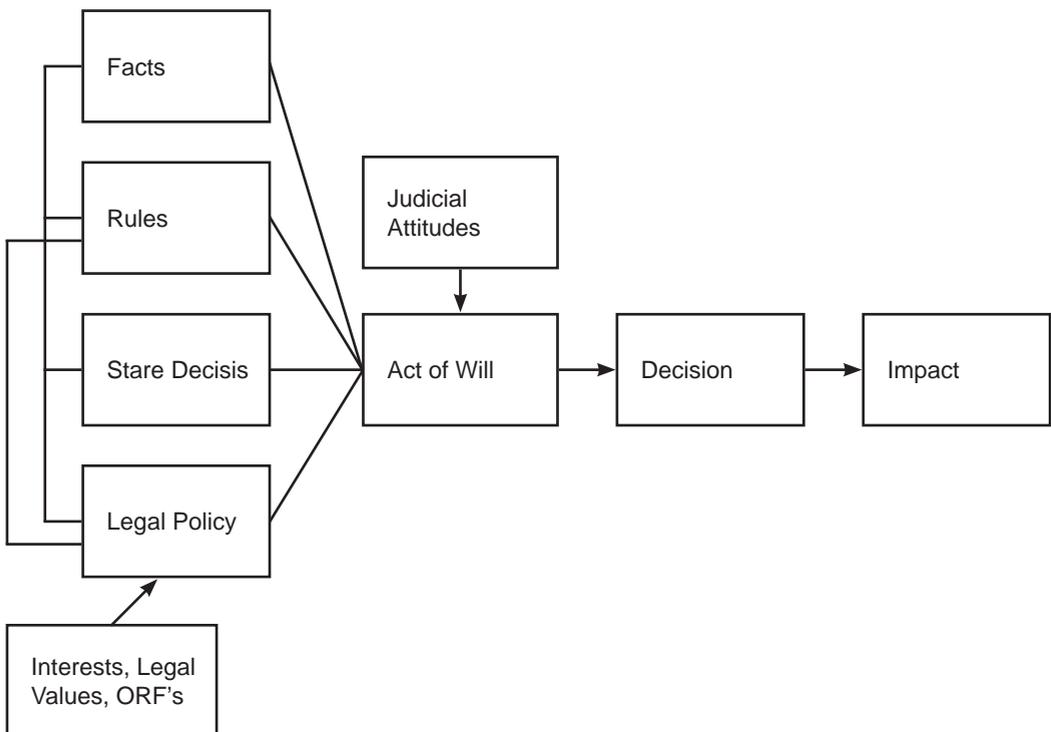
... in studying with attention and analysing with care the techniques of legal procedure and interpretation which permit men to live under the Rule of Law, the philosopher, instead of dreaming of the Utopia of an ideal society, can derive inspiration ... from what secular experience has taught men, charged with the test of organising a reasonable society on earth.<sup>21</sup>

Weinreb recognises in his conclusion that there is no escape from doubt and the possibility of error. Reasoning by analogy enables us continually to evaluate and improve the law in the light of experience. Perhaps this is the true meaning of Oliver Wendell Holmes Jr's mystical utterance, 'The life of the law has not been logic: it has been experience.'<sup>22</sup>

John Farrar\*

### THE STRUCTURE OF JUDICIAL DECISION MAKING

(From J H Farrar, *Introduction to Legal Method*, first edition, 1977, 157, but omitted from later editions.)



21 (1963), 255 (my translation).

22 *The Common Law* (1881), 1.

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## BOOK REVIEW

TRUSTS LAW: TEXT AND MATERIALS by Graham Moffat with Gerry Bean and John Dewar, Fourth Edition, Cambridge University Press, 2005, xlvii, 1051 pp.

I was pleased to have the opportunity to review the latest edition of Graham Moffat's book, *Trusts Law: Text and Materials*, as I have been an admirer of this work since the first (albeit thinner) edition appeared in 1988. It is a book in which the author exhibits an obvious familiarity with the subject matter yet at the same time he maintains an enthusiasm for the intricacies of trusts law which sets him apart from many other authors in this area. The book is part of the series which is published under the banner of *Law in Context*. The general editors of the series are William Twining and Christopher McCrudden.

The philosophy that lies behind the series is that legal phenomena should be taught from a broad perspective, from the viewpoint of law's place in society. When new developments occur, they should be taught while bearing in mind the practical implications for the operation of law as well as its rules and principles. Although the book is written primarily from an English perspective, the author carefully chooses examples from any of the common law jurisdictions that will provide clear explanations of the points being made. Graham Moffat recognises that the different approaches to issues that have developed in Australia, New Zealand and Canada, as well as the United Kingdom, are important to our overall understanding of the way trusts work and how equitable principles may be applied. He uses these examples to explain the way the different jurisdictions approach particular problems within the contexts of their own systems.

For example the relationship between the common law and equitable remedies has been discussed at various times in each of the jurisdictions and different judicial attitudes have prevailed. The Canadian and New Zealand approaches may have some things in common with each other, as may the prevailing attitudes in the United Kingdom and Australia, but each country adopts its own unique solutions to remedy the problems. The questions raised might be almost identical, but the answers are arrived at according to the individual needs and accepted legal philosophy of that jurisdiction. While Moffat is successful in giving a detailed account of the issues and the legal philosophies that guide the answers, he avoids the commonplace techniques of mere comparison. Instead, he balances one opinion against another, introducing similarities and points of difference where appropriate. He takes the whole picture, describes it, explains it and then offers his own perspective which serves to clarify the issues and enlighten the reader.

The detail of Graham Moffat's knowledge in the area of equity and trusts is phenomenal. He writes clearly, but the clarity of the writing does not detract from the complexity of the material he is presenting. He neither over-simplifies nor does he obfuscate in the way that some authors try to establish their superiority in a subject, particularly in this area. This is not an easy subject, but by taking this contextual approach the law remains relevant and dynamic. Equity in this book is viewed against the background of individual legal systems with their unique histories and formative characters. To teach law in context means that diverse legal issues are never examined in isolation, but instead are presented against a background of events and changes that form a reference to the society in which the issues arose. Graham Moffat's book returns to this theme time and again.

For example, the judicial attitude to the treatment of women has been steadily evolving since the 1970s. This has been clearly evident in areas like employment law and the law relating to matrimonial property. In trusts law the imputed trusts (constructive and resulting trusts) have been applied in situations where women appeared to be suffering an injustice, at times when relationships were breaking down, but when the established legislation was of no use to them. Questions of justice and policy were expected to be resolved within a conceptual framework that was never intended to serve such a need. Judges have been asked to interpret policy which has led to uncertainty and much reliance on evidentiary matters. A clear result of this has been that the cases have become more expensive to litigate. Moffat explains the present position clearly and then goes on to identify possible ways forward. In doing this he refers to approaches taken in Commonwealth jurisdictions, thus putting law into a wide context, but at the same time making each jurisdiction's approach part of a broader exposition of the principles.

Another example in which law is seen to be more frequently operating against a contextual background comes from the commercial world. In recent years there has been an increasing demand for equity to find solutions to problems arising in areas of activity where equity was hitherto discouraged from involvement. Some commercial transactions may now give rise to fiduciary relationships and breach of duty between those connected by contracts may now result in an equitable remedy. Here again Graham Moffat succeeds in giving us the context against which we can properly examine the issues. He gives us a detailed analysis of the problems and suggests ways forward based on a reasoned examination of the various approaches that have been adopted in New Zealand, Australia, Britain and Canada. The commentary is authoritative and the examination of current developments is thorough.

There are 1051 pages in this edition of *Trusts Law: Text and Materials* which is testament to the continuing work of the author to gather together insights from all the important commentators and decided cases in this area of law. The work encompasses the law relating to charities and the role of trustees, private and family trusts, where the problem of sham trusts are discussed against a background of modern social welfare and avoidance of payment for care for the elderly. These are all relevant wherever the national legislation allows for assets to be held under a trusts which are protected from the normal rules pertaining to taxation. Even in the portions of the book that are written from the perspective of the English lawyer, for example where the Trustee Act 2000 is discussed, the author compares case law on the legislation with other cases from other jurisdictions on the basis that even specific statutes from diverse common law countries have a common foundation. This is a book that is accessible to law academics and students at undergraduate and postgraduate levels who will find it proves to be a stimulating resource.

Sue Tappenden

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