LEGISLATION NOTES

COMMERCE AMENDMENT ACT 1990

When he introduced the Commerce Law Reform Bill to the house, the then Minister of Commerce, the Honourable David Butcher stated:[1]

> The Bill enacts the decisions resulting from the review of the Commerce Act. It also implements the changes to the Commerce Act and the Dumping and Countervailing Duties Act needed to implement the Government's commitment in article 4 of the protocol on acceleration of free trade in goods under the closer economic relations agreement.

The review to which he refers was commenced in August 1988 with the release of a discussion paper by the then Department of Trade and Industry. During its passage through the house, the Bill was split into three separate amendments: to the Fair Trading Act 1986, the Dumping and Countervailing Duties Act 1988, and the Commerce Act 1986.

The last of these was passed with little opposition in June 1990 as the Commerce Amendment Act 1990 ("the Amendment"). It features, apart from a number of procedural and policy reforms, two major substantive changes to the Commerce Act, ("the principal Act"). They are:

1. The addition of the new s 36A, replacing customs regulation of trans-Tasman trade.

2. Repeal of the Part III pre-notification provisions in relation to mergers and takeovers, in favour of a self-regulated approach consistent with the Australian model.

Trans-Tasman Trade

This is arguably the most far reaching of the changes. Section 36A prohibits any person who has a dominant position in a market in New Zealand, Australia, or Australasia, from using that position for the purpose of either restricting entry to a market, or preventing or deterring a person from competitive conduct, or eliminating any person from that market. This is an extension of the existing s 36, with the difference that s 36A applies to trans-Tasman markets for goods only — services are excepted.[2]

This new provision replaces the former anti-dumping regime that operated with respect to trans-Tasman trade. Previously where there was a discrepancy between the export price and the normal domestic price of traded goods, duties were imposed as a remedial measure, not to penalise the firm that was dumping, but to raise the

[1] 504 NZPD 14742, 12 December 1989.

[2] It also applies to New Zealand markets as well, see s 36A(1)(a), a seemingly superfluous addition inasmuch as it repeats s 36; although see Vautier, infra at note 14, 83.

price of the good to the market level; in effect, a protective measure for the benefit of domestic firms. In the context of a united trans-Tasman market however, this sort of protection was seen as anomalous. As the then Minister of and Trade and Industry, the Honourable David Caygill commented:[3]

> This move symbolises the achievement of the so called "single trans-Tasman". From 1 July 1990 goods of Australian and New Zealand origin exported across the Tasman will be subject only to those disciplines which are imposed by Australia and New Zealand competition law (in the same manner as would goods manufactured in Auckland for sale in Dunedin or those made in Sydney and sold in Hobart).

Accordingly, the provisions of the Dumping and Countervailing Duties Act have ceased to apply to goods exported from Australia into New Zealand.

The new model in section 36A has an entirely different set of objectives. The emphasis is no longer on protection, but on promoting effective and workable competition in the market place. Instead of customs regulations that target the effect of dumping (such as low pricing), competition laws punish anti-competitive purpose with the imposition of harsh pecuniary penalties (or in a civil case compensating losses caused by a breach of the section with damages). In this sense, dumping per se will no longer be regulated between the two countries unless it can be shown that it was carried out by a dominant firm, with the requisite anti-competitive purpose, in breach of s 36A. This reform was a specific goal of the two governments following the 1988 review of CER.

In a similar move, Australia has also replaced its anti-dumping laws in relation to trans-Tasman trade, as found in the Australian Customs Tariff (Anti-dumping) Act 1986, with s 46A of the Australian Trade Practices Act 1974. Section 46A prohibits a *corporation* with a substantial degree of market power in a trans-Tasman market (defined as a market in Australia, New Zealand, or Australia and New Zealand) from taking advantage of that power for an anti-competitive purpose (much the same purposes as proscribed by the New Zealand Act).[4]

There is arguably a difference between threshold tests in the two Acts. The Australian section refers to a "substantial degree of market power", whereas the New Zealand section refers to a "dominant position". The latter may be a higher threshold. Concerns have been expressed that New Zealand firms may be more vulnerable to liability under the Australian Act than their Australian counterparts under the New Zealand Act. A report by the Steering Committee of Officials[5] (a committee formed to assist the harmonisation process), while not addressing the issue fully, nevertheless proposed that:[6]

[3] "1988 ANZCERTA REVIEW — Outcome and Implications of Trans-Tasman Business" in Ricketts (ed), *CER and Beyond* NZIIA seminar August 1988.

[4] A New Zealand exporter has already been the subject of an unsuccessful application for injunctive relief on s 46A - see *Berlaz Pty Ltd & OS v Fine Leather Care Products Limited* (Federal Court, Sydney 24 April 1991) noted in [1991] 2 ATPR 32, 792.

[5] "Australian New Zealand Closer Economic Relations — Trade Agreement Memorandum of Understanding Between the Government of New Zealand on Harmonisation of Business Law", Report to Governments by Steering Committee of Officials, June 1990.

[6] Ibid, para 8.11.

The application of the two tests should be closely monitored to see if the problems arise, and to investigate whether more consistent wording is desirable.

The Steering Committee has resolved to reach agreement by 1991 as to whether a new legislative approach should be recommended.[7]

Whatever their findings, it remains a mystery why the wording of the two Acts was not harmonised.[8] The then Minister of Commerce, the Honourable David Butcher, at the third reading stage indicated that Australia was moving away from the wording of its section, possibly toward the New Zealand model, and in that context New Zealand should wait and move, or not move, as the case may be, in harmony with Australia.[9]

While the Minister's comments seem plausible in their context, they merely beg the wider question as to why new sections were being added to statutes in both countries, supposedly in the cause of harmonisation, which were in form, and possibly in effect, out of harmony with each other. If harmonisation was the goal, adding new and separate sections would seem to simply add, rather than remove, an obstacle to that process. The Minister's explanation would also appear to belie the claim, heard throughout the debates, that the courts were likely to consider the two sections synonymous. While agreement on the substantive concept of harmonisation was reached with apparent ease, a minor mechanical difficulty has been placed in the "too hard" basket and left for the courts to resolve.

Predatory Pricing

Another concern of local manufacturers is that the removal of anti-dumping provisions, in favour of s 36A, destroys what little protection local producers had against Australian exporters. As has been stated, in contrast with anti-dumping laws, the primary goal of the competition regime is competition itself, not the protection of individual competitors. In the context of trans-Tasman trade, the focus for regulating Australian exporters will be no different from the sort of controls that exist between the local producers themselves. The area of domestic trade practice which most closely resembles the concept of dumping, in effect at least, is predatory pricing. This practice involves the use of short run price cutting in an effort to exclude rivals on a basis other than efficiency in order to gain or protect market power.[10]

The reason for concern about this change of emphasis is that, as opposed to the test for dumping, predatory pricing is difficult to prove. Getting rid of unwanted stock (dumping), if not intended to harm rivals, is not in itself enough to be caught by s 36A. The problem for the plaintiff, and the courts, because of the s 36A focus

7 Ibid, 73.

8 The Parlimentary Select Committee was apparently unanimous that the two sections should be harmonised but nevertheless decided to leave s 36A in its present form. See Report of Commerce and Marketing Committee, 508 NZPD 2222.

9 508 NZPD 2419, 26 June 1990.

10 OECD, *Predatory Pricing* (1989) 81.

on purpose rather than effect, is distinguishing between legitimate and predatory price cuts.

In the United States, although this problem has been the subject of much debate and litigation, it remains a "live issue". There, the courts began with simplistic formulae for price predation such as "below cost" pricing. This in turn led to arguments regarding the appropriate measure of cost; for example, whether it should be marginal or average variable costs. In 1986 the US Supreme Court moved away from the sole emphasis on the pricing itself to consider whether the price cutting firm had a reasonable expectation of recovering, through later monopoly profits, more than it had lost during the period of cut-pricing — the so-called recoupment theory.[11]

New Zealand courts have not heard any cases that involve price predation, and the Australian courts only a few. In *The Victoria Egg Marketing Board v Parkwood Eggs Pty Ltd*[12] the question of whether a particular cost-based test should be used was left undecided. The general wording of both Acts may suggest a case-by-case, rather than a strictly formulated approach.[13] Whatever the test, as Kerrin Vautier, New Zealand economist and member of the Commerce Commission suggests, "the evidentiary burden on plaintiffs is likely to be both daunting and intimidating — with or without the 'blizzard' of legal rules."[14]

Mergers and Takeovers

The second major substantive change brought about by the Amendment involves the removal of the pre-notification provisions in respect of mergers and takeovers. Part III of the principal Act has been completely repealed and replaced with a new Part III. The previous regime required participants in a proposed merger or takeover acquisition which exceeded a certain asset threshold, and in limited cases involved a certain activity, such as broadcasting, to pre-notify the Commerce Commission. If the proposal did not involve the acquiring or strengthening of a dominant position, the Commission would provide a clearance for the proposal to proceed; or notwithstanding such an increase in dominance, the Commission could authorise the proposal on the grounds of public benefit.

Under the new "strikedown" regime, as found in the amended ss 47 and 48, pre-notification is no longer mandatory. In a provision similar to s 50 of the Australian Trade Practices Act, s 47(1) simply makes it illegal for a person to acquire assets or shares of a company that would, or would be likely to, result in a new dominant position, or the strengthening of an already dominant position. A firm considering a new acquisition which will breach this provision can seek a clearance from the Commerce Commission as before, but on a voluntary basis. Should such an

[11] *Matsushita Electrical Industrial Co v Zeneth Radio Corporation* (1986) 475 US 538.
[12] (1978) 2 ATPR 40-081. See also a note in [1991] 1 ATPR para 3.852.
[13] See [1991] 1 ATPR para 5-505, for a fuller discussion of predatory pricing reaching the conclusion that cost-based tests are likely to be rejected in favour of a rule of reason.
[14] Vautier, "Trans-Tasman Trade and Competition Law" in Vautier, Farmer, & Baxt (eds) *CER and Business Competition* (1990) 102.

acquisition go ahead in breach of s 47, without a clearance or authorisation, the High Court is empowered under the new sections of the principal Act, on the application of the Commission, to:

(i) impose pecuniary penalties of up to $5,000,000 for a corporation, and $500,000 for an individual (s 83)[15]; and
(ii) to order the divestiture of assets or shares acquired in breach of s 47 (s 85).

Furthermore, amendments to s 84 ensure that both the Commission and private individuals can obtain injunctive relief to prevent a breach of s 47; while under the new s 84A, private individuals can take action in the High Court and seek damages for loss suffered as a result of such a breach.

To facilitate acceptance and understanding of the strikedown regime, the Commerce Commission has published a number of brochures, including one entitled the *Business Acquisitions and the Commerce Act. A Guide to when to seek clearance from the Commerce Commission.*[16] In answer to the question "When should I apply for a clearance?" the Commission lists a number of factors, stated to be non-exhaustive, which indicate the need for such an application, such as whether:

(i) the acquisition will affect other parties in the industry market;
(ii) barriers to entry in the affected market are high;
(iii) competition from imports is viable; or
(iv) there are statutory restrictions affecting pricing, limiting output, or controlling entry.

Rationale for the Changes

The new regime reflects the deregulative agenda of the government of the day. The removal of rigid and arbitrary clearance procedures places the onus on the business community to become self-disciplined. More importantly, perhaps, it implements the Government's post 1988 review[17]commitment to harmonise commercial statutes with the Australian equivalents, under the CER protocol. Originally the Bill merely proposed a streamlining of Commerce Commission procedure, but at the Select Committee stage, after strenuous submissions from the business community, the Australian approach was adopted.

The Select Committee considered that the new regime was worth trying, if only because it served to reduce the costs and delay industry suffered under the pre-notification provisions. An example was given by a member of the Committee, the Honourable Trevor De Cleene, the purchase of a commercial building even though not affecting a market position, often needed a clearance involving up to $3,000 in fees to the Commerce Commission alone.[18]

[15] The repealed s 83 imposed fines of $300,00 and $100,000 respectively. NB: the standard of proof required under the new s 83(3) is the civil standard only.
[16] Reproduced in New Zealand Company Law and Practice para 15-380.
[17] See Memorandum of Understanding on Harmonisation of Business Law.
[18] 508 NZPD 2421.

There were reservations expressed, however, in the closing debate that the new voluntary regime would promote surreptitious business dealings. This is a view also expressed by Dr Lojkine, the then head of the Commerce Commission, who has published a statement warning that the proposed provisions and penalties would not prevent unlawful midnight takeovers or mergers. As one member stated, "it is almost impossible to unscramble the egg once a merger or take-over that is against the law has taken place."[19]

Supporting Provisions

In support of the above changes, the new s 4 extends extraterritorial jurisdiction over persons or corporations resident, or carrying on business in Australia, in as much as their conduct affects a New Zealand market.[20] Section 6A provides that s 36A and Parts VI and VII of the amended Act apply to the Australian Crown and Australian Crown Corporations. Section 6B provides that the New Zealand Crown and Crown Corporations are not immune to s 46A of the Australian Trade Practices Act.

Further provisions provide the Commission with increased powers of investigation. Section 99A allows the Commission to require Australian residents to supply information and documents in relation to s 36A. Section 155A furnishes the Australian Trade Practices Commission with similar powers in relation to New Zealand residents.

Supporting Legislation

Various pieces of subsidiary legislation were also essential for the implementation of the changes to the Commerce and Trade Practices Acts. In New Zealand three relevant enactments were passed:

(1) Judicature Amendment Act 1990. This is a powerful piece of legislation providing, inter alia, for the High Court to sit in Australia for the hearing of New Zealand proceedings and for the Federal Court of Australia to hear Australian proceedings in New Zealand.

(2) The Reciprocal Enforcement of Judgments Amendment Act 1990. This amendment to the Reciprocal Enforcements of Judgments Act 1934, provides, inter alia, for service and registration of orders or injunctions to which ss 46A, 155A and 155B of the Trade Practices Act apply.[21]

(3) The Evidence Amendment Act 1990. This includes, inter alia, provision for judicial notice of Australian Acts and Regulations, and seals and signatures of Australian courts and judges.

[19] Ibid, 2423.

[20] The parallel provision in the Australian Act is found in s 5(1A).

[21] The Government has announced its intention to extend the scope for enforcing Australian judgments in NZ. A Reciprocal Enforcement of Judgements Amendment Act will be introduced late this year, which will be parallelled by an Australian Amendment. See (1991) 14 TCL No 19, 2.

Concluding Comments

The changes mentioned above, harmonising to some extent Australian and New Zealand trade practice regimes, are far reaching and show a degree of foresight. The creation of an intra-jurisdictional network for controlling trans-Tasman trade, bought about by consultation and co-operation between the two legislatures, has shown the commitment both nations have made to implementing the CER treaty. They are long term changes, but as is often the case there are, as a consequence, concomitant short term costs.

One such cost, recognised by the Government, is the effect on local producers of removing anti-dumping legislation, especially in the current recessionary climate. Another cost, perhaps a long term cost, although not one that has received much recognition, is the erosion to some extent of New Zealand's parliamentary sovereignty as a consequence of the extraterritoriality provisions contained in s 5(1A) of Australian Trade Practices Act. New Zealand courts' authority has also, to some extent, been undermined with the grant to the Australian High Court of a warrant to set up court in New Zealand, under the jurisdiction of the Trade Practices Act 1974. These same concerns could, of course, be shared by Australians in relation to the New Zealand provisions.

In the New Zealand context, the Crown's special relationship with the Maori, by virtue of the Treaty of Waitangi, must make any question of sovereignty a Treaty issue. In the case of the Australian judiciary determining the liability of New Zealand's Crown enterprises, or indeed private enterprises, some statutory recognition of the relationship between the Treaty partners seems warranted. Treaty rights, although they do not bind the Crown statutorily (per se), bind the Crown in honour. It is fair to say that only in recent years have the Crown and the judicary become more sensitive to this obligation. It would be too much to expect the Australian judicary to achieve overnight the sort of awareness that has taken their New Zealand counterparts 150 years to develop.

Arguably, a conflict between s 46A and Maori interests under the Treaty may be unlikely; although it could be imagined that Maori interests in fisheries, or such treasures as the Whakarewarewa thermal reserves, could involve the use of a dominant position to prevent entry into a market, but with such a position justified by pre-emptive and Crown recognised Treaty rights. Furthermore, with the Australian Act purporting to bind the New Zealand Crown, there may arise a conflict, for example, with s 9 of the State Owned Enterprises Act which states, "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." As the former statute was passed after the latter, it would prevail by virtue of the implied repeal doctrine. Even if the possibility of conflict is remote, the ceding of extraterritorial jurisdiction, no matter how small, should not be made without consulting the Treaty partner.

The extraterritoriality provisions are ultimately only rendered necessary by the fact that the wording of the two statutes remains unaligned. If the provisions were the same, it would surely have sufficed, for the purpose of trans-Tasman litigation,

to make New Zealand judgments enforceable in Australia, and vice versa — a move that was required anyway with the current changes. If complete harmonisation of the two sections takes place, and it seems likely that it will, the jurisdictional changes will have been rendered redundant. At that point the direction may well turn toward a trans-Tasman tribunal[22] — an alternative approach that with more foresight, and perhaps less haste, could have been included in this round of reform.

The setting up of such a tribunal would avoid the constitutional implications of the extraterritoriality provisions. It would also provide an experimental model for future harmonisation of Australian and New Zealand commercial arbitration. If the way is toward total economic unity, and this would seem to be the implicit agenda of the CER, the stages, in consultation with the Treaty partner, should be tentative steps — forward only, not one step forward and three back.

— Justin Orsborn

22 This move is already under consideration. The Steering Committee intends to file a report in 1991. See (1991) 14 TCL No 17, 2.

EMPLOYMENT CONTRACTS ACT 1991

Introduction

The Employment Contracts Act was passed on 7 May 1991, and most of its provisions took effect on 15 May 1991. Part VI of the Act took effect on 19 August 1991, and established the Employment Tribunal and the Labour Court, institutions which are given exclusive jurisdiction over employment contracts.

The aim of this Act is to do away with central wage bargaining and replace it with direct employer-employee bargaining. In so doing, it removes the arbitration process, and also deprives the government of any direct means of determining wage levels. The stated reason for doing this is to make the New Zealand labour market more efficient. This involves reducing the role of nation-wide union organisations, and perhaps, indirectly, lowering wage and salary levels. The Act does not recognise a special class of corporation called a "union". Instead there are to be employee organisations, which may take any form whatsoever, whether formally incorporated or not. The Employment Contracts Act therefore has no provisions that are the equivalent of Parts I to VII of the Labour Relations Act 1987. These parts of the Labour Relations Act were the backbone of the centralised bargaining system. Their most important functions were to control union formation, registration, conduct, and membership.

Membership of Employee Organisations

Part I of the Employment Contracts Act deals with freedom of association. It states that membership of employee organisations is to be voluntary (s 6), and that

no person may exert undue influence on an employee to join, leave or not join an employee organisation (s 8). There is also a prohibition on preference, qualified or unqualified (s 7). The intent behind this provision is to prevent the formation of "closed shops". An employer may not refuse to hire someone because they do or do not belong to an employee organisation. Employee organisations have none of the powers or privileges previously reserved for trade unions. They do not have the exclusive right to bargain on the employees' behalf (s 12). Nor do employee organisations have the right to enforce employment contracts (s 43 (d)), or to become involved in the settlement of personal grievances (s 32 and Schedule 1). Presumably, the contract can involve the employee organisation in the resolution of a personal grievance, if such a clause can be negotiated. The standard procedure envisaged by the Act, however, is direct discussion between employee and employer, with recourse to the Employment Tribunal if discussion fails.

The changes to the way in which bargaining agents are to be chosen, and the powers they are to have, probably represent the most significant changes perpetrated by this Act. The Act does not allow a bargaining agent to become the exclusive and permanent representative of the employee. Under the previous system, the union chose its members by means of a membership rule. The employee's only choice was to belong or not to belong. Under this Act, the employee will choose his or her bargaining agent, and may change that agent at any time. However, this freedom of choice is gained at the expense of being able to organise and act collectively.

Bargaining

Part II of the Act deals with bargaining. It allows any person negotiating an employment contract to choose to engage an agent to negotiate on his or her behalf. The agent can become a party to the contract, if all parties agree (s 17).

Section 11 provides for certain people to be excluded from bargaining. Any other party to the contract may object to the participation of an agent who has, within the last ten years, been convicted of an offence which is punishable by five or more years' imprisonment (s 11(1)). When such an objection is made, the person appointed as agent may not act in those negotiations. Section 11(2) has the same threshold and applies to situations where the bargaining agent is a group or organisation, and a member of the group, or an agent or potential agent of the group has a criminal conviction. If s 11(2) is invoked, the group or organisation may continue to act as agent, but the person with the criminal record is prohibited from further involvement. Breach of this provision, or any other in Part II, can lead to a penalty being levied against the offender (s 51(2)).

The purpose of s 11 is to prevent "gangster unionism". Gangster unionism has allegedly been rife in the United States, where criminal elements, in particular the Mafia, have gained control of unions for the purpose of extorting money from employers with threats of industrial disruption. The means by which the gangsters gain control of unions are usually violent. In New Zealand, until now, criminal elements would have been excluded from industrial bargaining by the requirement

for registration of unions. Registered unions had to fulfill a stringent set of conditions set out in the legislation.[1] The Minister had the power to deregister unions if they failed to fulfill these statutory conditions.[2] Section 11 requires parties conducting negotiations to have the will to enforce it. If the criminals involved are sufficiently ruthless, the other party involved in the negotiations may well choose not to invoke s 11. The only penalty for a breach of s 11 is a fine of up to $5000, which does not seem a great deterrent.

Once an agent has gained the right to represent the party to the employment contract, the agent has to establish its authority to represent that person with the employer or employee involved (s 12(2)). This provision, in a subtle way, makes large scale collective agreements extremely difficult to organise. Presumably, the agent has to establish its authority with some form of writing. If employees are spread all over the countryside, or the organisation is very large, it may be all but impossible for the bargaining agent to be sure of reaching all the employees it wishes to represent. It may be even more difficult to gather signatures from all these employees in a reasonable period of time. Site bargaining may become the norm, not because employees wish it, but due to the logistical nightmare of getting authority from all the employees involved.

Once it has been established that the agent actually has authority, the employer or employee must recognise the authority of that agent, and proceed to bargain with them (s 12(2)).

Section 13 allows persons seeking to gain the authority of employees to act as their bargaining agents to enter the workplace of the employer. This, however, can only be done with the consent of the employee. The employer can effectively limit the choice of the employee by allowing only approved agents to have access to the employees. Once a person or organisation has authority to act as the agent of the employee, the employer must allow the agent into the workplace to enable her or him to discuss the negotiations with the employee. Such an entrant onto the workplace must notify management (s14).

Section 18 allows negotiation as to whether or not the agreement is to be individual or collective. In effect, however, the only party with any choice is the employer. An employer need not agree to a collective employment contract, no matter what the employees want (s 18 (2)). Section 19 requires individual employment contracts to be consistent with any existing collective agreements. Section 24(1) requires that any collective agreement covering 20 or more employees must be registered with the Secretary of Labour. Sections 24(2) and 24(3) however have the effect of making the registered copies of collective agreements confidential information, by exempting them from the Official Information Act 1982. Awards and agreements have in the past always been matters of public record. It seems the government does not want relativity based bargaining, and hopes that by keeping the contents of collective agreements secret from those not party to the agreement, it can

1 Part II of the Labour Relations Act 1987

2 Sections 31 and 32 of the Labour Relations Act 1987.

prevent negotiators bringing up relativity arguments. This could lead for example to employees on opposite sides of the same city doing the same work, maybe even for the same employer, yet receiving drastically different pay rates and conditions.

Personal Grievances

Part III deals with personal grievances. The significant change is that grievance procedures are no longer available only to for union members. This removes one of the strongest incentives for being a union member. Unlike the previous statute, the Employment Contracts Act confers no legal advantages on union members. Apart from the removal of union participation, and the cessation of reinstatement as the preferred remedy for an unjustifiable dismissal, however, the Act is materially the same as the Labour Relations Act 1987. It is somewhat surprising that this part of the statutory scheme is virtually unchanged. Even unjustified dismissal has been retained, despite the criticism directed at that part of the law by the Employers' Federation in 1990.

The employee who wishes to pursue a personal grievance under the new regime, however, will find the process both arduous and expensive. Previously, if discussions failed to resolve the dispute, a grievance committee consisting of representatives of the union and the employer was set up. Should the dispute remain unresolved at that level, it was referred up to the Labour Court. Unions often took these cases on behalf of their members, with the union rather than the employee bearing the cost.

It is now the employee's responsibility to take the grievance to the Employment Tribunal if discussions with the employer do not resolve the matter. This will probably be an expensive undertaking, involving legal representation. Further, there is the possibility of an appeal to the Labour Court (s 95), and further appeal to the Court of Appeal on points of law (s 135). The likely effect of the present legislation will be that while the substantive rights of the employee remain the same, the expense and difficulty involved in enforcing those rights will ultimately lead to their waiver.

Disputes

Part IV deals with what were formerly called disputes of right, or the interpretation of the agreement. The agreement is to provide a procedure for resolving these disputes. If there is no procedure provided, then Schedule 2 of the Act inserts standard clauses (s 44). Section 46 states that the dispute procedure shall not apply to clauses requiring the parties to negotiate further, whether or not such negotiations are contingent upon a particular event occurring, or where the agreement provides for redundancy payments, but does not specify the size of the payment.

Penalties

The penalty for an individual who breaches an employment contract, or any provision of Parts II, III and IV of the Act, is a fine of up to $2000. For a corporation, the penalty is a fine of up to $5000 (s 53 (1). The penalty is to be paid to the Crown, but the Employment Tribunal has the power to order part or all of the penalty to be

paid to any person(s 54).The Employment Tribunal is the tribunal of first instance in a penalty case, with appeal to the Labour Court (s 51). Any person who incites another to breach an employment contract is also liable to be penalised (s 52(2)).

Compliance

The Act gives the Tribunal power to order compliance with any employment contract in s 55. The Labour Court has the power to order compliance with orders of the Labour Court under s 56. Under s 58, any order made by either the Tribunal or the Court can be filed in the District Court, and enforced as if it were an order of the District Court.

Harsh and Oppressive Contracts

Section 57 is novel and without precedent in New Zealand labour law. It allows the Labour Court to re-open harsh and oppressive employment contracts. The grounds are limited, however, to the use of oppressive conduct when entering into the agreement (s 57(1)(a)), or the contract being harsh and oppressive at the time it was concluded (s 57(1)(b)). The Court is unable to re-open employment contracts that become oppressive after being entered into. This is a major limitation on the operation of this section. Further, the court cannot re-open the contract of its own accord, but must wait for one of the parties to request intervention (s 57(3)). The Court may take into account all the circumstances surrounding the case when making the order (s 57(5)). It can order the total or partial setting aside of the contract (s 57(4)(a)), and/or the payment of compensation (s 57(4)(6)).The section is available to both employers and employees.

The Court is not, however, permitted to set aside or re-open contracts that are unfair or unconscionable (s 57(7)). This shows that the section is only intended to be applied to the most outrageously unbalanced contracts. There is no provision for unfair or unconscionable employment contracts, which are presumably more common than harsh and oppressive contracts. The nature of an employment contract means that unfair or unconscionable terms take on far greater significance than they would in a credit contract for a piece of furniture or a motor vehicle. What would merely be inconvenient or expensive in a credit contract might be intolerable in a employment contract. While the government is to be applauded for including a clause protecting vulnerable employees, arguably it should have gone further, and provided for protection of those who might be dealt with unfairly. It is also unsatisfactory that the Court cannot find a contract oppressive of its own motion. This could lead to the manifestly unjust situation of two parties in separate grievance cases, with similar facts, experiencing wildly different results merely because one lawyer had the foresight to include a claim of oppressiveness, and another did not.

Strikes

The definitions of strikes and lockouts are substantially the same as in the Labour

Relations Act 1987 (ss 61 & 62). Virtually the only time a strike will be lawful is when it concerns the negotiation of a new employment contract (s 64). Any strike or lockout during the currency of an employment contract is illegal (s 63), except when it relates to safety (s 71). Participants in an illegal strike may be sued in the Labour Court for the various economic torts set out in s 73(1) of the Act, or restrained by a compliance order under s 74.

Institutions

Part VI of the Act sets up the institutions that will administer the new regime. The first of these is the Employment Tribunal. This has two arms. The first is the mediating arm, which is to be available to help employers and employees reach agreement in disputes. Presumably, s 78 refers to what used to be known as disputes of interest, that is the bargaining of new agreements. This can be the only area open to mediation as s 79 states that the Tribunal shall adjudicate in disputes covered by disputes procedures (s 79(1)(c)), and in personal grievances (s 79(1)(b)). The Tribunal has no powers of arbitration. Unlike the Arbitration Court of old, the Employment Tribunal has no power to impose the terms and conditions of employment contracts upon employers and employees who cannot, or will not, come to agreement.

The Employment Court is established by s 103, and its jurisdiction defined by s 104. It is to act as a court of appeal for the Employment Tribunal, and as a tribunal of fact in any case based on an employment contract or an industrial tort.

Conclusion

The effect of this Act will be to reduce the degree of union coverage, which will reduce employee bargaining power. This, the present National Government hopes, will (along with benefit cuts) lead to a reduction in wage levels and conditions. In this, the Act looks likely to be successful, especially amongst those workers who are difficult to organise, such as shop assistants and clerical workers.

The Act will, however, raise bargaining costs, for both employers and employees. The previous system, whatever its defects, allowed for quick and relatively cheap industrial bargaining. Most employers and employees never had to concern themselves with negotiating employment contracts. Now they will have to take these negotiations into their own hands, or employ bargaining agents to negotiate on their behalf. The bargaining agents that employers, and in some cases, employees, engage will often be lawyers or industrial relations consultants, whose fees are likely to be substantial.

The Act will not be conducive to industrial harmony and peace. With the removal of any form of arbitration machinery, the path to a quick resolution of industrial disputes is lost. Industrial warfare, with persistent hardening of attitudes, such as the recent coal miners' strike in England, may well become common in New Zealand industrial bargaining.

— *David Shearer*

NEW ZEALAND BILL OF RIGHTS ACT 1990

Historically, Bills of Rights have been born in times of political upheaval and constitutional crisis. Opponents of the New Zealand Bill of Rights Act 1990,[1] have queried why New Zealand, a country not in crisis, and with a good human rights record, needs a Bill of Rights. Proponents respond that New Zealand is singularly unique in its absence of formal "constitutional checks",[2] and for this reason:[3]

> [R]eliance on the old maxim "If it ain't broke, don't fix it" may provide a false sense of security. Whilst wholesale disregard of fundamental rights and freedoms by any New Zealand Government is unlikely, the risk of a gradual whittling away of rights is a much more realistic possibility...

The Act has a long history beginning with the White Paper draft in 1985. That proposal was to be entrenched and have the force of supreme law; the courts would have had power to strike down statutes inconsistent with the Bill of Rights and Te Tiriti o Waitangi was to have been recognised and affirmed as part of the supreme law of New Zealand.

However, the report of the Justice and Law Reform Select Committee based on the many submissions it had received in relation to the White Paper, concluded that New Zealand was not ready for an entrenched Bill of Rights.[4] The main objections were the resulting transfer of power from the Government to the judiciary, and the creation of uncertainty in the law. In accordance with the Select Committee's recommendations, the Bill of Rights is an ordinary statute which may be repealed, revoked or amended in the ordinary way.

The rights and freedoms which the Act purports to "affirm and protect" extend to include the right to life and security of the person (ss 8–11). Sections 12 to 18 set out our democratic and civil rights and freedoms. Some concern has been expressed over the nature of the electoral rights conferred by s 12. Does this section extend to allow prisoners and mental patients the right to a vote they were previously denied? Sections 19 and 20 provide for freedom from discrimination, and the rights of minorities.

Rights relating to the criminal process are provided for in ss 21-27. Section 23 confers two new rights on persons who are arrested or detained. Section 23(1) (b) provides for "the right to consult and instruct a lawyer without delay and to be informed of that right" and s 23 (4) (b) provides for "the right to refrain from making any statement and to be informed of that right."

Section 3 (a) provides that the Act is to apply only to acts done "by the legislative, executive, or judicial branches of the government of New Zealand." The insertion of the word "only" emphasises that the Act's provisions do not apply as between private citizens.

1 Hereafter referred to as the Act.
2 502 NZPD 13044 (10 Oct 1989)
3 Ibid, 13039.
4 Of the 431 submissions received, 243 opposed the Bill outright, 35 supported it and 56 indicated qualified support while the remainder opposed some part of it, but it was not clear whether they totally rejected the idea of a Bill of Rights.

However, these rights are not without limitation. Section 5 provides "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society ." To illustrate how this section operates, the Indecent Publications Tribunal with respect to its censorship of the *Penthouse* magazine has stated:[5]

> the classification of "Penthouse" (U.S.) as indecent in the hands of persons under 18 years . . . may well violate freedom of expression, but . . . is a reasonable limitation prescribed by law and demonstrably justified in a free and democratic society.

TheAct includes no reference to Te Tiriti o Waitangi, it was deemed to be too important to be included in a Bill of Rights that was not supreme law.[6] The courts do not have the power to strike down legislation, nor, following the late insertion of s 4, can the courts hold any enactment or provision of an enactment, (past, present or future) impliedly repealed, revoked, invalid or ineffective, or decline to apply any such enactment which is inconsistent with the Act. Although the Select Committee recommended that social and economic rights be included, the government felt that these were not enforceable and therefore were not included.

As a result, what we have today is something less than a Bill of Rights might aspire to be, and its implications are not as far reaching. But that is not to say that it is totally ineffective. It is intended that the Act provide for enforceable individual human rights that may not be protected by existing legislation, while codifying existing common law rights. The Act is also envisaged as having a major educative effect by "promoting a clear understanding of and respect for essential civil and political rights among the people."[7] Furthermore, the Act provides three mechanisms "to ensure that laws are not passed that are inconsistent with the Bill."[8] The first of these is s 7 which "requires the Attorney-General to report to the House when he or she considers that any provision in a bill is inconsistent with the rights contained in the Bill of Rights."[9] The second mechanism empowers a parliamentary select committee, by an amendment to the standing orders, to examine bills for any inconsistencies with the Bill of Rights and to report them to Parliament. The third mechanism is through the post-legislative, interpretative role of the courts provided for in s 6, which will assist judges to interpret the law in a manner "that is consistent with the rights and freedoms contained in this Bill ".

Section 6 provides that where an interpretation consistent with the Bill of Rights can be given it is to be preferred. According to Rishworth, "[Section 6] is a statutory articulation of what has always been an interpretation principle. Parliament is not lightly to be assumed to intend to interfere with fundamental rights and freedoms such as appear in bills of rights."[10] However, the courts may still have a degree of flexibility. Where legislation is inconsistent with the Bill of Rights, or the law is

5 (1991) 14 TCL No 17, 30
6 Supra at note 2, at 13041.
7 509 NZPD 2803 (17 July 1990).
8 Ibid.
9 Supra at note 2, at 13039.
10 Rishworth, "The Potential of the New Zealand Bill of Rights" [1990] NZLJ 68, 69.

unclear or ambiguous and where it does not frustrate Parliament's intentions, the courts may "read down",[11] or interpret the legislation narrowly so as to give it a meaning consistent with the Bill. But where legislation plainly overrides a stated right, the courts have no option but to give effect to it.

Bill's Effect On The Executive

It is in the area of executive action that the widest implications of the Bill of Rights Act will be realised. The Right Honourable Geoffrey Palmer's opinion is that:[12]

> The Bill of Rights will put obstacles in the way of the Executive when it is framing its legislative proposals. It will provide standards by which legislation must be measured, and it will provide criteria that must be followed before legislation can be introduced. That is novel to our system of government and will be extraordinarily helpful and beneficial in ensuring that legislation conforms to basic principles, important standards, and real legal tests.

The Act will also control governmental procedures such as law enforcement. If an infringement of the Bill is established the question arises whether a remedy is available under the Act. It has been argued that "there is a clear implication that the Courts ought to grant remedies for breaches."[13] The Explanatory Note provides "the courts might enforce these rights in different ways in different contexts" and it is contemplated in Hansard that the courts already have suitable remedies available to them within their jurisdiction, for example, the exclusion of evidence, stays of proceedings, and damages.

As had been anticipated by various commentators, it is within the area of the criminal law that cases have been argued which claim an infringement of rights under the Act. While it may be premature to comment on the effect the Bill of Rights has had on the executive, it is nevertheless useful to turn to the cases to determine what practical effect it has had and to see how the courts have approached their interpretative role.

In the case of *Flickinger v Crown Colony of Hong Kong*,[14] the Court of Appeal concluded that s 66 of the Judicature Act 1908 now conferred a right of appeal in criminal matters, where in the past it had been held that it did not. In order to give effect to the rights specified in s 23(1)(c) of the Bill of Rights Act the Court gave the Judicature Act a wider interpretation than it had previously been given.

In the case of *Minto v Police*,[15] an unreported decision of the High Court at Auckland, Robertson J noted, in reference to an invitation to give retrospective effect to s 16 of the Bill of Rights Act (which guarantees freedom of peaceful assembly):[16]

> it is difficult to apprehend how the law could be changed by an Act which merely "affirms" a right [which existed before the Act was passed, although] perhaps the right may have new and different aspects.

[11] See Rishworth, ibid, 69 for a fuller discussion on "reading down" legislation.
[12] 510 NZPD 3760 (21 Aug 1990).
[13] Supra at note 10, at 72.
[14] [1991] 1 NZLR 439, noted at (1991) 6 AULR 625.
[15] (1991) 14 TCL No 10, 11.
[16] Ibid.

This passage quite aptly sums up the courts' attitude towards the Bill of Rights. While they are happy, on occasion, to interpret a statute more widely or narrowly as the case may be, the Bill of Rights really only affirms rights which were already in existence and does not, effectively, change the law.

Criticisms of New Zealand Bill of Rights Act

The Bill of Rights Act has been described as a "theorist's Bill", "a watered-down, Clayton's version of a Bill of Rights", "a bumper-sticker legislative measure" and "a Trojan Horse". It has been seen by some as the first steps towards the introduction of a full scale Bill of Rights; as an attempt at changing public hostility to such a supreme statement of law. This hostility stems from a fear by many that ultimate power will be transferred from the elected representatives who are directly accountable, to an appointed judiciary with a tenure for life.

Some consider that the Act in its present form "may be giving a blank cheque to the courts in relation to matters that are really the province of Parliament."[17] For example, s 8 provides "[no] one shall be deprived of life. . . . " The section does not define the status of the foetus and therefore the courts could make decisions on issues such as abortion, decisions that should be made by the elected representatives of the people.

On the other hand, there are those who consider that "the Bill of Rights is a meaningless statement that is utterly uncontroversial and is an apology for constitutional reform . . .".[18] As it is an ordinary statute the Government may repeal, amend or revoke it at any time and hence there is effectively nothing in the Act which checks the power of the Executive.

The Act is seen as creating a degree of uncertainty in the law, by replacing well-known rights with ill-defined rights. "One would not really know what an Act of Parliament meant until it had gone to the courts to be interpreted and to be held up against the yardstick of a Bill of Rights."[19] There is also a degree of uncertainty in the language of the Act. For example, "disproportionately severe," (s 9); "unreasonable search or seizure," (s 21); "inherent dignity," (s 23(5)). What do these phrases mean? In defining them, the courts are forced to make value judgments.

There is a real danger that where rights are defined, the Act "limits our rights to the States [sic] perception of what rights will be".[20] An example of this is s 19 which provides, "[e]veryone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status or religious or ethical belief." The grounds on which one cannot discriminate should be extended to include disability, age, and sexual orientation.

17 Supra at note 12, at 3455.
18 Supra at note 2, at 13051.
19 Supra at note 12, at 3460.
20 Interim Report of the Justice and Law Reform Committee, *Inquiry into the White Paper — a Bill of Rights for New Zealand* (1987), 12.

Criticism has been levelled at the Act because it effectively denies access to justice to certain groups. These difficulties are seen to arise because of a lack of resources, a "lack of knowledge about legal proceedings, lack of confidence, and because of practical difficulties such as access by persons in rural communities to lawyers. This is seen to impact particularly on some groups such as women and ethnic groups."[21]

The Act also emphasises individual rights to the exclusion of collective rights. Such an emphasis denies Maori concepts of collective rights and indicates "a lack of recognition of the rights which New Zealanders are entitled to as a group, for example, the right of women as a group, to be free from all exploitation from pornography."[22]

The decision to exclude Te Tiriti o Waitangi from the Bill has been both applauded and criticised. In fact the Maori response to incorporating Te Tiriti in an Act of Parliament, which would not be supreme law, was "that incorporation is inconsistent with the mana of the Treaty; that this would allow Parliament to alter or repeal the Treaty ".[23] However, this fear may be overcome, Elkind and Shaw suggest, "by stating in the Bill of Rights that Parliament *shall not* have that power." It has also been argued that "any constitutional reform which seeks national legitimacy must reckon with the Treaty."[24]

Despite its apparent weaknesses, the Bill may be seen as a reflection of New Zealand's conservative tradition and a necessary precursor to an eventual, entrenched Bill of Rights. One day there may even be a written constitution for New Zealand, but for now, constitutional law reform looks to be a slow and hesitant process.

— Mary-Ellen Kenyon

[21] Ibid, 10.

[22] Ibid, 13.

[23] Elkind & Shaw, *A Standard for Justice* (1986) 5.

[24] Speech by Elias to the Legal Research Foundation Inc., Annual General Meeting, 10 October 1985, p3, quoted in supra at note 23, at 42.