LEGISLATION NOTES

THE COPYRIGHT ACT 1994

The conclusion of the General Agreement on Tariffs and Trade ("GATT") Round in 1993 signified major intellectual property reforms for many countries. The Trade Related Aspects of Intellectual Property ("TRIPS") Agreement prompted New Zealand to implement legislative reform of intellectual property. One of the most fundamental changes to the law of intellectual property was the repeal of the Copyright Act 1962, and its replacement by the Copyright Act 1994 ("the Act"). The Act is substantially modelled on the United Kingdom Copyright, Designs and Patents Act 1988. The Act is in eleven parts, and this note will focus on the six parts containing the major changes to the law and the significant differences with the 1962 Act.

Description, Ownership, and Duration of Copyright[1]

Description of copyright

Under the first category of Part I, a broad heading of "original works"[2] has now been extended to encompass what was, under the 1962 Act, separated into Part I works and Part II subject matter. This new category of original works specifically encompasses a range of media not contemplated by the 1962 Act. It includes literary, dramatic, musical, or artistic works, and films, broadcasts, cable programmes, and typographical arrangements of published editions. The category of "works" also gives protection to multimedia works and databases. The Act provides protection for these works by means of an inclusive definition of "compilation".[3]

This particular part of the Act also includes a wider definition of "literary work". The Act now defines "literary work" as:[4]

> [A]ny work, other than dramatic or musical work, that is written, spoken or sung and includes–
>
> (a) A table or compilation; and
>
> (b) A computer program.

This is probably the most progressive Part of the Act. The 1962 Act was ill-equipped to deal with the problems associated with new technology. Whether copyright existed in works generated by or originating from a computer source was unsettled.

The existence of copyright in computer programs and related material was not

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1 Part I.
2 Section 14.
3 See Brown, "The New Copyright Legislation – An Analysis" in *Intellectual Property: Copyright Act 1994; GATT Legislation 1994* (Legal Research Foundation 1994) 17. See also s 2 of the Act.
4 Section 2.

recognised until 1983. In Australia, the case of Apple Computers *Inc v Computer Edge Pty Ltd*[5] prompted a change in legislation. The case refused to recognise protection for computer programs. It was only after amendment to the Australian copyright legislation that computer programs began to enjoy protection. The United Kingdom followed suit by instituting a similar amendment to their Copyright Act. New Zealand, however, seemed to lag behind. Despite various reports by the Industrial Property Advisory Committee, it was not until 1994 that New Zealand completed its changes. By extending the definition of literary work to include computer programs, the Act provides protection to an important and rapidly expanding industry.

Ownership of copyright

The Act addresses two major problem areas concerning the ownership of copyright. These are copyright in commissioned works and in works created by employees.

Under the 1962 Act, where a work was created pursuant to a commission, copyright vested in the "author". This term was narrowly defined as:[6]

> [T]he natural person or persons who were responsible for first reducing the work to writing or some other material form.

The Act now defines an "author" as, among other things, "the person by whom the arrangements necessary for the creation of the [work] are undertaken". Section 21 vests copyright in the commissioner where they pay or agree to pay for the work and the work is made in pursuance of that commission.[7] Thus, if a contractor creates a work for money, it seems that the copyright will be owned by the commissioner. This issue is particularly important in regard to independent authors who create computer software under contract. Unless they specifically retain copyright in their contract, the commissioning of the work will deprive them of ownership.

The second area of ownership concerns journalists and other paid writers. Primarily, copyright vests in the employer when an employee creates a work "in the course of his or her employment".[8] Prior to this Act, a journalist retained copyright in his or her own work regardless of whether it was produced in the course of employment.

Duration of Copyright

These provisions only create minor changes to the 1962 Act. Changes in duration were prompted by both the TRIPS Agreement and the Berne Convention.[9] First, the Act takes account of "computer-generated" works which have no apparent author. Section 22(2) states that computer-generated literary, dramatic,

5 (1983) 1 IPR 353.
6 Brown and Grant, *The Law of Intellectual Property in New Zealand* (1989) 272.
7 Section 21(3)(a) and (b).
8 Section 21(2).
9 See clause 23 of the Berne Convention.

musical, or artistic works enjoy the same copyright duration as if they had an author. Therefore, the works enjoy a copyright duration of fifty years from the year in which they were made.

Similarly, copyright in sound recordings and films exists for fifty years and begins from the year in which the work was made, or the year in which the work was first made available to the public, whichever is later.[10]

The Act also gives protection to works of artistic craftsmanship for a period of twenty-five years.[11] The section complies with the Berne Convention. Under the 1962 Act these works were only given sixteen years protection if they were "industrially applied".

Finally, the change in duration of Crown copyright is significant. The copyright in works produced for the Crown, or by the Crown, has been increased from 50 years to 100 years and firmly vests in the Crown.

Infringement of Copyright[12]

The Act makes no substantial changes to the infringement of copyright. The amendments to the infringement sections of the 1962 Act were primarily sourced from the Copyright, Designs and Patents Act 1988 (UK). The Act divides infringement into primary and secondary infringement. Under the 1962 Act, the courts and commentators similarly divided infringement. However, these distinctions were never expressly reflected in the legislation. Primary infringement is making copies of a work without the owner's consent. Secondary infringement is possessing, importing, or dealing with infringing copies, or possessing the means for making infringing copies.

Primary infringement

Sections 29 to 31 prohibit active infringement by copying, issuing to the public, performing or showing in public, broadcasting or including in any cable programme service, and infringement by making an adaptation. The sections also capture the rental of works, especially software and videos.

Secondary infringement

Secondary infringement deals chiefly with the importation, possession of an infringing copy, or possession of the means for making an infringing copy.[13] It covers all passive acts constituting collusion in the copying and distribution of works in breach of their copyright restrictions. These sections were motivated by the developing technology available for multiple copying (for example, VCRs, photocopiers and facsimiles), and the relative ease with which infringing copies could be made and distributed.

However, the Act recognises that, with the growth of "home entertainment systems", the domestic reproduction of copyright material has correspondingly

10 Section 23(1)(a) and (b).
11 Section 75.
12 Part II.
13 Sections 35-39.

increased. The Act therefore limits the use of sections 35 to 39 to those people who make infringing copies "in the course of business". There is an express exclusion in s 35 for infringing copies made for a "person's private and domestic use". The section acknowledges that the cost of policing the infringing copies made by home or domestic users outweighs the potential benefits of protecting the copyright. Further, the accessibility of VCRs, sound-systems, and indeed blank video and audio cassettes, makes a certain amount of private copying inevitable.

Permitted Acts[14]

This Part creates new restricted acts. Part III allows restricted copying provided it is for the purpose of criticism, review, or news reporting.[15] The sections also allow copying for the purposes of private research and study.[16] Such permissible actions must constitute "fair dealing".

Section 43 of the Act lays down strict guidelines as to what the court shall consider "fair dealing" in the context of research and private study. These guidelines essentially clarify the position set out in *Longman Group Ltd v Carrington Technical Institute Board of Governors*.[17] The court shall have regard to factors such as the purpose and nature of the copying,[18] and economic factors such as whether the work could have been obtained within a reasonable time at an ordinary market price.[19] The court must also consider what impact such copying would have on the market for the work and its value.[20] Finally, the court is directed to look at how much of the work has been copied and whether it is substantial in relation to the whole work.[21]

The more controversial sections in this Part of the Act are those which set definite limits as to the total amount of copying permissible by educational institutions in the course of instruction. The Act provides strict guidelines as to how much of a work may be copied for educational purposes. The limits are as follows:[22]

(i) From 1995 to 1997 the work copied is to be no greater than five percent of the total work or five pages of the total work.

(ii) From 1998 onwards the copying is to be no more than three percent of the total work or three pages of the total work.

In addition, the sections prevent an educational institution from copying the work again within fourteen days.

The main impetus behind these sections came from authors of technical material who felt they were being deprived of royalties. The sections were included into the Act in order to encourage educational institutions and authors to reach

14 Part III.
15 Section 41.
16 Section 42.
17 [1991] 2 NZLR 574.
18 Section 43(3)(a) and (b).
19 Section 43(3)(c).
20 Section 43(3)(d).
21 Section 43(3)(e).
22 Sections 44-50. The Act does not state which of the amounts is to be preferred. However, s 44(4) provides that if reproducing the permissible number of pages would result in the entire work being copied, no more than fifty percent of such a work may be copied.

some agreement in the form of licenses. This has, however, proved problematic. The attitudes of some educational institutions was that they were being unfairly penalised for using material which they should be able to use as of right. On the other hand, the authors were not receiving the royalties and acknowledgment to which they were legally entitled.

Moral Rights[23]

This is a completely new Part which brings the law into compliance with Article 6 of the Berne Convention. The most important right conferred by this Part is the right to object to derogatory treatment of a copyright work. The Act defines derogatory as:[24]

> Treatment which is prejudicial to the honour or reputation of the author [or, in the case of film or production,] director.

The scope of this section in the United Kingdom has been interpreted to encompass defamation.[25] It follows from this that the section will probably be interpreted to mean that a lack of damage caused to the author's reputation will nullify the action. In these respects, Part IV of the Act is a significant step towards recognising an author's right to object to treatment such as distortion, mutilation, or any modification which compromises the author's integrity. The right to object to derogatory treatment continues until twenty years after the author's death.

Remedies for Infringement[26]

Damages

Damages for copyright infringement can include an additional amount conferred on the plaintiff as punitive damages. Whereas the 1962 Act stated that an award of additional damages could only be made if effective relief was not otherwise available to the plaintiff, the 1994 Act allows the court to award as it sees fit.

The Act has also removed the damages available for conversion. Under s 25 of the 1962 Act, the owner of a copyright work was deemed to be the owner of infringing copies and was therefore entitled to sue for conversion.

Criminal liability

The 1994 Act has considerably strengthened the criminal sanctions for copyright infringement. The penalties for infringement have risen from $100 to $5000 per infringing article. The maximum fine has risen from $1000 to $50,000.

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23 Part IV.
24 Section 98.
25 Dworkin, *Blackstone's Guide to the Copyright, Designs and Patents Act 1988* (1989).
26 Part VI.

Border Protection Measures[27]

This Part of the Act implements methods and procedures used to determine whether an item is pirated, and other procedures regarding the detention of pirated copies. The sections also outline the powers of the court in respect of such copies. This Part deals primarily with infringing copies which come through agencies such as Customs. Further, it provides that the copyright owner may request the Comptroller of Customs to inform the owner if any infringing copy comes into the control of Customs.[28]

Copyright Licensing[29]

The implementation of licensing schemes recognises that if an owner of copyright is able to grant a licence to a user, then the financial advantages for both are greatly enhanced. At present, the Australasian Performing Rights Association ("APRA") deals with the assignment of performing rights in works such as non-dramatic performances of music and literary works, or lyrics set to music. The Association collects royalties in return for licensing the users of the work. These are then repaid to the original owner of the copyright. Although this is not significantly different from the 1962 Act, the types of licenses and schemes offered under the Act are diverse. The emphasis is on encouraging users to enter into agreements before use and thereby avoid infringement.

Performers Rights[30]

This Part of the Act explicitly outlines a performer's right to copyright. In the past, a performer received no protection against pirated copies of their performances. Under this Act, a performer's consent must be obtained for any recording or broadcast of the performance other than for private or domestic use.[31] The performer has the right to seek relief if a copy is made for commercial purposes without his or her consent. Further, he or she will have the full range of remedies available to them under the Act.

Conclusion

The Copyright Act 1994 goes a long way towards remedying some problems in the law of copyright. However, it remains to be seen how the provisions contained in the Act will mature under judicial interpretation. The experience of the United Kingdom will undoubtedly prove valuable in determining the extent of protection offered by the Act. Nonetheless, it is inevitable that some "fine-tuning" will be needed in order to meet some of New Zealand's more specific requirements.

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*BA

27 Part VII.
28 Section 144.
29 Part VIII.
30 Part IX.
31 Section 171-174.

THE TRADE MARKS AMENDMENT ACT 1994

The Trade Marks Amendment Act 1994 ("the Amendment") seeks to meet certain obligations arising under the General Agreement on Tariffs and Trade ("GATT"), in particular the Trade Related Aspects of International Property ("TRIPS") Agreement, by addressing shortcomings in the Trade Marks Act 1953. The Amendment can be divided into four elements which will impact on traders. First, the Trade Marks Act 1953 has been amended to give a far wider definition of the types of trade marks which may be registered. Second, protection against infringement has been extended to include the use of marks on goods similar to goods or services for which the trade mark is registered. Until now, it has only been an infringement if the same mark, or a confusingly similar mark, is used on goods or services within the same specification of goods or services for which the mark has been registered. Third, the Act prohibits the registration of marks which are identical or similar to any trade mark which is "well-known" in New Zealand. Fourth, the Amendment introduces border protection measures involving detention of allegedly infringing goods by Customs.

Definition

A trade mark was defined in the Trade Marks Act 1953 as:[1]

> [A] mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as a proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person.

Forty years later, this definition has proven to be too restrictive. A more flexible definition is required to meet the needs of commerce, and to adapt to changes in trading practices. Recent advances in marketing and technology necessitate laws that provide for a much wider range of signs to be registrable.[2] Consumers often identify features such as shape and colour, and even sounds and smells, with a particular brand or trader, an example being the Coca-Cola bottle. The Amendment follows the policy adopted by the TRIPS Agreement that if something functions as a trade mark it should be treated as such.[3]

The 1994 Amendment defines a trade mark as:[4]

> [A]ny sign or any combination of signs, capable of being represented graphically and capable of distinguishing the goods and services of one person from those of another person.

This is wide enough to cover distinctive shapes, colour, sounds, and smells.[5] Authorities precluding the registration of shapes of containers as trade marks have

1 Section 2.
2 Ministry of Commerce, *Reform of the Trade Marks Act 1953 Proposed Recommendations* (December 1991), 5.
3 NZIPA Inc, "Submissions to Ministry of Commerce Review of Industrial Property Rights" 16 November 1990, 3.
4 Section 2(3).
5 Section 3 defines "sign" as including colour.

thereby been overruled.[6] The new definition provides trade mark owners with the opportunity to protect what was previously unprotectable as a trade mark. It provides a guide to registration that is flexible, and capable of reflecting the realities of the modern commercial world.

A limitation on the scope of the definition has been provided by the requirement that the mark be "capable of being represented graphically". This is to facilitate the recording of marks in the register, saving administration difficulties and allowing searches of the register. It means that a sign must be capable of expression by writing, drawing, or by a graph. A three-dimensional mark might be portrayed by one or more drawings and/or described in words, and a sound mark could be represented in conventional musical notation or described in words.[7]

Smells are not excluded from registration. An applicant may wish to register a smell for a perfume or for items where the smell would be a clear indication of trade source.[8]

Extension of Protection Against Infringement to Similar Goods

Section 3 gives protection against infringement as provided by the 1953 Act where a person, who is not the proprietor or registered user of a mark, uses a sign identical or similar to it in relation to any goods or services in respect of which the trade mark is registered.

The Amendment extends this protection. It is now not only an infringement to use a mark identical or similar to the mark in question on goods or services in respect of which that mark is registered, but also on goods or services that are similar to such goods.[9] Such use will constitute infringement where it is likely to deceive or cause confusion.

The rationale for the extension of protection is that once a mark has come to indicate to the public a constant and uniform source of satisfaction, its owner "should be allowed the broadest scope possible for the natural expansion of his [or her] trade" to other lines or fields of enterprise.[10]

There is a possibility that the use of trademarks on entirely non-related goods may itself injure the owner of the mark. For example, in *Eastman Kodak Co v Kodak Cycle Co*[11] the defendant was not diverting custom from the plaintiff. The real injury was the whittling away of the identity and hold upon the public mind of the mark, by its use upon non-competing goods.[12]

By extending protection to "similar" goods and services, the new provision does away with the need to bring an action in passing-off in cases where protection has previously not been available under the trade marks legislation. This will reduce the time, cost, and uncertainty of bringing actions at the common law.

Use constituting infringement

6 See for example, *Re Coca Cola* [1986] 2 All ER 274.
7 Department of Trade and Industry, *Reform of Trade Mark Law: UK White Paper* (Sept 1990) para 2.12.
8 There are sophisticated methods available for graphically defining smells. An aromagram or a chromotogram can be used to give a graphic representation of a smell without giving away its chemical composition. See Lyons, "Sounds, Smells and Signs" [1994] 12 EIPR 540.
9 Sections 3(b) and (c).
10 Schecter, "The Rational Basis of Trade Mark Protection" (1927) 40 Harv L Rev 813.
11 15 RPC 105 (1898). See also *Vogue Co v Thompson-Hudson Co* 300 Fed 509 (CCA 6th 1924).
12 Supra at note 10, at 825.

The Amendment omits the wording of s 2(2)(a) of the original Act which reads "references to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark" has been omitted. Thus, there appears to be no objection to the audible use of a mark constituting infringement. Radio advertisements could also amount to infringement, as could the public playing of a musical jingle that is itself a trade mark.

Part B marks[13]

Under the 1953 Act, a defence was provided to infringement actions where the court was satisfied that the use of the mark complained of was not likely to deceive or cause confusion, or to be taken as indicating a connection in the course of trade between the goods and the proprietor or registered user thereof.[14]

The Amendment provides that if an identical sign is used on the same goods there is no defence for Part B goods or services. The degree of protection afforded to Part B marks is therefore broadened by the removal of the statutory defence.

Well-known Marks

Background

Under a strict interpretation of the original trade marks legislation, rights conferred by registration were territorial in nature. A foreign owner of a mark unregistered in New Zealand was afforded no protection under the Act. This meant that local New Zealand traders could pre-empt a foreign owner and register the mark themselves, thus precluding use of the mark by the foreign owner. The foreign owner could suffer diversion of custom, loss of license fees, dilution of the mark, and loss of reputation.[15] With greater exposure of foreign marks in New Zealand, the result of an increasingly international market, the necessity to protect such marks has grown.

Prior to amendment, the Trade Marks Act 1953 contained no express protection for "well-known", that is, widely recognised but unregistered, marks. However, some protection was available under s 16 of that Act.[16] Remedies were also available under the Fair Trading Act 1986, and the common law tort of passing off. Nonetheless, these means of protection were costly and uncertain. Easier recourse to the registration system for overseas owners with no immediate plans to trade in New Zealand in the goods or services in question will be more effective and efficient.

New Zealand's international obligations to provide protection for well-known marks are embodied in the Paris Convention[17] and the TRIPS Agreement. Article

13 As defined in s 15(1).
14 Section 9(2).
15 Evans, "The Protection of International Business Reputation in Australia Under the Registered Trademark System", 22 ABLR, 345.
16 Section 16: "It shall not be lawful to register as a trade mark ... any matter the use of which would be likely to deceive or cause confusion." This section was applied to protect a foreign mark in *Pioneer Hi-Bred Corn Company v Hy-Line Chicks Pty Ltd* [1978] 2 NZLR 50.
17 1883 Paris Convention for the Protection of Industrial Property.

6 bis of the Paris Convention[18] requires signatory countries to provide reciprocal protection for the well-known trade marks of nationals of other signatories. This protection applies only to trade marks used in connection with similar goods and services. The TRIPS Agreement extends this protection to dissimilar goods and services (such as "Coca-Cola Jeans").[19] International obligations, and inadequate domestic protection for unregistered foreign "well-known" marks, thus provided the context for reform.

Section 17

The amended s 17 provides that no trade mark shall be registered in respect of any goods if the trade mark is identical or similar to, or a translation of a trade mark, which is well-known in New Zealand (whether through advertising or otherwise).[20] This applies to:

(i) those goods or any similar goods; and
(ii) any other goods if use of the first-mentioned trade mark would be taken as indicating a connection in the course of trade between those other goods and the proprietor of the well-known trade mark, and would be likely to deceive or cause confusion.[21]

The New Zealand Patent Office has indicated that examiners should equate the term "well-known" with "famous". Marks should indisputably be well-known.[22]

Implications of the section principally relate to registrability, and defensive registration of well-known marks.

(i) Registrability

Section 17 makes it explicit that well-known marks*must* be protected, whereas under s 16 of the original Act protection was not compulsory.[23] The Amendment will compel examiners to consider from the outset whether the mark under examination is identical or similar to a "well-known" mark even though the respective goods are dissimilar.[24]

Further, examiners are now required to consider "translations", and search for marks which correspond to the translation. However, the provision is silent on the registration of "well-known" marks concerning services on goods and vice versa.

(ii) Defensive registration of "well-known" marks

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18 As inserted by the Stockholm Revision 1967.
19 Worthy, "Intellectual Property after GATT" [1994] 5 EIPR 195, 196.
20 Section 17(2).
21 Section 17(4) is a mirror section worded to cover well-known services.
22 Letter from P Harris for Commissioner of Trade Marks, New Zealand Patent Office, 27 February 1995.
23 Supra at note 16.
24 Supra at note 22.

Some protection for foreign "well-known" marks is provided via "defensive registration".[25] The mark is then effectively registered, and can be protected against infringement by unauthorised use.

The section provides that where a trade mark:[26]

> [H]as become so well-known ... that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade in relation to the first-mentioned goods ... notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods ... the trade mark may ... be registered in his name in respect of those other goods as a defensive trade mark.

This section, therefore, allows for the pre-emptive registration of a mark in New Zealand to circumvent its unauthorised use. Registration of the mark then entitles the owner to full protection under the Act.[27]

Border Protection Measures

The Amendment provides for border protection measures by allowing Customs to detain goods that infringe registered trade marks. The practical significance of these measures is yet to be ascertained. It will assist trade mark owners where large amounts of goods are being imported which would, if released onto the market, have a detrimental effect on the owner's reputation and/or sales.

Conclusion

The Trade Marks Amendment Act 1994 enhances protection for traders through the wider definition of a trade mark, and increased protection against infringement. However, the provisions relating to well-known marks are unlikely to make a great difference. Courts have shown themselves willing to apply the existing legislation in a flexible and practical manner, having regard to commercial reality.[28] The opinion has been voiced in the United Kingdom that the greatest benefit of amendments to trade marks legislation will be by way of business for lawyers as they grapple with the new concepts.[29] It is inevitable that when reform is left until an Act has become as outdated as the trade marks legislation was, that some time will be spent in interpreting any amending statute. Nonetheless, the Amendment provides measures that will give trade mark owners the opportunity to protect what was previously only protectable at the common law, and this is to be welcomed. The protection measures increase certainty in an era of global business and communications. Several key areas of the legislation remain in need of amendment, and these will be addressed in further intellectual property reform.

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25 Section 18.

26 Under s 36 of the 1953 Act the mark had to consist of an invented word, as it was considered undesirable to extend a monopoly to ordinary words of the English language.

27 Whilst a foreign owner of a well known mark may seek to prevent its registration by a New Zealand user, until the mark is registered the foreign owner may not pursue an action for infringement under the Trade Marks Act.

28 See, for example, Pioneer Hi-Bred Corn Company v Hy-Line Chicks Pty Ltd, supra at note 17.

29 Lewin, "The New UK Trade Marks Law - A Godsend for Trade Mark Owners or a Goldmine for their Lawyers?" [1994] 3 EIPR 91.

These include reforming the register, and those provisions relating to assignment and licensing of trade marks. A further area requiring careful consideration is protection of Maori intellectual property rights.

Tracey Epps

THE MEDICAL PRACTITIONERS BILL 1995

The Medical Practitioners Bill 1995 ("the Bill") consolidates and amends the Medical Practitioners Act 1968 ("the 1968 Act") which is to be repealed. At the time of writing the Bill was before the Social Services Select Committee. The Committee received 114 submissions on the proposed legislation, a reflection of widespread interest amongst members of the medical profession, health consumer groups, and the general public.

The Bill introduces significant reforms to various areas of the law regulating medical practitioners. The existing provisions relating to the registration and certification of practitioners are amended. Provision is made for the maintenance of adequate levels of competence among practitioners, and the existing regime relating to fitness to practise is strengthened. Further, the Bill creates a simplified disciplinary regime for practitioners. It is this aspect of the Bill that has been most controversial and therefore comprises the principal focus of this note.

Registration

The existing categories of registration as a medical practitioner are replaced with new categories, the most important being general and vocational registration.[1]

At present, a practitioner holding ordinary registration is entitled to practise any branch of medicine without supervision. Under the new regime a practitioner registered under the comparable category of general registration may still practise any branch of medicine, but only under the supervision of a practitioner holding vocational registration in that branch of medicine.[2]

To achieve vocational registration a practitioner must have, in addition to general registration, the qualifications and experience considered appropriate by the Medical Council of New Zealand ("the Council") for that branch of medicine.[3] According to Professor Richards, "truly independent practice is only possible with vocational registration".[4] Practitioners registered under this category are not subject to the requirement of supervision. Existing specialists qualify for vocational registration.[5]

Probationary registration corresponds to the current conditional registration. It

1 Clause 12.
2 Clause 21.
3 Clause 22.
4 "Proposed Bill details conditions of practice", *New Zealand Doctor*, 17 February 1995.
5 Supra at note 3.

applies to those graduates from approved institutions who have not yet completed the requisite one year of supervised practice to enable them to qualify for general registration.[6] The definition of "approved institution" is broadened to include any foreign medical school from which the Council is satisfied, that a qualification at least equivalent in content and standard to that which may be obtained from the Universities of Auckland and Otago, is obtainable.[7]

Annual Practising Certificate

The existing requirement for a practitioner to hold an annual practising certificate is continued.[8] The certificate will specify the category of registration and the branch of medicine to which vocational registration relates.[9] Provision is made for the Council to decline to issue a certificate where it is not satisfied that the practitioner concerned is competent to practise in accordance with his or her registration.[10]

Competence

The Council may set or recognise competence programmes designed to examine or improve the competence of practitioners to practise medicine.[11] This is a significant increase in the Council's regulatory powers. These programmes may require practitioners to pass an examination, complete a period of practical training, or fulfill any other requirement the Council deems appropriate.[12]

The existing provisions relating to the regulation of practitioners who are rendered unfit to practise due to physical or mental disabilities are strengthened.[13] Under the new regime the Council may suspend for ten working days the registration of practitioners suspected of being unfit to practise, order the practitioner to undergo a medical examination, and impose restrictions on the practitioner on account of the disability.[14]

Quality Assurance Activities

Provision is made in the Bill for approved quality assurance activities. A quality assurance activity is defined as an activity designed to assess the quality of health services provided by a practitioner.[15] The Bill seeks to encourage participation in these activities by protecting the confidentiality of information that becomes known solely as a result of such an activity.[16]

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6 Clauses 14-15.
7 Clause 3.
8 Clause 104(1)(e).
9 Clause 56.
10 Clause 53.
11 Clause 60.
12 Clause 60(3).
13 Part VII.
14 Clauses 75-77.
15 Clause 65.
16 Clause 67.

Discipline

Over the past fifteen years, complaints against medical practitioners by disillusioned health consumers have increased fourfold.[17] Greater public awareness of patient rights following the cervical cancer inquiry[18] may be one reason for such a dramatic increase. It is also suggested that the statutory bar against civil action for personal injury has resulted in increased reliance on the provisions of the 1968 Act to satisfy the desires of dissatisfied patients. It is questionable whether the disciplinary provisions of the 1968 Act have coped adequately with the increased pressure placed upon them over the past two decades.

The most telling criticism of the existing disciplinary regime is that it is unduly complicated and confusing for consumers and practitioners alike. Three separate tribunals exist to discipline practitioners: the Council, the Medical Practitioners Disciplinary Committee, and the Divisional Disciplinary Committees. As well as regulatory offences, such as practising without a current certificate, there are three main offences for which a practitioner can be prosecuted. These are, in descending order of seriousness:

(i) disgraceful conduct in a professional respect;
(ii) professional misconduct; and
(iii) conduct unbecoming a medical practitioner.

Only the Council can find a practitioner guilty of the most serious charge. The Medical Practitioners Disciplinary Committee is authorised to hear charges of professional misconduct and unbecoming conduct, whilst the Divisional Disciplinary Committees are restricted to hearings of the least serious charge.

Three central reforms to the existing disciplinary regime will be enacted by the Bill to simplify the disciplinary process:

New tribunal

Disciplinary charges against a practitioner will be heard by a Medical Practitioners Disciplinary Tribunal ("the Tribunal").[19] The Tribunal will be chaired by a medical practitioner and made up of four other persons, two medical practitioners and two lay persons, selected from a panel maintained for the purpose.[20]

New offence

The three major offences for which a medical practitioner may be disciplined are replaced by a single offence.[21] A practitioner who is guilty of "any act or omission in the course of or associated with the practice of medicine that was, or could have been, detrimental to the welfare of any patient or other person" may be censured under the new regime.[22]

17 Conversation with Monica Franklin, Medical Practitioners Disciplinary Committee, 12 June 1995.
18 *The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into other Related Matters*, Auckland 1988.
19 Clause 92.
20 Clause 93.
21 Clause 104(1)(a).
22 Ibid.

This reform has been the subject of much criticism. The three existing charges and their counterparts in foreign jurisdictions have been the subject of judicial interpretation on numerous occasions. Thus, despite the archaic wording of the charges, a measure of certainty has been achieved in their interpretation. The New Zealand Medical Association ("the NZMA") has predicted that costly and time-consuming litigation will need to be undertaken before the meaning of the new misdemeanour is established.[23] Further, the disciplinary tribunals have found it constructive to be able to express their view of the gravity of the misconduct.[24]

The wording of the new charge has itself provoked comment. The offence contains no reference to the standard by which the act or omission of a practitioner is to be judged. The NZMA believes that as a result, the offence could apply to treatment that fails due to the vagaries of medicine and through no fault of the practitioner.[25] The NZMA has suggested amending the Bill to make it explicit that the conduct of a practitioner will be judged in accordance with a standard of reasonable medical practice.[26]

A further criticism of the new offence concerns the imposition on practitioners of a statutory duty of care to persons other than a patient. This might place a practitioner under a duty of care to the family, friends, or even associates, of a patient. Whether an unborn child could be regarded as falling within this category is a moot point.

It is questionable, however, whether this provision goes any further in this respect than the common law as established in cases such as *Tarasoff v The Regents of the University of California*[27] and *McLoughlin v O'Brian*.[28] *Tarasoff* established that a person is required by law to warn others of foreseeable harm, where that person bears some special relationship to a dangerous person or a potential victim. It is arguable that this case is persuasive authority in this jurisdiction. *McLoughlin* extended the early nervous shock cases to allow recovery for the effects of witnessing the infliction of harm, or its immediate aftermath, on a loved one.

Interaction with the Health and Disability Commissioner Act 1994

Another area of concern regarding the disciplinary provisions of the Bill is the manner in which they interact with the Health and Disability Commissioner Act ("the HDCA"). The HDCA created the office of the Health and Disability Commissioner ("the Commissioner") to act as a consumer watch-dog in the area of health services. The Commissioner is to enforce the provisions of a Code of Health and Disability Services Consumers' Rights. This will be drafted by the Commissioner during 1995 and adopted by regulations early in 1996.

Complaints against a practitioner will be made either to the Commissioner or to the Registrar of the Medical Council.[29] The investigation of a complaint may be undertaken by the Commissioner under the HDCA.[30] No action may be taken

23 NZMA, "Submission to the Social Services Select Committee on the Medical Practitioners Bill", 23 February 1995, 23.
24 Medical Practitioners Disciplinary Committee, "Medical Practitioners Bill submission", 22 February 1995, 5.
25 Supra at note 23.
26 Ibid, 24.
27 551 P 2d 334 (Cal 1976).
28 [1981] 1 AC 410.
29 Clause 80.
30 Section 36.

against a practitioner under the regime to be enacted by the Bill while that investigation is proceeding.[31] Once a decision has been reached by the Commissioner, either to initiate a proceeding against the practitioner under the provisions of the HDCA, or to take the matter no further, the complaint may be investigated by a Complaints Assessment Committee established by the Bill.[32]

Thus, it is possible that a practitioner may face proceedings under both the HDCA and the Bill, once enacted. This has prompted concerns from the medical profession over double jeopardy, protection from which is provided by s 26 of the New Zealand Bill of Rights Act 1990 ("NZBORA"). However, it is arguable that s 4 of the NZBORA allows such a result. Section 4 provides that no provision of any enactment is invalid by reason only of its inconsistency with a provision of the NZBORA.

Nevertheless, it is possible that a fairer regime would result if the separation between the disciplinary provisions of the Bill and those of the HDCA was rendered more concrete. This could be achieved by removing the ability of the Director of Proceedings under the HDCA to prosecute a practitioner before medical disciplinary tribunals.[33] In this manner, health consumers would be restricted to the extensive remedies available under the HDCA and the medical profession would achieve a greater degree of autonomy in its own regulation. This would accord with the intention of both pieces of legislation. The HDCA is primarily a consumer protection statute, while the Bill is designed to regulate and maintain levels of competence among practitioners.

Conclusion

Some commentators have called for a return to the common law right to sue for personal injury.[34] This could be regarded as a solution to the vexed issue of regulation of the medical profession. Despite the attraction of this suggestion for some consumers and members of the legal profession, such calls for reform are likely to fall on deaf ears given the current political environment. Moreover, a return to the common law system may no longer be necessary. The regulatory and disciplinary regime created by the proposed Medical Practitioners Act and the HDCA will, it is suggested, significantly alleviate the major problems evident in the current system. In this respect, the legislators appear to have achieved a workable balance between the expectations of an increasingly litigious general public and a nervous medical profession.

Jarrod Walker

31 Clause 83.
32 Clauses 83-84.
33 Clause 97(1)(a).
34 See Dawe, "Economically Speaking", *The National Business Review*, 21 April 1995.

THE FINANCIAL TRANSACTIONS REPORTING BILL 1995

The Financial Transactions Reporting Bill 1995 ("the Bill") is, at the time of writing, before the Justice and Law Reform Select Committee, and is due to come into force on 1 January 1996.[1] It will make some important changes to the New Zealand position on money laundering, and will have a major impact on banks, finance companies, trustees, fund managers, the TAB, lawyers, accountants, and other people who provide financial services.

Money Laundering

Money laundering occurs when the proceeds of criminal activity are made to look like legitimate income. International efforts have been made, especially in the last decade, to prevent money laundering primarily by raising the cost of laundering and increasing the chance of detection. By stopping criminals enjoying the proceeds of criminal activity, anti-money laundering legislation is regarded as a means of preventing other serious crimes, in particular drug trafficking.

Compared with other jurisdictions, money laundering in New Zealand has not generally been regarded as a large-scale problem.[2] However, if suitable legislation is not implemented, New Zealand could increasingly become a target for laundering as a weak link in the international crackdown on laundering the proceeds of crime. New Zealand has committed itself to the global fight against money laundering because it is a member of the Financial Action Task Force on money laundering, and a signatory to the 1988 Vienna Convention.[3] The Proceeds of Crimes Act 1991 and the Mutual Assistance in Criminal Matters Act 1992 have already been enacted in order to satisfy these international obligations. The Crimes Amendment Bill (No 2) 1994 is awaiting its third reading, and creates two new offences of laundering money and intending to launder money. The Financial Transactions Reporting Bill goes further towards complying with the recommendations made by the Financial Action Task Force. It aims to facilitate the prevention, detection, investigation and prosecution of money laundering.[4]

Provisions of the Bill

A common misapprehension about money laundering legislation is that it impinges only upon criminals, and that companies or professional advisers acting in good faith have nothing to fear.[5] The Bill changes that position in New Zealand.

Central to the Bill is "a recognition that financial institutions ... have a front-

1 Clauses 11, 18, and 32, which create the offences, are expected to come into force on 1 July 1996.
2 However, as a recent example, a money laundering charge might have been laid against the former Equiticorp director, Alan Hawkins, if such an offence had existed: "Sturt deplores legal ploys for fraudsters", *New Zealand Herald,* 1 March 1995, section 1, 1.
3 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychothropic Substances, 1988.
4 Financial Transactions Reporting Bill 1995, explanatory note, i.
5 Fisse, "The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting", in Fisse, Fraser and Cross, *The Money Trail* (1992) 1.

line role in the war on money-laundering and organised crime".[6] They are in a unique position to detect it, and are in a particularly vulnerable position to be a party to it. The Bill therefore imposes certain obligations on financial institutions.

Obligations on Financial Institutions

The definition of "financial institutions"[7] is inclusive. It covers banks, life insurance companies, building societies, friendly societies, credit unions, casinos, sharebrokers, real estate agents, trustees or managers of superannuation schemes or unit trusts, and the TAB. It also includes any person whose business consists of borrowing or lending, managing funds, acting as trustee of funds, or providing financial services other than solely the provision of advice. Accountants and lawyers are covered, but only to the extent that they receive funds in the course of their business for the purpose of deposit or investment, or where lawyers receive funds for the purpose of settling real estate transactions.

The three basic types of obligations placed on financial institutions are to verify identity, report suspicious transactions, and retain business records.[8]

Verification of identity[9]

The requirements to identify customers and keep certain records are designed to enable the police to reconstruct a paper trail to identify the criminals. Financial institutions have an obligation to verify the identity of a person in four situations:

(i) before an account or arrangement is provided by the financial institution;[10]

(ii) when a transaction is conducted by someone otherwise than through an account or arrangement, and
(a) the cash involved exceeds a certain amount prescribed by regulations, or
(b) there are reasonable grounds to believe that transactions are being structured to avoid the verification of identity requirement, and that the aggregate amount would exceed the amount set out in the regulations;[11]

(iii) where transactions are being carried out which would require the identity to be verified, and the financial institution has reasonable grounds to believe that the transactions are done on behalf of another person;[12] and

(iv) when the financial institution has reasonable grounds to suspect that the transaction may be relevant to the investigation or prosecution of a money laundering offence, or the enforcement of the Proceeds of Crime Act 1991.[13]

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6 Hon. D A M Graham NZPD 6684 (4 April 1995).
7 Clause 3. This definition is subject to any regulations made under the Act.
8 See Part II, Part III, and Part IV of the Bill.
9 Part II.
10 Clause 6.
11 Clause 7.
12 Clause 8.
13 Clause 9.

It will be an offence not to verify identity in these situations.[14] A defence is available where all reasonable steps were taken to ensure compliance with the provision.[15]

Reporting suspicious transactions[16]

The requirement to report suspicious transactions ensures authorities are alerted to possible criminal activity at an early stage so an investigation can commence. Financial institutions must report transactions to the police if they have reasonable grounds to suspect that the transaction may be relevant to the investigation or prosecution of a money laundering offence, or to the enforcement of the Proceeds of Crime Act 1991.[17]

The financial institutions must have regard to guidelines as to what constitutes a suspicious transaction. [18] These guidelines will be issued by the Police[19] in consultation with the Privacy Commissioner and relevant industry organisations.[20] They will be reviewed and updated from time to time, to adapt to changing money laundering techniques.[21]

Auditors may, but do not have to, make reports on suspicious transactions.[22] Lawyers have been granted a specific exemption from making a report if the communication is subject to legal professional privilege.[23] Information that consists of or relates to receipts, payments, income, expenditure, or financial transactions of any person is not privileged information if it is contained in or comprises a lawyer's trust account records.

The financial institution may not disclose the existence of a suspicious transaction report to anyone other than the police, a lawyer (for the purposes of obtaining advice or representation), or their own employees or agents in so far as it is necessary for them to carry out their duties.[24] No civil, criminal, or disciplinary proceedings may be brought against a person for the disclosure of information as required by the Bill, or the consequences following from that disclosure.[25]

Retaining business records[26]

The financial institution is required to keep records of every transaction in a suitable form so as to allow the Commissioner of Police to reconstruct a transaction at any time.[27] They must also keep records relating to the evidence used to verify the identity of people in accordance with the Bill.[28] These records must be

14 Clause 11.
15 Clause 12.
16 Part III.
17 Clause 13.
18 Clause 13(5).
19 Clause 20.
20 Clause 21.
21 Supra at note 6.
22 Clause 14.
23 Clause 16.
24 Clause 17.
25 Clause 15.
26 Part IV.
27 Clause 25.
28 Clause 26.

kept for a period of five years and then destroyed unless there is a lawful reason for keeping them.[29] Further, regulations will be made specifying other records that must be kept and the length of time they must be retained.[30]

Penalties

An individual will be liable to a fine not exceeding $20,000, and a body corporate will be liable for up to $100,000 for failing to verify identity[31] or failing to make a report.[32] Knowingly making a false or misleading report results in a liability of up to $10,000.[33] A person who commits an offence either for the purpose of pecuniary gain, or with intent to prejudice an investigation may be imprisoned for up to two years.[34]

Obligation to Report Imports and Exports of Cash[35]

The Bill requires every person arriving in, or leaving New Zealand, to report cash to a customs officer if it exceeds the amount prescribed in the regulations.[36] Failure to make a report will result in liability to a fine of up to $2000.[37] Customs officers are given the power to detain and search a person, or that person's baggage, if they suspect that a cash report is required but has not been made.[38] Wilful obstruction of a customs officer exercising his or her powers results in possible imprisonment for not more than three months, or a fine not exceeding $1000.[39]

Conclusion

The Financial Transactions Reporting Bill is extensive, as it will affect a wide range of institutions, not just banks.[40] It draws from elements of similar legislation in the United Kingdom and Australia, but is otherwise unique to New Zealand. The proposed legislation has been referred to as one of the best pieces of money laundering legislation in the world.[41]

New Zealand has not followed the United States and Australian approach of requiring every transaction above a certain threshold to be reported. It was found that this requirement imposed high compliance costs on the financial institutions

29 Clause 30.
30 Clause 27.
31 Clause 11(2).
32 Clause 18(2).
33 Clause 18(3).
34 Clause 18(6).
35 Part V.
36 Clause 33.
37 Clause 36(1).
38 Clauses 34 and 35.
39 Clause 36(2).
40 A significant minority of members of the Financial Action Task Force do not yet require non-bank financial institutions to pay special attention to complex, unusually large transactions. See Financial Action Task Force on money laundering, *Annual Report 1993-94*; see also Organisation for Economic Development, *Financial Market Trends* (June 1994).
41 "Canadians Praise Money Laundering Law", *Dominion*, 6 April 1995, 2.

without any real increase in the detection of criminals.[42] Instead, New Zealand has adopted a mandatory reporting requirement if the transaction is objectively suspicious. An advantage of this flexible standard is that the regime can adapt to new money laundering techniques. Adaptability may come at the expense of certainty, although it seems unlikely that financial institutions acting in good faith will be prosecuted in borderline cases.

A possible criticism of the legislation is that places a financial burden on financial institutions in order to solve an overseas problem. Submissions have been made to the Select Committee on the methods by which the Bill's objectives are achieved. The wide regulation-making powers and blanket verification provisions have received particular attention. These have been criticised as being difficult to comply with, and yet easily circumvented by someone who wants to launder money.[43]

Regardless of what form the Bill takes when enacted, financial institutions will have to be aware of their new obligations. In order to minimise the risk of liability, compliance programmes should be implemented. These will include "know your customer" policies, good internal controls, staff training and employee awareness, and effective record keeping and reporting procedures.

Neither financial institutions nor the legislature are safe to assume that currently effective anti-money laundering measures will be effective in the future. For the moment, New Zealand is ensuring that it will not be a weak link in the international fight against laundering the proceeds of crime.

Laura O'Gorman

THE MARITIME TRANSPORT ACT 1994

The Transport Law Reform Bill 1993 was intended to reform all modes of transport in New Zealand. The Maritime Transport Act 1994 ("the Act") has the more limited aim of bringing New Zealand's maritime law up to date. Even within this restricted scope, the Act's provisions are too numerous to be dealt with in this note. Provisions concerning the regulation of maritime activity, the health and safety of seafarers, coastal shipping, the carriage of goods, and salvage and disaster response will be discussed.

The Maritime Safety Authority

The Maritime Safety Authority ("the Authority"), created by the Maritime Transport Act 1993, continues in existence and adopts the Ministry of Transport's regulatory role. The Authority is a Crown entity, and is therefore bound by the provisions of the Public Finance Act 1989.[1] The objective of the Authority is the

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42 Supra at note 5.

43 "New anti-laundering plan has loopholes, says QC", *New Zealand Herald*, 21 June 1995, section 4, 3.

1 Maritime Transport Act 1994, s 429(10).

regulation of maritime activity so as to promote a safe maritime environment, and to provide an effective anti-pollution and oil spill response regime.[2] Consistent with government policy and the Public Finance Act 1989, these objects are to be obtained at a reasonable cost to society.[3]

The Act specifies the functions of the Authority.[4] It is responsible for setting and monitoring adherence to safety standards for all modes of shipping.[5] The Minister of Transport's power to make rules[6] to implement this function has caused a good deal of public debate. For example, the rules concerning the standards to be met on vessels, including foreign pleasure craft, before the requisite maritime documents will be issued to allow departure,[7] are said by many yachting enthusiasts to be unnecessarily restrictive. However, those who have to mount searches for pleasure craft in distress may disagree.

Less controversial functions of the Authority include taking steps to ensure the provision of navigational aids for shipping, licensing ships and their crews, the investigation of maritime accidents,[8] and the maintenance of the New Zealand register of ships.[9]

The Authority is required to appoint a chief executive, known as the Director of Maritime Safety ("the Director").[10] The Director is responsible for the administration required to ensure the implementation of the rules and regulations promulgated under the Act. These rules include "Maritime Rules" made by the Minister[11] which deal with the more detailed aspects of the Maritime Transport regime.[12] The Director has the power, in limited circumstances, to make emergency rules.[13] The more traditional approach of regulation by the Governor-General is used to deal with the fixing of the fees and charges necessary to run the system.[14]

Health and Safety of Seafarers

The Maritime Transport Act repeals Part II of the Shipping and Seamen Act 1952. Part II of that Act dealt in great detail with the duties owed by ship owners to ensure the health and safety of seafarers. The Maritime Transport Act, however, prescribes only basic duties and deals with the issue in a mere twenty-eight sections.[15]

The provisions pertaining to health and safety on ships mirror those in the Health and Safety in Employment Act 1992. As the provisions only apply to domestic vessels it is difficult to understand why the Health and Safety in Employment Act 1992 was not simply extended to include the safety and employment of seafarers. Seafarers are required to take responsibility for their own safety and that of others on board.

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2 Section 430. The marine pollution provisions will not be analysed. They are yet to take legal effect, and would be more appropriately dealt with in an examination of environmental law issues.
3 Section 430(2).
4 Section 431.
5 Section 431(1)(a)-(d).
6 Section 34.
7 Section 21(d).
8 Sections 57-60.
9 Section 189.
10 Section 439.
11 Section 446.
12 Sections 34 and 36.
13 Sections 37 and 447.
14 Section 445.
15 Sections 6-33.

The Act was seen as an "appropriate vehicle" for aligning shipping law with the general labour law policy of New Zealand.[16] Like the Employment Contracts Act 1991, the approach of the Act is to discontinue state intervention and to promote the free negotiation of employment contracts, while recognising that the conditions that seafarers are employed under are different from land based activities.[17] The Act only prescribes the minimum employment standards required by International Labour Office conventions concerning the rights of seafarers. Again, individual responsibility is at a premium. General labour law will govern the employment relationship between owners and seafarers when it is not specifically controlled by the Act.

Coastal Shipping

The provisions concerning the liberalisation of coastal trade constituted the only other substantial area of public debate. Clause 240 of the Transport Law Reform Bill 1993 permitted "any ship where all appropriate papers are held" to ply the coast. This approach was considered to be consistent with the Government's policy of stimulating competition so that market efficiencies might result. The debate that ensued ended any such possibility, and a weaker "transit option" was settled on.[18] This entailed that foreign vessels carrying cargo or passengers to or from New Zealand could trade the coast as an integral part of the international voyage. Further, if no New Zealand ships, or foreign vessels in transit, are available, the Minister is empowered to authorise any foreign vessel to perform the carriage.[19]

Carriage of Goods

The Sea Carriage of Goods Act 1940 ("SCOGA") is repealed by the Act.[20] SCOGA will, however, continue to apply to contracts of carriage of goods by sea entered into prior to the commencement of the Act.[21] This has the consequence that the ship's agent is no longer deemed to be the legal representative of the ship's owner, master, or charterer.[22] However, it should be noted that an action in personam may still be available against the agent. If the contract of carriage is partly performed in New Zealand, and the agent plays some role in relation to the contract, then s 27 of the Carriage of Goods Act 1979 may impose liability on the agent.[23]

The Act provides that the Hague-Visby rules ("the Rules"), rather than the Hague rules, shall have the force of law in New Zealand.[24] The Rules apply, not only to bills of lading, but to non-negotiable documents of title, such as sea waybills, provided that the document contains an express provision adopting the

16 Ministry of Transport, *Review of the Shipping and Seamen Act 1992*, 53.
17 Ibid, 54.
18 Section 198(1)(b) and (c).
19 Section 198(2).
20 Section 212.
21 Section 213(1).
22 Cf s 11 of the Sea Carriage of Goods Act 1940.
23 *Fletcher Panel v Ports of Auckland* [1992] 2 NZLR 231.
24 Section 209.

Rules.[25] One effect of the Rules is to limit carrier liability. Article 4 of the Rules sets the limit at 666.67 Standard Drawing Rights[26] units of account per package, or two units per kilogram, whichever is the greater. This is a more realistic limit than that found in the Hague Rules.

It is interesting to note that the Rules apply only to "contracting States".[27] New Zealand acceded to the Convention[28] on 20 December 1994 and the Convention came into force after the three month delay period on 20 March 1995. The Act came into force on 1 February 1995. New Zealand was not, therefore, a "contracting State" for some seven weeks after the commencement of the Act. For that time neither the Hague nor the Hague-Visby rules applied in New Zealand, and thus the common law would seem to have prevailed. Litigation on this point is awaited with interest.

Though the parties cannot preclude or limit the jurisdiction of the New Zealand courts,[29] the Act does not exclude the possibility of the contracting parties choosing to have their relationship controlled by foreign law. This will now depend on the general rules of conflicts of law. The ability of the parties to choose foreign arbitration is not restricted by the Act.[30]

Salvage

Part IX of the Act leaves unaltered the entire salvage regime of the Shipping and Seamen Act 1952. Sections 113 and 114 provide for the payment of a reasonable amount of salvage for the saving of lives, cargo or wreck.

Salvage is also dealt with in Part XVII. The London Salvage Convention 1989 is incorporated there into the Act, although the relevant sections have not yet come into operation.[31] The adoption of this Convention is a desirable step. Payment to the salvor is no longer entirely dependent on the success of the salvor in saving property.[32] The minimisation of damage to the environment is now a factor to be taken into account in calculating the reward of the salvor,[33] with special compensation available where the environment has been threatened.[34] That special compensation will be greater than the general compensation available under Article 13.

This focus on the environment may explain why the drafters of the Act have chosen to place the new salvage regime with the marine pollution provisions. It remains to be seen what will happen to the traditional salvage regime once Part XVII takes effect. The two regimes do not sit easily together given the London Convention's focus on benefit to the environment, rather than the successful salvage required at common law.

Related to the salvage regime, and of importance to owners and masters, are the rather draconian powers conferred on the Director to instruct any ship within New Zealand waters to render assistance to a ship that the Director believes is hazard-

25 Section 209(2).
26 Standard Drawing Rights are a floating standard set by the International Monetary Fund.
27 Article 10.
28 The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25th August 1924, as amended by the Visby Amendments 1968 and Special Drawing Rights Protocol 1976.
29 Section 210(1).
30 Section 210(2).
31 Sections 215-220.
32 Article 12.
33 Article 13.
34 Article 14.