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CONTRACTUAL INTERPRETATION: DO JUDGES SOMETIMES SAY ONE THING AND DO ANOTHER?

Sir Geoffrey Vos*

Abstract

This article questions whether the factual situation that arose in ICS v West Bromwich Building Society would be decided the same way today. The developments in the law of contractual interpretation are tracked through Chartbrook v Persimmon Homes and Lord Hoffmann's retirement. It is suggested that there has been a sea change in Rainy Sky, Arnold v Britton, and Wood v Capita, even though those cases suggest that they are about continuity. The change of approach is compared with the developments taking place at the same time in the law of implied terms and in the use of mutual mistake rectification found in Daventry DC v Daventry & District Housing. The conclusion is that it may be better to interpret a written agreement in accordance with what the parties obviously agreed judged from the other terms of the contract and the admissible factual matrix, rather than rectifying a contract for mutual mistake to say exactly the opposite of what one of those parties would or could ever agree. The difference of approach between common law and equity judges is explored.

I. Introduction

It is perhaps obvious that many people say one thing and do another, and they do not say exactly what they mean. This may be what Lord Hoffmann was speaking about when he said in *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* that:[1]

> If one meets an acquaintance and he says "And how is Mary?" it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer "Very well, thank you" without drawing attention to his mistake.

* Chancellor of the High Court of England and Wales. This article is based on a lecture delivered to the Hong Kong judiciary on 16 October 2017, and as a Hotung Fellowship lecture at the University of Canterbury on 18 October 2017.

1 *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 [*Mannai*].

It is perhaps less obvious that judges are sometimes in the same boat. But, as it seems to me, recent trends in the law of contractual interpretation demonstrate that judges at the highest level have not always said exactly what they mean, hoping perhaps that others would not notice.

What I hope to show in this article is that there has been a distinct sea change in the law since the House of Lords decided *Investors Compensation Scheme Ltd v West Bromwich Building Society* in June 1997 (*ICS*),[2] now just over 20 years. That is not, in itself, surprising. But what is a little more surprising may be what has been said about the change. In short, what seems to me to have been a palpable change in the law has been repeatedly denied or at least played down. As Lord Hodge put it in *Wood v Capita Insurance Services Ltd* (*Wood v Capita*) on 29 March 2017:[3] "[t]he recent history of the common law of contractual interpretation is one of continuity rather than change". That was a view to which Lords Neuberger, Mance, Clarke and Sumption subscribed.

This is important, because one of the clarion calls of this same group of judges is and has been that the greatest benefit of the common law in general, and of our contract and commercial law in particular, is its dependable certainty and predictability. My conclusion is to wonder whether *ICS* would itself be decided the same way if it came to the UK Supreme Court today. Is that evidence of certainty or continuity, or rather uncertainty and imperceptible change? I feel this change particularly strongly as I argued the successful appellants' case in *ICS*, having had my case rather ridiculed by the Court of Appeal.

It is also useful in this connection to look at the direction of travel in regard to the associated subjects of implied terms and mutual mistake rectification, which have also been through some choppy judicial waters in the last few years. What emerges from this analysis is that there is often a significant difference of intellectual approach to these matters between judges who originate from a commercial background and those that emanate from a Chancery background (as we understand those terms in London). In making this distinction, I cannot help but make a reference to the fact that we have now brought both the Chancery Division and the Commercial Court (and the Technology and Construction Court) under the umbrella of the Business and Property Courts of England and Wales headquartered in the Rolls Building, so there may, I hope, be a real prospect for future convergence of approaches. We can, therefore, start with *ICS* itself.

2 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] [*ICS*].
3 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 [2017] 2 WLR 1095 [*Wood v Capita*].

II. ICS

The problem arose in *ICS* from what Lord Lloyd described as "slovenly drafting". Investors had to sign a claim form or an assignment in order to receive compensation. Section 3(b) of the form provided for the claims that would *not* pass to ICS as follows:

> Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society in which you claim an abatement of sums which you would otherwise have to repay to that society …

I argued, as counsel for ICS, that the only thing that did not pass to ICS was any claim in rescission. Andrew Leggatt LJ in the Court of Appeal had said that this was not an available meaning of the words, since what I wanted to do was make the words read: "[a]ny claim sounding in rescission (whether for undue influence or otherwise)", when they actually read "[a]ny claim (whether sounding in rescission for undue influence or otherwise)".

Lord Hoffmann began by saying that the fundamental change which had overtaken this branch of the law as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* had not been sufficiently appreciated.[4] He said that the result had been to "assimilate the way in which such documents [by which he meant commercial documents] are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life" (save that pre-contractual negotiations were to be ignored). I shall return briefly to the fact that this is one important area where the law in New Zealand differs from English law.

Lord Hoffmann then upheld the first instance judge's reasoning by applying the five most well-known of well-known principles that he had stated. The wider or more natural construction of "any claim" and "abatement" led to a "ridiculous commercial result which the parties to the claim forms were quite unlikely to have intended" so that it was clear that "the drafting of … section 3(b) was mistaken".

This was an application particularly of the first, fourth and fifth principles that he summarised. First, that interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Fourthly, that the meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the

4 *Prenn v Simmonds* [1971] 1 WLR 1381, at 1384–1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.[5]

Lord Hoffmann's fifth principle, explaining the fourth, was that the "rule" that words should be given their "natural and ordinary meaning" reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* (the *Antaios*) that:[6]

> … if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense.

The words in s 3(b) were avowedly construed as meaning something they did not say, not because what they did say was not a possible meaning, and not because the result was absurd, but because it made no commercial sense. Leggatt LJ was held to have been simply wrong to have decided the case on the basis that the construction I advocated was not an available meaning of the words used (about which, of course, he had been right).

III. Chartbrook

ICS held sway for a short generation and was even consolidated in *Chartbrook Ltd v Persimmon Homes Ltd* (*Chartbrook*)[7]. *Chartbrook* was also a rectification case, but for present purposes, it is sufficient to recall that Lord Hoffmann said:[8]

> What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

5 See *Mannai*, above n 1.
6 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201 [the *Antaios*].
7 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 [2009] 1 AC 1101 [*Chartbrook*].
8 At [25].

IV. Then Lord Hoffmann retired

When Lord Hoffmann retired from the Supreme Court on 21 April 2009, things began to change. Within 18 months, Lord Clarke had given his seminal judgment in *Rainy Sky SA v Kookmin Bank* (*Rainy Sky*) on 2 November 2011,[9] swiftly followed by *Arnold v Britton* (*Arnold v Britton*),[10] and then by *Marks and Spencer plc v BNP Paribas* (*Marks and Spencer*) on 2 December 2015.[11] There have been many other cases along the way, but these are probably the landmarks before *Wood v Capita*.[12]

V. From Rainy Sky to Arnold v Britton

The change came in the way that Lord Clarke expressed himself in *Rainy Sky* as follows:[13]

> *The language used by the parties will often have more than one potential meaning*. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must *consider the language used* and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. *If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*.

This introduces a two-step approach – first, identifying what constructions of the actual words are possible, then secondly identifying which of the identified possible constructions is most consistent with business common sense.

This formulation seems somewhat to bypass Lord Hoffmann's decision in *ICS* which adopted a construction that was not a possible construction, and his decision in *Mannai*, where it was not possible, anyway, as a matter of the words used, to construe the termination notice as taking effect on 13 January, when it said it took effect on 12 January. In neither case was the result that was achieved by the drafting absurd, just uncommercial.

9 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [*Rainy Sky*].
10 *Arnold v Britton* [2015] UKSC 36 [*Arnold v Britton*].
11 *Marks and Spencer plc v BNP Paribas* [2015] UKSC 72 [*Marks and Spencer*].
12 *Wood v Capita*, above n 3.
13 *Rainy Sky*, above n 9, at [21] (emphasis added).

In *Marley v Rawlings*,[14] which you will recall was the case in which the Supreme Court famously held that a husband and wife who had signed each other's wills had executed valid testamentary instruments, Lord Neuberger described the second sentence of Lord Hoffmann's fifth proposition in *ICS* as "controversial", and went on to give support to the views of Sir Richard Buxton in his article entitled "Construction and Rectification after *Chartbrook*",[15] where he had said that Lord Hoffmann's approach to interpretation in *ICS* and *Chartbrook* was inconsistent with previously established principles.[16] Sir Richard had, as Lewison LJ had written, made out a powerful case for the conclusion that, if Lord Hoffmann were right, the difference between construction and rectification had been reduced almost to vanishing point.

In *Arnold v Britton*,[17] the departure prefaced in *Rainy Sky* is taken forward. Lord Neuberger's first proposition was that:

> … reliance placed in some cases on commercial common sense and surrounding circumstances (… *Chartbrook* [16–26]) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision.

You will note that the words "save perhaps in a very unusual case" must be a nod to *ICS*. But, as later cases show, it would be surprising if *ICS* were to be decided in the same way today. Moreover, the reference to *Chartbrook* includes the controversial paragraph 25, which Lord Neuberger had already doubted in *Marley*.

In his second proposition, Lord Neuberger accepted that:

> … the worse [the] drafting, the more ready the court can properly be to depart from their natural meaning", but that did not "justify the court embarking on an exercise of searching for, let alone [correcting] [the word used is constructing], drafting infelicities in order to facilitate a departure from the natural meaning.

This is directly in conflict with what Lord Hoffmann said in his fifth proposition:[18]

> … if one would nevertheless conclude from the background that something must have gone wrong with the language,

14 *Marley v Rawlings* [2014] UKSC 2.
15 Sir Richard Buxton "Construction and Rectification after *Chartbrook*" [2010] CLJ 253.
16 *Chartbrook*, above n 7, at [25].
17 *Arnold v Britton*, above n 10.
18 *ICS*, above n 2.

> the law does not require judges to attribute to the parties an intention which they plainly could not have had.

Lord Neuberger's third point was that Lord Diplock in the *Antaios* had to be read bearing in mind that commercial common sense is not to be invoked retrospectively.[19] That again differs from Lord Hoffmann's fifth proposition.

Lord Neuberger's fourth proposition, to the effect that a judge should avoid re-writing contracts in an attempt to assist an unwise party or to penalise an astute party, is again somewhat at odds with Lord Hoffmann's approach.

Lord Neuberger's sixth proposition included a further nod to *ICS*, but within a very limited compass. It acknowledged that "in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract". In such a case, "if it is clear what the parties would have intended, the court will give effect to that intention", as in *Aberdeen City Council v Stewart Milne Group Ltd*,[20] where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract.

In *Wood v Capita*,[21] as I have said, the Supreme Court endorsed *Rainy Sky* and *Arnold v Britton*, but did so in such a way as to make clear that there is no room in the current law for the fourth and fifth principles stated in *ICS*. Those principles are not even mentioned by Lord Hodge in his passage on contractual interpretation.[22] That would be unremarkable, since the case concerned a badly drafted but ambiguous indemnity clause that certainly had more than one possible meaning. But it is rendered remarkable by the fact that Lord Hodge seeks to explain the principles that he contends represent continuity rather than change.[23] His exposition has been very recently referred to again by Lord Neuberger in *Actavis UK v Eli Lilley*,[24] where he said, in relation to construing documents, that the applicable principles as stated by Lord Hodge in *Wood v Capita* were "tolerably clear".

VI. Other Common Law Jurisdictions

It is worth noting at this stage the position in some other common law jurisdictions. In New Zealand, it has recently been decided that ambiguity does not have to be established before contextual and business common sense construction is permissible, even though the position was historically the

19 The *Antaios*, above n 6, at 201.
20 *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56 at [17] and [22].
21 *Wood v Capita*, above n 3.
22 At [8]–[15].
23 At [15].
24 *Actavis UK v Eli Lilley* [2017] UKSC 48 at [58].

reverse.[25] The approach of Tipping J in *Vector Gas*, which allowed reference to pre-contractual negotiations, has now gained currency in New Zealand, but certainly not in the UK.

In Australia, the classic decision was *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (*Codelfa*),[26] where the surrounding circumstances were only said to be admissible if the contractual language was "ambiguous or susceptible of more than one meaning" (whatever that latter formulation may add). It is not clear to me that the Australian position has changed since *Codelfa*, even though the later High Court decisions have not mentioned the need for ambiguity.

Finally, in Hong Kong, Lord Hoffmann's approach in *ICS* seems thus far to hold sway. Chief Justice Geoffrey Ma gave a resounding endorsement of the contextual approach to construction in *Fully Profit (Asia) Ltd v Secretary for Justice*,[27] approving both *ICS* and Lord Hoffmann's judgment in the Court of Final Appeal in *Jumbo King Ltd v Faithful Properties Ltd*.[28]

VII. Belise and *Marks and Spencer* – Similar Evolution in the Law of Implied Terms

At the same time as these changes have been progressing, a similar evolution has been going on in relation to implied terms. In 2009, at the end of Lord Hoffmann's judicial career, he delivered the Privy Council opinion in *Attorney General of Belise v Belise Telecom Ltd* ("*Belise*").[29] By 2015, Lord Neuberger had unequivocally reversed that development in the law in *Marks and Spencer*.[30]

In *Belise*, Lord Hoffmann equiparated the process of construction and the implication of terms. In *Marks and Spencer*, Lord Neuberger said that Lord Hoffmann's views on the implication of terms expressed in *Belise* "should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms". And so the law on implied terms reverted to the previous tough approach. The courts will not make a contract for the parties and, if something is omitted from a contract that the parties have made, it will take the rigorous application of the necessity test for the courts to imply a term. Moreover, the process of implication cannot normally begin until the process of contractual interpretation is complete. They are not one and the same process.

25 See paragraph 61 of the majority judgment in the New Zealand Supreme Court in *Firm PI 1 Limited v Zurich Australian Insurance* [2014] NZSC 147, where *Rainy Sky* was expressly footnoted as advancing a different position and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 [*Vector Gas*] at [4], [23], [64] and 151.

26 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

27 *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR.

28 *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR.

29 *Attorney General of Belise v Belise Telecom Ltd* [2009] 1 WLR 1988 [*Belise*].

30 *Marks and Spencer*, above n 11.

It is worth noting that the more conservative approach to implied terms, which does indeed achieve consistency in the law, was also taken by the Singapore Court of Appeal in two landmark cases that respectfully differed from Lord Hoffmann's approach in *Belise.* In *Foo Jong Peng v Phua Kiah Mai*,[31] the Singapore Court of Appeal refused to follow the reasoning in *Belise* at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests [were] not central to the implication of terms". That approach was adopted again in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.[32]

The New Zealand approach to *Belise* seems to regard it as having retained the necessity test,[33] though I note a recent High Court case where Downs J seems to have accepted that *Belise* had been superseded by *Marks and Spencer*.[34]

VIII. Chartbrook and *Daventry*

Before seeking to draw the threads of these changes in the law together, it is worth digressing to look at the most recent approaches to the law of mutual mistake rectification. The law on that subject was, apparently definitively stated by Lord Hoffmann in *Chartbrook*, and repeated by Etherton LJ (who dissented as to the decision, but with whom Neuberger MR agreed as to the law) in *Daventry District Council v Daventry and District Housing Ltd* (*Daventry*) as follows:[35]

> Lord Hoffmann's clarification was that the required "common continuing intention" is not a mere subjective belief but rather what an objective observer would have thought the intention to be: [see *Chartbrook* at 60]. In other words, the requirements of "an outward expression of accord" and "common continuing intention" are not separate conditions, but two sides of the same coin, since an uncommunicated inward intention is irrelevant. I suggest that Gibson LJ's statement of the requirements for rectification for mutual mistake [in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560] can be re-phrased as:
>
> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
>
> (2) which existed at the time of execution of the instrument sought to be rectified;

31 *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [34]–[36].
32 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43.
33 See *Satterthwaite v Gough Holdings Ltd* [2015] NZCA 130.
34 See *The Rintoul Group Limited v Far North District Council* [2017] NZHC 1132.
35 *Daventry District Council v Daventry and District Housing Ltd* [2011] EWCA Civ 1153 [*Daventry*] at 80.

> (3) such common continuing intention is to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and
>
> (4) by mistake, the instrument did not reflect that common intention.

The majority in *Daventry*, composed of Neuberger and Toulson LJJ, without expressly changing the law, nevertheless held on the facts, as I had found them as the first instance judge, that a contract should be rectified when it is accepted that the defendant would never have entered into the contract had it known that the terms were those to which the claimant asked that they be rectified.[36] That is, for sure, an unusual kind of *common* mistake. As Lord Neuberger MR said in that case:[37]

> It may appear counter-intuitive to describe the parties as having signed the contract under a common mistake, as the board of [the defendant] intended to agree what it provides; accordingly any claim for rectification by [the claimant] might appear to the uninitiated to be more appropriately based on unilateral mistake. However, as has been explained in all three judgments on this appeal, Lord Hoffmann's speech in *Chartbrook* [[2009] AC 1101] establishes that the issue as to whether there was a common mistake must be judged objectively.

And at paragraph 226:

> … there is much to be said for the view that many rectification claims which might previously have been regarded as based on unilateral mistake may now be better treated as being based on common mistake.

Although the Court of Appeal in *Daventry* purported to approve Lord Hoffmann's formulation in *Chartbrook*, they hardly made the law as certain as many of us had thought it before.

IX. What is to be Drawn from These Developments?

Let me first say something entirely positive. The new formulations in *Arnold v Britton* and *Wood v Capita* put greater weight, in the case of ambiguity, on the quality and formality of the drafting, which in my view is an appropriate approach. Greater weight undoubtedly has to be given to the most natural

36 At [219].
37 At [25].

meaning of the words used in a formal and carefully drafted document, than might be the case where the drafting is sloppy or careless. Regard must also be had, as recent cases emphasise, to the commercial reality that ambiguity often stems from the fact that the parties have not actually reached complete agreement and each hopes to be able to advance its construction of the ambiguity if a dispute later arises.

In my view, however, it is not an exaggeration to say that we have witnessed some sea changes. It is now as clear as can be that contractual interpretation is limited to choosing between two available meanings of the words used and that there is not, save anyway in a most exceptional case or a case of obvious absurdity, any scope for adjusting the language to reflect what the objective observer would think the parties must actually have meant in the light either of the other terms of the written contract or the available factual matrix. As Lord Hodge reiterated in *Wood v Capita*:[38]

> … *where there are rival meanings*, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

Professor David McLaughlan's article entitled "The lingering confusion and uncertainty in the law of contractual interpretation" hits a number of nails on the head,[39] but it was written before *Arnold v Britton* and *Wood v Capita*. His latest view expressed in a case note on *Wood v Capita* in the latest edition of the Law Quarterly Review argues that neither that case nor *Arnold v Britton* did actually roll back on Lord Hoffmann's *ICS* principles.[40]

So what of the criticism that the last two principles in *ICS* mean that it is hard to know where interpretation ends and rectification begins? That would be a valid criticism if the law on rectification were as clear as it was before *Daventry*, but the same judges who have put the brakes on in relation to the developments in the law of construction noted in *ICS*, have thrown the application of the law of mutual mistake rectification into doubt. As Etherton LJ made very clear in *Daventry*:[41]

> That [the appellant's argument] muddles the distinction between rectification for mutual mistake (on the ground of an objective common continuing intention) and unilateral mistake (on the ground that the Defendant was aware or ought to have been aware that the Claimant entered the formal contract under a mistake) and wrongly conflates elements of both (the Defendant's culpability being

38 *Wood v Capita*, above n 3, at [225] (emphasis added).

39 David McLaughlan "The lingering confusion and uncertainty in the law of contractual interpretation" (2015) LMCLQ 406.

40 David McLaughlan "Continuity, not change, in contract interpretation?" (2017) 133 LQR 546.

41 *Daventry*, above n 35, at [91].

> irrelevant for rectification for mutual mistake, but essential for rectification for unilateral mistake).

Lord Neuberger said in an extra-curial lecture in Singapore in 2016:[42]

> When it comes to the sort of issue raised in *Arnold*, I believe that a common law judge has to harden his or her heart, and to bear in mind that, while a decision on an issue of principle in a particular case will undoubtedly affect the parties in that case, it is very likely to affect many more people who are in a different and unknowable position. I come back to the fundamental importance of the law being certain, or, perhaps a better word, predictable. A common law judge has the privilege of making and developing the law as well as interpreting and applying it, and with that privilege comes the responsibility of not being wrongly swayed by sympathy for the plight in which an imprudent or unlucky litigant finds himself. If the judge is so swayed, the danger is that the resulting decision will muddy the clear water of certainty which is such an important ingredient in the rule of law. As Professor Glanville Williams once said, "[w]hat is certain is that cases in which the moral indignation of the judge is aroused frequently make bad law". But, as Lord Denning at his best demonstrated, that should not prevent a judge from moving on the law in an appropriate way when the right case arises.

I wonder whether black-letter law does not need to be applied consistently across the piece if the certainty of the common law is to be preserved.

It is, therefore, one thing to adopt a hard black-letter approach to contractual construction and to harden one's heart to the injustice that that conservatism may cause, but quite another to adopt a more flexible view of the law of mutual mistake rectification, which had been well-settled for many years, and exists merely to correct errors in reducing agreements to writing in documents, not errors in the agreements themselves. My view is that it is better to interpret a written agreement in accordance with what the parties must obviously have agreed as judged from the other terms of the contract and the admissible factual matrix, rather than rectifying a contract for mutual mistake to say exactly the opposite of what one of those parties would or could ever agree.

42 Lord Neuberger, President of the Supreme Court of the United Kingdom "Express and Implied Terms in Contracts" (Speech at the School of Law, Singapore Management University, 19 August 2016) at [18].

X. Is There a Difference Between the Approaches of Judges from Different Disciplines?

In England and Wales, perhaps uniquely, we have judges that are trained in practice in starkly contrasting disciplines. We have equity judges brought up on a diet of equity and trusts, and we have 'commercial' judges brought up on a diet of commercial and financial contracts, whose familiarity with equitable remedies is rather less. They generally come together only when they sit in the same Court of Appeal. Of course, all these judges have to interpret written contracts – probably all-day long.

The cases I have mentioned highlight this difference of approach. The common law and commercial judges have always taken a harder line on the construction of written contracts, holding commercial men to their bargains. But yet, they are sometimes softer when it comes to equitable remedies than those more familiar with them.

For my part, I think Lord Hoffmann, an equity lawyer, squared the circle in *Mannai* and *ICS*. The rule he explained in his fourth and fifth principles were not a licence to the unscrupulous. They provided a mechanism for establishing what the objective meaning of a contract actually was. People do in ordinary life and in commercial life use the wrong words to convey their meaning. As I started by saying, they may call someone by the wrong name, without meaning to refer to someone else. If the background available to both the parties makes that error clear, one can and should go beyond choosing between the possible meanings of an ambiguous words, but can conclude that the parties have used the wrong words, just as happened in each of *Mannai* and *ICS*. Lord Diplock was a formidable lawyer. I would not easily conclude that he was wrong in the *Antaios* to assert that a commercial contract whose proper construction "flouts business common-sense" should be "made to yield to business common-sense".

XI. Conclusion

The debate is certainly not over, but we have just perhaps concluded one swing of the pendulum. It will be interesting to see how matters develop as the composition of the UK Supreme Court changes, and a different balance of judges comes to consider these problems.

THE RELATIONSHIP BETWEEN STATES OF EMERGENCY, POLITICS AND THE RULE OF LAW

Ralf Salam*

Abstract

The relationship between states of emergency, politics and the rule of law, has been long been debated amongst law scholars and political theorists. Most of these debates have focused on the effect of states of emergency on the rule of law and State sovereignty. This article infers that difficulties still exist in identifying the relationship between politics, the law, human rights and states of emergency. This articles intention is to simplify the understanding of the political and legal aspects of states of emergency. The comparative methodology used throughout this article has allowed for data collection, involving the analysis of various sources, including the opinions of the world's top legal and political theorists.

I. Introduction

History reveals that states of emergency can greatly affect the political and legal aspects of an ordinary citizen's life. Indeed, repercussions may include instances of suspension of some normal governmental functions or authorisation for government agencies to limit, or suspend, civil liberties. Such actions are considered to be political and to have a great effect on the citizen's basic human rights. Regarding this, Agamben cited Ernesto Laclau when he expounded that:[1]

> [S]ociety requires constant efforts at re-grounding … and if the plurality of demands requires a constant process of legal transformation and revision, the state of emergency ceases to be exceptional and becomes an integral part of the political construction of the social bond.

* Author, Legal Consultant. Former Secretary General of the European African Human Rights Organization. Ralf.salam@gmx.de.

1 Giorgio Agamben *Sovereign Power and Bare Life* (Stanford University Press, Palo Alto, 1998) at 16.

II. The Relationship between States of Emergency and Politics

Agamben acknowledged the relationship between emergency, politics and law, when he said that:[2]

> States of emergency depends on the relationship between two elements - heterogeneous and antithetical, Nomos and Anomie, the law and the forms of life whose articulation is to be guaranteed by the State in times of emergency as long as the law and the forms of life remain separated.

Here we can see how he divided the condition itself into two contradictory elements which could merge together at certain moments. According to him, their dialectic works when they merge into a unique power with two sides.[3] As such, when the state of emergency becomes the general rule, the political system transforms into an apparatus for discrimination.[4] While he cited the possibility that both elements of an emergency could merge together, he warned that this action might result in deterioration in human rights.[5]

In spite of the consequences of states of emergency on the rights of citizens, especially their legal rights, one can note that emergency conditions exist in all political and legal systems of the world, which might be due to the political need of States to establish order and to supplement the objects of law, at times of stress. This principle applies generally, regardless of whether the ruling regime is a premature political regime or a modern one. The authorities which control legal institutions and are responsible for the creation or review of laws in a premature regime are generally politically motivated. Similarly, in modern States it may be said that the authorities are also politically motivated, since the ruling party in a modern democratic state has a majority in Parliament and, therefore, has the power to pass laws compatible with its general political policies. The major difference between a premature political system and a democratic or modern one can be summarised in two words: public interest.

In theory, the emergency conditions should be those which are needed to reflect the gravity of the situation, without unduly affecting the legal rights of the individual. Conversely, in practice, and especially in non-democratic or premature regimes, the sovereign has the power to suspend, not only political order, but also the legal system.[6] States of emergency, therefore, affects the

2 Giorgio Agamben"The State of Emergency" Extract from a lecture given at the Centre Roland-Barthes (University of Paris VII, Denis-Diderot, 2002) <www.generation-online.org> at 9.

3 At 16

4 At 16.

5 At 16.

6 This definition follows Carl Schmitt's definition of an emergency in Carl Schmitt *Political Theology* (University of Chicago Press, Chicago, 2005) at 12.

balance of power. This refers to the empowering of the executive to name officials to deal with emergencies, which, consequently, results in the normal administrative and legal processes being overridden, regardless of the normal administrative rules inherent in democratic States.[7] In political practice, the executive could exercise extraordinary powers in an emergency without abusing his power. This would depend on the character of the executive and whether or not he would supplement his institutional powers. However, the majority of cases have proved that the imposition of the states of emergency, or exceptional legislation such as counter-terrorism acts, have led to many negative impacts on the rule of law, since authorities have found those conditions convenient in controlling the country's political and economic activities. Moreover, police forces and security services find it easier to work in the presence of emergency legislation, since they will not be bound by restrictions on their activities imposed by codes of criminal procedure or by constitutional safeguards.[8]

The misuse of the condition by administrative authorities has long been a concern for classical political scholars, including Walter Benjamin, who stated that:[9]

> … states of emergency has become, in our modern history, a rule of life and not an exception anymore, as can be seen through our recent history, especially in the history of the rise of Fascism which flourished in the name of progress.

Benjamin went on to justify his opinions by evidence from our recent political history. He cited Hitler's administrative authorities during the Nazi era and how they eroded and violated the human rights standards during the proclamation of states of emergency,[10] excusing their acts by the famous, undefined, expression, "the Public Good". In this respect; John Locke had a conservative opinion with regard to the application of emergencies, when he argued that it is necessary, in certain situations, that the executive can exercise a broad discretion, "he meant the application of emergency legislation" in which "the legislative power and the normal law provided no relief", since this power is limited to wartime or to great urgency.[11]

7 See for example, the Egyptian Emergency Law 58/62 art 7,11.13.

8 Article 7,11.13.

9 Walter Benjamin, Gershom Scholem and Theodor W Adorno *The Correspondence of Walter Benjamin* 19101940 (University of Chicago Press, Chicago, 1994) at 6465.

10 At 6465.

11 John Locke *The Second Treatise on Civil Government* (Prometheus Books, Amherst, New York, 1986) at 203207. See also Edward S Corwin *The President, Office and Powers* (New York University Press, New York, 1957) at 147148.

According to Clement Fatovic:[12]

> … the main cause of conflict between Emergency legislation and the rule of law could be related to the fundamental principles of the rule of law, which seeks to place limits on what the government may do, by substituting the arbitrariness and unpredictability of extemporary decrees with the impartiality and regularity of impersonal rules promulgated in advance.

This principle fails to function during emergencies, since the imposition of states of emergency leaves the executive with no formal obligations. Some countries, however, do impose obligations in respect of formal consultation, as well as notification and approval of the legislature.[13] In France, for instance, the President is not required to obtain prior approval from either his cabinet or from the Parliament before declaring an emergency, although he is expected to consult the Prime Minister and the *Conseil Constitutionnel*.[14] In other countries, such as Hungary and Germany, approval must be obtained from the parliament before the states of emergency can be declared.[15]

Various opinions have emerged recently, examining the legality of states of emergency. One of those who has expressed an opinion in this respect is Bruce Ackerman, who tried to identify a way to reconcile the demands of the emergency and the procedures of legality.[16] Others opined that emergencies relax the legal and constitutional structure of the state (and even, perhaps, partially suspend it)[17] and pointed out that the common systems of legal and institutional checks and balances tend to be destabilised during the state of emergency.[18] These opinions are important for legislators and jurists to understand the extent to which states of emergency could affect the rule of law.

Another issue which presents itself, when discussing the relationship between states of emergency and the rule of law, is the superior role of politics protected by sovereignty. All countries consider the topic of sovereignty to be a national subject, which would lead us to believe that during the declaration of emergency, and likewise during the application of counter-terrorism legislation, it is unlikely, in practice, that there will be an effective body to review the executive's decisions. Even Carl Schmitt thought that the rule

12 Clement Fatovic *Outside the Law* (Johns Hopkins University Press, Baltimore, 2009) at 3.
13 French Constitution, arts 16(1) and 19. See also John Bell *French Constitutional Law* (Clarendon Press, Oxford, 1992) at 16.
14 Above, n 13.
15 See the Constitution of Hungary, Germany.
16 Bruce Ackerman"The Emergency Constitution" (2004) 113 The Yale LJ1029.
17 Oren Gross and Fionnuala Ní Aoláin*Law in Times of Crisis* (Cambridge University Press, Cambridge, 2006) at 17.
18 Eric A Posner & Adrian Vermeule"Accommodating Emergencies" (2003) 56 Stanford L Rev 605, at 607.

of law might be undermined in a modern democratic system at a time of emergency.[19]

According to a basic understanding of the function of the roles of the executive in "guaranteeing the basic human rights", it is acceptable to authorise derogations during emergencies, but such restrictions often require constitutional guarantees within the diverse legal regulations. Such regulations may be found in the Constitution, which, as a general rule, is the highest authority, followed by the Code of Criminal Procedure and administrative regulations. All such guarantees may be breached by the executive under the provisions of the states of emergency. Hitler's emergency system is a good example. The systems of some countries contain a notable defect, in that they cannot guard their constitutional provisions with efficient legal supervision during emergencies. Indeed, supreme judicial authorities within non-democratic regimes cannot control the behaviour of the executive, especially within the period of the declaration of states of emergency.[20]

The above explanations would lead us to an important question: do states of emergency belong to law?

Agamben responded to that question when he stated that "states of emergency contradicts the basic aspect of law and is more related to politics than to law".[21] It was his opinion that the states of emergency condition is a kind of barbaric act, that cannot even belong to logic and that it is an insane condition that should be considered as outside the law. Agamben added that "[t]he structure of the states of emergency is an inverted figure". Indeed, he compared it with anomic festivals, like the Roman Saturnalias, the charivari and the medieval carnival, which suspend and invert the legal and social relations defining normal order:[22] "Men dress up and behave like animals; bad habits and crimes that would normally be illegal are suddenly authorised".[23]

Agamben pointed to evidence from our recent history in order to confirm his opinion. He recalled the history of the Nazi regime when, just after Hitler came to power on 28 February 1933, he suspended all the Articles of the Weimar Constitution.[24] Since his decree was never revoked, we can state that the entire Third Reich, from a legal point of view, was under states of emergency legislation for 12 years.[25] He continued, arguing that the 1933 Decree for the Protection of People and the State was a clear example of how modern totalitarianism can be defined as the institution, by way of a states of emergency, of a legal civil war that permits the elimination of political

19 John P McCormick "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers" (1997)10 CJLJ 163–187.

20 Supreme State Security Emergency Court of Damanhour, "Memorandum No 5631/2005" (Supreme State Security Emergency Court of Damanhour 2005) at 2327.

21 Agamben, above n 2, at 40.

22 At 8.

23 At 8.

24 At 8.

25 At 8.

adversaries.[26] Furthermore, Agamben explained that "it is not necessary that the technicality of declaration of states of emergency itself is not bound by sense of the term".[27] He might have meant by this, that the *de facto* states of emergency, or other exceptional legislation including counter-terrorism legislation, which has recently become established in some constitutions[28] could have negative effects on the rule of the law and on society as a whole.[29] In this respect it seems that he disagreed with Carl Schmitt's thinking that the declaration of an emergency is a sovereign power, since, according to Agamben, the proclamation, in itself, allows the removal of a subject from the purview of "regular" law. In the use of such terminology, he had drawn on Schmitt's famous definition that "the sovereign is he who decides on the state of exception".[30] Since Schmitt understood the exception in relation to states of emergency as an associated feature that facilitated the economic and political crises that imperilled the State and, therefore, would require the suspension of regular law and rules to resolve those crises.[31]

It may be noted that the philosophical thoughts of Agamben regarding states of emergency were influenced by Swiss philosopher, Karl Meuli. This influence can be seen as Agamben described the Roman anomic festivals as examples of the negative effect of emergency conditions on the rule of law.[32] The opinion of Meuli with regard to social exceptionalism could be interpreted in relation to states of emergency through the connection between anomic festivals and the situation of suspended law that characterises certain archaic legal institutions.[33] Agamben was influenced by Meuli's opinion of the anomic festivals, when he argued that it is:[34]

> … possible to kill a man without going to trial, to destroy his house and to take his belongings. Far from reproducing a mythological past, the disorder of the carnival and the tumultuous destruction of the charivari re-actualise a real historical situation of anomy.

He further explained that:[35]

26 At 8.
27 At 2.
28 See, for example, art 179 of the Egyptian Constitution 1972. See also the American Patriot Act 2001.
29 See above.
30 Schmitt, above n 6, at 2324. See also Agamben, above n 1, at 57.
31 Nasser Hussain "Thresholds: Sovereignty and the Sacred" (2000) 34 (2) Law and Society Review 495.
32 Agamben, above n 2.
33 Ibid.
34 Ibid.
35 At 63.

> … ambiguous connection between law and anomy is thus brought to light: the state of emergency is transformed into an unrestrained festival where one displays pure violence in order to enjoy it in full freedom.

Other scholars, such as Clement Fatovic, evaluated the relationship of states of emergency with law in terms of its purpose.[36] Fatovic explained that "the purpose of law is to create order where it does not exist and to stabilise it where it does exist".[37] In his opinion:[38]

> … in justice there are many conflicting aims including the pursuit of equality, the protection of individual rights, the expression of communal values, the preservation (or transformation) of the *status quo* and the consolidation (or dispersion) of power. In this respect, he has reduced the Law to its basic aim, which is order.

He explains how the specific kind of order that law produces or preserves can be defined by its substantive aims.[39] Moreover, although the establishment of order, as such, is independent of any particular set of substantive aims, "the law accomplishes this aim primarily by specifying rules that minimise the variability and arbitrariness associated with discretionary action".[40]

Indeed, many cases in our recent past have dealt with the above-mentioned situations. Differences of opinion between scholars with regard to the point may also be seen, especially with regard to the basic values of a constitution and its relationship with emergencies. It is not only scholars and philosophers who have been concerned about this topic, but also judges, politicians and human rights activists. In this respect, Lincoln's Martial Law program created a significant legal and theoretical battle, not only in the USA, but also worldwide. Referring to that, former Justice Benjamin Curtis objected to Lincoln's theory of implied powers and explained that such implied powers were contrary to a strict reading of the American Constitution.[41] Amid such criticism, Lincoln accepted the *Habeas Corpus* Act of 1863 and endorsed congressional authority, retrospectively, to impose constitutional limitations on the Martial Law program.[42] Citing the 1863 Act, Ernest Fraenkel argued that military power would disturb the principle of legality, where the executive power does not commit to the principle of legality, or where the authorities have vested in the state of exception a pretext for the continued imposition

36 Fatovic, above n 12, at 1.
37 At 1.
38 At 1.
39 At 1.
40 At 1.
41 Chandler Robbins *Memoir of the Hon Benjamin Robbins Curtis, LLD* (J Wilson and Son, Cambridge, MA, 1878) at 280281.
42 At 280281

of exception.[43] Such expansion could suspend the rights of *habeas corpus.*[44] Fraenkel called it the "dual state", whereby officials have the authority to displace legal controls whenever they deem this appropriate.[45]

III. The Constitutionality of States of Emergency

Debates between law scholars have emerged since Carl Schmitt introduced his theory of exception. These debates have focused on whether states of emergency have sufficient constitutional credibility.[46] One of those opinions is that of Fathi Sorour who emphasised that there was enough credibility to support states of emergency from the constitutional legal point of view.[47] He confirmed his opinion arguing that: "Indeed, this is particularly so, given the fact that states of emergency create a separate judicial system which means, in fact, that it gains credibility from constitutional corroboration".[48]

One could assume that a country's constitution would describe the circumstances that could lead to the declaration of a state of emergency, identify the procedures to be followed and specify the limits to the emergency powers and the rights which can be suspended. While each country defines its own practices, many national constitutions have been influenced by the Universal Declaration of Human Rights, which has led to great improvements in human rights standards. Indeed, this can be noted in the articles contained in most modern constitutions, which contain references to human rights standards. Such modern constitutions, for example those of India, Venezuela, Brazil and Italy, have all confirmed the right of *habeas corpus*.[49]

While those modern constitutions have acknowledged human rights standards, one can note that most of them also acknowledge states of emergency. The American constitution, for example, provides that in times of emergencies"[t]he privilege of *Habeas Corpus* shall not be suspended, except in certain and exceptional cases, such as Rebellion or Invasion".[50] None of the other American constitutional clauses gives special powers to any branch of government in the event of such exigencies.[51] For example, Clause 2 states

43 Ernst Fraenkel *The Dual State. A Contribution to the Theory of Dictatorship* (Oxford University Press, Oxford, 1941) at 1112.
44 At 1112.
45 At 1112.
46 Fathi Sorour *Legitimacy and Criminal Procedure* (House of the Arab Renaissance, Cairo, 1977) at 285.
At 285.
47 At 285.
48 At 285.
49 Italian Constitution, art 4.
50 See the American Constitution, art1 s8 cl15 and art1 s9 cl2 e.
51 Henry Monaghan "The Protective Power of the Presidency" (1993) 93 Colum L Rev 1, 3238. See also George Winterton "The Concept of Extra-Constitutional Executive Power in Domestic Affairs" (1979) 7 Hastings Const LQ1 2435. See also the Egyptian Constitution (1923), arts 154, Egyptian Official Gazette (18 January 2014).

that the privilege of the right of *habeas corpus* shall not be suspended.[52] One can suggest that International Human Rights Treaties may have influenced the writers of the American Constitution. Other constitutions, such as the Egyptian Constitution, specify in general wording the definition of the states of emergency.[53]

Another example of the acknowledgment of the emergency condition within liberal democratic constitutions, "which permit a fairly broad suspension of constitutional provisions during times of emergency", is to be found in the constitution of the Swiss Confederation. Under the doctrine of *régime des pleins pouvoirs* (regime of plenary powers[54]), the Swiss federal government can act to safeguard the Confederation's security, independence, neutrality or economic interests, by declaring states of emergencies when the legislature cannot meet the required guarantees for the safety of the federation, or when the legislative process can no longer function.[55] While such an extreme assumption of power by the federal government would, under normal conditions, be deemed unconstitutional, under exceptional circumstances it becomes operational.[56] The doctrine places practically no limits on the power of the federal executive, apart from Switzerland's obligations under the ECHR.[57]

Meanwhile, the Constitution of the Irish Republic contains an article (article 28(3.3)) which permits the suspension of the Constitution's fundamental rights in times of emergency.[58] It should be noted, with regard to that point, that the only legal limitation on the declaration of an emergency is the existence of a "grave emergency",[59] in which event the government is allowed to virtually rewrite the constitution through emergency measures.[60] Another modern constitution, the Algerian Constitution, provides in its Article 96(1) that, during the period of a state of war, the Constitution is suspended and the President assumes all powers.[61] Meanwhile, in India, due to the Indian system having developed a unique system of constitutional distribution of powers, the Indian Constitution gives pre-eminence to the Union over the States and places the President of India in a unique position.[62] Although the President of India is a titular figure according to the Indian democratic system, under certain circumstances the Constitution gives him

52 The American Constitution, cl 2.
53 Egyptian Constitution (1923), arts 62, 72.
54 See the Constitution of the Federal Government of Switzerland at 23.
55 At 23.
56 At 23.
57 At 23.
58 Irish Republic Constitution, art 28.3.3.
59 Asanga Welikala *State of Permanent Crisis* (Centre for Policy Alternatives, Colombo, 2008) at 81.
60 At 81.
61 The Algerian Constitution, art 96 (1).
62 *SR Bommai v Union of India* [1994] ([1994] 2 SCR 644; AIR 1994 SC 1918; (1994) 3 SCC1).

the power to impose direct rule, including declaring states of emergency, but he can only act on the advice of the Prime Minister.[63]

It may be noted that, in the above examples of modern constitutions, the constitutional provisions for declaring a state of emergency fall into three groups. The first of these groups comprises those that vest the power of declaration in the legislature (usually parliamentary systems), followed by those that empower the executive to make the declaration (generally presidential systems) and, lastly, the remainder which are hybrids. Among the countries that vest the power of declaration in the legislature (although initiation of the process rests with the executive) are South Africa,[64] Germany[65] and Israel,[66] which are all, essentially, parliamentary systems.[67] However, in the interest of a rapid response, these jurisdictions may give a limited power of declaration, and even rule-making, to the executive, subject to ratification by the legislature.

Indeed, states of emergency represents a challenge for democratic constitution-makers to provide for the exercise of power, particularly executive power, that facilitates strong and efficient government, whilst simultaneously ensuring safeguards against abuse. This problem seems to have been partly solved by modern constitution-makers,[68] since many constitutions seek implicitly to limit or explicitly to prevent judicial review at times of emergency,[69] while many others are silent on the matter.[70] Here, the consequences of a declaration of states of emergency on the constitutional order vary, since the fundamental rights, constitutionally protected under normal circumstances, can be limited or derogated from during an emergency and, consequently, the institutional framework and balance of constitutional order undergoes change. Indeed, this is why modern constitutional provisions often prohibit executives or parliamentary bodies from modifying any articles of the constitution during an emergency.[71]

The legal consequences of applying states of emergency can also be seen in the expansion of the executive role within the institutional framework of the State.[72] Most modern constitutions offset the conferral of power through procedural mechanisms, such as legislative approval or consultation

63 Indian Constitution, art 352.

64 Halton Cheadle, Dennis Davis and Nicholas Haysom *South African Constitutional Law* (Butterworths, Oxford, 2002) at 11. See also South African Constitution, art 34(1).

65 German Basic Law art 115a.

66 Israeli Basic Law, art 38(a).

67 Greek Constitution, art 48(1); Italian Constitution, art 78, 87.

68 See, for example, South African Constitution, s 37(3).

69 See, for example, the Malaysian Constitution, art 150(8); see also Irish Constitution, art 28.3.3.

70 See, for example, Sri Lankan Constitution prior to the Tenth Amendment, art 155. See also Stephen Ellman, "Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution, A" [1989] New York Law School <http://digitalcommons.nyls.edu>.

71 For example, French Constitution, art 89(4); Belgian Constitution, arts 187, 196. See also Gross and Ní Aoláin, above n 17, at 6061.

72 Locke, above n 11, at 159160.

requirements, and time limits on the validity of the declaration. Thus, some constitutions provide that Parliament must be summoned immediately upon the declaration of a state of emergency,[73] and others that the legislature may not be dissolved[74] or that its term of office is extended during the currency of a state of emergency.[75] Meanwhile, the impact on the constitutions of countries that adopt federal systems can be judged according to the constitutional evolution of those countries.[76] Even very different federal constitutional cultures and practices, such as those in Canada and Australia, demonstrate some specified articles which deal with emergencies.[77] The constitutions of other federations, such as Germany, India and Russia, provide explicitly for the suspension of fundamental federal constitutional principles during times of emergency.[78]

IV. Oren Gross and Fionnuala Ní Aoláin's Models of Accommodations

Various scholars have made great efforts to try to facilitate a more systematic understanding of "law, politics and 'theory and practice of states of emergency'".[79] However, in the opinion of this author, Oren Gross and Fionnuala Ní Aoláin are among the best scholars who have interpreted states of emergency. They organised its fundamental aspects on an academic basis, divided it into broad conceptual models in order to facilitate their understanding, and arrived at three categories of accommodation, namely, constitutional, legislative and interpretive.[80] Gross and Ni Aoláin argued that states of emergency are generated from the constitutional rule of law and,

73 Sri Lankan Constitution, art 155(4).

74 French Constitution, arts 16 and 89. See also Portuguese Constitution art 289; Spanish Constitution arts 169 and 116(5).

75 See German Basic Law, art 115(h).

76 See for example, the Swiss Federal Constitution.

77 Herbert Marx "The Emergency Power and Civil Liberties in Canada" (1970) 16 Mac Gill Law Journal 39 at 5761. See also Christopher D Gilbert"There will be Wars and Rumours of Wars: A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada" [1980] 18 Osgoode Hall Law Journal 307. See also Donald G Creighton *Dominion of the North: A History of Canada* (Houghton Mifflin, Boston, USA, 1944) at 439. See also Patricia Peppin "Emergency Legislation and Rights in Canada; The War Measures Act and Civil Liberties" [1993] 18 Queen's LJ129at 131. See also Jeffrey Goldsworthy *Australia* (Oxford University Press, Oxford, 2006) at 6466, 85, 102 and 138.

78 German Basic Law, art 53(a)(2). See also Egyptian Constitution (Egyptian Official Gazette, 26 March 2014).David P Currie *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago, 1994) 134at 138-39. See also Donald P Kommers"Germany: Balancing Rights and Duties" in Jeffrey Goldsworthy (ed)*Interpreting Constitutions* (Oxford University Press, Oxford, 2006) at 163, 167, 169 and 185. See also the Indian Constitution, arts 353,356 and 360. See also Durga Das Basu *Introduction to the Constitution of India* (9thed, Prentice-Hall,New Delhi, 1982) 30216. See also the Russian Constitution art 88.

79 Gross and Ní Aoláin, above n 17, at 1127.

80 At 1127.

therefore, they developed models to be followed in order to understand the nature of it.[81] These models, which Gross and Ní Aoláin called constitutional emergency regime models, are based on the premise that constitutional norms and legal rules control governmental responses to emergencies and terrorist threats.[82] Gross and Ní Aoláin called it "the assumption of constitutionality"[83] and, according to them, the analytical framework of states of emergency may be expressed as follows;

(1) The model of legal accommodation, with particular focus on the Roman model of constitutional accommodation and other classical concepts, including the Roman dictatorship, the French *état de siege* and the British concept of Martial Law.[84] This approach seeks to accommodate a regime of emergency powers within the constitutional order of the institution of dictatorship, as found in the Roman Republic.[85] Models which were inspired by the Roman prototypes, such as the French état de siege and the British concept of Martial Law, could be classed within this model .[86] These models have formed legal arrangements for emergency powers in both the civilian and common law traditions.[87]

(2) The libertarian model of constitutional perfection - the "business as usual" model based on "notions of constitutional absolutism and perfection" - entertains no deviation from ordinary rules and norms of legal conduct,[88] even in times of emergency.[89] This model embodies theories of constitutional absolutism and constitutional perfection and involves unconditional commitment to the constitutional instrument as a fortress of rights.[90] This means that, whatever measures a government may take, they cannot, under any circumstances, diminish or suspend the constitutionally protected rights.[91] This model differs from the interpretive accommodation model, which contemplates the emergency-sensitive judicial interpretation of ordinary laws.[92] Conversely, in this model, there is no difference in the interpretation of ordinary laws between times of emergency and normalcy.[93]

81 At 1127.
82 At 1127.
83 At 86.
84 Welikala, above n 60, at 34.
85 At 34.
86 At 34.
87 At 34.
88 Oren Gross "Chaos and Rules: Should Responses to Violent Crises always be Constitutional?" (2003) SSRN Electronic Journal <www.ssrn.com> at 112.
89 At 112.
90 Welikala, above n 60, at 49.
91 At 49.
92 At 49.
93 See American Convention on Human Rights (*Habeas Corpus* in Emergency Situations), arts 27(2), 25(1), 7(6).

(3) The extra-legality model, with particular reference to the work of Carl Schmitt.[94] Extra-legal measures models are those that are ready to contemplate extra-legal, or even extra-constitutional, actions during times of crisis.[95] Such models are based, in particular, on a precise view of political morality and ethical conduct.[96] Gross and Ní Aoláin introduced this model on the basis of some principles drawn from the quasi-religious Jewish law of Halakha, which permits derogation from the fundamental norms of the Torah and Talmud in exceptional circumstances.[97] With regard to this point, John Locke, in his "theory of the executive prerogative",[98] came very close to the Gross and Ní Aoláin model, as did Albert Venn Dicey.[99] This model has an inherent conceptual requirement of institutional morality and legitimacy since, in their view, "public officials may act extra-legally when such action is necessary for protecting the nation and the public".[100] This is another example of the thoughts of the above scholars being based on this model.

From the normative, extra-legalist, perspective, Oren Gross and Fionnuala Ni presented five different approaches to the issue of necessity and its relationship with law.[101] These five views were divided into two constitutional approaches and three approaches "operating outside the constitutional sphere".[102]

The two constitutional approaches are:

(1) Necessity as a source of law.

(2) Necessity as a "meta-rule of constitutional construction".[103]

The three extra-constitutional approaches were set out as follows:

(1) Political necessity, rendering legal issues irrelevant.

(2) Necessity as suspending law but not creating new law.

(3) Necessity as excusing illegal conduct without rendering it legal or suspending it.[104]

94 Welikala, above n 60, at 33.
95 At 33.
96 At 33.
97 Gross and Ní Aoláin, above n 17, at 113119.
98 Jeffrey Friedman, Two Treatises of Government: John Locke (Legal Classics Library 1994) at 67.
99 Gross and Ní Aoláin, above n 17, at 130132.
100 At112.
101 At 47.
102 At 47.
103 At 47.
104 At 47.

Oren Gross and Fionnuala Ní Aoláin introduced a Modern Comparative Context, in which they enabled states of emergency to be categorised according to whether the accommodation was constitutional, legislative or interpretive.[105]

According to them, constitutional accommodation is based on the presumption of temporal separation between emergency and normalcy and seeks to provide a constitutional framework of general application to be put into operation in times of crisis.[106]

Legislative accommodation may fall into one of two separate categories:

(1) Legislation in response to a crisis which may modify the existing law to deal with specific challenges presented by the crisis.[107]

(2) Special emergency legislation, whereby the emergency must be met under the umbrella of the law.[108] This type of emergency regards ordinary laws as inadequate to deal with specific emergencies.[109] It suggests that supplementary emergency norms that pertain to the particular exigency (or to potential future exigencies), should be created.[110] The interpretive approach has been particularly significant in jurisdictions with older constitutions, such as in the USA, which do not contain expressive and detailed rules regarding emergency powers.[111] In such countries, judges are required to resolve competing claims of institutional responses to emergencies without much textual guidance .[112]

Interpretive accommodation is the response in which judiciaries may interpret the constitutional and legal provisions in a way that addresses the challenges of a crisis and facilitates the government's reaction.[113] Gross and Ní Aoláin defined this situation as existing constitutional provisions, in which laws and regulations are given new understanding by way of context-based interpretation, without any explicit modification or replacement.[114] Additional powers should be able to deal with dangerous threats which may be accommodated by judges exercising "the elastic power of interpretation".[115]

105 At 47.
106 Bruce Ackerman "The Emergency Constitution" (2004) 113 The Yale Law Journal. Faculty Scholarship Series. Paper 121<http://digitalcommons.law.yale.edu>.
107 Ackerman, see above n 110.
108 Welikala, above n 60, at 47.
109 At 47.
110 Gross and Ní Aoláin, above n 17, at 67.
111 Welikala, above n 60, at 49.
112 At 49.
113 Gross and Ní Aoláin, above n 17, at 72. See also Richard A Posner *Law, Pragmatism, and Democracy* (Harvard University Press, Cambridge, MA, 2003) at 295.
114 At 295.
115 At 295.

Gross and Ní Aoláin pointed out two broad problems regarding the classification approach to the structuring of emergency powers, stating that "such classification and categorization are viable projects".[116] They, moreover, opined that creating a "sliding scale of emergency regimes" may encourage governments to resort, more readily, to some states of emergency, because the perception that they are "not so serious" makes them "more readily accepted by legislatures, courts and the general public".[117] The danger here is that:[118]

> [t]his can also act to condition people to live with some types of emergency, as, once a kind of emergency regime becomes accepted as the normal way of life, it will be easier for the government to "upgrade" to a higher-level emergency regime.

They added that:[119]

> … the argument is made that the benefits of accommodation exceed the potential costs of invoking such models of emergency rule, therefore, the models avoid constitutional and legal rigidity in the face of crisis, allowing governments to act responsibly, within a legal framework, against threats and dangers; operating within the confines of a legal system also means that mechanisms of control and supervision against abuse and misuse of powers - such as judicial review and Parliamentary oversight over the actions of the executive government - are available and functioning.

According to Eric Posner & Adrian Vermeule, the normative expectations of the accommodative approach, which relies on practical experience, suggest that, when confronted with the exigencies of a crisis, the models have not always been able to withstand the depredations of assertive executives, rendering them meaningless, apologetic and unprincipled.[120]

One could note from the above analysis that scholars have dedicated great efforts to explain emergencies and their relationship with law and politics. Some of these efforts have been recognised as inspirations in legal and political fields, although, in practice, these efforts have not introduced practical tools to ensure official and political compliance with the letter and the spirit of these theories. Thus, the experience whereby judges and legislators have been unable to assert their institutional role to give meaningful effect to

116 At 45.
117 At 4546.
118 At 46.
119 At 81.
120 Eric A Posner & Adrian Vermeule "Accommodating Emergencies" (2003) 56 Stanford Law Review 605 at 607.

constitutional safeguards during times of emergency is as much a matter of politics as of law. As Friedrich observed:[121]

> There are no ultimate institutional safeguards available for ensuring that emergency powers be used for the purpose of preserving the constitution … All in all, the quasi-dictatorial provisions of modern constitutional systems, be they martial rule, state of siege or constitutional emergency powers, fail to conform to any exacting standard of effective limitations upon a temporary concentration of powers. Consequently, all these systems are liable to be transformed into dictatorial schemes if conditions become at all favourable to it.

V. The Effects of Emergencies on the Rule of Law

Modern democracies have generally maintained their legitimacy by claiming that the law rules over particular leaders or interests. Indeed, this explains why Victorian jurist, Albert Venn Dicey, articulated a distinctive rule of law.[122] While Dicey's rule of law was derived from the unwritten English constitution and common law heritage, in America the rule of law was inseparable from what legal historian Willard Hurt called the constitutional ideal[123] that all power should be accountable to a power outside of itself, whatever its constitutional form.[124] The rule of law was vulnerable during wartime emergencies, since nation-state authorities demanded unilateral power.[125] This resulted in the introduction of the Alien and Sedition Acts of 1798, by which[126] Lincoln suspended the writ of *habeas corpus* during the Civil War.[127]

In 1917, other exceptional acts were also ratified by Congress, including the Espionage Act, which gives the power to the authorities to confiscate property, wiretap, search and seize private property, censure writings, open

121 Carl J Friedrich *Constitutional Government and Democracy* (Blaisdell Pub Co, Waltham, MA, 1968) at 570. See also Gross and Ní Aoláin, above n 17, at 81.

122 Albert Venn Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (Macmillan London 1914)at 12.

123 James Willard Hurst *Law and Markets in United States History* (University of Wisconsin Press, Madison, 1982) at 9798. See also Richard A Cosgrove *The Rule of Law* (University of North Carolina Press, Chapel Hill, 1980). See also Joseph Margulies *Guantánamo and the Abuse of Presidential Power* (Simon & Schuster, New York, 2006) at 33. See also Harold H Bruff *Bad Advice: The Presidential Lawyers in the War on Terrorism* (University of Kansas, Lawrence, 2009) at 89.

124 Hurst, above n 128.

125 At 9798.

126 Alien Enemies Act 1798, Sec 2, 4,5.

127 Ibid.

mail and restrict the right of assembly.[128] A famous example of the use of this act can be found in the case of *Debs v United States,* where "the socialist leader and presidential candidate, Eugene Debs, was prosecuted and convicted for his criticism of World War I".[129]

Following the end of the Second World War, "and after the perceived emergency was over, several people were convicted of violating the Sedition Act".[130] Justice Black referred to the Court's opinion, when affirming Korematsu's conviction for disobeying his internment order during World War II, saying: "Indeed, this decision was supported by civil libertarians such as William O'Douglas, Felix Frankfurter and Harlan Stone".[131]

One can see the negative effects of Emergency Conditions on the rule of law, and especially on guaranteeing the right to a fair trial. These negative effects have motivated the international community to introduce some important international rules, such as the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. These include similar provisions with regard to the right to a fair trial, hence:

(1) The right for trial in front of an independent and impartial court.

(2) The right to have access to a lawyer and to an interpreter.

(3) The right to be informed, without delay, of the particulars of the offence alleged against the accused.[132]

(4) The right not to be convicted of an offence except on the basis of individual penal responsibility.[133]

(5) The right to be tried in one's presence, and not to be compelled to testify against oneself.[134]

(6) The right to examine, or to have examined, the witnesses against him and to attend and examine witnesses on his behalf under the same conditions as witnesses against him.[135]

(7) The right to have the judgment pronounced publicly.[136]

128 William C Banks and ME Bowman"Executive Authority for National Security Surveillance" (2000) 50 American University Law Review 1<http://digitalcommons.wcl.american.edu>.

129 *Debs v United States* (1919) 249 US 211. See also *Frohwerk v United States* (1919) 249 US 204, 39 S Ct 249, 63 L Ed 561 US. See also *Schenck v United States* (1919) 249 US 47.

130 Gary R Wills *A Necessary Evil: A History of American Distrust of Government* (Simon & Schuster, New York, 2002) at 135140.

131 *Korematsu v United States* (1944) 323 US 214.

132 Ibid.

133 See Additional Protocol to the Geneva Conventions of 12 August 1949 (Protocol I) 8 June 1977.

134 Protocol I.

135 Protocol I.

136 Protocol I.

(8) The right to be able to submit an appeal to superior courts.[137]

It may be noted that the function of the legal system during an emergency, and especially the role of judges in ensuring the effective protection of human rights in emergency situations and during the application of counter-terrorism legislation, could lead to a crucial situation for the legal rights of a citizen. The rule of law may be affected and the normal legal status quo circumvented, leading to interference by the executive in the functions of other authorities, especially the judiciary. Such interference may influence the independence of the judiciary and unbalance the principle of the three independent authorities - legislative, executive and judiciary - so that the three cease to be separate, since orders and decisions issued by States under the states of emergency provisions may cause the executive branch to intervene in some of the functions of the judiciary. These issues will be discussed briefly and can be summarised as follows;

A. Initial Investigation and Interrogation

Under normal circumstances, investigation, interrogation and prosecution are duties and responsibilities of the judiciary. In accordance with this, guarantees exist to ensure that defendants enjoy all essential safeguards. Such guarantees are represented, inter alia, in the function of police officers, who may arrest a person only once evidence has become available. Moreover, while directly charging the accused after his or her arrest is essential, detaining a person without charging them is forbidden. However, following the proclamation of states of emergency, the powers of the judiciary are transferred to the military ruler, including the power to issue arrest warrants, which presents the possibility for a person to be detained without being charged. In addition to this, a person's collateral rights could be neglected during the initial investigation and interrogation, for example by a failure to observe the confidentiality of the investigation, or the failure to appoint a defence lawyer.[138] Moreover, under emergencies, the Minister of Defence or Interior or the Head of State, have the authority to order the arrest of the accused, or release him or her before or after the trial, or issue a pardon. Sentences are final and are not subject to the control of the supreme courts.

States of emergency provisions may also set up special tribunals, which may involve discrimination contrary to Article 26 of the ICCPR.[139] These points were quoted in the case of *Kavanagh v Ireland,*[140]with reference to

137 See Geneva Convention (1949) art 49, 50, 10508, 7173, art 3. See also Protocol II to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 6.

138 See the Egyptian Emergency Law 58/62 art 6, 8 and 9. See also the US Patriot Act 2001.

139 See arts 14 and 26 of the ICCPR.

140 Communication No819/1998 *Kavanagh v Ireland* (Views adopted on 4 April 2001) in UN doc GAOR A/56/40 (vol. II)133 para10.1.

the "Special Criminal Court created in Ireland".[141] In this case, Kavanagh complained that he had been the victim of a violation of article 14(1) of the ICCPR, by being subjected to the Special Court, "which did not afford him a jury trial and the right to examine witnesses at a preliminary stage".[142]

In the same manner, the Human Rights Committee confirmed that "trial before courts other than the ordinary courts is not necessarily, per se, a violation of the entitlement to a fair hearing" and added that "the facts in the Kavanagh case did not show that there had been such a violation".[143] On the other hand, it stated that the decision of the Director of Public Prosecutions to charge the complainant before an extraordinarily constituted court deprived him "of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts".[144] The Committee then noted that the Offences Against the State Act set out a number of specific acts which could be tried before a Special Criminal Court "if the DPP is of the view that the ordinary courts are inadequate to secure the effective administration of justice".[145] However, the Committee considered it problematic that:[146]

> …No reasons are required to be given for the decision that the Special Criminal Court would be "proper", or that the ordinary courts are "inadequate", and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually indemonstrable circumstances.

In this it was referring to the condition where countries are facing terror threats.

In this case, the conclusion of the Committee was that Ireland had failed to demonstrate that "the Special Criminal Court was based upon reasonable and objective grounds".[147]

B. Trial and Verdict

When proclaiming states of emergency, the establishment of exceptional courts has become a common practice. Such exceptional courts have different names in different countries, including Emergency Courts, State Security Courts and Military Courts. These courts usually consist of a judge and

141 The Irish government proclamation of 26 May 1972, pursuant to s 35(2) of the Offences Against the State Act 1939.

142 Communication No819/1998 *Kavanagh v Ireland* (Views adopted on 4 April 2001) in UN doc GAOR A/56/40 (vol II)133 para10.1.

143 At para 10.1.

144 At para 10.1.

145 At para 10.1

146 At para 10.2.

147 Lawless Case ECtHR (1961) Series A no3 56 para 28.

security officers from the armed forces or National Guard. The formation of those courts casts a doubt as to whether the members of the courts have the necessary legal qualifications to take their positions as judges. Indeed, it is usually the case that these courts do not require their members to be legally qualified. An example of this is found in of Article (7) of the Egyptian Emergency law, which authorises the President to form the State Security Courts from military personnel, but does not specify any legal requirements for the chosen military personnel.[148] This might breach the right to a fair trial by a competent, independent and impartial tribunal and an example of such a violation can be found in the case of *M González del Río v Peru*, where the Committee held that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".[149] However, the Committee also admitted that "it would simply not be feasible to expect that all the provisions of Article 14 must remain fully functional in any kind of emergency".[150] It seems clear from the various comments and views of the Human Rights Committee that an accused person should be tried by an independent and impartial court, in any circumstances, including times of public emergencies.[151]

VI. Exceptional Emergency Courts

Exceptional Courts are those courts which are formed to deal with the exceptional situations, amongst which are the declaration of states of emergency, or the country being subjected to terror attack and resolving to pass counter terrorism legislation. These exceptional courts handle different crimes and include State Emergency courts, Emergency Courts, and Martial Courts. The states of emergency investigative procedures, such as pre-trial detention, interrogations and searches, are completely different from those to be found in the codes of criminal procedures. In his book, *Constitutional Theory*, Carl Schmitt stated that Constitutional Law can be suspended during the state of exception and be violated by measures of the state of exception.[152] This is because the legal regulations that control restrictions on the freedom of the individual may require proper coordination between the society and the executive branch. [153]

In the above situation, the task of the legislator is to establish safeguards to ensure that prejudice to the rights and freedoms of the individual are of

148 Egyptian Emergency Law 58/62 art 7.

149 Communication No 263/1987M *González del Río v Peru*(Views adopted on 28 October 1992) GAOR A/48/40 (vol II) 20 para 5.2.

150 See the Committee's reply to the Sub-Commission on the question of a draft third Optional Protocol to the Covenant in UN doc GAOR A/49/40 (vol I) annex XI.

151 Ibid, see also United Nations Compilation of General Comments123 para 4 and Communication No 263/1987M, above n 155, at para 5.2.

152 Carl Schmitt and Jeffrey Seitzer *Constitutional Theory* (Duke University Press 2008) at 80.

153 Clinton Rossiter *The Supreme Court and the Commander in Chief* (Da Capo Press 1970) at 81.

the lower order, as suggested by Dyzenhous. In addition to this, there must also be cooperation among the constitutional branches of government, rather than unilateral action by one branch,[154] as can be seen in the case of Lambdin P Milligan.[155] Here, the executive branch had power to override the rule of law during states of emergency, giving the chance for politicians to interfere in legal work. Milligan was a peace democrat activist, who believed in the idea of the right to independence of the Confederate states and was charged in 1864 with various crimes, all punishable before the federal courts. A political decision was made by the executive to try him before a military commission, which had been established on 24 September 1862 by President Lincoln to try those accused in accordance with Martial Law.[156]

Such behaviour of executives during emergencies caught the attention of the UN Human Rights Committee, which did not entirely prohibit trials of civilians by State Security or Military Courts.[157] However, in contrast to this, the Committee stated that "the Criminal Code [may] be amended so as to prohibit the trial of civilians by military tribunals *in any circumstances*".[158] In its General Comment No 13 on Article 14, the Committee emphasised that this article prohibited the trials of civilians in front of Military Courts.[159]

Other commentaries by the ICCPR advise States to avoid violating their citizens' rights during Emergencies. They emphasise that "the State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trials of members of the military accused of military offences".[160] Indeed, in effect, military tribunals are designated to try military personnel and not civilians.[161] Even if it was deemed appropriate to try a civilian in front of a military court, certain rights have to be observed. According to a judgment of the ECtHR, military courts in such exceptional cases should preserve the rights of the individual to a hearing by a competent, independent and impartial tribunal, previously established by law, and his due process rights should not be violated.[162] In the general principle of law, every person has the right to be tried by regular courts.

This principle could be described as the rule of judicial independence, in which the courts follow procedures previously established by law. The creation of "tribunals that do not use the established procedures of the legal process … to displace the jurisdiction belonging to the ordinary courts or

154 Tony Allan Freyer *Little Rock on Trial* (University Press of Kansas 2007) at 69.
155 Charles Fairman and others, *History of the Supreme Court of the United States* (Macmillan 1971) at 182252. See also Charles Warren, The Supreme Court in United States History (Cosimo Classics 2011) at 140176.
156 Rossiter, above n 159, at 2627.
157 UN doc ICCPR A/52/40 (vol I) [1997] 58 para 381.
158 UN doc GAOR A/52/40 (vol I) 60 para 381.
159 ICCPR Article 14, see also UN doc GAOR A/56/40 (vol I) 47 para 12.
160 UN doc GAOR A/56/40 (vol I) 47 at 6162 para15.
161 *Castillo Petruzzi et al v Peru* [1999] IACtHR Series C no 52 162 para 86.10 (IACtHR)
162 At para 86.10.

judicial tribunals"[163] is considered to violate the right of an individual to a fair trial under international law. For example, under Article 8(1) of the American Convention on Human Rights, a presiding judge must be competent, independent and impartial. Moreover, under military law, judicial members of military courts are appointed by the executive, who also have authority to decide which military judges will be promoted, which places the independence of the military judges in doubt.[164]

The European Court of Human Rights also examined the competence of Martial Law and its conformity with Article 6(1) of the ECHR. In *Yalgin v Turkey* for instance, two of the applicants submitted that their right to a fair hearing had been breached as a consequence of their conviction by the Ankara Martial Law Court.[165] The court noted that the Martial Law Court had been "set up to deal with offences aimed at undermining the constitutional order and its democratic regime". It concluded, however, that it was not its task:[166]

> … to determine *in abstract* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicants' right to a fair trial.

In reviewing this case, it should be noted that the Martial Law Courts in Turkey comprise five members - two civilian judges, two military judges and an army officer - and that the military judges chosen, were appointed by a decree of the Minister of Defence. The army officer, however, was appointed on the proposal of the Chief of Staff, and in accordance with the rules governing the appointment of military judges.[167]

With regard to the existence of safeguards to protect the members of the Martial Law Court against external pressure, the European Court, in the case of *Yalgin v Turkey,* noted that" the military judges undergo the same professional training as their civilian counterparts".[168] Therefore, it stated that they:[169]

> … enjoy constitutional safeguards identical to those of civilian judges. They may not be removed from office or made to retire early without their consent; as regular members of a Martial Law Court they sit as individuals. According to

163 American Convention on Human Rights (General Secretariat, Organization of American States 1970) art 8(1).

164 *Castillo Petruzzi et al v Peru* above n 167, at paras 128-131; in para129, the Court quoted Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.

165 *Yalgin v Turkey* ECtHR (2001) at paras 43-44 <http://echr.coe.int>.

166 At para 4344. See also UNCHR, "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers. Professional Training No 9" (UNCHR 2003).

167 *Yalgin*,above n 171, at para 40. See also *Mehmet Ali Yilmaz v Turkey* TCtHR 29286/95.

168 *Yalgin*,at para 40.

169 At para 41.

> the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties.

However, according to the European Court, there are other aspects which could undermine the credibility and independence of military tribunals, which could be listed as follows:

(1) The military judges are servicemen who take orders from the executive.

(2) The military judges are subject to military discipline and promotion reports from their administrative superiors.

(3) The military judges' appointments are made by the military administrative authorities.

(4) The army officer in the Martial Law Court is "subordinate in the hierarchy to the commander of the army corps and not independent of these authorities".[170]

Therefore, the European court observed that:[171]

> Even appearances may be of some importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. When deciding whether, in a given case, there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified.

VII. Conclusion

The analysis conducted above has revealed that the relationship between law and politics is based on the respect that the executive has for the rule of law. The politics of emergency are embedded in an on-going political struggle. Additionally, the more respect that the executive shows for the rule of law, the more independence the judiciary has, and the higher the likelihood that justice can be achieved. One of the most severe results of the declaration of states of emergency is the exposure of civilians to accusations in front of military, or exceptional, courts.

170 At para 41- 42.
171 *Yalgin*, above n 171.

HEAD-SWAPPED PHOTOGRAPHS & COPYRIGHT: A NEW ZEALAND PERSPECTIVE

S. Che Ekaratne *

Abstract

With increasing advances in photo-manipulation technology, the digital alteration of personal photographs is becoming more frequent. One type of altered photograph is the "head-swapped photograph" featuring one person's head and a different person's body as a result of combining portions of two photos. This article examines to what extent New Zealand copyright law can protect against the unauthorised creation and dissemination of head-swapped photographs. While New Zealand copyright law provides many advantages in this regard, it also presents some challenges. The article identifies and evaluates some of these challenges, using an example scenario of a real-life head-swapping incident in New Zealand. The article goes on to posit a suggested approach specifically applicable to the infringement analysis of a head-swapped photograph and applies this approach to several scenarios. While this suggested approach is with reference to New Zealand law, it may also be helpful in other jurisdictions with similar copyright regimes.

I. Introduction

In the past, options for changing or manipulating a person's photograph were usually limited to physical alterations, such as drawing a moustache on the photographed face or gluing on a photo of a different person's head. With emerging technological developments, however, the potential for photo-manipulation is now both more sophisticated (in terms of the degree of alteration possible) and more simple (in terms of the ease of photo-manipulation software).[1] Furthermore, the distribution of altered images can now be faster and broader due to the internet and social media.

* Lecturer, School of Law, University of Canterbury. The author thanks Professors Ursula Cheer, Stephen Todd and the anonymous reviewers for their helpful comments. The author also thanks Wendy Smith for her kind assistance with newspaper sources.

1 For a summary of technological photo-alteration processes, see Raphael Winick "Intellectual Property, Defamation and the Digital Alteration of Visual Images" (1997) 21 Colum-VLA JL & Arts 143 at 150-152.

One type of photo-manipulation involves substituting a photographed individual's head with a different individual's head, or substituting a photographed individual's body with a different body. This type of altered photograph thus features one person's head and a different person's body as a result of combining portions of two photos. Such photographs are referred to in this article as "head-swapped photographs". With modern photo-manipulation technology, such a head-swapped photograph may not be immediately obvious: some viewers may believe it to be an unaltered photo of a single individual. This is especially likely because, unless an alteration is visually obvious, we usually assume that a photograph depicts reality.[2] Altered photographs can therefore "present different legal and artistic issues than any previously known method of creative expression".[3]

The creation and distribution of head-swapped photos without consent may result in emotional, reputational, or financial harm to the individual/s in question.[4] Such unauthorised alteration often occurs in relation to people who are in the public eye, such as entertainers and politicians. For instance, a 1971 magazine published a photograph featuring the actor Cary Grant's head superimposed on the body of a different man.[5] Similarly, in 2006, a New Zealand newspaper published a photo composed of film director Lee Tamahori's head and a Wellington performer's body.[6] A more recent head-swap, from 2016, involved the actress Meghan Markle after she was romantically linked to Prince Harry. Photographs of her head were "superimposed on to the body of a porn star [and] were published on an X-rated site".[7] With respect to such well-known individuals, "the use of digital technology gives … the ability to create images of celebrities that are far more damaging than any actual photograph".[8]

This kind of unauthorised photo-manipulation is not, however, limited to 'celebrity' individuals: it could happen to anyone. For example, an employee distributed to co-workers photocopied images featuring his supervisor's head-photo superimposed on sexually-explicit female bodies.[9] Such unconsented alteration is only likely to become more frequent with the increasing ease of image-manipulation through technological advances.

2 See Winick, above n 1, at 148.

3 At 148.

4 See Carissa Byrne Hessick "The Right of Publicity in Digitally Produced Images: How the First Amendment is Being Used to Pick Celebrities' Pockets" (2002) 10 UCLA Ent LR 1 at 4-6; Peter Jones "Manipulating the Law Against Misleading Imagery: Photo-Montage and Appropriation of Well-Known Personality" (1999) 21(1) EIPR 28 at 28.

5 *Grant v Esquire, Inc* 367 F Supp 876 (SDNY 1973).

6 Kristian South "Tamahori Shock New Sex Claims" *Sunday News* (5 February 2006) at 1-3. The head-swap was identified in Liz Smith "That's my dress, Lee" *The Wellingtonian* (16 February 2006) at 3.

7 Felicity Cross "Meghan Markle 'TOPLESS' pics shock - internet wags superimpose her head on porn stars body" (Daily Star, 6 November 2016) <www.dailystar.co.uk>.

8 Hessick, above n 4, at 4.

9 *Bowman v Heller* 420 Mass 517 (1995).

In New Zealand, those who are displeased about dissemination of head-swapped photos may have several legal options, depending on the circumstances. Potentially-applicable legal areas include copyright, defamation, moral rights, passing off, and laws specific to digital harms. From among these legal areas, this article focuses on copyright: specifically, to what extent New Zealand copyright law can protect against the unauthorised creation and dissemination of head-swapped photographs.

This article begins by delineating the scope of photographs that it discusses. It then describes advantages of copyright law for New Zealand plaintiffs attempting to counter head-swapped photos. Next, the article explains how photographs may be classified for purposes of New Zealand copyright protection. The article goes on to explain how copyright in a photograph could be infringed by head-swapping and subsequent dissemination of the head-swapped photo. To this end, a real-life head-swapping incident in New Zealand will be used as an example scenario. This is the head-swap involving Lee Tamahori's head and a Wellington performer's body mentioned above.[10] By means of this discussion, the article identifies and evaluates potential challenges in attempting to address head-swapping by means of a copyright infringement action. Finally, the article suggests an approach specifically applicable to the infringement analysis of a head-swapped photograph, and applies this approach to several scenarios.

II. Scope of Photographs Discussed

The focus of this article is the unconsented creation and dissemination of head-swapped photographs of identifiable human beings.

In this context, "identifiable" refers to the subject being identifiable in the original, unaltered photo. A "subject" of a photograph is an individual who is visible in the photograph. The subject may not be identifiable in the original photo due to being incidentally shown (such as in a crowd scene) or otherwise unrecognisable (such as due to lack of camera focus when the photo is taken). Such photographs with non-identifiable subjects fall outside the scope of this article.

The article limits its discussion to head-swapped photographs. As explained in the Introduction, a head-swapped photograph is one that features one person's head and a different person's body as a result of combining portions of two different photographs. This article does not address head-swapped photographs that have undergone further photo-manipulation, such as colour changes or additions of photo-objects to the individuals' bodies.[11]

10 See above n 6. As of March 2017, no reported New Zealand cases were found involving copyright infringement relating to head-swapped photos.

11 For examples of other forms of photo-manipulation, see Molly Torsen Stech "Detangling Copyright, Transformation and Ideas (in Photographs)" (2016) 11 JIPLP 339 at 343.

The assumption, therefore, is that the head and body portions have not been further modified when creating the head-swapped photo. This limited scope is useful to highlight the main challenges of copyright law in the head-swapping context within the length of this article.

This article's focus is the creation and dissemination of head-swapped photographs without the photograph subject's consent. 'Creation' here refers to the head-swapping, that is, the combining of head and body portions to create the final head-swapped version. A subject may have consented to the taking and/or dissemination of the original (unaltered) photo, but may not desire that photo to be disseminated in an altered or digitally-manipulated form. In many instances, "alteration of a photograph … may be in excess of a license to use the photograph as originally taken".[12] For example, an American author allows her website photo to be downloaded and reposted, but only under a Creative Commons licence that does not permit distribution of modified versions.[13] Another type of unauthorised dissemination is when the subject has consented to some form of dissemination of the altered photo, but the altered photo has been distributed beyond the scope of that consent. An example would be a head-swapped photo circulated as a joke among a small group of friends. The subject may be happy with this but not with anything beyond this small-group circulation.

The assumption of this article is that any appropriate legal protections would ideally be applicable to a broad group of people and contexts—to both celebrities and non-celebrities, and to both online and offline uses. While there may not be universal agreement that this is the scope of what should be protected, such a broadly-defined scope accounts for the diversity of persons who face these situations in real life. In this article, the term 'celebrities' denotes individuals generally identifiable due to their presence in the media or online. The term 'non-celebrities' refers to all other individuals, with an understanding that sometimes celebrity/non-celebrity status may not always be clear-cut. As discussed in the next section, one benefit of copyright law for New Zealand plaintiffs is that it is applicable to such a broad range of contexts.

III. Copyright's Advantages in the Head-Swapping Context

In the head-swapping context, copyright law can be a useful legal tool for several reasons. First, unlike some other jurisdictions, New Zealand does not recognise a specific cause of action for the unauthorised use of an individual's image—either as a privacy tort or as a separate legal action. The New Zealand Court of Appeal "do[es] not consider there is a cause of action in our law directed to unauthorized representation of one's image".[14] The same approach

12 J Thomas McCarthy *The Rights of Publicity and Privacy* (Thomson Reuters, 2016) at § 10:37.

13 See NK Jemison "About" (2017) <http://nkjemisin.com>. Copyright in this photo is owned by the photograph subject. See McCarthy, above n 12.

14 *Hosking v Runting* [2005] 1 NZLR 1 (CA) [171].

is found in English law.[15] By contrast, the laws of most American states recognise publicity rights, including image rights, in some form.[16] Therefore, while plaintiffs in some other jurisdictions have used "image rights" as a basis for legal action against head-swapping,[17] New Zealand plaintiffs do not have this option.

Second, compared to many other legal areas, copyright law can be an advantageous tool for a head-swapping plaintiff. Copyright has been described as "the most effective [legal] tool against the unauthorized alteration of motion pictures, videotaped images and photographs".[18] Even outside the context of photo-manipulation, it has been recognised that many "[o]ther legal actions [besides copyright] … are limited in scope and rarely applicable to prevent the unauthorised distribution of an individual's photograph".[19] For instance, defamation seems at first glance to be a useful cause of action in a head-swapping context. However, with respect to the New Zealand head-swap mentioned in the Introduction,[20] a media law commentator pointed out that the potential success of a defamation lawsuit was not clear-cut.[21] This is exemplified by head-swapping cases in other jurisdictions where defamation claims failed.[22] Similarly, privacy law may not be applicable in many head-swapping circumstances.[23]

Another legal option is contract law: that is, contracting that a photograph would not be altered. This option was also mentioned by the aforementioned media law commentator regarding the New Zealand Lee Tamahori head-swap.[24] Yet people often do not contractually specify future uses of their photos, either due to legal ignorance or due to a lack of bargaining power.

15 See *Fenty v Arcadia Group Brands Ltd* [2015] EWCA Civ 3 (22 January 2015) [29] ("There is in English law no 'image right' or 'character right' which allows a celebrity to control the use of his or her name or image.").

16 See McCarthy, above n 12, at § 6:3. For the distinctions between publicity rights and copyright in the US, see § 11:52.

17 See, for example, *Grant v Esquire, Inc* 367 F Supp 876 (SDNY 1973); *Hoffman v Capital Cities/ABC, Inc*, 255 F 3d 1180 (9th Cir 2001).

18 Winick, above n 1, at 152.

19 Susan Corbett "The Case for Joint Ownership of Copyright in Photographs of Identifiable Persons" (2013) 18 MALR 330 at 331-332. For further discussion of other causes of action in New Zealand see 333-336, 344, 348.

20 See above n 6.

21 Professor Ursula Cheer was quoted with regard to defamation law as follows: "there's an identity issue and [the plaintiff] would have to argue that people would think worse of her". Smith, above n 6, at 3. As further analysed in Part V.C below, a copyright infringement lawsuit would also not have been successful due to ownership issues.

22 See, for example, *Grant v Esquire, Inc* 367 F Supp 876, 878 (SDNY 1973); *Charleston v News Group Newspapers Ltd* [1995] 2 WLR 450 (HL). See also Dinika Roopani "The Scope and Content of a 'Publication' on the Internet for the Purposes of Defamation Law" (2015) 20 MALR 33.

23 For a discussion of the relationship between privacy law and copyright law in New Zealand, see Susy Frankel "The Copyright and Privacy Nexus" (2005) 36 VUWLR 507. On the limitations of New Zealand privacy law in the context of unauthorised use of photographs, see Corbett, above n 19, at 331, 334-335, 339, 348.

24 See Smith, above n 6, at 3.

This is highlighted by many real-life instances of head-swapping—including the Lee Tamahori head-swap, where no contractual limitation seemed to exist. Moreover, even photograph subjects that do contractually limit photo-alteration may find that the contractual language does not account for future technological developments.[25]

Another potentially useful legal area in New Zealand is the moral right to object to derogatory treatment of a work. This right encompasses alterations that are prejudicial to the honour or reputation of the work's author or director.[26] The usefulness of this cause of action can be limited, however, since the photograph's subject would often not be the author or director of the photograph or underlying film.[27] Moreover, New Zealand moral rights in general have been criticised because "the limitations of the rights are so severe that they are rarely of much utility", with this particular (derogatory treatment) moral right described as "unduly limited in New Zealand".[28] This approach seems to follow that of several other common law jurisdictions. For instance, the UK has been described as a jurisdiction "that take[s] a grudging attitude toward moral rights".[29]

The above discussion is not intended to suggest that copyright law will *always* be applicable to *all* instances of head-swapped photos. This article will go on to identify potential challenges in attempting to address head-swapping by means of a copyright infringement action. It is true, however, that despite these challenges, copyright law holds certain comparative advantages. For instance, copyright persists even after the creator's death. Copyright protection can last considerably longer than the life of the author who created the photograph.[30] Consequently, heirs of a copyright owner may be able to utilise copyright law to prevent use of a photo even after that person's death. This is not the case with some other causes of action, such as defamation: "the dead cannot be defamed".[31] Furthermore, New Zealand authors and copyright owners do not need to take any affirmative steps (such as registration) in order to obtain this posthumous protection. There is in fact no government-run copyright registry in New Zealand. This can be contrasted with registered trade marks, which can last indefinitely but require registration renewals every ten years.[32] Copyright law can therefore be an administratively simpler way to ensure long-term protection.

25 See Winick, above n 1, at 181-183.
26 Copyright Act 1994, s 98(1). Exceptions apply: see ss 100-101.
27 See Part V.C below.
28 Susy Frankel *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, New Zealand, 2011) at 300.
29 David Vaver "Moral Rights Yesterday, Today and Tomorrow" (1999) 7 IJLIT 270 at 272. On the Canadian approach to moral rights, see also at 275-276.
30 Copyright durations for different types of photographs are further discussed in Part V.B below.
31 Christina Michalos "Virtual Actors and the Law: Protection Provided by Intellectual Property Law Against Use of Computer-Manipulated Images of Performers" (1997) 8(6) Ent LR 205 at 209.
32 Trade Marks Act 2002, ss 57, 58.

The third main reason for copyright's usefulness in this context is its ability to provide a comparatively broad scope of protection, particularly with regard to non-commercial uses. As noted in the previous section, this article assumes that appropriate legal protections should apply to a broad group of people and contexts. Copyright protection applies to photographs in both commercial and non-commercial contexts. A photo disseminated by a personal social media account could receive the same level of copyright protection as a photo plastered on an advertising billboard. Due to this aspect of copyright law, it can be a useful tool for plaintiffs who are not celebrities and who do not use their image for any commercial gain. This can be contrasted with the common law tort of passing off and with registered trade marks, both of which usually require some use in a commercial or business context. A registered trade mark may be revoked if:[33]

> … at no time during a continuous period of three years or more was the trade mark put to genuine use in the course of trade in New Zealand … in relation to goods or services in respect of which it is registered.

Similarly, passing off can be used to prevent unconsented use of a person's image—but usually only when that person has previously utilised her image for merchandising or endorsement.[34] This is due to the passing off requirement of business-related goodwill.

Another advantage of copyright for plaintiffs is its applicability to both online and offline dissemination of a copyrighted work. The scope of copyright law as a legal tool is broad and not limited to digital misuse. This is in contrast to laws that target various harms created only by digital or online means, such as the Harmful Digital Communications Act 2015.[35]

Finally, a review of New Zealand copyright legislation was launched in June 2017, with an issues paper due to be released for public consultation in 2018.[36] Discussions of New Zealand copyright law are therefore especially timely.

As explained in this section, copyright law can be an advantageous tool for New Zealand plaintiffs attempting to counter head-swapped photos. On the other hand, copyright law can pose challenges due to ownership issues, as well as due to how the test for infringement is structured. First, however,

33 Section 66(1)(a).

34 See *Fenty v Arcadia Group Brands Ltd*, above n 15; *Irvine v Talksport Ltd* [2003] EWCA Civ 423 (1 April 2003). As one commentator notes: "passing off can quickly dispose of claims where the plaintiff is not a well-known individual who has a commercially valuable reputation to exploit". David Tan "The Fame Monster Reloaded: The Contemporary Celebrity, Cultural Studies and Passing Off" (2010) 32 Syd LR 291 at 301.

35 For a general critique of the Harmful Digital Communications Act 2015, see Stephanie Frances Panzic "Legislating for E-Manners: Deficiencies and Unintended Consequences of the Harmful Digital Communications Act" (2015) 21 Auckland UL Review 225.

36 "Review of the Copyright Act 1994" (Ministry of Business, Innovation and Employment, 20 September 2017) <http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/review-copyright-act-1994>.

it is useful to examine how a photograph may be defined for purposes of copyright protection.

IV. Photographs as Defined by New Zealand Copyright Law

Under the New Zealand Copyright Act 1994, copyright exists in certain defined types of copyrightable works. A photograph would usually be classified as an "artistic work"[37] since artistic work is defined to include "a … photograph … irrespective of artistic quality".[38]

A photo that is the result of capturing a still image from a film is classified differently for copyright purposes. According to the statute:[39]

> … photograph means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced; but *does not include a film or part of a film* (emphasis added).

For this purpose, "film means a recording on any medium from which a moving image may by any means be produced".[40] Accordingly, a few-seconds-long YouTube video and a two-hour-long movie could both be films for copyright purposes. Making a still image photograph from such a copyright-protected film could infringe the film copyright by means of copying, as the statute defines "copying" to "include[], in relation to a film … the making of a photograph of the whole or any substantial part of any image forming part of the film …"[41]

As a result of these statutory definitions, a still image photograph created from a movie or other video would not be classified as a photograph (an artistic work) for copyright purposes, but rather as part of a film.[42] The creation and dissemination of such a video-still (even without any alteration) could infringe copyright in the underlying film. Since in reality many photographs are created in this way, video-still photographs are included in the scope of this discussion in addition to directly-taken photographs.

There are some relevant differences in how New Zealand copyright law treats directly-taken photographs as against video-stills. Some of these differences are described below.

37 Copyright Act 1994, s 14(1)(a).
38 Section 2(1), definition of "artistic work", para (a)(i).
39 Section 2(1), definition of "photograph".
40 Section 2(1), definition of "film".
41 Section 2(1), definition of "copying", para (d).
42 Frankel "The Copyright and Privacy Nexus", above n 23, at 517; Paul Sumpter *Intellectual Property Law: Principles in Practice* (2nd ed, CCH New Zealand, Auckland, 2013) at 29.

V. Head-Swapped Photographs & Copyright Infringement

When a photograph is altered and disseminated without the subject's consent, the copyright-related considerations can be different in comparison with unaltered photographs. This part of the article will explain how copyright in a photograph could be infringed by head-swapping and subsequent dissemination of the head-swapped photograph. By means of this discussion, the article identifies potential challenges in attempting to address head-swapping by means of a copyright infringement action.

In examining the relevant copyright concerns, the following discussion will use a real-life head-swapping incident as an example scenario. This incident is henceforth referred to as the "Tamahori head-swap".

The Tamahori head-swap occurred after New Zealand film director Lee Tamahori was arrested in the US for allegedly soliciting as a prostitute while wearing a black dress and wig.[43] In reporting this event, New Zealand newspaper *Sunday News* illustrated its news article with a photograph that appeared to be Lee Tamahori wearing a black dress.[44] In fact, however, this was a head-swapped photograph. The head was of Lee Tamahori and the body was of a female performer from Wellington (who did not wish to be identified but was unconnected with Lee Tamahori).[45] The photo from which the body portion was sourced was originally published in the fashion pages of another newspaper, the *Dominion Post*.[46] The subject of this fashion photograph claimed she had only given permission for her photo to be used for that purpose.[47] However, this photo had been digitally-altered by attaching Lee Tamahori's head to her body (the source of the Lee Tamahori head-shot is unclear).

The subject of the body portion was not pleased about the head-swapping. With respect to the photos taken for the *Dominion Post*'s fashion section, the subject stated:[48]

> I just thought they were specifically for what we agreed to use them for. I think it is quite scary the way the media can take things and use them for whatever they want.

43 The prostitution-related charges were later dropped when he pleaded no contest to criminal trespass "007 director makes sex case deal" (BBC News, 24 February 2006) <http://news.bbc.co.uk>.

44 Kristian South "Tamahori Shock New Sex Claims" *Sunday News* (5 February 2006) at 1-3.

45 See Smith, above n 6, at 3.

46 At 3.

47 At 3.

48 At 3.

The editor of the *Sunday News* offered an apology[49] and there was no indication of any legal action. In future head-swapping situations, however, it is possible that a subject may initiate legal action. It is therefore useful to analyse the likelihood of success such a subject may have in an action for copyright infringement under New Zealand law.

The remainder of this section will examine whether head-swapped photos could constitute copyright infringement under New Zealand law, using the Tamahori head-swap as an example scenario. Since the source of the Lee Tamahori head-shot is not clear, the potential plaintiff in this example scenario will be the subject of the body portion (the performer photographed for the *Dominion Post* fashion section). The unaltered *Dominion Post* photo from which the body portion was sourced will be referred to as the "fashion photo", to distinguish it from the *Sunday News* "head-swapped photo" featuring Lee Tamahori's head and the performer's body.

To establish copyright infringement in New Zealand, a plaintiff would usually need to establish the following:

> (1) there is a work in which copyright can subsist;
>
> (2) copyright does subsist in the work;
>
> (3) the plaintiff owns the copyright in the work [or is an exclusive licensee]; and
>
> (4) the copyright in the work has been infringed.[50]

In the Tamahori head-swap scenario, the "work" would be the fashion photo (from which the subject's body portion was sourced for the head-swapped photo).

Taking these points in turn:

A. Was there a work in which copyright can subsist?

As described in Part IV above, under s 14 of the Copyright Act a photograph could be either part of a film (if a still-image from a video) or an artistic work (if directly taken). Here the fashion photo was directly taken and was not a video-still. It accordingly qualifies as a photograph and therefore an artistic work.

49 At 3. The *Sunday News* editor was quoted as stating: "We endeavour to be as careful as possible and if we have slipped up this time we would apologise for any offence caused."

50 These requirements were laid out in *PS Johnson & Associates Ltd v Bucko Enterprises Ltd* [1975] 1 NZLR 311 (SC) 315. This case was decided under an older version of the Copyright Act, and involved industrial designs. Under the current Copyright Act 1994, matters relevant to industrial designs and underlying drawings can be different from other aspects of copyright law.

B. Did copyright subsist in the work?

Copyright would not subsist if the copyright owner had given up copyright or if the copyright had expired. As discussed above, the fashion photo is an artistic work for copyright purposes and therefore copyright in it would only expire "50 years from the end of the calendar year in which the author dies".[51] (Copyright in a video-still photo would have a different expiration date that is not dependent on when the author died.[52] Many of these durational periods may in future be increased to 70 years.[53]) Thus, any copyright in the fashion photo would not have expired. The photo would also not fall under a category of works that cannot be copyright-protected under New Zealand law.[54] Neither is there any evidence of a Creative Commons licence or other waiver of copyright. It seems therefore that, at the point of publication of the head-swapped photo, the fashion photo was in copyright.

Another requirement for copyright subsistence is that the photograph has a relevant link with New Zealand or a prescribed foreign country. This could be via the author's legal status (such as citizenship or domicile) or via the country where the work was first published.[55] Regarding the fashion photo in this scenario, the author for copyright purposes would likely be the person who took the fashion photo.[56] That person's identity, and therefore legal status for copyright purposes, is unclear. Still, we can assume that the fashion photo qualifies via the country where the work was first published[57] as it was published in a New Zealand newspaper.

For copyright to exist, the potentially-infringed work must also be original for copyright purposes. In New Zealand, this means it must be neither a copy of another work nor copyright-infringing,[58] and "must be the product of more than minimal skill and labour".[59] There is no indication that

51 Copyright Act 1994, s 22(1). For artistic works (including photographs) that are not computer-generated, the 'author' is the person who created the work, ss 5(1), 5(2)(a). If the author of the photograph is unknown, copyright expires "at the end of the period of 50 years from the end of the calendar year in which it is first made available to the public by an authorised act" s 22(3).

52 Copyright in a film expires the later of (i) 50 years from the end of the calendar year in which the film was made, or (ii) 50 years from the end of the calendar year in which the film was made available to the public by an authorised act, if so made available before the end of period (i). Copyright Act 1994, s 23(1).

53 Trans-Pacific Partnership Agreement Amendment Act 2016, ss 5, 6. These legislative changes can only come into force when the Trans-Pacific Partnership Agreement enters into force for New Zealand. Section 2. Following the United States' withdrawal, other member countries are consulting on next steps for the Agreement. "Trans-Pacific Partnership" (New Zealand Ministry of Foreign Affairs & Trade) <https://www.tpp.mfat.govt.nz/>.

54 These include items like statutes, court judgments and some government reports - so photographs would not fall under this category. Copyright Act 1994, s 27.

55 Copyright Act 1994, ss 17-19. "Prescribed foreign country" is defined in s 2(1). "Publication" and "publish" are defined in s 10.

56 See Part V.C below.

57 Copyright Act 1994, s 19. "Publish" is defined in s 10.

58 Section 14(2).

59 *Henkel KGaA v Holdfast New Zealand Ltd* [2006] NZSC 102 (30 November 2006) at [37].

the fashion photo was copied from another work or that it was copyright-infringing. The fashion photo is also likely to meet the requirement of being the product of more than minimal skill and labour, especially given that a photo taken for a newspaper's fashion pages would entail set-up, lighting choices and so on. Note that an artistic work is defined to include "a … photograph … irrespective of artistic quality".[60] The reference to "irrespective of artistic quality" suggests that even a photograph taken by means of a hasty point-and-click could be copyright-protected under the "low"[61] threshold for originality in New Zealand. However, in some other instances the level of originality may be more questionable.[62]

In the Tamahori head-swap scenario, therefore, copyright most likely does subsist in the fashion photo. The analysis of whether the fashion photo was infringed by the alteration can therefore proceed.

C. Is the plaintiff the copyright owner or an exclusive licensee?

Actions for copyright infringement can usually be brought only by the copyright owner or by an exclusive licensee.[63] In many instances, the photograph's subject is neither. Therefore, the subject is often unable to sue for copyright infringement. This is one of the biggest challenges with respect to using copyright to protect against photo-alteration.

The first owner of copyright in a work is usually the author of the work,[64] who in turn is defined as the person who created the work.[65] In the case of a film as statutorily-defined, the person who created it (that is, the author, and therefore the default copyright owner) is "the person by whom the arrangements necessary for the making of the … film are undertaken".[66] This would apply to video-still photographs. With directly-taken photos (that are not video-stills) the person who created it (the author) would usually be the

60 Copyright Act 1994, s 2(1), definition of "artistic work", para (a)(i).

61 *Henkel*, above n 59, at [38]. This can be compared with the American standard for copyright originality which requires "at least some minimal level of creativity". *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340, 345 (1991). See also Susan Corbett "The Worth of a Picture: Photography, the Media and the Law of Copyright" (2000) 2 New Zealand Intellectual Property Journal 201 at 201-202.

62 See Susy Frankel, above n 23, at 518 (mentioning that under New Zealand copyright law, "[a] security camera film may not reach the requisite originality threshold, but each case must be assessed on its facts.").

63 Copyright Act 1994, ss 120(1), 123(1). Section 2(1) provides that: "exclusive licence means a licence in writing, signed by or on behalf of a copyright owner, authorising the licensee, to the exclusion of all other persons (including the copyright owner), to exercise a right that would otherwise be exercisable exclusively by the copyright owner."

64 Section 21(1).

65 Section 5(1).

66 Section 5(2)(b). For films the "author" for copyright purposes may be either a natural person or a body corporate, at s 5(3).

person who took the photograph.[67] The author and therefore copyright owner of a directly-taken photograph would thus usually be the photographer. We can see therefore that, unless the photo is a selfie, the copyright owner in New Zealand would generally be the photographer and not the photograph's subject.

This often means the photographer has exclusive rights to copy, alter and disseminate the photo[68] and the photograph's subject does *not* have these rights (absent a licence from the photographer). And unless the subject is either the copyright owner or an exclusive licensee, she would not be able to sue for infringement,[69] even if the photo is used without her consent.

There are, however, a few exceptions under which someone besides the photographer could be the copyright owner. These include:

- The photographer or other copyright owner could legally transfer copyright ownership to the subject by contractual assignment.[70] As an example: an American author purchased the copyright in her photo from the photographer and posted the photo on her website.[71] Under New Zealand law such a copyright assignment must be "in writing signed by or on behalf of the assignor".[72]
- For certain types of works (including statutorily-defined photographs, but not films) made by an employee in the course of employment, the employer can be the copyright owner.[73] In real-life situations this exception is less relevant for photographs of non-celebrities used for non-commercial purposes.
- For certain types of works (including both photographs and films) made in pursuance of a commission, the commissioner can be the copyright owner.[74]

The two exceptions for employers and commissioners are subject to any agreement to the contrary,[75] so the relevant parties can contract out of these default rules. For example: imagine the subject commissions a professional photographer to take a photograph of her. As the commissioner, the subject would likely own the copyright in that photo. However, the photographer's

67 For such works, the author must generally be a natural person. Clive Elliott, Jeremy Finn and others, *Intellectual Property Law* (LexisNexis 2013) at [COP5.2]. However, it is possible that in some instances the person who created the photograph may be someone besides the person who took it. See Corbett, above n 19, at 340-341 (comparing the New Zealand and Australian statutory definitions of a photograph's author); Kevin Garnett and Alistair Abbott "Who is the 'Author' of a Photograph?" (1998) 20(6) EIPR 204 at 206-208.

68 Copyright Act 1994, s 16(1)(a)-(h).

69 See above n 63.

70 Copyright Act 1994, s 113(1)(a).

71 See Jemison, above n 13.

72 Copyright Act 1994, s 114. Section 2(1) defines "writing".

73 Copyright Act 1994, s 21(2).

74 Section 21(3).

75 Section 21(4).

standard contract may specify that the photo's copyright belongs to the photographer. Many photographers' standard contracts contain such a clause to allow the photographer to charge customers for prints.[76] Now imagine that the subject agrees to this standard contract—perhaps not reading it as thoroughly as she should have. In this instance, the subject has contracted out of the usual commissioning rule such that the photographer still owns copyright in the photo.

Even in this situation, the subject could still have some rights to limit the copyright owner's use of the photo under the section 105 moral right.[77] To return to the above example: under s 105, without the subject's consent the photographer may not issue copies of the photo to the public, and may not exhibit, show or communicate the photo to the public—*if* the subject commissioned the photo "for private and domestic purposes"[78]. If the subject did *not* commission the photo for private and domestic purposes, the photographer would *not* face such restrictions since as the copyright owner s/he has the exclusive right to do acts of copying, showing and so on.[79]

In the Tamahori head-swap scenario, the copyright in the initial, unaltered fashion photo was in fact owned by the newspaper that printed it, not by the photographer or the subject of the photo. This could be because the photographer who took the photo was commissioned by the newspaper, or was an employee, or because the copyright was assigned by the photographer to the newspaper.[80] As the copyright owner, this newspaper could sue the other for copyright infringement regarding the head-swapping, but did not seem to have any interest in doing so. This may be because both newspapers were 'sister publications' of the same company.[81]

As for the subject (who did have an interest in preventing the head-swapped photo) there is no evidence of an employment or commissioning situation that would result in her owning the copyright. There is also no evidence of an assignment of copyright to her or that she was granted an exclusive licence. The subject therefore could not sue for copyright infringement. The subject also could not make use of the section 105 moral right, because she did not commission the fashion photo for private and domestic purposes. Even if the subject had commissioned the fashion photo, it would have been for purposes of the fashion page of the newspaper, which is neither private nor domestic.

76 Frankel, above n 23, at 516.

77 Copyright Act 1994, s 105.

78 Copyright Act 1994, s 105(1). As of March 2017, no reported New Zealand case was found that analysed the meaning of "private and domestic purposes".

79 Section 16.

80 The *Dominion Post* was reported as the copyright owner of the fashion photo, with no further details. See Smith, above n 6, at 3.

81 The *Sunday News* and the *Dominion Post* are described as "sister Fairfax publications" in an article published shortly afterwards. David Cohen "Newspaper exposes sister rag's cross-dressing" *National Business Review* (3 March 2006). As of March 2017, both newspapers are still listed on Fairfax Media Ltd's website "Fairfax Daily & Sunday Newspaper Subscriber Contacts" (2017) <www.fairfaxmedia.co.nz>.

(1) Addressing the challenge of the ownership issue

The above analysis demonstrates how these rules relating to copyright ownership can pose a challenge for a photograph's subject who wishes to bring an infringement action. While copyright can be a useful tool for individuals whose photos have been digitally manipulated, the issue of ownership can often block their ability to sue for infringement. This is more likely to be a problem for those who are not celebrities and/or do not utilise their images in a commercial context. Individuals with a business interest in their image would likely have received legal advice to secure copyright ownership by means of the commissioning rule or by assignment.[82]

One solution to this issue involves joint authorship. It has been recognised that:[83]

> [i]n relation to photographs, where it is sometimes more difficult than in the case of works of fine art to identify the originator of the work, there is … clearly scope for increased application of the principles of joint authorship.

In the New Zealand context, it has been proposed that copyright in certain kinds of photos (where a person is identifiable and non-incidental) should be jointly owned by the subject/s and the photographer.[84] Conversely, the idea of property rights for New Zealand photograph subjects has been criticised as inappropriate on the basis that subjects would usually not have invested the skill and labour necessary for originality.[85]

In New Zealand, a copyright work of joint authorship is defined as "a work produced by the collaboration of 2 or more authors in which the contribution of each author is not distinct from that of the other author or authors".[86] The work must also be made in furtherance of some common design.[87] As a general rule, the authors of a work of joint authorship would jointly own the copyright.[88] Accordingly, if copyright in a photo is jointly owned by subject and photographer, the subject would have more control over how the photograph is used.

In order to minimise uncertainties over the scope of the subject's control, any such legal reforms regarding joint copyright ownership should be placed

82 This is probably more accurate for directly-taken photographs than for video-stills taken from a commercial film, as the film studio would usually own copyright in the latter. See Navin Katyal "The Unauthorized Dissemination of Celebrity Images on the Internet … In the Flesh" (2000) 2 Tulane Journal of Technology and Intellectual Property 1 at 6-7.

83 Garnett and Abbott, above n 67, at 209.

84 See Corbett, above n 19. Corbett suggests exceptions for when there is an outweighing public interest in freedom of information and for professional commissioned photographs. See at 332 n 16, 348-349.

85 See Frankel, above n 23, at 520.

86 Copyright Act 1994, s 6(1).

87 Clive Elliott, Jeremy Finn and others, above n 67, at [COP6.2], citing *Glogau v Land Transport Safety Authority of New Zealand* [1997] 3 NZLR 353 (HC).

88 At [COP6.2].

in the statute. For instance, the relevant United Kingdom statute provides that:[89]

> Where copyright (or any aspect of copyright) is owned by more than one person jointly, references in this Part to the copyright owner are to all the owners*, so that, in particular, any requirement of the licence of the copyright owner requires the licence of all of them* (emphasis added).

The italicised wording specific to licences is not present in the equivalent New Zealand statutory section.[90] Relevant commentary suggests that in New Zealand too, all joint copyright owners would need to consent in order to license an otherwise-infringing act.[91] Commentary also suggests that if the photo's subject is a joint owner, the subject could sue another joint owner (such as the photographer) for a potentially infringing act[92] (such as head-swapping). With respect to a joint owner's ability to sue a third party (that is, not another joint owner) for infringement: it is likely, though not entirely clear, that this can be done even without the consent of other joint owners.[93] If so, the subject could bring an infringement action against a third party who has altered and disseminated the photo even if the photographer or other copyright owner has no wish to be involved in the suit.

If implemented, such a reform involving joint ownership may solve many of the above-described problems relating to ownership. It may not, however, be a solution for another problem: uncertainty over whether the head-swapped photo has been changed to the extent that a substantial part has been taken. This issue is examined in the next section.

D. Has the copyright in the work been infringed?

Even if a photograph subject can sue for infringement, in head-swapping situations there may be other challenges with respect to whether the copyright has in fact been infringed.

For primary copyright infringement in New Zealand, a work's copyright is infringed when someone who is not the copyright owner or a licensee does a "restricted act" in relation to the whole work or a substantial part of the work.[94] The restricted acts are the potentially infringing acts which the copyright owner has the exclusive right to do in New Zealand.[95] One issue with head-swapped photos is that the types of potentially infringing acts can

89 Copyright, Designs and Patents Act 1988 (UK), s 173(2).
90 See Copyright Act 1994, s 8(1).
91 See Elliott, Finn and others, above n 67, at [COP6.2]; Paul Sumpter *Intellectual Property Law: Principles in Practice* (2nd ed, CCH New Zealand 2013) at 48.
92 See Elliott, Finn and others, above n 67, at [COP6.2].
93 At [COP120.4].
94 Copyright Act 1994, s 29.
95 The restricted acts are listed in Copyright Act 1994, s 16, and further detailed in ss 30-34.

be more limited than for an unaltered photo. The most relevant restricted (that is, infringing) acts with respect to photographs include: copying the work, issuing copies to the public by sale or otherwise, showing or communicating the work to the public, and making an adaptation of the work.[96]

The question at this stage is which of these restricted acts could constitute infringement in a given head-swapping situation. The answer depends on the type of photo. Both directly-taken photographs and video-stills can involve copyright infringement by the restricted act of copying. This is because "[t]he copying of a work is a restricted act in relation to every description of copyright work."[97] Indeed, the statute expressly defines copying to "include, in relation to a film … the making of a photograph of the whole or any substantial part of any image forming part of the film …"[98] Similarly, copyright in both directly-taken photographs and films can be infringed by means of issuing copies to the public[99] and by communicating the work to the public.[100] In contrast, showing the work in public is a restricted act for films, but not for artistic works such as directly-taken photographs.[101]

Infringement by means of making an adaptation is not a restricted act for either films or directly-taken photographs. This is because making an adaptation is a restricted act only for literary, dramatic and musical works.[102] This limitation with respect to infringement by adaptation is especially relevant for head-swapped photographs. It indicates that the act of head-swap photo-manipulation by itself cannot constitute infringement by making an adaptation. Therefore, a plaintiff arguing copyright infringement for an altered photograph would need to show infringement by means of some other restricted act.[103] As discussed above, this could be copying, issuing, communicating and so on.

As mentioned earlier, primary infringement by means of *any* restricted act refers to the doing of that act "in relation to the work as a whole or any substantial part of it".[104] In the case of altered photographs, the issue of whether a substantial part was taken is especially pertinent because the act of alteration itself cannot constitute infringement by making an adaptation.

Even if the subject is still identifiable and recognisable in the head-swapped photo, a defendant could argue there was no infringement because a substantial part of the initial photo was not involved. This would be relevant for the act of altering the photo, as this act could infringe the initial photo

96 Section 16(1)(a)-(b), (e)-(g).
97 Section 30.
98 Section 2(1), definition of "copying", para (d).
99 Section 31. "Issue to the public" is defined in s 9.
100 Section 33. Section 2(1) states: "communicate means to transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning".
101 Section 32(2). "Showing" is not defined in the statute's interpretation section, s 2.
102 Section 34(1). "Adaptation" is defined in s 2(1).
103 See Frankel, above n 28, at 282.
104 Copyright Act 1994, s 29(2)(a).

by copying a substantial part of it when creating the head-swapped version. It would also be relevant in the subsequent dissemination of the head-swapped photo, as there could be infringement by issuing or communicating (or *showing*, for a video-still) a substantial part of the original photo when disseminating the head-swapped version.

With regard to infringement by copying, case law has established that:[105]

(a) The reproduction must be either of the entire work or of a substantial part.

(b) There must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof.

(c) There must be some causal connection between the copyright work and the infringing work. The copyright must be the source from which the infringing work is derived.

Among these three requirements, the "causal connection" aspect would likely be satisfied in many head-swapping situations, including the Tamahori head-swap. For "objective similarity", the requirement is for similarity between the allegedly infringing work (that is, the head-swapped photo) and a *substantial part of* the copyright work (that is, of the fashion photo). If what was copied is considered a substantial part, establishing objective similarity would be straightforward in many head-swapping scenarios. This is because what was copied would be identical, not just objectively similar. For instance, it seems the body portion in the Tamahori head-swapped photo was identical to the body portion in the fashion photo. (Following the scope of photos examined in this article, this is assuming that the copied portion is not further modified when creating the head-swapped photo. If it is further modified, the objective similarity analysis would be more complex.)

The main issue is, therefore, whether a substantial part was taken. As discussed above, this would be relevant for other forms of infringement too, not just by copying. While the level of the work's originality is relevant to the infringement analysis,[106] the analysis below proceeds on the basis that the Tamahori fashion photo is sufficiently original (as discussed above under Part V.B) for this not to be an issue.

According to the New Zealand Supreme Court, assessing whether a substantial part was taken "can sometimes be a difficult matter of evaluation and is usually the most difficult question which arises in copyright cases".[107] The "substantial" aspect does not refer solely to the amount; it can be a

105 *Wham-O MFG Co v Lincoln Industries* [1984] 1 NZLR 641 at 666 (CA).

106 *Henkel*, above n 59, at [38], [41]; *Land Transport Safety Authority of New Zealand v Glogau* [1999] 1 NZLR 261 (CA) at 271.

107 *Henkel* at [44].

qualitative analysis.[108] This is especially the case if the allegedly infringed work is an artistic work, since "[w]hat amounts to a substantial part in an artistic work case depends more on qualitative visual impression rather than on quantitative analysis".[109] Therefore, the defendant's altered photo may be infringing even if it retains only a quantitatively small part of the plaintiff's photo—if the part retained is qualitatively a substantial part. This analysis is contextual and "is a subject upon which, in borderline cases, minds can reasonably differ".[110] The New Zealand Supreme Court has described this qualitative "substantial part" analysis in terms of whether what has been copied "is the essence of the copyright work".[111]

It is important to note that the question here is whether a substantial part of the plaintiff's copyrighted work features in the defendant's work—*not* on whether a substantial part of the defendant's work is from the plaintiff's.[112] A head-swapped photo could be copyright-infringing even if most of it consists of aspects entirely unrelated to the plaintiff's photo—as long as a substantial part (or the whole) of the plaintiff's photo is to be found in the head-swapped photo. This approach has been followed by the copyright law of several other jurisdictions such as England[113] and the United States.[114] A commentator justifies this approach by means of the economic-incentive theory, stating that: [115]

> [t]he economic incentive provided by this [copyright] monopoly would be rendered meaningless if others could take existing images without permission and use and manipulate them at will, even if their alterations add some value to the original.

108 As the New Zealand Court of Appeal stated: "Whether a part of a copyright work is a substantial part must be decided by its quality rather than by its quantity." *Wham-O MFG Co v Lincoln Industries*, above n 105, at 666 (CA). See also *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 276 (HL).

109 *Henkel*, above n 59, at [44], citing *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 279 (HL).

110 At [44], citing *Designer Guild Ltd v Russell Williams (Textiles) Ltd* [2000] UKHL 58, [2000] 1 WLR 2416 (HL).

111 At [44], citing *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 at 678 (CA).

112 See *Bleiman v News Media (Auckland) Ltd* [1994] 2 NZLR 673 at 679 (CA) ("The fact that separate original work has been added to an infringement does not make it any the less an infringement.").

113 See *Designer Guild Ltd v Russell Williams (Textiles) Ltd,* above n 110, at 2425 (HL) ("But while the copied features must be a substantial part of the copyright work, they need not form a substantial part of the defendant's work"). On the influence of European Union law on the English 'substantial part' analysis, see below Part V.D.

114 According to a leading US copyright treatise, "[i]t is entirely immaterial that, in many respects, plaintiff's and defendant's works are dissimilar, if in other respects, similarity as to a substantial element of plaintiff's work can be shown". Melville B Nimmer & David Nimmer *Nimmer on Copyright* (Matthew Bender, 2015) at § 13.03[B][1][a]. This is with respect to the US 'substantial similarity' analysis of copyright infringement (which is similar to, but not the same as, the New Zealand 'substantial part' analysis). See also Winick, above n 1, at 154.

115 Winick, above n 1, at 154.

To illustrate this with the Tamahori head-swap: the question is whether the head-swapped photo contains a substantial part of the fashion photo. If so, the copyright in the fashion photo could be infringed, even if the head-swapped photo also contains a lot of other aspects entirely unconnected with the fashion photo.

Interestingly, it is not entirely clear how a court would rule in situations like the Tamahori head-swap. The part of the fashion photo that featured in the head-swapped photo was the subject's body. On the one hand, the subject's body could be interpreted as a substantial part of the fashion photo (compared with the totality of her body plus her head). On the other hand, a person is usually recognisable and identifiable by means of facial features, so perhaps if the head is removed then the remaining body-only could be interpreted as *not* a substantial part of the original. To counter the latter approach, the subject could argue that in a photo used for fashion purposes, the body (wearing the fashion-relevant clothing) is in fact the *most* substantial part, that is, the "essence".[116] This particular subject in fact stated that when she saw the head-swapped photo, "I recognised the shot *and particularly the dress*"[117] (emphasis added).

The Tamahori head-swap highlights this potential uncertainty in relation to copyright infringement of head-swapped photographs. When the subject is considering whether to bring a legal action under copyright law, it could be difficult to predict how a court will rule on the substantiality question.

If the plaintiff does succeed in establishing infringement, defences to copyright infringement in New Zealand are specific and narrow. An infringing defendant must usually fit its conduct into one of the specific "permitted acts"[118] in order to receive a defence. These specific statutory defences provide New Zealand courts with less discretion than, for instance, an American-style "fair use" infringement defence under which several factors are considered to determine whether a particular use is fair.[119]

It has been argued that New Zealand too should adopt a fair use style defence.[120] Until then, however, the New Zealand approach to copyright defences can result in comparatively more certainty in terms of whether a particular use constitutes infringement. In the context of photo-manipulation, the New Zealand approach is also arguably more advantageous to plaintiffs since many of the statutory defences are very narrow and specific. A defendant's infringing head-swap may therefore be unable to satisfy any of the defences. For instance, there is no specific defence for parody.[121]

116 *Henkel*, above n 59, at [44].

117 Smith, above n 6, at 3.

118 Copyright Act 1994, Part 3. For a discussion of common law public interest defences, as preserved by s 225(3), see Frankel, above n 28, at 338-343.

119 See 17 USC § 107.

120 Alexandra Sims "The Case for Fair Use in New Zealand" (2016) 24 IJLIT 176. Besides the United States, other jurisdictions with fair use style copyright defences include Israel, Singapore, South Korea and the Philippines. At 177 n 4.

121 Sims, above n 120, at 178, 188-189.

New Zealand's statutory defences include incidental copying; criticism, review and news reporting; research or private study; and defences for educational purposes.[122] Among these, at first glance the news reporting defence seems applicable to the Tamahori head-swap. The head-swapped photo was used to illustrate a news story. However, the fair dealing defence for news reporting is limited in the context of directly-taken photographs. This is because if such a photo is used for purposes of reporting current events, the defence only applies if the relevant current events are reported *by means of* a sound recording, film, or communication work.[123] Therefore, if a photograph is used for purposes of reporting current events in any type of work *except* a sound recording, film or communication work—that cannot be fair dealing for purposes of reporting current events.

The result is an inability to use this defence if a directly-taken photo is used without the copyright owner's consent in a literary work (such as a newspaper) for news-reporting purposes. This would be the case even if the copyright owner is acknowledged.[124] However, this restriction would not seem to apply to video-stills, given that they fall outside the statutory photograph definition.[125]

In the Tamahori head-swap scenario, the head-swapped photo could be copyright-infringing if a court considered it to contain a substantial part of the fashion photo. If so, the defendant could not use this defence even though the infringing photo was used to illustrate a news story, since the defence is inapplicable for directly-taken photos used in a newspaper.

(1) Addressing the challenge: what should be considered a "substantial part"?

The above discussion highlighted the importance of the "substantial part" analysis in a copyright regime with very specific defences, such as New Zealand. The ensuing question is: what *should* be considered a substantial part in relation to head-swapped photographs? As with the rest of the article, this is with regard to instances where neither the head nor the body is further modified when creating the head-swapped photo.

A useful approach to this issue would be as follows.

- If the "substantial part" inquiry is in relation to the subject's *head*, the head should ordinarily be considered a substantial part of the photo from which the head was sourced. This is because a person is usually recognisable and identifiable by means of facial features.

122 Copyright Act 1994, ss 41-49.

123 Section 42(2)-(3).

124 This is due to the wording of Copyright Act 1994, s 42(3), which mentions "sufficient acknowledgement" as a requirement but excludes photographs in this context.

125 See Corbett, above n 61, at 201, 204.

To apply this to the Tamahori head-swap scenario: the head-swapped photo should be considered to have taken a substantial part of the unidentified photo from which Lee Tamahori's head was sourced.

- If the "substantial part" inquiry is in relation to the subject's *body*, the inquiry should include a purposive analysis of the (unaltered) source-photo from which the body portion was sourced. The court should accordingly take into account the purpose of that source-photo's creation and dissemination in determining whether the body portion is a substantial part of that photo.
- This purposive analysis builds on English case law that predates changes influenced by European Union law. Under the influence of EU law, the "substantial part" inquiry in English copyright law asks whether the part allegedly copied contains elements that are the expression of the plaintiff-author's intellectual creation.[126]As mentioned in a pre-Brexit edition of a leading UK copyright treatise, the full impact of these changes is unclear.[127] Some of these changes do not seem suitable imports into New Zealand law. For instance, the aforementioned treatise suggests that under the EU-influenced English "substantial part" analysis, the importance of the part allegedly copied in relation to the whole work may be irrelevant.[128] This approach does not seem to align with the New Zealand concept of "substantial part" as discussed above. Indeed, the term "*substantial* part" itself implies that the part must be looked at in comparison with the whole. Therefore, New Zealand should continue to consider "old" (pre-EU-influenced) English copyright law when helpful to the New Zealand context—particularly in the current post-Brexit world.
- In determining what is a substantial part of an artistic work, "old" English cases have asked what part of the work would be "visually significant to the person to whom the work would normally be addressed".[129] For instance, in a case involving design drawings of a laminating machine, "visually significant" was interpreted to mean visually significant to an engineer and not a layperson.[130] This aspect of the English case has been applied by the New Zealand High Court.[131]

126 *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482; [2014] RPC 8 at [38], citing *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECR I-6569; [2009] ECDR 16 (Court of Justice of the European Union) at [39].

127 Gillian Davies and others (eds), *Copinger and Skone James on Copyright* (17th ed, Thomson Reuters (Professional) UK, London, 2016), paras 7-40, 7-46, 7-47.

128 At para 7-46.

129 At para 7-106, citing *Billhofer Maschinenfabrik GmbH v Dixon & Co Ltd* [1990] FSR 105.

130 *Billhofer Maschinenfabrik GmbH v Dixon & Co Ltd* [1990] FSR 105 at 121-122.

131 *Hammar Maskin AB v Steelbro New Zealand Ltd* HC Christchurch CIV-2006-409-977 (8 October 2008) [182]-[190]. While the Court of Appeal subsequently reversed on patent infringement grounds, the High Court's copyright infringement decision was not appealed. *Hammar Maskin AB v Steelbro New Zealand Ltd* [2010] NZCA 83 [20].

It has also been applied by the English Patents County Court even while acknowledging the impact of EU law.[132]

- Such an approach could be used in the "substantial part" inquiry for the subject's body suggested above. Using this purposive analysis, the court should take into account the purpose of the source-photo's creation and dissemination to determine whether the body portion would be visually significant to the persons to whom the source-photo was addressed. Who would be the relevant persons to whom the photo would normally be addressed? This would depend on why the photo was taken and distributed: that is, the purpose behind it.

To apply this to the Tamahori head-swap scenario: a main purpose of the fashion photo's creation and publication seems to show the subject wearing the dress. It is therefore arguable that given this purpose, to readers of the newspaper's fashion section the subject's body (wearing the clothing) would be a substantial part (the 'essence'[133]) of the fashion photo. Recall that even the subject "recognised the shot *and particularly the dress*"[134] (emphasis added) even though her head was not included. Under this analysis, the head-swapped photo should be considered to have taken a substantial part of the fashion photo.

The conclusion could be different if the purpose of the fashion photo was instead the subject modelling headwear, such as a hat or a tiara. Since a hat or a tiara would be worn on the head, the body portion of such a photo could be perceived as being less significant—to the same readers—given the headwear-modelling purpose of the photo. Therefore, a court could be comparatively less inclined to consider the body a substantial part of this type of photo.

If the subject of the source-photo is a celebrity, the result of this "substantial part" analysis for the body portion would be less certain. In such cases there are several questions a court should consider. Is the purpose of the photo to highlight the celebrity, or the clothing worn, or both? Where is the photo displayed: in which newspaper section, or on what type of online blog? The answers would help identify the photograph's purpose and the relevant persons to whom it is addressed. Any accompanying text would also assist in this analysis. For instance, a photo of the celebrity Rihanna on a gossip website titled *Rihanna goes to the mall to buy nail polish* would be different in many ways from a photo on the BBC news website titled *Rihanna arrives at BRIT Awards wearing Alexander McQueen dress*. Furthermore, in the modern internet age a photo can be quickly reposted in many different places and contexts. In such instances, the relevant viewer is likely to be an ordinary member of the public even though the initial photo may have been targeted to a specialist audience.

132 *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPCC 1, [2012] ECDR 11. This case did not involve a head-swapped photograph.

133 *Henkel*, above n 59, at [44].

134 Smith, above n 6, at 3.

It is acknowledged that this suggested approach for the body portion is contextual and that in some instances different judges could come to different conclusions.[135] However, this contextual nature exists with the current approach too. As the New Zealand Supreme Court has stated, assessing whether a substantial part was taken "is usually the most difficult question which arises in copyright cases" and "is a subject upon which, in borderline cases, minds can reasonably differ".[136] In the head-swapping context, therefore, it is posited that the suggested purposive analysis for the body portion could be helpful to focus the court's analysis in such cases. It would also provide some guidance to future photo-subjects and photo-alterers.

There are interesting policy implications of the suggested approach for head-swapped photographs involving naked or sexually-explicit body portions. In an American case,[137] an employee distributed to co-workers two photocopied images featuring his supervisor's head superimposed on sexually-explicit female bodies. The supervisor's head-photo was taken from her campaign postcard for a union election. The bodies were taken from pornographic magazines and were "two different photographs of women striking lewd or masturbatory poses".[138] The employee's actions were held to constitute infliction of emotional distress under state law.

Copyright issues were not discussed in the opinion, but we could imagine how it may be resolved as a New Zealand copyright infringement action following the "substantial part" approach suggested in this article. Let us first assume that the ownership rules allowed the suit to be brought, or that the law has been changed to allow for joint copyright ownership by the subject. With regard to the "substantial part" analysis, it is not entirely clear from the court decision how much of the subject's body was visible in the photo from which the head was sourced. This photo could have featured only or mainly the head. Even if the body was visible, however, under the suggested approach taking the identifiable head portion of this photo would be considered taking a substantial part of it. Therefore (if other infringement requirements are satisfied) under New Zealand law the defendant has likely infringed copyright in this photo by copying the head portion.

Now let us turn to the sources of the body portions. Again, we will assume that ownership is not an issue. Given the purpose of pornographic magazine photos and the intended addressees, the body portion of such a photo should be considered a substantial part under the suggested approach. Therefore, the copyrights in these photos have also likely been infringed.

No defence seems to apply under New Zealand copyright law for copying either the head or the body portions in this latter example.

135 This is of course even likelier if there was further modification to the head or body portions before inclusion in the head-swapped version.

136 *Henkel*, above n 59, at [44].

137 *Bowman v Heller*, above n 9.

138 At 520.

This has important policy implications relating to websites displaying allegedly naked photos of well-known individuals. In many instances, these photos are in fact head-swapped photos of these individuals' heads on others' bodies.[139] And as highlighted by the American case discussed above, this type of head-swapping also occurs in relation to those who are not celebrities.

VI. Conclusion

Head-swapped photographs are likely to become more frequent with increasing advances in photo-manipulation technology. This article examined to what extent New Zealand copyright law can protect against the unauthorised creation and dissemination of head-swapped photographs. Copyright in a photograph could be infringed by the act of head-swapping as well as by the subsequent dissemination of the head-swapped photo. As explained in this article, copyright law can be an advantageous tool for New Zealand plaintiffs attempting to counter head-swapped photos. On the other hand, relying on copyright in such contexts can pose challenges. This article identified and evaluated some of those challenges, drawing on a real-life New Zealand head-swap as an example scenario.

One challenge when using copyright law in such situations is that the photograph subject may not be able to bring an infringement action due to the copyright ownership rules. Under these rules, the owner of copyright in the source-photograph is often the photographer, not the subject. The article considered and commented on some ways in which a subject could nevertheless be able to bring an infringement action.

Another challenge involves how the test for copyright infringement is structured. The main challenge here is the uncertainty over whether the head-swapped photo contains a substantial part of a source-photo. The article analysed this issue and posited a suggested approach specifically applicable to the infringement analysis of a head-swapped photograph. While this suggested approach is with reference to New Zealand law, it may also be helpful in other copyright regimes with a similar combination of a "substantial part" infringement analysis and specific fair dealing defences.

139 Winick, above n 1, at 151-152. For a recent example, see Cross, above n 7.

EXTRAORDINARY POWERS AND POLITICAL CONSTITUTIONALISM

Sascha Mueller*

Abstract

During times of emergency situations extraordinary powers may be vested in the executive in order to prevent or reduce its impact. Emergency legislation is usually explicit about its extraordinary nature and requires triggers that enable the executive to use extraordinary powers. However, in recent times, New Zealand's parliament has passed legislation that contains extraordinary powers, yet does neither draw attention to its extraordinary status, nor requires any triggers. As these acts did not directly deal with a threat to life or property, but instead likely had an economic purpose, it appears that Parliament created extraordinary powers out of convenience, rather than necessity. Due to New Zealand's political constitution, acts of parliament cannot be challenged in court. This approach bears the danger of executive creep, where the executive gets more and more power in order to "get things done", with little regard to constitutional safeguards.

I. Introduction

In 2010, the New Zealand Parliament passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act) in response to an alleged inability of the regional council, Environment Canterbury, to effectively manage Canterbury's water resources.[1] Between 2006–2008, Environment Canterbury had failed to meet the vast majority of statutory time limits when processing resource consent applications.[2] Canterbury is the home of a large part of both irrigated land and water consumption in New Zealand, and the government decided to pass urgent legislation to rectify the situation. The ECan Act was passed under urgency in March 2010, and it contained several constitutionally significant provisions. *Inter alia,* it provided for the replacement of elected councillors by appointed commissioners, established extensive regulation making powers, and restricting access to the Environment Court.

* Senior Lecturer, Law School, University of Canterbury

1 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 [ECan Act] (30 March 2010) 661 NZPD 9927; (30 March 2010) 661 NZPD 9930.

2 Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (June 2009) Appendix 4; see also (30 March 2010) 661 NZPD 9927.

One year later, the Canterbury Earthquake Recovery Act 2011 (CER Act) was passed in response to the ongoing earthquakes in the Canterbury region. In particular, the February earthquake had had devastating effects on the city, causing many casualties and making large parts of Christchurch uninhabitable. After 10 weeks of a state of emergency, the CER Act was meant to facilitate and expedite the recovery efforts and the rebuild of the region. To that end, it contained extensive executive powers reminiscent of those available during a state of emergency, such as the power to enter or restrict access to premises and roads, control the dissemination of information, and the requisition of property. In addition, the Act contained substantial regulation making powers.

Extraordinary public powers, such as the ones contained within these two Acts, are usually reserved for emergency situations in which ordinary public powers are not sufficient to effectively deal with a crisis. Ordinary constitutional processes are too slow to respond to the immediate needs of the population, so that they must be restricted to enable swift help and relief to those affected. We are therefore accustomed to extraordinary powers in the form of emergency powers provided for by emergency legislation.

Neither of the situations that led to the passing of the ECan Act and the CER Act can be described as emergencies in the traditional sense. While both addressed issues that required solutions, neither case required immediate action. Both situations could have arguably been resolved through normal, or at least less severe means. It may therefore be that the powers created by these Acts are inappropriately broad.

In general constitutional theory, the propriety of emergency powers is determined by establishing the constitutional norm, whether the power in question derogates from that norm, and whether this derogation is justified.[3] However, the constitutional system in New Zealand does not provide for legal means to evaluate the propriety of statutory powers. While the exercise of public powers by the executive can be judicially reviewed, the content of these powers cannot. The reason, of course, is that Parliament is sovereign and its legislation beyond legal reproach. The only way to hold it accountable for its actions is through political means, that is, general elections. This approach to constitutionalism is called political constitutionalism, and it relies on a constitutionally conscientious legislator and a constitutionally aware constituency.[4]

This paper argues that the constitutional safeguards provided in this way have not been working as sufficiently as they could. It appears that Parliament has, on occasion, provided for excessively extraordinary statutory powers (such as in the case of the ECan Act and the CER Act) out of convenience rather than necessity. The paper will first explore the concept of extraordinary

3 John Ferejohn and Pasquale Pasquino "The law of the exception: A typology of emergency powers" 2004 2(2) ICON 210 at 222, 223.

4 Mark Tushnet *Comparative Constitutional Law* (Edward Elgar Publishing, Cheltenham, 2014) at 47.

powers in New Zealand. It will show that, due to the lack of supreme law, no statutory power is technically extraordinary. Any derogation from constitutional norms is justified by the fact that Parliament is supreme. In order to determine what is extraordinary, we have to therefore rely on an explicit statement by Parliament that a given power is extraordinary (for example, powers provided for by the Civil Defence Emergency Management Act 2002, which are available only when a state of emergency is declared). However, taking the literal meaning of "extraordinary", we can find other statutory powers that are extraordinary, not because they have been labelled as such, but because they are unusually broad compared to other statutory powers. The paper will then explore ways to evaluate the propriety of extraordinary powers and how these ways interact with our system of political constitutionalism. It will argue that while such extraordinary powers, particularly those provided for by the ECan Act and the CER Act, are constitutionally "legal", they may not be "legitimate". It will conclude that it may be time to revisit our concept of parliamentary sovereignty and introduce limited review powers as a "soft" check on parliamentary legislation.

II. Extraordinary Powers in New Zealand

When speaking of extraordinary powers, we usually think of powers available to the executive during times of emergency. The constitutional concept of emergency powers dates back at least to the time of the Roman Republic.[5] When Rome was threatened by a crisis (generally a threat of invasion of its territory), the elected Senate would derogate all governmental powers to an appointed Dictator. The mandate of this Dictator was to do anything necessary to avert the threat and resolve the crisis, after which power was transferred back to the Senate and ordinary government resumed. The modern state relies on a set of constitutional rules in order to facilitate and guarantee transparent and limited government.[6] Constitutional processes and procedures slow down decision-making, but a crisis situation does not allow for careful and slow contemplation. The executive may need to be freed from time-consuming bureaucracy and constitutional safeguards. This capacity to suspend constitutional norms and empower the executive may find its justification in the concept of necessity, or it may be inherent to the nature of sovereignty.[7] Regardless, the welfare of the population outweighs the need of strict adherence to constitutionalism: "the constitution is not a suicide pact."[8]

5 Victor V Ramraj "Emergency powers and constitutional theory" 2011 41(2) HKLJ 165 at 170.

6 Tushnet, above n 4, at 49.

7 Carl Schmitt said that "[s]overeign is he who decides on the exception.", Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab MIT Press 1985) (1922) at 5; see also generally Giorgio Agamben *State of Exception* (University of Chicago Press, Chicago, 2005) at 1–31.

8 *Terminiello v City of Chicago* 337 US 1 (Jackson J, dissenting).

Unlike during the time of the Roman Republic, emergency powers today do not generally suspend the constitutional order wholesale.[9] Instead, emergency law tends to respond to the particular needs of the pertinent emergency situation. Which constitutional norms are modified, to what extent, and which extraordinary powers are awarded, depends on the specific situation. Emergency law is tailored towards the requirements of the executive to be able to deal with the crisis situation. For example, extraordinary powers created by the Civil Defence Emergency Management Act 2002 enable the government to deal with natural disasters such as floods and earthquakes. Civil defence emergency management groups have powers to evacuate, clear buildings and roads, create emergency shelters, and direct resources.[10] The Health Act 1956 allows for isolation and quarantine of people in the case of an epidemic.[11]

A. Formal versus Functional Emergency Powers

New Zealand uses the legislative model of emergency law, whereby extraordinary powers for emergency situations are created through ordinary legislation. This stands in contrast to the Neo-Roman model, where extraordinary powers are provided on a constitutional level, that is, they are inherent to the constitutional system.[12] As constitutional provisions tend to be general in nature, constitutional emergency powers tend to be very broad and sweeping. The executive is given a *carte blanche* to deal with the crisis. The Neo-Roman model was popular in Europe during the early 20th century. However, it has given way to the legislative model in most modern democracies for two reasons: (1) the Neo-Roman model is associated with authoritarian regimes, where emergency powers are used to gain influence and suppress the opposition;[13] (2) under the legislative model, emergency law gains additional democratic legitimacy, as it is created by a popular assembly of representatives.[14]

Because emergency powers are created for specific situations under the legislative model, they tend to be spread widely across the statute book. In its review of the legislative response to national emergencies, the Regulations Review Committee has identified 59 pieces of legislation that contain "statutory

9 With the possible exception of Martial Law. However, it is disputed whether Martial Law is still applicable in the NZ context, see NZ Law Commission *Final Report on Emergencies* (1991) at [4.46].

10 Civil Defence Emergency Management Act, Part 5.

11 Health Act 1956, Part 4.

12 Remnants of such broad inherent powers can be seen in New Zealand in the concepts of the royal prerogative, state necessity, and possibly Martial Law; see NZ Law Commission, above n 9, at [4.33]–[4.48].

13 See, for example, Hitler's "legal" rise to power thanks to emergency powers provided for by Art 48 of the Weimar Constitution.

14 Ferejohn and Pasquino, above n 3, at 215.

powers of those exercising public power in an emergency."[15] These range from general emergency powers in dedicated emergency statutes, such as the Civil Defence Emergency Management Act 2002, to more specific powers in cases of epidemics, threats to food safety, hazard substance emergencies, fires, terrorism and war. Although some jurisdictions create one all-encompassing piece of emergency legislation,[16] the New Zealand Law Commission strongly advised against this in its Final Report on Emergencies.[17] It said that such legislation tended to create broad and ill-defined extraordinary powers akin to those under the Neo-Roman model.

All of the statutory powers identified by the Regulations Review Committee are formally designated as powers to be used in case of a pre-defined emergency situation. However, looking only at formal emergency powers does not reveal the full picture of extraordinary powers in New Zealand. It does not uncover such public powers that are formally ordinary, but functionally extraordinary. New Zealand's strong adherence to the concept of parliamentary sovereignty means that, strictly speaking, all statutory powers are ordinary. As there is no higher law than parliamentary legislation, there is no difference between a statutory power created for everyday use by the bureaucracy and one created for exceptional use in times of crisis. Both powers are created through the same legislative process and subject only to review by Parliament itself. To this end, Dicey himself proclaimed that emergency law cannot exist in England.[18]

Of course, while there may be no formal difference between ordinary and emergency law in New Zealand, there certainly is a functional one. Emergency law is meant to be exceptional; emergency powers are excessive, as they must enable swift and effective emergency response. For that reason, such powers are meant to be only temporary, as once the crisis is averted there is no need for such powers.

In political systems where constitutional norms are supreme law, the difference can be measured by the extent to which the powers infringe on constitutional norms, and this determination is adjudicated by a court or some other form of constitutional entity. Parliament in New Zealand, on the other hand, is not subject to external review, and neither is parliamentary legislation. The only adjudicator who determines whether a statutory power is extraordinary or not is Parliament itself. Emergency statutes generally designate certain powers as extraordinary, in that they are only available when

15 Regulations Review Committee *Interim report on the Inquiry into Parliament's legislative response to future national emergencies* (May 2015) at 6.

16 Emergencies Act RSC 1988 c 22.

17 NZ Law Commission, above n 9, at [4.11].

18 Albert Venn Dicey *Introduction to the Law of the Constitution* (5th ed, MacMillan and Co, London, 1897); in response to the Privy Council decision in *Ex Parte DF Marais* (1902) AC 109, Dicey later conceded that martial law could be established by an act of Parliament, Albert Venn Dicey *Introduction to the study of the law of the constitution* (7th ed, Macmillan and Co, London, 1908) at 538–555; see also David Dyzenhaus "The 'Organic Law' of Ex Parte Milligan" in Austin Sarat (ed) *Sovereignty, Emergency, Legality* (Cambridge University Press, Cambridge, 2010) 16–57 at 42–53.

certain conditions are met; for example, during a state of emergency under the Civil Defence Emergency Management Act 2002,[19] when an epidemic notice is issued by the Prime Minister under the Epidemic Preparedness Act 2006,[20] a biosecurity emergency is declared under the Biosecurity Act 1993,[21] or when the Prime Minister believes on reasonable grounds that an international terrorist emergency exists.[22] In each of these cases it is clear that the statutory powers in question only become available upon a clearly defined and urgent situation.

But what if Parliament, by oversight or design, creates a functionally extraordinary power without a clear signpost and which is not subject to strict conditions? In lieu of legal mechanisms to determine the extraordinary nature of such public powers, it may be difficult to detect and distinguish extraordinary powers from ordinary ones.

From a conceptual point of view extraordinary powers follow a certain structure. In order to determine that a provision is extraordinary, we require (1) a norm and (2) a derogation.[23] That means that if the pertinent power is a derogation of ordinary public powers, it must be extraordinary. There are thus two ways of detecting them within the New Zealand context: by comparing "ordinary" statutory provisions with those usually only available during exceptional times; and/or by looking for statutory powers that are so extreme that they are commonly regarded as exceptional.

Both the CER Act 2011 and the ECan Act 2010 illustrate statutory powers that are not formally designated as emergency powers but which contain powers usually deemed extraordinary.

B. Canterbury Earthquake Recovery Act 2011

The CER Act 2011 was passed in order to aid and expedite the recovery of the Canterbury region following the earthquakes of 2010-12.[24] It established a dedicated authority responsible for facilitating the recovery process – the Canterbury Earthquake Recovery Authority (CERA); CERA was tasked to develop a recovery strategy and recovery plans;[25] and the Act created a range of statutory powers to enable CERA and the Minister for Earthquake Recovery to effect the recovery efficiently. Among other powers, the Act provided for the ability to control gathering and dissemination of information,[26] enter

19 Civil Defence Emergency Management Act, Part 5.
20 Epidemic Preparedness Act 2006, ss 4, 5.
21 Biosecurity Act 1993, s 144.
22 International Terrorism (Emergency Powers) Act 1987, s 6.
23 See Ferejohn and Pasquino, above n 3, at 222.
24 Canterbury Earthquake Recovery Act, s 3. The Act was repealed and replaced on 19 April 2016 by the Greater Christchurch Regeneration Act 2016.
25 At ss 11–26.
26 At ss 29–32.

premises and restrict access to buildings and roads,[27] demolish and erect buildings,[28] and requisition property.[29]

While these powers certainly enable and aid the recovery of an earthquake-struck region, they are strongly reminiscent of such powers which had been identified by the Law Commission as typical emergency powers.[30] Even more pertinently, they broadly mirror powers available under the Civil Defence Emergency Management Act 2002 during a state of emergency.[31] That means that the CER Act provided for the continuation of several public powers that are usually reserved for a situation which requires a formal declaration and the availability of which is limited to a seven-day period.[32] It is difficult to argue, then, that the powers created by the CER Act are merely ordinary statutory powers. If such powers are extraordinary during a state of emergency, they are certainly extraordinary in the absence of such a state.

The Act even included provisions that did not apply during a state of emergency. It empowered CERA to compulsorily acquire real property. This power went beyond the ordinary compulsory acquisition powers under the Public Works Act 1981, under which a decision acquire property can be challenged in the Environment Court.[33] In contrast, the CER Act excluded the ability to appeal most decisions made under the Act, including the decision to acquire property compulsorily.[34] Both the compulsory acquisition powers of CERA and the extent to which appeals are limited is clearly out of the ordinary.

Perhaps the most unusual power under the Act was the ability of the Governor-General to create provision by Order in Council and on the recommendation of the Minister for Earthquake Recovery necessary for the purposes of facilitating and expediting recovery.[35] Such a general power to create regulations is usually referred to as a "Henry VIII" clause, as it essentially allows government by decree. Effectively, the executive can create law without the normal parliamentary oversight, and such law can override other primary legislation.[36] The Law Commission regarded such sweeping regulation-making powers as justified only where either the exact measures to deal with an emergency or the nature of the emergency cannot be predicted.[37]

27 At ss 33–34, 45–47.
28 At ss 38–43.
29 At ss 52–59.
30 NZ Law Commission, above n 9, at [3.106].
31 Civil Defence Emergency Management Act, Part 5.
32 At s 70.
33 Public Works Act 1981, ss 23–27.
34 Canterbury Earthquake Recovery Act, s 68; only the amount of compensation for compulsory acquisition may be challenged, s 69(1)(a).
35 At s 71.
36 Tim Macindoe and Lianne Dalziel "New Zealand's response to the Canterbury earthquakes" (paper presented to Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011).
37 NZ Law Commission, above n 9, at [5.69]–[5.71].

This strongly suggests that Henry VIII clauses are extraordinary and should be used only in extraordinary cases.[38]

C. Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010

The ECan Act also has exceptional constitutional effects and provides for a range of unusual powers. The main effect of the Act is the replacement of democratically elected regional councillors by Government-appointed commissioners.[39] This, in effect, undermines the population's right to elect its own regional representatives and thus undermines democratic principles. Of course, the ability to vote in regional elections has been granted by Parliament in the first place and is thus derived from Parliament's original competency to govern over regional matters.[40] Nevertheless, a derogation from a democratic right, once granted, is not a matter to be taken lightly. Such a step is clearly exceptional, particularly as it only applies to one region – only residents of the Canterbury region have lost their voice on regional council matters.

The Act further contained a range of provisions designed to effect the purpose of the Act. Joseph identifies four unusual constitutional aspects of the Act which are in contravention of rule of law principles: (1) parts of the Act apply to one specific water conservation order and is thus *ad hominem* rather than general; (2) as a consequence of the *ad hominem* provisions, those parts have retrospective effect; (3) it contains a Henry VIII clause by allowing the responsible Minister to override certain provisions of the Resource Management Act 1991; and (4) it restricts the ability to challenge changes to the regional plans in the Environment Court.[41]

These provisions of the CER Act and the ECan Act are clearly extraordinary. In the context of the latter, the Ministry of Justice referred to the removal of elected councillors and the deferral of local body elections as of "constitutional significance."[42] Yet, neither Act required the existence of an extraordinary situation or a specific action to be taken before these powers became available (such as a public declaration of a state of emergency). As such, these provisions are formally ordinary powers; the Regulations Review Committee's interim report mentioned neither Act as a source of emergency powers. This shows that whether statutory powers are formally extraordinary in New Zealand depends solely on what Parliament declares to be extraordinary. It also shows

38 Stephen Argument "Henry VIII clauses – Fact Sheet" (November 2011) ACT Legislative Assembly <www.parliament.act.gov.au>.

39 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act s 9. The Act has been repealed and replaced by the Environment Canterbury (Transitional Governance Arrangements) Act 2016 on 9 May 2016. The new Act allows for seven elected and six appointed members, at s 9.

40 Local Electoral Act 2001, s 19E.

41 Philip Joseph "Environment Canterbury Legislation" (2010) *NZLJ* 193.

42 Cabinet Paper "Response to Review of Environment Canterbury" (29 March 2010) at [102].

that the group of public powers that are formally extraordinary do not include all functionally extraordinary public powers.

III. When is the use of extraordinary powers appropriate?

However, neither Act stood in a constitutional vacuum. They responded to what could be perceived as exceptional circumstances: earthquakes which had devastated large parts of the Canterbury region and a potential water management crisis. It is therefore arguable that these powers, whether they were formally recognised as extraordinary or not, were appropriate for the respective situations. As discussed above, however, there are no constitutional mechanisms to determine the propriety of such extraordinary powers. Without the ability to review statutory powers or a standard against which to measure them, there is a danger that extraordinary powers are normalised and start creeping into ordinary legislation unrecognised.[43]

A. A taxonomy of extraordinary powers

The presence of a legislative review structure does not mean that the determination of whether a statutory power is appropriate is always clear. In the United States, Bernadette Meyler has created a taxonomy of extraordinary powers and the extent to which they can justifiably interfere with constitutional norms.[44] She describes three categories of emergency situations: political, natural, and economic. Political emergencies are situations that have been created directly through human actions. They encompass such events as internal or external armed conflicts (war, civil war, incursions, rebellions, and so on) as well as terrorist attacks. Natural emergencies are, as the name suggests, naturally occurring disasters and force majeure events such as earthquakes, floods, and volcanic eruptions.[45] And economic emergencies are those events that severely and negatively impact the economy of a country. Examples of this are the Great Depression of the 1920s and 1930s or the Greek financial crisis.[46]

Each of these types of emergencies may impact constitutional norms in different ways. The existence of a political emergency may put the very integrity of a country, and thus its constitutional order, at risk – particularly if the country is under occupation or threat of occupation. Consequently,

43 Ferejohn and Pasquino, above n 3, at 219; Oren Gross "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" 2003 (112) Yale LJ 1011, at 1090.

44 Bernadette Meyler "Economic emergency and the rule of law" 2007 56(2) DePaul Law Review at 539.

45 Some argue that the emergency created by natural events is "man-made", as it often is a result of vulnerabilities in the design and construction of buildings and infrastructure, see NZ Law Commission, above n 9, at [2.23].

46 See Gross, above n 43, at 1025.

it may be more easily justifiable to veer from applying strict constitutional procedures if the very existence of the constitution is in peril. Immediate and extensive action may be required, and more intensive infringements on constitutional norms and individual liberties may therefore be acceptable.[47]

Natural disasters, on the other hand, tend to be localised to a specific area of a country. During such emergencies, the primary concern of the state is not the long-term preservation of the constitutional order, as it is not endangered. Rather, the focus is on coordination of emergency services and resources for the rescue effort, as well as general infrastructure concerns in the affected area. Extraordinary powers tend to focus on facilitating rescue efforts and providing emergency relief by expediting decision-making processes and restricting individual rights to movement and property.

Finally, economic emergencies endanger the economic stability of a country, and as such the closely related political and social stability. Therefore, a grave threat to a country's economy can be a threat to the integrity of the state and, thus, its constitutional order. However, not every threat to the economy warrants constitutional derogation: the economy is under constant threat from ordinary events such as unemployment, currency fluctuations, and other adverse events.[48] The threat must therefore be of such severity that only extraordinary action can mitigate long-term adverse effects on the state as a whole. Government action thus generally focusses on fiscal action such as taxation and subsidies. Unless the emergency happens extremely suddenly, however, there is generally no need for extraordinary public powers because the lack of immediacy allows for more moderate and ordinary response.[49] In fact, the Law Commission identified only a few emergency provisions "that might be classified as economic" in New Zealand,[50] while the Regulatory Review Committee identified only one.[51]

Each emergency requires its own set of responses and the extent of derogation from ordinary constitutional processes depends on the specific circumstances of the situation. However, Meyler's taxonomy can act as a guideline. It posits that certain types of emergencies, particularly economic ones, do not require as severe measures as other types of emergencies. As seen above, infringements on political rights, such as the right to vote, to freely assemble, or to other democratic processes, and individual rights, such as the right to life, freedom, or opinion, are less justifiable than infringements on economic rights, which is mainly the right to property.[52] Therefore, as economic emergencies tend to be less urgent or immediate than political or natural emergencies, extraordinary powers that infringe on constitutional

47 At 1026.
48 Meyler, above n 44, at 565.
49 Gross, above n 43, at 1026.
50 NZ Law Commission, above n 9, at [3.104].
51 Under s 9(2) Defence Act 1990, the Armed Forces may be used to provide public services; Regulations Review Committee, above n 15, at 70.
52 Meyler, above n 44, at 565.

norms and processes relating to political and individual rights are less likely to be appropriate.

Meyler writes within the much stricter rights-based context of US jurisprudence. Nevertheless, the underlying premise of her taxonomy applies to the New Zealand constitutional context as well. We can use it as a framework to better evaluate the extraordinary powers created by the CER Act and the ECan Act.

B. Applying the taxonomy of extraordinary powers to the CER Act and the ECan Act

As previously discussed, the extraordinary powers provided for by the CER Act were largely similar to, or even exceeded, those available during a state of emergency under the Civil Defence Emergency Management Act. These powers affected people's property, but also their freedom of movement[53] and access to the courts; it also affected the constitutional relationship between Parliament and the executive in form of the Henry VIII clause. Such powers are quite drastic, but are arguably appropriate in the context of a devastating natural disaster which requires quick and decisive response. In its "Inquiry into Parliament's legislative response to future national emergencies", the Regulations Review Committee suggested that the powers conferred in the CER Act were broadly appropriate, even though some of the powers, in particular the Henry VIII clause, was broader than it needed to be.[54] The Committee suggested, among other things, that emergency powers should be bespoke for each emergency and only confer powers that are strictly necessary; to that end, executive discretion when using such powers should also be limited to the extent necessary to deal with the emergency; and executive action should remain judicially reviewable.[55]

However, the Committee did not address how to determine whether a legislated emergency power is necessary in any given emergency. This is because it did not investigate the different natures of emergencies. It simply accepted the Government's point of view that the recovery of the Canterbury region amounted to a national emergency, which required the CER Act to convey extraordinary powers. It failed to consider that, unlike the Civil Defence Emergency Management Act, the CER Act did not respond to the earthquakes directly. Rather, as its name suggests, the purpose of the Act was to aid the recovery of the region, not to respond to the immediate effects of the

53 Both property and freedom of movement were particularly affected by the so-called "Central City Red Zone", an exclusion zone around the Christchurch Central Business District enforced by the New Zealand Army. This exclusion zone remained in effect for two years; see "Christchurch CBD Cordon Reduction Map" Rebuild Christchurch (26 June 2016) <www.rebuildchristchurch.co.nz>.

54 Regulations Review Committee *Inquiry into Parliament's legislative response to future national emergencies* (December 2016) at 18.

55 At 19-24.

earthquakes. The need for a speedy recovery from natural disasters arises in part out of social and individual needs of the affected population. To be sure, in the months following the February earthquake there was much need for reinstating essential services and demolishing dangerous buildings. However, the main concern of the Act was to facilitate the rebuild of the region, and the primary focus of the rebuilding effort was economic. Without proper roads, a robust system of essential services, and a functioning city centre, the local economy would have receded catastrophically. The purpose of the Act was therefore to mitigate an economic disaster, rather than a natural one.

According to Meyler's taxonomy, this means that extraordinary powers should have been limited to what is strictly necessary in the context of an economic emergency. Initially, powers that exempted CERA from certain provisions of the Resource Management Act or that facilitated public works were arguably appropriate, as they streamlined bureaucracy and thus expedited the recovery process. On the other hand, the restriction of access to the courts and especially the Henry VIII clause were arguably excessive.[56] Admittedly, the Orders in Council resulting from the Act were largely aimed at streamlining and reducing bureaucracy.[57] But each order that overrode parliamentary legislation could have been made by Parliament. At that stage, there was no urgency that required immediate action. As such, several of the extraordinary powers under the Act seem out of proportion and thus inappropriate.

The nature of the situation to which the ECan Act responded is somewhat more difficult to discern. As Canterbury is a major source of fresh water in New Zealand, the lack of water management strategies arguably poses an environmental threat. However, the main reasons given for introducing this legislation were the economic importance of water, both to the Canterbury region and New Zealand as a whole.[58] Many of the arguments relied on the fact that Environment Canterbury did not meet statutory timelines relating to consent applications and the resultant adverse economic effects. As such, removing elected councillors, barring access to the Environment Court, and the Henry VIII clause appear excessive for a situation that is more akin to an economic emergency than a natural disaster.[59]

It can even be argued that, neither during the aftermath of the Canterbury earthquakes, nor during the difficulties with Environment Canterbury, an emergency situation existed at all. In emergency management theory, there

56 See also Andrew Geddis, "An Open Letter to the People of New Zealand and their Parliament" Pundit (28 September 2010) <pundit.co.nz>.

57 "The Canterbury Earthquake Recovery Act 2011" Department of the Prime Minister and Cabinet (12 August 2016) <cerarchive.dpmc.govt.nz>.

58 Ministry for the Environment, above n 2; see also (30 March 2010) 661 NZPD 9927.

59 See also Ike Kleynbos and Ann Brower "Changes in urban and Environmental Governance in Canterbury from 2010 to 2015: Comparing Environment Canterbury and Christchurch City Council" 2015 11 Policy Quarterly at 46; Neil Gunningham and Cameron Holley "Natural Resources, New Governance and Legal Regulation: When does collaboration work?" (2011) 24 NZULR 309.

is a clear distinction between emergency response and emergency recovery.[60] The former requires extraordinary powers in order to respond to an acute threat to people's life and/or property, while the latter does not require such powers, as the immediacy of the situation has passed. By the time the CER Act was passed, most if not all acute threats had passed. Any action taken under extraordinary powers could have been achieved through ordinary acts of Parliament, following ordinary constitutional processes, without further endangering life or property unduly. Similarly, it can be argued that it is doubtful that the situation leading to the ECan Act can be considered an emergency. The decrease in processing consent applications within statutory time limits can be correlated to a 40 per cent increase in dairy farming in the region over the same time.[61] Although this raises issues which needed to be addressed, the government already had abilities within the Resource Management Act and the Local Government Act to respond to these.[62] Moreover, by the time the Act was passed, Environment Canterbury had increased processing times to levels similar to other Councils.[63]

IV. Extraordinary Powers and Political Constitutionalism

Applying Meyler's taxonomy to the two Acts suggests that their use of extraordinary provisions is, at least to a certain extent, inappropriate. Both statutes contain constitutionally significant extraordinary provisions which appear disproportionate to the requirements of their respective emergencies; it is even unclear whether the situations could be deemed emergencies at all.

As mentioned before, however, Meyler writes in a different constitutional context. The constitutional system of the United States is not only more rights-based than New Zealand's, but it is also designed to spread public power more evenly between the branches of government.[64] American constitutionalism (as well as that of many other modern democracies) emphasises the desire to limit government power. It does so by institutional arrangement, that is, a clear separation of powers and a consequent system of governmental checks and balances. Each branch of government has limited competencies and can, to a further or lesser extent, control the actions of the other branches. In particular, it aims to limit both executive and *legislative* power. It is based on the liberal democratic ideal that individual rights must be protected from all

60 NZ Law Commission, above n 9, at [2.25]–[2.29].

61 Ministry for the Environment *Resource Management Act: Two-yearly Survey of Local Authorities 2007/2008* (ME 937, 2007) Appendix 1; this was by far the largest increase of any region of New Zealand.

62 Cabinet Paper, above n 42.

63 Environment Canterbury *Annual Report 2009/2010* (2010) at 70.

64 Jo Eric Kushal Murkens "Constitutionalism" in Mark Bevir (ed) *Encyclopedia of political theory* (Sage Publications, Thousand Oaks (CA), 2010),at 288.

government action, even that of the legislature. As Kushal Murkans puts it: "The *raison d'être* of constitutionalism is the legalization of political rule."[65]

This legalisation comes in the form of legal review mechanisms, wherein the actions of each branch is controlled through judicial means. This concept of constitutionalism requires the existence of some kind of higher law, which establishes these legal mechanisms and provides a standard against which public actions can be evaluated.[66] These rules must not stem from ordinary legislation, as that would allow the legislature to sidestep the controls and thus put it into a superior position. Legal review is generally undertaken by some form of judicial body. In the United States and Canada, for example, this form of constitutional review is undertaken by the ordinary courts.[67] Other jurisdictions employ a specialised Constitutional Court for review of parliamentary legislation, in recognition of the distinctly political aspect of its role.[68]

That means that any powers created by the legislature, be they extraordinary or not, are subject to systemic scrutiny and can be found to be unjustified, and thus void, within the wider constitutional context. In such a constitutional system, Meyler's taxonomy has clearly defined borders. Constitutional norms and individual rights are defined within rules superior to ordinary legislation. Any infringement on such rules can thus be measured against a clear norm, against standards set by the constitution. Of course, this does not mean that the outcome of such an exercise is always clear – the justification for infringements is still up for debate. However, higher law provides for a clear standard of constitutional norms, and legal review mechanisms create a forum in which the propriety of extraordinary public powers can be assessed.

The New Zealand political system does not allow for legal mechanisms to review legislative power. Constitutional compliance is instead achieved through political means.[69] Tushnet explains that the political safeguard lies in the democratic process and the resulting accountability of members of the legislature to the electorate.[70] Parliamentarians are elected on the basis that they represent the views of their constituents. As such, as long as the constituents have an interest in constitutional compliance, the legislature will too. The legislator relies on their constituents' favour in order to be re-elected, and, therefore, will act in their interest. If the constituency is indifferent to constitutional considerations, they have delegated their decision on these matters to the elected legislator. Other political mechanisms, such as a robust legislative process, are meant to ensure constitutional compliance *ex*

65 At 294.
66 At 288.
67 Tushnet, above n 4, at 48.
68 At 49.
69 Mark Elliott "Interpretative Bills of Rights and the Mystery of the Unwritten Constitution" 2011 NZLR 591 at 609.
70 Tushnet, above n 4, at 46.

ante. Particularly the select committee stage provides a forum for reasonable discussion and public input around constitutional considerations.[71]

Political constitutionalism is a necessary consequence of parliamentary sovereignty: there cannot be fundamental law that reigns supreme over parliamentary legislation. Nor can there be any state actor that can find parliamentary legislation void. The legislature is considered the political actor whose powers are neither derived from, nor controlled by any other constitutional entity. The only way to hold Parliament directly accountable for its actions is through the political process of democratic elections. Within such a system, Meyler's taxonomy is meaningless, as public powers cannot be measured against a fundamental standard provided for by higher law. The propriety of extraordinary powers cannot be decided through legal mechanisms; it can only be decided at the ballot box.

The weakness of political constitutionalism is twofold: the legislature may be unaware that a constitutionally problematic provision is embedded deeply within an otherwise ordinary piece of legislation; and legislators may not be conscientious when it comes to constitutional matters.[72] The former can be relatively easily remedied by creating mechanisms which vet proposed legislation for potential constitutional inconsistencies. In New Zealand, an example of such a mechanism is the Attorney-General's statutory role of reporting inconsistencies of any newly introduced Bill with the New Zealand Bill of Rights Act 1990.[73] The latter is not as easily mitigated, and is therefore the basis of much of the criticism levelled at political constitutionalism.[74]

In practice, however, the theoretical difference between legal constitutionalism with its legal review mechanisms and political constitutionalism may not be significant. The threat of the constituency's wrath and the parliamentarian's own constitutional conscience may be sufficient to provide adequate protection of constitutional provisions. In addition, even in jurisdictions in which parliament reigns supreme, the judiciary still plays a part in policing constitutional compliance – it can raise attention to constitutional issues in a "weak form" of judicial review.[75]

The effectiveness of weak form judicial review depends, however, on the goodwill of the government, and, in particular, parliament. Elliott investigates the effects of bills of rights in political systems with unwritten constitutions and parliamentary sovereignty, namely the United Kingdom and New Zealand.[76] Among other things, he addresses the effectiveness of weak form judicial review in the context of political constitutionalism. He finds that

71 JF Burrows and RI Carter *Statute law in New Zealand* (4th ed, LexisNexis, Wellington (New Zealand), 2009) at 87–95.

72 Tushnet, above n 4, at 47.

73 New Zealand Bill of Rights Act 1990, s 7.

74 Murkens, above n 64, at 292, Tushnet, above n 4, at 45.

75 As opposed to the 'strong form' judicial review that can bar parliamentary legislation; see Tom Ginsburg and Rosalind Dixon *Comparative constitutional law* (Edward Elgar, Cheltenham (UK), 2011) at 271.

76 Elliott, above n 69.

New Zealand Bill of Rights Act and the Human Rights Act 1998 (UK) have a transformative effect on their respective countries' constitutions. Both countries' courts have the ability to declare statutory provisions inconsistent with their bills of rights, although only in the United Kingdom is this a statutory power.[77] Elliot finds that in the United Kingdom, this weak form approach to judicial review is exceptionally effective: out of 19 declarations of incompatibility, 18 were remedied by the government.[78]

The United Kingdom government's tendency to react so favourably to the courts' declarations may, of course, not wholly result from their strong desire for constitutional compliance. Other political factors are likely at play, such as the European Convention on Human Rights and the resulting questions about the hierarchical relationship of United Kingdom courts and the European Court of Human Rights; and the United Kingdom's membership in the European Union.[79]

These considerations do not exist in New Zealand. According to Elliot, it appears that the New Zealand government is not as likely to follow the courts' findings.[80] For example, in *R v Hansen*[81] the Supreme Court opined that s 6(6) Misuse of Drugs Act 1975 could not be interpreted in consistence with the right of presumption of innocence contained in s 25(c) New Zealand Bill of Rights Act. Yet, a decade later, the provision remains on the statute books.

Another sign that New Zealand legislators may not be very conscious of, or even conscientious about, constitutional processes is their use of the urgency motion during the legislative process. Urgency allows Parliament to expedite the legislative process by omitting one or several of the stand-down periods between legislative stages (for example, between the Committee of the Whole House stage and the Third Reading stage).[82] Parliament makes use of the motion relatively frequently, albeit mostly in a way that appears constitutionally unproblematic.[83] However, in its most extreme form, urgency allows Parliament to omit *all* stand-down periods as well as the Select Committee stage altogether.[84] In this form, a Bill can be introduced and passed in a single sitting. The only requirement for passing the motion is that

77 Human Rights Act (UK), s 4; see also Claudia Geiringer "On the Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

78 Elliott, above n 69, at 61.

79 Murkens, above n 64, at 293.

80 Elliott, above n 69, at 612–613; citing Andrew Geddis "Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed" [2011] NZ L Rev 443 at 467–472; and Claudia Geiringer "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 Otago LR 389 at 397–401.

81 *R v Hansen* (2007) NZSC 7.

82 Burrows and Carter, above n 71, at 85, 86.

83 Sascha Mueller "Where's the Fire: The Use and Abuse of Urgency in the Legislative Process" (2011) 17(2) CantLR at 328.

84 Standing Orders of the House of Representatives 2014, SO 58.

the moving minister give reasons for using urgency. There are no standards regarding the reasons, and they cannot be challenged.[85] Passing legislation at such speed is a substantial derogation from the ordinary legislative process and can, as such, be regarded as an extraordinary legislative power. It is justifiable during exceptional situations, yet it is employed with concerning frequency.[86]

Both the CER Act and the ECan Act were passed in one sitting under urgency. It is arguable that the former Act was urgently required in order to be able to lift the state of emergency which, at the time, had been in force for 10 weeks. However, in view of the fact that, in many respects, the Act functionally extended the state of emergency for five years, a few more weeks of deliberation may have resulted in an Act with fewer sweeping and more appropriate extraordinary powers.[87] As for the latter Act, as mentioned above it is not clear that there was an urgent situation which had to be dealt with in the first place. Even if the water management of the region was heading towards an economic and environmental disaster, it had been doing so for several years and the disaster would not have manifested itself within the next few days of introducing the legislation. This was an ongoing event which did not require urgent and immediate legislation.

V. Legality, Legitimacy, and No 8 Fencing Wire

Within the New Zealand system of parliamentary sovereignty and political constitutionalism, neither Act can be regarded as "unconstitutional". Parliament can create public powers, ranging from benignly ordinary to extremely extraordinary. It is accountable only politically, to the public in general elections. The CER Act and the ECan Act may have included excessive powers and been passed in a constitutionally concerning manner, but they were passed entirely within Parliament's competency.

What Parliament does and what it ought to do are, of course, not the same. Dyzenhaus distinguishes between the *power* of sovereign parliaments to act and their *authority*.[88] He bases this claim on Dicey's discussion of Parliament's ability to legislate for Martial Law, which requires the existence of a statute which is unconstitutional, as it suspends parliamentary sovereignty, but nonetheless valid.[89] Admittedly, neither the CER Act nor ECan Act impact on Parliament's sovereignty, perhaps with the exception of the Henry VIII clauses. But even those do not suspend its sovereignty, as Parliament can withdraw its delegation to legislate at any stage.

85 At SO 57.
86 Mueller, above n 83, at 316.
87 Green Party MP Kennedy Graham raised this concern during the First Reading of the bill (12 April 2011) 671 NZPD 17907.
88 Dyzenhaus, above n 18, at 42–53.
89 At 49.

But, the distinction between power and authority raises an interesting possibility: that there is a difference between a statutory power's constitutional legality and its moral legitimacy. Parliament is free to create public powers, but it should do so within reasonable limits. The legislature holds the trust of the people that it will uphold democratic principles and constitutional ideals. In an ideal world, therefore, the discrepancy between legal and legitimate parliamentary action would be minimal.

Unfortunately, New Zealand has a history of misused extraordinary powers.[90] When dockworkers refused to work overtime after failed wage negotiations in 1951, the government of the day interpreted this as strike action and activated its extraordinary powers under the Public Safety Conservation Act 1932 (PCSA), as it regarded the dockworker's action a threat to New Zealand's economy.[91] By way of regulation, freedom of expression and assembly were restricted and picketing was declared an offence, among other things. Similarly, the Economic Stabilisation Act 1948 (ESA) enabled the Governor-General to create regulations when deemed necessary for the purpose of promoting economic stability. Over the next four decades, governments took frequent advantage of these powers, in particular the Muldoon government in the late 1970s and early 1980s. The excessive use of the ESA at the time led Shelton to lament that there was a growing divergence between constitutional theory and practice, and that "the coherence of the constitution [was] breaking down".[92] The examples discussed in this article suggest a renaissance of economic extraordinary powers.

A tendency apparently exists that governments purport an economic emergency to justify the necessity of extraordinary powers. Meyler argues that this preference to label an event an economic emergency is a result of the popular view that the economy is an uncontrollable force, with which one cannot negotiate.[93] Governments can, therefore, merely react to such a force and thus remove the issue of responsibility for the crisis. That also makes the notion that extraordinary powers are appropriate in such situations more compelling.[94]

The question remains why there are so few political consequences if these extraordinary powers are as constitutionally concerning as this article suggests. Although both the PCSA and the ESA were repealed after the end of the Muldoon era, it took many decades and over 200 regulations before this happened. And while there was some initial public concern about the

90 GWR Palmer and Matthew Palmer *Bridled power: New Zealand's constitution and government* (4th ed, Oxford University Press, Oxford, 2004) at 209–212.

91 Public Safety Conservation Act 1932, s 2(1).

92 D Shelton *Government, the Economy and the Constitution* (LLM Thesis, Faculty of Law, Victoria University of Wellington, 1980) at 392; cited in: Palmer and Palmer, above n 90, at 210.

93 Meyler, above n 44, at 552.

94 At 547, 548.

extent of extraordinary powers under the CER Act and the ECan Act, the government was still in power after two general elections.[95]

The problem lies in the fact that, for political constitutionalism to effectively control excessive government powers, it requires conscientious legislators and a well-informed constituency. As seen above, the history of Parliament's constitutional conscientiousness is spotty at best. This weakness in the political system is exacerbated by the fact that New Zealand's adherence to parliamentary sovereignty is likely the strongest of all modern democracies.[96] The United Kingdom has two parliamentary chambers acting as a check and it is bound to an international human rights regime through its Human Rights Act. New Zealand has neither. Furthermore, our parliamentary system creates a close personal proximity between the legislature and executive, so that the latter plays a major part in creating its own extraordinary powers. And, if the spectre of economic decline is a constant part of the government's rhetoric, constitutional concerns take a backseat in the minds of the constituency facing a purported economic crisis.

This is not to say that the executive is malevolently usurping Parliament's powers. Both the CER Act and the ECan Act were addressing legitimate issues. While these issues likely did not require extraordinary powers (or at least not the extent of these powers), it was more convenient to simply empower the government and "get on with it", unburdened by constitutional processes and bureaucracy. However, this approach to constitutionalism is not sustainable in the long term. Convenience is not a viable replacement for constitutional principle. A sustained use of extraordinary power runs the risk of normalising it. If the use of extraordinary power is not temporary but long term, the powers cease to be extraordinary and will become constitutionally transformative – thus fulfilling Shelton's prediction.[97]

VI. Conclusion

The lack of constitutional safeguards allows Parliament to create extraordinary public powers that are not designated as emergency powers, and are therefore used in non-emergency and ordinary situations. This blurs the line between ordinary and extraordinary powers and may normalise the use of extraordinary powers. As the examples of the CER Act and the ECan Acts show, such blurred lines allow extraordinary powers to be created for the sake of convenience rather than necessity.

95 Andrew Geddis, "An Open Letter to the People of New Zealand and their Parliament" Pundit (28 September 2010) <pundit.co.nz>; Philip Joseph "Environment Canterbury Legislation" 2010 NZLJ 193.

96 Tushnet, above n 4, at 41.

97 Ferejohn and Pasquino, above n 3, at 223.

In its final report on the legislative response to national emergencies, the Regulations Review Committee found that the powers extended to the government by the CER Act had been too extensive.[98] This assessment was particularly due to the broad law-making powers and the lack of safeguards in the Act. But the Committee's recommendations may not be sufficient, as they only extend to formally designated emergency powers and leave the determination of which powers are necessary to Parliament. It may be time to revisit the extent of parliamentary sovereignty in New Zealand. No other modern democracy applies it as strictly as we do, and we should consider adding our own restrictions on Parliament's powers. It is both unnecessary and unrealistic to change our constitutional system wholesale and introduce some form of strong judicial review of legislation. It may be enough to introduce a formal way for our courts to declare a statutory provision to be inconsistent with constitutional principles, and strengthen legislative vetting process before a Bill is introduced in Parliament. This represents an interesting midway point between political and legal constitutionalism, and it allows Parliament to retain its sovereignty.

98 Regulations Review Committee, above n 54, at 18.

THE STEWARD AND THE STEWARDSHIP

DJ Round*

Abstract

In environmental literature the word stewardship suggests serious responsibilities to the environment entrusted to the steward's care. In New Zealand, however, stewardship land enjoys less permanent protection than any other category of land administered by the Department of Conservation. The Department's recent attempt to revoke a higher protection status and thereby return land to stewardship status revealed a lack of clarity as to the Conservation Act's high policy. After litigation, the Department's powers are somewhat clearer and more limited. The Department's credibility as a conservation advocate has, however, suffered. The Conservation Act has not prevented various Departmental failures of good stewardship, and other law changes suggest that, unless serious changes are made, the Department may well continue to fail to live up to conservationists' expectations.

> And the lord commended the unjust steward, because he had done wisely: for the children of this world are in their generation wiser than the children of light.
>
> – Luke 16:8[1]

I. Stewardship Land

On behalf of the New Zealand people, and for the purposes outlined in the Conservation Act 1987,[2] the Department of Conservation administers

* Lecturer in Law, University of Canterbury; former long-time chair of the Christchurch branch of the Native Forests Action Council (NFAC) and of the North Canterbury branch of the Royal Forest and Bird Protection Society; former national president and long-time national executive member of Federated Mountain Clubs (FMC); former member of the Canterbury/Aoraki Conservation Board; trustee of the Maurice White Native Forest Trust.

1 *The Holy Bible* (King James Version) at Luke 16:8.

2 In particular s 6(a) of the Conservation Act 1987: "to manage for conservation purposes all land … held for the time being under this Act". "Conservation" means "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations" (s 2).

some 8,600,000 hectares, roughly one third of New Zealand's total land area of about 26,800,000 hectares.[3]

Of these 8,600,000 hectares, about 2,820,670 hectares – almost a third and, therefore, roughly a ninth of New Zealand's total land area – is "stewardship land".

Stewardship land is not the highest category of land held by the Department, but actually the lowest. It is merely land administered by the Department (and therefore a "conservation area", as is all "land or foreshore held under this Act for conservation purposes")[4] which has received no higher classification and, therefore, protection.[5]

As explained below, the particular label "stewardship land" arose out of the practical political situation at the time the Department of Conservation was established. The Act describes a very prosaic form of stewardship, just as the dictionaries define "stewardship" in a prosaic manner[6]. Nevertheless, it is, at the least, worthy of remark that this lowest category of conservation land bears such a promising name, for stewardship is sometimes spoken of as involving lofty and important duties. Environmental rhetoric sometimes speaks of humankind's responsibilities to care for the earth as a stewardship. Section 7 of the Resource Management Act 1991 includes the "ethic of stewardship" and "kaitiakitanga" among the matters to which all persons exercising functions and powers under the Act shall have particular regard.[7]

Parliament could easily have used another term for this least-protected category of conservation land. It could have spoken of interim or provisional protection, of a land bank, or of Category A and Category B lands. The word stewardship, although familiar to English speakers, has a slightly old-fashioned air to it. It cannot have been an accident that Parliament chose this word. It is easy to imagine that Parliament chose it specifically for its overtones of environmental responsibility - overtones which, intentionally or not, might actually divert attention from that land's more precarious conservation status.

3 The figure of 8,600,000 appears in the Department's Annual Report for the year ending 30 June 2015 <doc.govt.nz>. However, the Parliamentary Commissioner for the Environment, in her August 2013 report on stewardship land, discussed below, gives a total area of 8,838,470 hectares. Jan Wright *Investigating the Future of Conservation: The Case of Stewardship Land* (Parliamentary Commissioner for the Environment, 21 August 2013).

4 Section 2 of the Conservation Act 1987.

5 At s 2, "Stewardship area means a conservation area that is not (a) a marginal strip; or (b) a watercourse area; or (c) land held under this Act for one or more of the purposes described in s 18 (1) …".

6 "Steward: An official appointed to control the domestic affairs of a household, esp. the supervision of servants and the regulation of household expenditure" *Shorter Oxford English Dictionary* (3rd Revised Edition, Oxford University Press, Oxford, 1993).

7 Resource Management Act 1991 s 2 defines kaitiakitanga as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori … and [which] includes the ethic of stewardship".

II. The Philosophies of Stewardship and Sustainability

The well-known adage, "We have not inherited the earth from our parents, but have borrowed it from our children", is but an environmental re-phrasing of Edmund Burke's insistence that we are but the "temporary possessors and life-renters, not the entire masters", of what we have received from our ancestors. We hold our inheritance in "moral entail" with a duty to pass it on in an enhanced state, if possible, but at the least unimpaired.[8]

Yet the philosophy of stewardship is not nearly as prominent as that of sustainability. An unscientific examination of the indexes of standard environmental texts reveals countless references to sustainability as a guiding principle, but very few to stewardship.[9] A statutory preference for sustainability does little to explain this phenomenon. It merely places the question one further step back: *why* do statutes refer to sustainability and not stewardship?

The reason cannot lie in the precision or helpfulness of the concept of sustainability. Since *New Zealand Rail v Marlborough District Council,*[10] it has become increasingly clear that the Resource Management Act's definition of sustainable management is not much more helpful than if the legislature had suggested, in Ian Williams' words,[11] that sustainable management meant "sugar and spice and all things nice". A definition that simply lists all good things says little about sustainability, and even less about management.

Without more ado, "sustainability" leaves unstated the thing that is being sustained. It is impossible to sustain an ecosystem, a particular resource and a human community all at the same time. Ecological sustainability and human use may well be incompatible. To manage land for one human use reduces the capability of that land to serve other human uses. And in the end, human needs will always take precedence.

Donald Worster considers the acceptance of sustainability as marking the point at which the environmental movement abandoned its hopes of fundamentally changing the world.[12] Instead, it compromised with a fatally

8 Edward Burke "Reflections on the Revolution in France" (J Dodsley, London, 1790) at ch xiv. William J Ophuls in *Ecology and the Politics of Scarcity Revisited* (W H Freeman & Co, New York, 1992) presents substantial arguments for Burke's stewardship philosophy as the best for our forthcoming new age of scarcity.

9 Works which do *not* mention stewardship include Gru Brundtland *Our Common Future* (*the 'Brundtland Report'*) (UNESCO, Bonn, 1987); Eric T Freyfogle *Why Conservation Is Failing and How It Can Regain Ground* (Yale University Press, New Haven CT, 2006); Donella Meadows *Limits to Growth: a report for the Club of Rome's Project on the Predicament of Mankind* (Universe Books, 1972); Tim Jackson *Prosperity Without Growth, Economics for a Finite Planet* (Routledge, London, 2009) and KS Shrader-Frechette *Environmental Ethics* (Rowman & Littlefield, Lanham, 1998).

10 *New Zealand Rail v Marlborough District Council* [1993] 2 NZRMA 454.

11 Ian Williams "The Resource Management Act 1991: Well Meant but Hardly Done" [2000] 9 Otago LR 673.

12 Donald Worster "The Shaky Ground of Sustainable Development" in *The Wealth of Nature, Environmental History and the Ecological Imagination* (Oxford University Press, Oxford, 1994).

flawed model of human relationships with the earth. "Sustainability" expressed the hope that current lifestyles needed only to be modified, not fundamentally altered; that we could, essentially, have our environmental cake and eat it too. The basic conservation truth, Eric Freyfogle asserts, is that:[13]

> … our behaviour to nature is somehow deficient … [W]e need to act more humbly and respectfully … [This is] easily forgotten when humans are assigned the task of 'sustaining' nature.

The vagueness of "sustainability" – especially when "sustainable" is linked with any number of nouns – management, development, institutions, cities, societies, transport, agriculture, anything – has rendered the concept meaningless.[14] It thereby becomes much more acceptable as an agreed principle. It allows human beings to be in charge of managing the earth, and making decisions which may be harmful to Nature as long as they can be argued to serve the greater purpose of sustainability. But if our fundamental environmental problem is that we are not humble and respectful enough to nature, then surely stewardship offers greater potential to be a remedy.

Stewardship and sustainability both look to the future, but from different perspectives. A steward must be more humble than a sustainer, because even though a steward may command the household under his care, he still does so only as the servant of the master. A steward is also more limited in his range of options, because his duty is to maintain what already exists. He is not free to sacrifice some of his inheritance for experiments in sustainability.

It may be no accident, then, that many of those seriously proposing stewardship as an ecologically necessary and philosophically acceptable model for the future have worldviews enriched by spiritual understanding. John Seymour[15] thought "Benedictine stewardship" the highest recommendation and cultural artefact of the Roman Catholic Church. Matthew Fox was a Dominican monk,[16] and Sean McDonagh,[17] a Columban priest. Wendell Berry admires the Mennonite Amish communities and,[18] like Rene Dubos[19] and John Peet,[20] speaks from a broad Christian conviction.

Some still do not find enough humbleness in this "shallow ecology". Michael Pollan offers the "idea of the garden" as a mutually fruitful model

13 Eric Freyfogle, above n 9, at 119.
14 Westpac's advertising describes itself as "the world's most sustainable bank".
15 John Seymour *The Ultimate Heresy* (Green Books, Cambridge, 1989).
16 Matthew Fox *Original Blessing* (Bear & Co, Santa Fe, 1983).
17 Sean McDonagh *To Care for the Earth* (Bear & Co, Santa Fe, 1987).
18 Wendell Berry *The Gift of Good Land* (North Point Press, New York, 1981); Wendell Berry *The Unsettling of America* (Sierra Club Books, San Francisco, 1986).
19 René Dubos "Franciscan Conservation versus Benedictine Stewardship" in David Spring and Eileen Spring (eds) *Ecology and Religion in History* (Harper Torchbooks, New York, 1974).
20 John Peet *Energy and the Ecological Economics of Sustainability* (Island Press, Washington DC, 1992).

for human relationships with the earth;[21] Eric Freyfogle considers that model "merely a kinder, gentler form of land degradation".[22] No adherent of "deep ecology", which recognises the inherent value of nature, would even accept that the human species has any more natural rights than any other. Human beings have duties to respect other species, not powers of management over them.[23]

Aldo Leopold, in his immortal *A Sand County Almanac*,[24] proposed a "land ethic" whereby humans would cease to be lords of creation and would instead regard themselves as members of the "land community". He has therefore been claimed as one of the founders of Deep Ecology. His hope, though, that "[w]hen we see land as a community to which we belong, we may begin to use it with love and respect" is also compatible with the position of human stewardship.

Love for the land can express itself in different ways. Rather than arid debates about correct positions, it may be enough to echo St Augustine and say, "Love, and do what you like".

That instruction, though, is not specific enough for a Government Department. Perhaps remarkably, the Conservation Act offers little coherent philosophy of the Department's duties concerning its own lands. The Act's definition of conservation speaks in the same breath of intrinsic value, public recreational enjoyment and future human generations. The general duty does seem to be that of a caretaker – a steward – rather than a developer, but the Act's guidance as to Departmental decision-making has been interpreted by the Department, at least, as allowing some surprising latitude. *Quis custodiet ipsos custodes*?[25] A firm Departmental commitment to genuine stewardship would be welcomed by many.

III. The Inappropriateness of 'Stewardship Land' Classification

The lowly legal status of stewardship land in the Conservation Act should not lead us to believe that the land so classified – or, more accurately, the land *not otherwise* classified – is necessarily of lesser conservation value than other parts of the public conservation estate. Especially in the South Island, many areas of stewardship land have very high conservation values. Some areas undoubtedly worthy of national park status still have this low classification. The areas were largely identified by the then Parliamentary Commissioner for the Environment, Dr Jan Wright, in her August 2013 report, *Investigating*

21 Michael Pollan "The Idea of the Garden" in *Second Nature* (Bloomsbury, London, 1996).
22 Freyfogle, above n 9, at ch 3 "The Lure of the Garden".
23 Devall and Sessions, *Deep Ecology, Living As if Nature Mattered* (Gibbs Smith, East Layton, 1985).
24 Aldo Leopold *A Sand County Almanac* (Oxford University Press, Oxford, 1949)
25 "Who shall guard the guardians themselves?" (Juvenal, Satire VI, lines 347–348).

the future of conservation: The case of stewardship land. The largest and finest stewardship land areas in the South Island include Dean Forest and the Longwood Range,[26] the Livingstone Range and Mavora lakes, the catchments of the Haast and Landsborough and all the wonderful lowland forest between the Cascade and Big Bay; the catchments of the Hokitika and much of the Grey; the Denniston Plateau and Mokihinui River, the Raglan Range, the former St James Station and the headwaters of the (Canterbury) Waiau River.

Explanations as to why lands of such high conservation value lack the legal status properly reflecting those values must presumably centre round the glacial pace – to employ no harsher term – at which the Department's bureaucracy moves. Once one might have fairly added that the Department, when it was established in 1987, faced large challenges in classifying the lands it found itself in charge of, but after 30 years that excuse is surely no longer available.

The reasons for the existence of the *category* of stewardship land lie in the history of the Department's establishment, and in the previous status of the lands allocated to this new department of state.

Nearly all of what is now the public conservation estate had before 1987 been held and administered by two government departments. One was the New Zealand Forest Service, which, despite its perhaps misleading name (imitating the United States of America's federal Forest Service), was a proper Department of State, regulated by the Forests Act 1949. The other, the Department of Lands and Survey, had an even longer history, with occasional variations of name, and was finally regulated by the Land Act 1948.

Both departments had mixed functions. The Department of Lands and Survey administered national parks and reserves, but also held much other Crown land and was responsible, *inter alia*, for the breaking-in of new land and the establishment of farm settlements. These farms would eventually be freeholded to new farmers. The Forest Service, which held most of the Crown's native forests, had identified "protection forests" on steeper country, and "forest parks" (where native logging could still be carried on in delineated areas), and still allowed logging access to various other lowland forests, on very generous terms, to logging interests in some rural communities. Virtually all its commercial income arose from the vast planted exotic forests still then (before the State-Owned Enterprises Act 1986 and later privatisations) publicly owned, but the Service still harboured ambitions of discovering the secrets of long-term sustainable indigenous forest management. These ambitions made it the enemy and target of the vigorous conservation movement of the 1970s and 80s.

There were economic reasons, though, as well as conservation ones, why the reforming Labour Government of 1984 to 1990 handed the kingdoms of the Forest Service and the Lands and Survey Department over to the Medes and Persians. But in any case, much of the land held by the old departments

26 Shown in Figure 3.3 of the Report, Wright, above n 3, at 28 and 29.

was in no sense allocated to conservation purposes. It might well have been that in future some form of human use and development would be found for it. Stewardship land was therefore intended – initially, at any rate – to be a neutral land bank, to hold land whose ultimate end use had not been decided upon.[27] There was, to begin with, no automatic assumption that stewardship land merited protection. After all, if it did, why had it not already been classified as national park, reserve or forest park? On the other hand, given that all remaining wild lands are ones for which little or no human use has been found in the long period of European settlement, and that wilderness is, in the current dispensation of human affairs, a resource which can only shrink, and not grow, it could be argued that practically all such remaining areas *ipso facto* have conservation value and little human usefulness.

As the Crystal Basin controversy, mentioned below, illustrates, the current legal arrangement has the consequence, *inter alia*, that any land which the Department acquires, no matter how high its conservation values, automatically initially falls into the category of stewardship land until it is later – very possibly much later – given a higher classification. The Department's classifications cannot, of course, be arbitrary. They must be carefully considered, and based on proper evidence, and the preparation of a case for a higher classification may take some time. All the same, abundant evidence of the high conservation values of the South Island areas identified by the Parliamentary Commissioner and listed above has long existed, and the Department has, in many cases,[28] had 30 years to prepare a case. No explanation of the Department's inactivity can be flattering.

IV. Controversial Exchanges of Stewardship Land

Since stewardship land is merely conservation land not having any specific or particular higher status, it is not surprising that it is not as closely guarded by the law as are other parts of the public conservation estate. Stewardship land is indeed the only part of the estate which can be alienated from Crown

27 "The clear intention in creating stewardship areas was to protect them from development or extractive use until their conservation value could be established, [and] the appropriate form of protection chosen…; unless of course the conservation values were found to be inadequate, when the area would be disposed of…"; Hon Philip Woollaston, Minister of Conservation at the time of the Department's founding, *Stewardship Land and DOC - the beginning* September 2012 at 7 <pce.parliament.nz>. The Conservation Bill initially required that stewardship land was to be managed so that "its inherent character is largely unaltered", but this was changed to a somewhat more specific requirement that "every stewardship area shall be so managed that its natural and historic resources are protected" (Conservation Act 1987, s 25).

28 Not all. St James Station, for example, was run as a pastoral lease; the lease was purchased by the Crown, via the Nature Heritage Fund, only in 2008. All the same, its conservation values were already well-known; they were of course the reason for the purchase. Although figures are difficult to obtain, additions to the public conservation estate by way of Nature Heritage Fund purchases and tenure review under the Crown Pastoral Land Act 1998 must now be of considerable significance in enlarging the area of stewardship land.

ownership. Section 16 (1) provides that "… no conservation area or interest [therein] shall be disposed of except in accordance with this Act", and the only provisions that the Act makes for the disposal of conservation areas deal with stewardship areas, which can be "disposed of", in situations where conservation values are essentially not involved, under s 26, or "exchanged", under s 16A, "for any other land", as long as certain conditions are fulfilled:[29]

> Section 16A Exchanges of stewardship areas
>
> Subject to subsections (2) and (3), the Minister may, by notice in the Gazette, authorise the exchange of any stewardship area or any part of any stewardship area for any other land.
>
> The Minister shall not authorise any such exchange unless the Minister is satisfied, after consultation with the local Conservation Board, that the exchange will enhance the conservation values of land managed by the Department and promote the purposes of the Act …

It was this vulnerability of stewardship land to alienation by way of exchange – and two controversial proposed such alienations, one of which actually occurred – that prompted the then Parliamentary Commissioner for the Environment to write her 2013 report, *Investigating the future of conservation: The case for stewardship land*.[30]

The exchange which did *not* ultimately occur was that of land in the Mokihinui Gorge, in Buller, where Meridian Energy proposed to build a hydroelectric dam which would have flooded the gorge. Meridian's project manager argued that it was an "important fact … that the area … is stewardship land … not in a national park … not in an ecological reserve or specially protected area. The river doesn't have a water conservation order on it …".[31]

On the generally reasonable assumption that the classification of conservation land should reflect that land's conservation value, he could be argued to have a point, but, in the end, the entire proposal was abandoned.

The land exchange which did occur concerned part of an area of high country land, Crystal Basin, adjoining the Porters Ski Area in the Craigieburn Range. The Crown's own Nature Heritage Fund had paid $3.5 million for several thousand hectares of high country land including Crystal Basin, as a "strategic acquisition … link[ing] a number of key protected areas".[32] When the land became part of the public conservation estate, it automatically became stewardship land until given a higher classification. Six years later, the Department had still not got around to that higher classification, and, in

29 Section 16A was inserted into the Act by the Conservation Law Reform Act 1990. The original Act's only provision for the disposal of stewardship areas was s 26.

30 Wright, above n 3.

31 Chapter 5 of the Report, at 41.

32 Chapter 5.2, at 44.

March 2011, the Director-General of Conservation approved the exchange of 196 hectares of that land at Crystal Basin, which would then become the freehold property of the company operating the Porters Ski Area, in return for 56 hectares of relatively rare coastal lowland forest at Steep Head Gully, in Le Bons Bay on Banks Peninsula. The Canterbury Aoraki Conservation Board, which had to be consulted under s 16A(2), had recommended that the exchange be declined.[33] The Nature Heritage Fund was among other organisations also opposing the exchange. Steep Head Gully, for which Crystal Basin was exchanged, was private land, but was effectively already protected by the Banks Peninsula District Plan, and indeed also by inaccessible terrain which had simply made it impossible to log or even, were it cleared, to graze. The land swap could perhaps be argued to have increased the conservation values of the conservation estate, because the estate now included this area of a rare forest type – the exchange might "enhance the conservation values of land *managed by the Department*".[34] But it would not provide a net conservation benefit to conservation generally, because the land becoming part of the conservation estate – Steep Head Gully – was in no danger of destruction, and the land leaving the conservation estate – Crystal Basin – would have its conservation values either remain unchanged or possibly even decline.[35]

In response to public concerns about such exchanges, the Parliamentary Commissioner for the Environment produced her report, which recommended that the Minister of Conservation should "seek advice from the … Conservation Authority to provide guidance on the principles and processes … used when making decisions on net conservation benefit". She also recommended that the Minister "instruct the Department … to identify areas of stewardship land that are clearly of significant conservation value, and reclassify them in accordance with that value".[36]

Occasional land exchanges and sales of parcels of land with little conservation value which the Department has inherited occasionally occur without controversy. Controversy may arise, though, if land of undoubted value is to be lost from the conservation estate. Even when the estate obtains land of conservation value in exchange, concerned citizens may think that the price paid was too high. It may have been possible for the land obtained in exchange to be obtained in some other way.[37] It may not have been necessary

33 The author was a member of the Board at the time.

34 Conservation Act 1987, s 16A(2) (emphasis added).

35 This point was touched upon in the Conservation Authority's January 2016 report, *Stewardship Land: Net Conservation Benefit Assessments in Land Exchanges*, at 2.9.

36 Wright, above n 3, Chapter 7 of the Report, *Conclusions and recommendations*, at 58-59. The Conservation Authority's January 2016 report to the Minister *Stewardship Land: Net Conservation Benefit Assessments in Land Exchanges* was in response to these recommendations.

37 The Court of Appeal in the case around which this article centres observed at paragraph 79 of its judgment that if the land provided to the Department by way of exchange - the "Smedley Block" - were worthy of protection and incorporation within the public conservation estate, the Department could have attempted to buy it directly from its owner.

to exchange the land at all in order to protect the land outside the estate. Steep Head Gully, for example, was, essentially, already protected. If the two areas of land to be exchanged are very different – as in the case of the Crystal Basin and Steep Head Gully exchange – then questions impossible to answer arise about the comparison, metaphorically speaking, of apples and oranges.

Behind all these arguments lurks the fear that development interests and political pressure on the Department may contaminate the process. The development interest is a given – the land is, after all, to be exchanged so that it may be used for some human purpose. Where such a purpose exists, and where very significant projects and sums of money are involved, political pressures of one sort or another upon the Department are only to be expected.

V. The *Ruataniwha* Case; The Legal and Factual Background

An entirely new issue and area of concern arose out of the facts of *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* (the *Ruataniwha* case) decided by the High Court in February 2016,[38] by the Court of Appeal[39] in August 2016 and by the Supreme Court in June this year.[40] The case concerned a proposed land exchange, but also one entirely new issue. That issue's momentous implications obliged the Royal Forest and Bird Protection Society, in the public interest, to pursue the case from the High Court, where it was unsuccessful, to the Court of Appeal and then (after the Society's victory there) to be taken by the Department to the Supreme Court. Palmer J in the High Court found for the Crown; two of the three judges of the Court of Appeal for Forest and Bird. The weight of judicial opinion was therefore evenly balanced when the matter reached the Supreme Court.

The land exchange in question was desired by the Hawke's Bay Regional Investment Company in order to make possible the building of an 83-metre-high dam on the Makaroro River. The lake behind the dam would inundate the stewardship land concerned.[41] The conservation land was sought only in order that it could lawfully be inundated by the new lake. The purpose of the dam was to "provide a long-term sustainable water supply solution for Central Hawke's Bay"[42] by providing irrigation for up to 27,000 hectares of land, some of which, anyway, would undoubtedly be used for more intensive land uses – including dairying – than those prevailing at present. In exchange for the surrender of 22 hectares of conservation land in two different locations

38 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [The *Ruataniwha* case][2016] NZHC 220; (2016) 19 ELRNZ 370.

39 *The Ruataniwha case* [2016] NZCA 411.

40 *The Ruataniwha case* [2017] NZSC 106.

41 The whole scheme is however generally referred to as the "Ruataniwha Scheme", even though this dam was proposed for the Makaroro.

42 Hawke's Bay Regional Investment Company Ltd *Slides for the Ruataniwha Water Scheme Public Meeting 6 August 2015*.

in the Ruahine Conservation Park the Department would acquire 146 hectares, later increased to 170 – the "Smedley Block", adjoining the Ruahine Conservation Park nearby. (The conservation values of the Smedley Block are not entirely clear; in the Supreme Court judgment is it described as "currently being grazed",[43] but it rationalised the boundaries of the Conservation Park and evidently contained patches of conservation value.)

What would good stewardship, and the purposes of the Conservation Act, require? The exchange would enlarge the public conservation estate. The Smedley Block was argued by the Department to enhance the estate's conservation values. Human prosperity would certainly be enhanced, as water was made available for agriculture for reliable irrigation. The Department would show itself to be a reasonable landowner willing to recognise and accommodate the wider public good where that was desirable and possible.

On the other hand, the dam would drown an area of the conservation estate – not a large area, but one with conservation value. It would block a river's natural flow and fish movements for ever. It would promote agricultural intensification which was widely expected to intensify downstream nutrient loads and affect downstream water systems.

But beside those objections, a land exchange in this case would establish a frightening precedent; for at the beginning of this particular land exchange process the conservation land concerned was *not stewardship land at all*. The land had a higher status; it was part of the Ruahine Forest Park – deemed, by s 61(2) of the Conservation Act, to be a conservation park.

Section 16(1) of the Conservation Act provides that "… subject to the Public Works Act 1981, no conservation area … shall be disposed of except in accordance with this Act".

The only provisions which the Act then makes for disposal of conservation areas are to be found in s 16A, quoted above, dealing with the exchange of stewardship areas, and s 26, dealing with their disposal upon very strict conditions in what are therefore uncontroversial situations.

Those provisions might lead us to conclude that only stewardship areas may be disposed of, by one means or another, and that after stewardship land has been allocated a higher status it will remain part of the public conservation estate for all time; or until such time, anyway, as a future parliament might choose to amend the existing law.

Part 4 of the Act, however, deals with extra levels of protection. Section 18(1) provides that:

> … the Minister may … declare any land … held under this Act for conservation purposes to be held for the purpose of a conservation park, an ecological area [or other purposes] and, subject to this Act, it shall thereafter be so held.

43 *The Ruataniwha case,* above n 40, at [8].

Sub-section (7) then provides that subject to an obligation to give public notice and hear objections:[44]

> … the Minister may … vary or revoke the purpose or … purposes for which any land or interest held under sub-section (1) is held; and it shall thereafter be held accordingly.

In this particular case the Minister had delegated this revocation authority to the Director-General, Mr Lewis Sanson.

Conservation parks and ecological areas, then, are not necessarily forever. National parks, under the National Parks Act 1980, are to be "preserved in perpetuity".[45] The Reserves Act 1977 provides for the "preservation and management" of reserves for the benefit of the public, and s 24 requires that any change in classification of most reserves may be made only after the physical reason for the original classification has been destroyed or has disappeared.[46] But the status of conservation parks and ecological areas can be revoked by a very simple procedure. But by what criteria and for what reasons may this be properly done?

The question has considerable practical significance. New Zealand has 30 conservation parks, generally ranging in size from around 50,000 to 150,000 hectares. Their total area is somewhere around 18,000 square kilometres. This area, and the number of parks, could well increase in future if the Department reclassifies current stewardship land as conservation park. (Stewardship lands could, of course, be given different higher classifications.)[47]

Covetous eyes still watch the conservation estate. Forest and Bird understands that there are "proposals by developers that would result in flooding areas in both Lake Sumner Conservation Park in Canterbury and the Oteake Conservation Park in Otago".[48] A suitable decision of the Supreme Court would have raised developers' hopes for similar downgrading of protected land status for their irrigation schemes. A new proposed land use would not necessarily have to be for agriculture, and the conservation land affected need not necessarily be only on the frayed margins of the conservation estate. A private party wanting to build an hotel, for example, in some remote and beautiful place classified as conservation park, might offer a larger area of different land elsewhere in exchange. If the status of conservation park could be revoked, not for conservation reasons but only in order to effect a land

44 A similar provision applies to wilderness areas and sanctuary areas. By s 18AA, it is the Governor-General who declares these areas to exist, and who may revoke such a declaration; conservation parks and ecological areas, not quite so special, are dealt with by the Minister alone.

45 National Parks Act 1980, s 4(1). Section 11 (1) declares that "No area of land … included in any park shall be excluded from that park, except by Act of Parliament".

46 Section 15 also authorises the Minister to exchange reserve land for other land to be held as part of that reserve. The extent of that power, and its relationship with s 24, is unclear.

47 But it is also possible that the effect of the Supreme Court's decision will be to make future governments more reluctant to grant stewardship areas a higher status; see Part X below.

48 Forest and Bird fundraising appeal letter, 24 February 2017.

swap under s 16A of the Conservation Act, then a very large part of our public patrimony would be liable to be traded away.

The grounds on which a revocation of conservation park status may be made under s 18(7) are therefore a matter of great public importance.

VI. The Purposes of the Conservation Act

The issue in the *Ruataniwha* case was a simple one. In moving from the initial situation, where the land concerned was conservation park, to the Department's intended final situation, where the land had been exchanged for other land, the Department had to make two decisions. The first decision was whether or not to revoke the status of conservation park for these particular little areas, thereby reducing them to the status of stewardship land. Then, after that had been done, the second decision was whether or not to exchange this newly-created stewardship land for the Smedley Block.

Obviously, these two decisions were intimately connected. The whole purpose of the first step, revoking the conservation park status, was to make the land available, as stewardship land, for the second step, of exchange. The Department's decision-makers knew this perfectly well and openly referred to it when making the first decision. But nevertheless, there were two distinct decisions to be made. Forest and Bird argued that knowledge of the ultimate intended destination of the land (as a consequence of the second decision, about exchange) had improperly tainted or infected the first decision.

On what ground had the Department made its first decision? And whatever that ground was, was it a proper ground under the Act?

The test for the second decision, about the exchange, is spelt out in s 16A – the exchange must "enhance the conservation values of the Department and promote the purposes of the Act". But what guidance did Parliament give as to how the first decision, to revoke conservation park status, was to be made?

On this matter the Act is completely silent. Forest and Bird argued that Parliament's clear intention that only stewardship land was available for exchange meant that any downgrading of land from another status for the purpose of exchange was *ipso facto* improper.[49]

The Departmental decision-makers, Palmer J found in the High Court, "did not pretend to be considering revocation independently of the exchange".[50] Indeed, he considered that decision-makers came "perilously close to risking the wrong legal test being applied to the revocation decision". The only test identified in the Department's decision paper was the s 16A test for exchange, which is of course the second decision. The phrase in s 16A, just quoted above, was "formulaically recited in the decision paper and its recommendations".[51] Although the decision-makers were clear that there

49 The *Ruataniwha* case, above n 38, at [65].
50 At [74].
51 At [75].

were two distinct decisions to be made, "the basis on which the [revocation] decision was made is harder to establish".[52]

As well as this suspicious dearth of evidence, a general principle of statutory interpretation sensibly requires that general powers granted by statute must be exercised only for the statutory purposes.

Few would be surprised by Palmer J's view that "the promotion of conservation purposes, broadly interpreted, is at the heart of the Conservation Act". But what are those purposes? The Act's definition of conservation is so broad as to be non-justiciable in any but the most egregious circumstances. It must surely be capable of being interpreted in a broad policy-oriented way. Moreover, the Act contains not just a definition of conservation but also one of "nature conservation". Nature conservation is somewhat more specifically directed at preserving and protecting native species. But nature conservation is not the Department's purpose. It is the purpose of the Conservation Authority, but the Department's purpose is merely conservation. *Ergo*, conservation must be something rather broader. Since the Act itself contemplates land exchanges, in certain circumstances, could they not be said to be part of the conservation purpose?

The big picture policy approach of senior Departmental decision-makers could well be argued to be within the Act's general conservation purpose. Forest and Bird could well be argued to be placing too narrow a construction on the conservation purpose[53]. As the Director-General's was "convinced that what was offered to and accepted by [him] well and truly meets the purpose of the Conservation Act and is a good outcome for the Department and conservation"[54], His Honour considered that the Director-General had satisfied himself that there was a "good and proper basis, founded in conservation purposes broadly interpreted, for the revocation decision".[55]

The essential question, then, was simply one of how broad or narrow "conservation purposes" were to be interpreted. Forest and Bird's approach was that revoking conservation park status could only be done if the land in question no longer deserved such status. Any consideration of a possible exchange was improper. The Department argued that the purpose of the Act was to promote conservation, and for that purpose the Crown was entitled and indeed obliged to "take a global view of the conservation implications of the revocation decision rather than focussing on one particular resource in isolation".[56]

The Department would doubtless argue that an exchange would not only enlarge the conservation estate but also allow the satisfaction of the demand

52 At [77]–[78].

53 At [73]. "Indeed, Forest and Bird acknowledged … that its submission against taking the proposed exchange into account applies irrespective of whether total conservation value is increased or a better conservation outcome is achievable" (at [72]).

54 At [78] and [79].

55 At [80].

56 At [49].

for irrigation water. It would not help the wider cause of conservation if the Department and the public conservation estate were to be perceived as dogs in the manger and obstacles to economic development.[57]

Forest and Bird would argue that the Act's broad conservation purposes are best achieved by jealously guarding what has already been declared to be a valuable part of the public conservation estate. It is a perilous precedent to "treat … the conservation estate as a fungible business portfolio".[58]

Forest and Bird might also argue, surely, that if the Department were to take a "global view" of conservation[59] – and His Honour found that "the reference to the promotion of conservation of New Zealand's natural and historic resources in the [Act's] long title is to a broad and collective concept"[60] – then the Act's definition of conservation is ultimately not just limited to the conservation estate, and so the effect of a dam on a river's natural flows and life, and the effect of irrigation and intensified agriculture on the plains below, should also have been considered. Has the Department no duty of stewardship beyond the boundaries of the public conservation estate?

VII. The *Ruataniwha* Case; The Court of Appeal's Approach

In the Court of Appeal, Harrison and Winkelmann JJ took Forest and Bird's narrower approach, that revocation of conservation park status under s 18(7) had to be made solely by reference to the "particular resource". A "relativity analysis" of the type undertaken by the Director-General, comparing losses and gains, was inappropriate for that decision. Section 18(7)'s function was to enable land to be reclassified if that were necessary to reflect its actual conservation value. Conservation park status might have been erroneously applied in the first place, or perhaps a natural disaster has altered the land so that that status is no longer appropriate. But a decision to revoke protected status to enhance the overall conservation estate goes too far.[61]

The Act's Parliamentary history, closely examined by the Court, suggested that the first question was the correct test.[62] The definition of "conservation park" which makes mention of recreation, was also pressed into service, although the Court was wary of a "revolving door between … stewardship

57 "It would be artificial and inimical to good public administration for … the revocation decision … to be prevented by law from taking into account the merits of the proposed land exchange." At [70].

58 At [76].

59 At [49].

60 At [61].

61 At [50] of the Court of Appeal judgment, above n 39.

62 At [55]. The Conservation Law reform Bill 1989 originally proposed allowing s 16A exchanges for all conservation areas.

areas and conservation park based on whether the land concerned happens to be an area for recreation at any given moment".[63]

The Court also found a "clear and dominant message" in the Act's definition of "conservation", which included maintaining *intrinsic values* providing for appreciation and recreational enjoyment by the public and safeguarding the options of future generations.

Buller Electricity Ltd v Attorney-General[64] concerned "disposal" of stewardship land under s 26. That was a different situation from that at issue here; but both cases at least involved alienation of the conservation estate, and Doogue J found that:

> When the Act is looked at as a whole, there is no basis upon which the Minister could sell the land or otherwise dispose of it unless he was satisfied that it was no longer required for conservation purposes. The Minister could not properly give consideration to social and economic or other factors.

Therefore, "the whole concept of conservation [was] predicated upon maintenance of the status quo once *land* is found to meet the statutory requirements."[65] Broad general policy considerations such as the Director-General relied on could not stand against the text and purpose of the Act.

Reviewing the Director-General's evidence, it was clear that he did not base the revocation decision on intrinsic values. He acknowledged that the exchange proposal, and that alone, was the reason. Both Departmental decisions – to downgrade the land's status, and then to exchange – were driven by the same objective. Since the Court considered that a change in land's intrinsic values was the only proper reason for revocation, the revocation was invalid.

VIII. The Supreme Court Decision

The decision of the Supreme Court, released on the morning of 6 July, was the lead item on National Radio's midday news bulletin. There was widespread coverage in many news media over the next few days[66].

A majority, Elias CJ, and Glazebrook and Arnold JJ, affirmed the Court of Appeal's majority decision. William Young and O'Regan JJ dissented. As opinion was also divided in the Court of Appeal, and Palmer J at first instance found for the Crown, the total score of judges for and against, if one may do something as undignified as a headcount, is a close 5:4.

63 At [62].

64 *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 352.

65 At [57].

66 The Christchurch Press, however, published nothing on the decision in its edition of 7 July, and on 8 July merely one paragraph of eight lines on page 2.

This difference of opinion must diminish the decision's moral authority somewhat. Within 24 hours the Minister of Conservation, the Hon. Maggie Barry, had suggested that the government might well seek to amend the Conservation Act in order to allow such exchanges,[67] and Sir Geoffrey Palmer had publicly declared that such an "over-ruling" of the Conservation Act would be a "constitutional outrage".[68]

The Minister could surely have replied that four excellent judges agreed with the Department's interpretation of the Act. There is nothing inherently outrageous or unusual about Parliament changing a statute which runs contrary to desired policy. Legislation is not the same thing as "over-ruling", and, in any case, Parliaments are sovereign.

The Minister also suggested that any law change would not be retrospective so as to affect this particular case. She did not even mention the highly relevant recommendation of the New Zealand Conservation Authority in January 2016, that the Conservation Act be amended so as to authorise the exchange of other categories of land above stewardship land – in particular, conservation parks.[69]

The Supreme Court readily found that decisions on revocation had to be made on the basis of the intrinsic values of the land in question, and not by way of comparison with other land elsewhere.[70] In the case of a conservation park, as here, the "conservation purposes" which prompted protection were the natural and historic resources of the land and waters.[71] If a comparative approach were taken then "erosion of protection [would be] inevitable", because "it is likely that there will often be other land that would come out ahead on the sort of comparative assessment here undertaken".[72] It was always accepted by the Department that the 22 hectares had conservation values that warranted protection; had it not been for this proposed exchange, they would have continued to be protected within the conservation park. That being so, the revocation decision was clearly driven by the s 16A enhancement-of-the-conservation-values-of-land-managed-by-the-Department test, and for that reason the decision was unlawful.[73]

IX. Fettering the Minister's Discretion

Only time will tell whether any future Parliament might amend the Conservation Act as desired by the then Minister. If Parliament should

67 Radio New Zealand "Government eyes law change after dam decision" (6 July 2017) <radionz.co.nz>.

68 Radio New Zealand "Land-swap law change would be a 'constitutional outrage'" (6 July 2017) <radionz.co.nz>.

69 See Part X, below.

70 *The Ruataniwha case*, above n 40, at [109].

71 At [112].

72 At [119].

73 Paragraphs 126 and 127 offer a succinct summary.

amend the law, it might be that the Court's views on another issue is of more significance in the longer term, assuming, of course, that Parliament does not alter that matter also. That matter is the so-called "fettering of the Minister's discretion".

The Act grants powers to the Minister. Section 17Q, for example, says that "[s]ubject to this part, the Minister may grant a concession …". Ministers may issue permits. They may dispose of stewardship land:[74]

> Fettering … means placing limits on the statutory discretionary powers of the Minister (and the officials to whom she has delegated those powers). Most of the important decisions made by the Minister and her delegates are made under such powers which, as they are expressed in the Conservation Act itself, are discretionary. A power is fettered when limits are placed on its use over, above and separate from any limits or constraints to be found in the statute conferring the power or in general public law principles about proper decision-making. The rationale is that when Parliament conferred broad powers on a Minister, Parliament must have intended the Minister to exercise her discretion subject only to any limits or constraints in the statute conferring the power.

Accordingly, the Department's policy has long insisted that conservation management strategies and plans must never impose blanket rules,[75] but must always leave a discretion with the Minister. To make planning documents binding on the Minister would be improperly to fetter her discretion.

So, in CMSs, for example:[76]

> … limiting statements are not favoured, and an effects-based approach is preferred. To state that "[c]oncessions are considered inappropriate in the Caples Valley" is limiting and improper. But to state that "[a]dverse effects on the current recreational opportunity in the … Valley shall be avoided, remedied or mitigated" is "effects-based" and "acceptable".

In the latter case, of course, the Department's discretion as to the granting of concessions in the Caples Valley is so enormous as to place any decision except the most egregious beyond legal review.

74 Extracts from briefing paper by Jeff Connell, then Otago Conservator, to the Otago Conservation Board, 3 July 2001 (Agenda Item 6.1(b) Report 0161).

75 See above, n 73.

76 See above, n 73.

It had always been difficult to reconcile the Department's approach with other provisions of the Act. By s 17Q the Minister may grant a concession; but by s 17T (2) the Minister "shall" decline an application if it is inconsistent with the provisions of any conservation management strategy or plan. As Mr Connell observes, s 17N (2) says that no conservation management strategy "shall restrict or affect the exercise of any legal right or power by any person other than the Minister or the Director-General …". This must surely imply that strategies can restrict the powers of the Minister and her delegates. Fettering is entirely permissible, and indeed mandatory, if it is authorised, directly or indirectly, by the Act itself.

In arguments in the Supreme Court in the *Ruataniwha* case the Crown abandoned the argument it had used in the High Court and Court of Appeal that the actual provisions of the actual planning documents were simply immaterial in this case. It had become clear that provisions in those documents definitely argued against revocation and exchange. Instead, the Crown argued boldly that "planning instruments do not bind the Minister and could not constrain her decision-making power under s 18(7)".

The Court could not accept that. It had no doubt that the Minister and her delegate were bound to exercise their powers "in accordance with the policies expressed in the planning instruments formally adopted under the Act".[77]

Plans are important. They ensure consistency of decision-making. Many important interest groups expend a great deal of energy in their creation. It would be most wasteful of those efforts if the Department were then simply free to ignore them. The Department wields immense influence in plans' development. Not only lobby groups but even Conservation Boards themselves sometimes have to struggle to have good conservation provisions in the plans.[78] It would be most wasteful of public energies if those plans could at the end of the process simply be ignored by the Department. Why would Parliament have provided for the laborious creation of plans that were so pointless?

If the Department could simply ignore carefully prepared plans, and be bound only by the very general words of the Act, then its arbitrary power would be great indeed, and its duties of genuine stewardship minimal indeed.

In the *Ruataniwha* case, then, the decision-maker was obliged to respect and comply with statements of land exchange policy in the Conservation General Policy[79] and the Hawkes Bay Conservation Management Strategy.[80] The attitude of those instruments was that an exchange is appropriate only when the conservation land to be disposed of has low conservation values.

77 At [130].
78 At [131].
79 In accordance with which all conservation areas and natural and historic resources shall be managed – s 17A Conservation Act 1987. Policies are prepared in accordance with s 17B.
80 Prepared under s 17D, and also governing the management of conservation areas and natural and historic resources – s 17A.

These policies were to be respected whenever land reclassifications or exchanges might occur, not just when more general reviews were initiated by the Department.

If the Minister were obliged to respect such statements as that, it might not be absurd to imagine a future where a Minister is obliged to respect statements in CMSs that more appropriate higher levels of protection be given to stewardship land. The trick, of course, would be getting such statements into a CMS in the first place.

The fettering objection is used to justify many Departmental discretions. In *Ruataniwha* it was used in an attempt to justify a land exchange. But the Court's condemnation of the fettering excuse must surely extend to other categories of Ministerial power - to the granting of concessions and licences, for example. The exercise of the Department's discretion there is occasionally the subject of private and even public disquiet.[81] For the Department to forgo inscrutable discretion, and instead be subject to the rule of law, is an advance which will be welcomed by many different interest groups.

Perhaps one day the Department's respect for Conservation Management Strategies might even move it to comply with s 17H(4)(b) and review them every 10 years as required, rather than considering itself to be free to review or not review as it pleases.[82]

An intriguing side issue in *Ruataniwha* concerned marginal strips. By s 24 of the Conservation Act[83] these must be reserved alongside rivers, lakes or foreshore whenever there is a "disposition of land" by the Crown. Both the blocks of conservation park land to be exchanged for the Smedley Block were, of course, beside the Makororo River. If this exchange were a "disposition" of land of the sort contemplated by Part 4A, then even after exchange of the rest of the land the Department would still hold marginal strips beside the Makororo River, which still could not, then, lawfully be flooded. The proponents of the dam would be no further ahead. None of the various exceptions to the marginal strip requirement was argued by the Crown to apply,[84] and it would be absurd to say that alienating land by exchange was not a disposition. It may well have been a serious error of the dam proponents

81 Several examples of public controversy are mentioned in Part XI, below.

82 A *Progress report on the status of CMS and management plans*, 20 May 2015, prepared by Sarah Bagnall for Meeting No. 143 of the New Zealand Conservation Authority (Agenda Item 143.14) lists two CMSs 20 years old for which "review [is] not currently scheduled within the next five years", as well as three other CMSs, 19, 23 and 25 years old, for which the review process is just beginning. Admittedly, s 17H(4)(c) does allow the Minister to extend the ten-year period after due consultation; but can such administrative leeway really extend to 25 years? That sounds more like an exercise of the forbidden dispensing power. Surely the extension provision was intended to cover only minor delays?

83 The Conservation Act 1987, Part 4A, "Marginal strips".

84 Under s 24B an exemption from the marginal strip requirement is possible if "the land has little or no value in terms of the purposes specified in s 24C"; an argument to that effect might be possible if the whole 22 hectares were not considered worthy of protection. Under s 24E marginal strips may also be exchanged in certain circumstances. But "[t]hese matters are not before the Court on the present appeal" (Para 151).

not to take into account the requirement for these marginal strips. But it was undoubtedly the case, as Palmer J held in the High Court, that "an exchange of land under s 16A is a disposition which triggers the reservation of marginal strips adjoining streams of three metres or more in the absence of any exemption".[85] The marginal strips had not yet been created, and so the problem was perforce one for future adjudication. "The consequences for the … Water Storage Scheme of the marginal strips created are not currently before us."

X. Stewardship Land in the Future

The Supreme Court's decision does mean that this particular threat to the integrity of the public conservation estate - alienation of specially-protected areas by their appointed stewards or guardians - has been averted. The longstanding understanding that protected lands are to remain so indefinitely has been affirmed. In recognising the importance of management plans, also, and in dismissing the Department's arguments about fettering the Minister's discretion, the Court recognised that the Department is not a law unto itself, but is indeed a steward guarding lands owned by the public.

Although to a considerable extent an affirmation of the status quo, however, the course of the litigation, and the ultimate decision, have changed a great deal.

It is now firmly established that once lands are dedicated to conservation purposes, by being given a higher status than stewardship land, then, barring extreme events, they are to have that status indefinitely. It is the Minister, or the Governor-General on the recommendation of the Minister, who declares stewardship land to have additional specific protection or preservation requirements; and the knowledge that such declarations are irrevocable will inevitably make certain Ministers and governments reluctant to make them in the first place. The end result – subject to any obligation possibly imposed on a Minister by planning documents – might well be the opposite of the Parliamentary Commissioner's 2013 recommendation that the Department hasten to reclassify areas of stewardship land of significant conservation value.

As for lands already of higher status than stewardship land, the decision, if it stands, will undoubtedly make more difficult the little minor boundary adjustments often necessary for state highways, electricity generation and other public works.[86]

On the other hand, it is not impossible that Parliament might see fit to amend the Conservation Act. Time will tell. The Minister has already raised that possibility, and has been condemned for doing so. Yet the New Zealand Conservation Authority's January 2016 report to the Minister, *Stewardship*

85 At [161].

86 Vernon Rive *Legal test for land swaps under the Conservation Act 1987* (2016) 11 BRMB 210.

Land: Net Conservation Benefit Assessments in Land Exchanges, prompted by the Parliamentary Commissioner's 2013 report, and which acted on her recommendation to provide guidance on principles and processes to be applied when deciding questions of net conservation benefit, also suggested that the power to authorise exchanges could well be extended beyond stewardship lands to other categories of conservation land – in particular, to conservation parks.[87] It pointed out that "in many instances the boundaries of conservation parks have arisen for historical reasons rather than … a particular assessment of conservation values …"

XI. The Department of Conservation in the Future

Regardless of the ultimate outcome, however, the very existence of the litigation has undoubtedly eroded the credibility of the Department among conservationists as a principled and trustworthy advocate for conservation and defender of the public conservation estate. Perhaps behind the scenes the Department furiously opposed the Minister's desire to revoke the conservation park status of those 22 hectares. In public, anyway, the Department was relaxed and compliant. The final revocation decision was the Director-General's; it was to him that the Minister had delegated her power. The author was present at 13 June 2015 Annual General Meeting of Federated Mountain Clubs (FMC) in Christchurch, when the Director-General, Mr Sanson, was the guest speaker. This was at the time when the litigation under discussion was pending but had not yet been heard by the High Court. Mr Sanson certainly gave those present to understand that he was not entirely unhappy that Forest and Bird was contesting the proposed revocation of conservation park status. Nevertheless, he did not appear unhappy with his Department's position. This mature *realpolitik* was not much comfort to members of Forest and Bird watching their Society spend a great deal of its funds doing the Department's job for it, and indeed despite it.

Conservationists have long harboured mixed feelings about the Department. It undoubtedly does some splendid work, and makes decisions which conservationists applaud. It also makes decisions which cause increasing dismay. Conservation work is sometimes perceived as being relatively remote from the hurly-burly of politics. Nevertheless, the Department attracts a considerable amount of controversy. Its actions, or inaction, are increasingly

87 New Zealand Conservation Authority, above n 35, at 2.22. The report also recommended, at 2.16, that "the reclassification of stewardship land to other categories should not be prioritised over other work of the Department". This is because the Authority considered that stewardship land actually *was not* "less protected" than other categories of conservation land. See Part 6 of the Report, *Stewardship Land - How protected is it?* The Authority's point of view on this matter differs from that of the Parliamentary Commissioner, and might seem to be contradicted by the further point made by the Authority that if stewardship land were given higher status then the granting of concessions and exchanges would be more difficult (Part 7, "Implications of Reclassifying Stewardship Land under Existing Legislation").

at odds with conservationist expectation of what "their" Department should be doing. Conservationist criticism of the Department would indeed be much sharper were it not for the fact that the Department, for all its imperfections, still appears to be better than any alternative.[88] Conservationists often fear that public criticism of the Department may serve the interests of those who would like to see the Department done away with altogether. Yet it might be better for the Department in the long run if criticism were less muted and more trenchant.

The courts, not the Department, thwarted this proposed alienation of a specially protected area for no other reason than to assist further intensification of agriculture downstream. The Department has been ready to flout its own Fiordland and Mt Aspiring National Park Management Plans for the greater convenience of the tourism industry.[89] Indeed, at the FMC AGM referred to above, the Director-General indicated generally that somewhere about half of the Department's budget would be spent on matters related to tourism; even though s 6(e) of the Act specifically declares that, subject to the over-riding duty to conservation, the Department may "*foster* the use of natural and historic resources for *recreation*", but only "*allow* their use for tourism" (emphasis added).

When, in 2016, the government announced its objective of eliminating certain deadly introduced predator species from New Zealand by the year 2050,[90] it proposed to entrust the task not to the Department, but to an entirely new Crown entity, to be called Predator Free 2050 Ltd. The proposal was, certainly, for the removal of those pests from all of New Zealand, not just the public conservation estate. Nevertheless, one cannot but wonder why the Department was not given the job. The chief purpose of removal was a conservation purpose. Eradication operations would begin on the conservation estate, and for some years be carried out only there. The Department has considerable expertise in such operations and indeed conducts some now. The decision not to give the job to the Department surely calls for explanation.

The Department has more than once displayed a strong desire to abandon, in one way or another, numerous back-country huts and tracks. A significant amount of the maintenance of many public tracks and huts less frequented by tourists is now done by volunteers, financially assisted by funds administered by Federated Mountain Clubs (FMC), the New Zealand

88 "And always keep a-hold of Nurse/For fear of finding something worse." Hilaire Belloc "Jim, Who ran away from his Nurse and was eaten by a Lion" in *Cautionary Tales for Children* (Eveleigh Nash, London , 1907).

89 Discussed in DJ Round "Restoring the Mana of the Whenua, The Battles over the Birds" [2016] NZJ Envtl L 203.

90 See above, n 89, "A Crown entity – Predator Free 2050 Ltd – has been created, but it is not evident how this organisation will interact with the Department of Conservation …"; Parliamentary Commissioner for the Environment *Taonga of an Island Nation; Saving New Zealand's Birds* (May 2017) at 99.

Deerstalkers' Association (NZDA) and Trail Fund New Zealand.[91] These three organisations together form the Backcountry Trust (previously the New Zealand Outdoor Recreation Consortium), and volunteers keen to maintain, repair or even create huts and tracks can apply for funding from funds which the Trust administers. The funds come from the Department's Community Conservation Partnership fund; but the work is done not by Departmental staff but by volunteers. Since they are volunteers, and the money is spent chiefly on the purchase and transport of materials, the money goes much further than it would if the Department itself were doing the work.

Given the Department's new emphasis on serving tourism, such volunteer work on huts and tracks may be necessary if many huts and tracks are to receive any attention at all. How long will it be before volunteers, irritated at being mere unpaid labour, begin to demand a more significant role in the administration of such areas? We tend to think that the threat of privatisation of the public conservation estate will come from big business interests, but might it not also come from humble lovers of the wilds who eventually tire of being unpaid servants taken for granted by a Department whose interests and priorities are increasingly focussed elsewhere?

Then, for what it is worth, a Game Animal Council exists,[92] and although only of limited influence at present, it will doubtless seek to extend its influence.

The Department, then, seems already on the way to losing much of its authority and involvement in native species recovery, basic back-country public recreation and game animals, and becoming much more involved in servicing the tourism industry. This is not the good steward envisaged when the Department was established in 1987.

XII. Conservation's Future

Other straws in the wind suggest that, as human populations and human pressures on the limited resources of a finite planet continue to increase, more demands will inevitably be made that the public conservation estate, regardless of how precisely it is classified, be unlocked for human use.

As mentioned above,[93] proposals already exist to flood portions of the Oteake and Lake Sumner Conservation Parks for the sake of irrigation schemes downstream. A hydro-electric scheme is proposed for the Morgan Gorge of the Waitaha River, a significant and spectacularly wild major South Westland river, but still only stewardship land.

91 According to its website, "a charitable national organisation supporting volunteer-led sustainable trail building throughout New Zealand. Run by and for volunteers" <trailfund.org.nz>. Although not specifically stated, its membership appears to be chiefly mountain bikers, and the trails it builds are for mountain bikes.

92 Established by the Game Animal Council Act 2013.

93 Part IV.

The Royal Forest and Bird Protection Society alleges that a secret cross-department plan exists –developed for the Ministers of Conservation, Energy and Resources, and Economic Development – which would make public conservation land available to privately-owned coal mining companies. The Society is dismayed that the Minister of Conservation, "rather than publicly advocating for the protection of conservation land, [is] instead working in secret to make that land available to destroy for private profit".[94] A controversial opencast coal mine already operates on the Denniston Plateau, part of the public conservation estate. There are proposals for other opencast mines nearby.

It is already possible, in certain circumstances, to remove timber from parts of the conservation estate for commercial purposes. This was the effect of the West Coast Wind-blown Timber (Conservation Lands) Act 2014, which authorised the recovery of trees blown over by the particularly damaging Cyclone Ita, in areas which included not just stewardship land but also reserves and forest park. The Act provided for no public scrutiny, not even by the local Conservation Board. Timber to be taken included not only actually toppled timber but also "irreversibly damaged" timber, "damaged to the extent that it is likely to die in the near future".[95] The Act exempted logging from restrictions under the Conservation Act, Reserves Act and Wildlife Act,[96] and from certain sections of the Resource Management Act.[97]

The Act covered only trees felled by that one storm, and is due to expire in 2019. Nevertheless, not so long ago the public conservation estate was to be left entirely to natural processes; and there will be more storms.[98] Already, the 2017 West Coast Economic Development Action Plan has proposed "enabling long-term access to windblown [native] timber on public conservation land", as well, indeed, as "identifying low value conservation stewardship land that could be disposed of".[99]

Such pressures will continue and increase. Stewardship land will, obviously, be particularly vulnerable; but all conservation land is owned, essentially, by the people, and if the people's Parliamentary representatives choose to amend or repeal protective legislation, even the National Parks Act, then they can. The people are *all* the people; not just the few hardy and yearning souls who visit and love these places, not just the ones who love but never visit, but

94 Caitlin Carew "Did anyone ask you if this was OK?" Forest and Bird Magazine (New Zealand, Winter 2017) at 6.

95 West Coast Wind-blown Timber (Conservation Lands) Act 2014, s 5.

96 At s 17.

97 At s 19.

98 See Owen Cox, *West Coast Wind-Blown Timber Act*, August 2014 FMC Bulletin, at 24–27. Perhaps inspired by the Act's example, the Grey District Council is now considering a plan to "sustainably harvest" native trees in three of its own reserves; Caroline Wood "Mad plan to log native forests" *Forest and Bird Magazine* (New Zealand, winter, 2017) at 28–29.

99 West Coast Governance Group *Tai Poutini West Coast Economic Development Action Plan 2017*. Published by the West Coast Governance Group, and supported by all West Coast mayors and the chair of Development West Coast. The plan also raises other possibilities which would intrude very significantly on the public conservation estate.

every citizen of distant northern conurbations who have never heard of these places and will never care, but who do expect that the Members of Parliament whom they elect will provide them with the lifestyle to which they would like to be accustomed.[100]

In the *Ruataniwha* controversy some conservationists hoped for rather more visible commitment to the integrity of the conservation estate from senior Departmental officials. As long as the government's desire for land reclassification was lawfully justified by the Conservation Act, however, the duty of public servants is loyally to serve elected governments. Perhaps those officials, whatever their private feelings, thought that half a loaf was better than none, and that conservation was better served by unpalatable compromises than by defiance and defeat.

In many of its attitudes and effectiveness, the Department is already a far cry from what it was, and was expected to be, at the time of its creation. Its decline is a consequence of the decline of conservation as a major political issue. That decline in turn arises out of our discovery that the physical resources demanded by our population and lifestyles are not as limitless as we had supposed a generation ago. Conservation now comes at a cost. Even the Department's constant reorganisations, with consequent unfortunate loss of institutional memory and experienced personnel, arise out of the political weakness of the cause it represents. In the last resort the Department can only be as strong, legally and politically, as the wider conservation movement. Government officials will only be good stewards if most citizens require them to be; if most citizens are good stewards themselves. Paradoxically, in an era of environmental crisis, the environmental movement is not the power in the land it once was.

Popular support aside, it was always unrealistic to expect the Department of Conservation to be forever a noble and incorruptible force for good. The Department is a bureaucracy like any other, subject to the same pressures, prey to the same ills, and working in the same way. No more can be expected.

It will not even be enough to give natural objects their own legal personality, as has recently been done with Te Urewera[101] and the Whanganui River,[102] for those natural objects must still have decisions made for them by human beings. One could argue that their particular legislation expects responsible decisions by their human stewards. But then, one could once have said the same thing of the Conservation Act.

100 According to Radio New Zealand "Special Economic Zones still on the table" (12 July 2017) <radionz.co.nz>, the government is still considering the possibility of "Special Economic Zones" where investments and developments could be "sped up … by by-passing existing rules". Coal mines, aquaculture and tourist developments would be particularly expected to benefit.

101 Te Urewera Act 2014, s 11.

102 Te Awa Tupua (Whanganui River Claims Settlement Act) 2017, s 14.

IS THERE A NEED FOR GREATER REGULATION OF INSOLVENCY PRACTITIONERS IN NEW ZEALAND? EXPLORING THE OPTIONS FOR REFORM

Celeste Brown*

I. Introduction

The success of any insolvency system is largely dependent on those that administer it, namely insolvency practitioners (IPs).[1] There is no statutory definition for an IP in New Zealand (NZ), though it is accepted that the role encompasses holding office as a liquidator, administrator or receiver.[2] These individuals carry out the most significant formal procedures available in NZ corporate insolvency law: liquidation, voluntary administration and receivership.[3] These procedures are distinct from those that apply in the personal insolvency law framework.[4]The formal corporate insolvency procedures are designed to benefit creditors as a collective group, with the ultimate goal of maximising their returns.[5] Ostensibly, IPs carrying out these procedures must act with a high level of professionalism and honesty. Further, they should not only have practical experience in the liquidation process, but also strong investigative and negotiation skills, and a sound understanding of insolvency law.[6] The UNCITRAL *Legislative Guide on Insolvency Law*

* Winner of the 2016 Canterbury Law Review Student Prize. The author would like to thank Associate Professor Lynne Taylor for her supervision. Celeste is now a lawyer working in the corporate commercial team at Anderson Lloyd in Dunedin.

1 Vanessa Finch *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge University Press, New York, 2009) at 178.

2 David Brown, David Vance and Jeff Hart "Insolvency Practitioners" in P Heath and M Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis NZ) at 1.

3 Lynne Taylor "Corporate Collapse" in John Farrar, Susan Watson, and Lynne Taylor (eds) *Company and Security Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) at 674. Other formal corporate procedures include compromise with the creditors and statutory management.

4 See, generally, Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomas Reuters, Wellington, 2016) at [1.3.2]. These procedures are for the most part administered by the Insolvency and Trustee Service, which is a part of the Ministry of Business, Innovation and Employment. The Insolvency and Trustee Service does administer some Court-appointed corporate liquidations. However, this is generally confined to those that are asset-less. Therefore, this paper focuses on those private IPs who are responsible to maximise any potential return to the creditors of a company.

5 Ministry of Economic Development *Insolvency Law Review: Tier One Public Discussion Documents* (Ministry of Economic Development, Wellington, 2001) at 15.

6 Brown, above n 2, at 4.

suggests that it is essential for an IP to have (1) appropriate qualifications, (2) adequate experience, and (3) certain personal qualities before taking office.[7] These requirements "ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime".[8]

The UNCITRAL suggested requirements are absent from the NZ regime. The current rules that regulate IPs in NZ are predominantly found in the Companies Act 1993 (CA) and the Receivership Act 1993 (RA). In reality, almost anyone can be an IP provided they are not disqualified by the unburdensome rules set out in the legislation. There is no requirement to obtain any qualification relating to accounting or law, and no practical experience is needed. There is no 'fit and proper' person test for appointment, nor does an appointee have to be resident in NZ. Making these requirements mandatory in NZ has proven difficult given the small number of IPs.[9] It is estimated that only 100 practitioners regularly provide insolvency services.[10]

Fortunately, the majority of IPs that regularly take office in NZ are drawn from the accounting, and in some circumstances, legal profession. These individuals are subject to ethical and professional obligations of their governing body: Chartered Accountants Australia and New Zealand (CAANZ) or the New Zealand Law Society (NZLS) respectively. The Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ) also have regulatory powers over IPs, though membership is optional. The regulatory regime under the CA and RA that IPs are subject to is dependent on the supervisory jurisdiction of the Court, which is inevitably associated with cost and delay. Moreover, the statutory provisions that should warrant accountability are highly technical, which often allows IPs to circumvent punishment.[11] There is no professional body with supervisory and investigatory powers that all IPs must be registered with.[12] This means that in a minority of cases a reckless and/or incompetent person will be appointed to office, and the existing legislative regime is inappropriate to deal with this. In this circumstance, the collective benefit for creditors the formal procedures are designed to ensure is arguably illusory.

7 United Nations Commission on International Trade Law (UNCITRAL) *Legislative Guide on Insolvency Law* (United Nations, 2005, accessed 28 November 2016), at 175 <www.uncitral.org>. These are only the minimum requirements.

8 At 174.

9 See generally Companies Office "Statistics" (4 November 2016) <www.companiesoffice.govt.nz>. In 2015 companies subject to the appointment of a liquidator was 2,337, a receiver was 90, and in voluntary administration was 31.

10 Ministry of Business, Innovation and Employment "Terms of Reference Insolvency Review Working Group" (15 October 2015) at 8.

11 The problems are most evident when IPs are appointed on an ad hoc basis in small to medium size companies.

12 David Brown and Christopher Symes "The Regulation of Insolvency Practitioners: Getting to 'Trust and Confidence'" (2013) 19 NZBLQ 226 at 228.

Both regulators and commentators accept that the laissez faire policy approach that prevails in NZ is unsatisfactory: "The status quo has a proven record of being unsatisfactory as it lacks any regulatory measures for effectively dealing with the minority of practitioners who are substandard."[13] One commentator notes that the regulation is very much "after the fact", with little control into the profession and only reactive measures in place.[14] In 2010, the Government introduced the Insolvency Practitioners Bill (IPB) to "restrict or prohibit certain individuals from providing corporate insolvency services".[15] However, almost seven years have passed since the Bill was introduced, and rogue practitioners have continued to take advantage of the lacuna in the legislation. Appropriately, the Government has since put IP regulation back on the agenda with the establishment of the Insolvency Review Working Group (IRWG).[16]

This paper will be divided into two parts. Firstly, it will examine the statutory regulatory regime and the case law it has generated to demonstrate that the status quo is undesirable. It also suggests that the proposed IPB fails to address the regulatory gap that exists in NZ. As such, this paper secondly explores options for reform. It analyses the IP regulatory regimes that exist in Australia, the United Kingdom (UK) and Ireland to provide guidance for legislators in NZ. It contends that the NZ Government should introduce a positive licensing system that mandates that IPs are, inter alia, appropriately qualified, have sufficient experience, and satisfy a 'fit and proper' person test before appointment. Under this regime, an existing professional body would be given overall regulatory power, while a Government entity retains a supervisory role over this body. This co-regulatory approach is the most feasible given NZ's insolvency climate.

II. Is There a Need for Greater Regulation of Insolvency Practitioners in New Zealand?

A. A Statutory Regime in New Zealand

There are no statutory requirements that an IP must satisfy in order to be appointed. Rather, an individual may take office provided they are not

13 Ministry of Economic Development "Regulation of Insolvency Practitioners Regulatory Impact Statement" (27 April 2010) 977783 at 2. The Ministry of Economic Development was replaced with the Ministry of Business, Innovation and Employment in July 2012.

14 Matthew Berkahn "Regulation of Insolvency Practitioners in New Zealand" (2010) 18 Insolv LJ 148 at 150. This is because misconduct is generally only reviewable if claims are brought against the IPs in Court proceedings.

15 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 1.

16 Ministry of Business, Innovation and Employment *Terms of Reference Insolvency Review Working Group* (15 October 2015) at 2. This group aims to determine whether the IPB should be withdrawn, progressed or replaced. The group released the first of two reports in July 2016.

disqualified by the rules set out in the CA and the RA. The rules in the CA apply to liquidators and administrators, while the rules in the RA apply only to receivers. This paper predominantly focuses on the regulatory framework governing liquidators. This is because liquidations are the most common corporate insolvency procedure.[17] As such, it is liquidators that have mainly featured in the case law. It is important to note that the legislative provisions applicable to liquidators are largely replicated in relation to those that apply for administrators and receivers. Thus, the supervisory and enforcement regime is very similar for all three office-holders.

Section 280 of the CA provides that, unless the High Court (the Court) directs otherwise, anyone can be appointed as a liquidator provided they are over 18 years old; are not in a direct continuous business relationship with the company; are not an undischarged bankrupt; and are not subject to treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[18] Understandably, the individuals that are excluded by the legislation are those who are most likely to experience a conflict of interest in their role, and those who are expected to lack the necessary competence.[19]

Despite these prohibitions, for such a specialised profession it is arguable that the absence of any positive requirements in the legislation prima facie seems incongruous given a liquidator's statutory duties and powers. For example, the principal duty of a liquidator is to take possession of, protect, realise and distribute the company's assets or proceeds to the company's creditors in accordance with the CA, and then to distribute any surplus assets to those entitled in a reasonable and efficient manner.[20] A liquidator is a company's agent.[21] They have the power to, inter alia, commence legal proceedings, sell or dispose of property, and set aside specified types of transactions occurring prior to liquidation.[22] Accordingly, a liquidator owes the fiduciary duties and duties of care that all agents owe to their principals. This makes them "subject to external rules and ethical obligations".[23] They are also officers of the Court who are "obliged to act in a manner consistent with the highest principles" and are "not permitted to take advantage of the strict legal rights available to them if to do so would mean that they were acting unjustly, inequitably, or unfairly".[24] Creditors and other concerned parties should be assured that competent individuals are carrying out these roles. This, however, cannot be guaranteed under the current statutory scheme.

17 Companies Office, above n 9.
18 Companies Act 1993, s280. Similar rules apply to administrators and receivers. See Companies Act 1993, s239F; Receivership Act 1993, s5.
19 Lynne Taylor "Receivership" in John Farrar, Susan Watson, and Lynne Taylor (eds) *Company and Security Law in New Zealand* (2nd ed, Brookers, Wellington, 2013) at 687.
20 Companies Act 1993, s253.
21 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] 3 NZLR 602 (CA).
22 Companies Act 1993 sch 6 cl (a), (e), and (g).
23 *Dunphy v Sleepyhead Manufacturing Co Ltd*, above n 21, at [22].
24 *Strategic Finance Ltd (in rec & in liq) v Bridgman* [2013] 3 NZLR 650 at [108].

It is important here to distinguish the methods in which liquidators may be appointed. They may be appointed by a special resolution of the shareholders, a resolution of the board on the occurrence of an event specified in the company's constitution, or the Court.[25] Appointment of a liquidator is also an option open to creditors of a company in administration at what is known as the "watershed meeting".[26] It is via shareholder and director appointments that there is most risk of incompetent practitioners being appointed.[27] Another risk is the appointment of "friendly liquidators" who may not act in the interest of creditors as a collective group by failing to pursue valid claims against the shareholders and directors should they arise.[28] It is relatively easy for delinquent individuals to assume appointment under this method and gain access to significant monies and assets that IPs are regularly entrusted with. All liquidators, however appointed, are subject to the Court's oversight and are on an "equal footing". Liquidators appointed by shareholders, however, are likely to need more supervision, given that they are generally appointed on an ad hoc basis.[29]

The legislation does not require IPs to be registered with a professional body with supervisory and investigatory powers, such as CAANZ or the NZLS. This means that if a creditor or other concerned wishes to have the conduct of an IP reviewed, when the IP is not a member of the aforesaid bodies, the concerned party must apply to the Court under the appropriate sections of the legislation: ss 284 and 286 of the CA where the practitioner is a liquidator, and ss 239ADS - 239ADV if the individual is an administrator. The Court has similar supervisory powers available under ss 34, 35 and 37 of the RA if the practitioner is a receiver.[30] These methods are not only costly, but as will be demonstrated below, some of the sections are highly technical and have a number of shortcomings.

25 An administrator may be appointed to a company by the company itself via a resolution of the board of directors, and also by a liquidator, secured creditor and the Court: Companies Act 1993, s239H(a)(e). The Court may also appoint receivers. However, they are most commonly appointed privately pursuant to a right accorded to a secured creditor under the terms of its arrangement (usually in the form of a general security arrangement) with a debtor company: Receivership Act 1993, ss2 and 6.

26 Companies Act 1993, ss241(2) and 239ABA(c).

27 The Court in *Jacobsen Creative Surfaces v Smiths City Ltd* (1993) 6 NZCLC 68, 422 at 437 set out its own principles that should be taken into account when a liquidator is appointed. This includes independence; resources of the liquidator; the wishes of the creditors and contributories; competence and experience; promptness; and the liquidator's familiarity with the company. See later discussion at Section II(B)(2)(b)(iii).

28 Brown, above n 2, at 5.

29 *ANZ National Bank Ltd v Sheahan* [2013] NZLR 674 at [137][138].

30 The Court also has a general power under s 301 of the CA to inquire into the conduct of all IPs and order them to repay money or return property if they are found guilty of misfeasance.

B. Summary of Case Law

An up-to-date summary of relevant case law provides a useful way to illustrate the need for greater regulation of IPs in NZ. It is also the only reliable information regarding issues and concerns about the conduct of IPs at the moment. Other evidence is merely anecdotal.[31] It is important to note that the case law is not likely to be truly representative of the extent of the problem, given the lack of incentives available for creditors to take action against IPs. Summarising ss 284, 286, and 283 will provide a framework to highlight how these provisions have been used to address relevant issues related to liquidators including general misconduct, remuneration and matters of conflicts of interest or independence.

(1) Section 284

This section grants the Court general supervisory powers over the conduct of liquidators. Those entitled to make an application as of right are the liquidator and the liquidation committee. A creditor, shareholder, other entitled person[32] or director may also make an application, though they will need the leave of the Court. The eight orders the Court may make are listed in s 284(1). These include giving directions in relation to any matter arising in connection with the liquidation; confirming, reversing or modifying the acts of the liquidator; granting a declaration as to the validity of a liquidator's appointment; or reviewing and fixing the remuneration of the liquidator to ensure that it is reasonable.[33] These powers are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under pt 16 of the Act. They are also exercisable if the liquidator is no longer acting, or if the company has been removed from the register.[34]

(a) Seeking leave

In *Trinity Foundation (Services No 1) Ltd v Downey* the Court held that a creditor seeking leave to make an application under s 284 must establish that they have an arguable case. This has two characteristics. First, a credible factual basis and second, a reasonable likelihood that, if the claim

31 Because the number of IPs in NZ is based on anecdotal evidence only, coming up with a solution is not an easy task. This makes it particularly difficult to determine whether stringent regulation recommendations, such as imposing qualification requirements or establishing a supervisory body that would result in compliance costs, would be justified based on the size of the industry.

32 Section 2 of the Companies Act 1993 defines an "entitled person" as a person upon whom the constitution confers any of the rights and powers of a shareholder.

33 Companies Act 1993, s284(1)(a), (b), (e), (f) and (g). The other orders include directing an audit of the accounts of the liquidator, and making other orders that the auditor requests, directing the retention or disposition of records of the liquidator or company itself.

34 Companies Act 1993, s284(2).

is established, the Court will disturb the act or decision in question. The liquidator's decision thus needs to be regarded as "unreasonable"[35] and the onus of proof in establishing this lies with the challenger.[36] This threshold for leave strikes a balance between preserving the rights of meritorious claimants, while ensuring that the assets of a company are not frittered away as a result of the claims that are not likely to succeed.[37] It also "favours allowing liquidators to make business decisions which they, as the persons appointed to exercise statutory responsibilities, are better qualified than the Courts to make".[38]

Applicants who do have an "arguable case" will not be able to pursue the claim if they are not listed as an entitled person under s 284(1). This was confirmed in *Official Assignee v Norris*.[39] Beginning in June 2010, the Registrar of Companies (the Registrar) received significant complaints about Norris, a liquidator handling eight separate liquidations in Nelson.[40] Following a thorough investigation, the information was referred to the Official Assignee (OA). The OA made wide-ranging allegations against Norris, including that he failed to comply with his principal duty under s 253 of the CA; combined the funds of the companies' and his own business; charged unreasonable and excessive fees; and failed to keep full and accurate records.[41]

Having regard to the gravity of Norris's conduct, the OA first sought orders under s 284(1)(a).[42] However, Norris was conveniently able to strike out the claim, as the OA was not listed as an entitled person to seek the exercise of the Court's supervisory power.[43] Mallon J noted that s 284(1) operates as a "filtering mechanism" designed to ensure that the actions of liquidators are challenged only in appropriate cases.[44] His Honour added that s 284 "is also designed to ensure that such challenges are brought only by those with a sufficiently direct interest in the liquidation."[45] The OA sought to rely on the Court's inherent jurisdiction, but the Court was reluctant to exercise its jurisdiction as a way around the limits prescribed by the statute.[46] This case suggests that it may be appropriate to amend s 284(1) to enable any other person, who is able to show the Court that they have a direct interest in the liquidation, to make an application. The OA, being the person appointed by

35 *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263 at [21].
36 *Commissioner of Inland Revenue v Hulst* (2000) 8 NZCLC 262, 266 (HC) at [28].
37 *Trinity Foundation (Services No 1) Ltd v Downey*, above n 35, at [22].
38 *Levin v Lawrence* [2012] NZHC 1452 at [54].
39 This is a leading case regularly cited which exemplifies the inadequacies of New Zealand's current regime. See generally M Tingey, D Friar and A Smith "Deficiencies exposed in regulation of insolvency practitioners" (1 August 2012) National Business Review <www.nbr.co.nz>.
40 *Official Assignee v Norris* [2012] NZHC 961 at [5].
41 At [9].
42 At [1]. Section 284(1)(a) allows the Court to give direction in relation to any matter arising in connection with the liquidation.
43 *Official Assignee*, above n 40, at [28].
44 At [18]. Citing *Trinity Foundation (Services No 1) Ltd v Downey* (2005) 9 NZCLC 263 at [21].
45 At [18].
46 At [30].

the Registrar to review the complaints about Norris, would arguably have a sufficient interest in the circumstances.

(b) Remuneration of liquidator: s 284(1)(e) and (f)

An application to review or refund the remuneration of a liquidator appears to be the most common claim made under s 284(1). While a number of applicants have been successful in challenging the fees of unscrupulous IPs, the case law illustrates the difficulties of bringing such a claim. A clear example is *Rai v Chapman*. The liquidator, Chapman, refused to make his records available to an independent accountant to assess the reasonableness of his work; he failed to respond to the requests to hold shareholders meetings; he failed to respond to telephone calls and any form of correspondence; and charged excessive fees.[47]

Invoices provided by Chapman showed that he charged fees of $62,767.89 plus GST.[48] Associate Judge Bell analysed Chapman's time records, stating that they were simply not accurate enough to determine what he was doing for days on end. He was also particularly critical of Chapman's decision to put the company into liquidation before the completion of the sale of the business and assets. His Honour considered that this decision was a mistake and that any IP would have advised the company to carry on trading under current management.[49] Accordingly, the Court found that this error of judgment resulted in a lot of unnecessary charges and difficulties that Chapman should be personally responsible for.[50]

In his concluding remarks, Associate Judge Bell drew attention to the practical and emotional difficulties of bringing a claim against a liquidator. He noted that most times it is not even worthwhile bringing a claim against them, which "leaves the liquidator in a position of some immunity".[51] He therefore praised Rai for challenging the conduct of Chapman, indicating that an amount of unprofessional conduct by IPs is likely not detected. Interestingly, in a subsequent hearing Chapman was fined $2,000 for not adhering to a Court order to hand over all records relating to the liquidation after being replaced as liquidator by a shareholders' resolution.[52] Associate Judge Bell determined that his "tardiness deserves punishment" and that his slow compliance reflects badly on him as a liquidator.[53] Notwithstanding this, Chapman is still legally able to practice as an IP today.

47 *Rai v Chapman* HC AK CIV-2010-404-002300 [30 July 2010] at [6] and [17].
48 At [11] and [25]. He had charged himself out at $200 an hour and his secretary out at $140, plus GST.
49 At [28].
50 At [29]. Chapman's expenses were fixed at $25,000 and he was required to return all payments he received in excess.
51 At [35].
52 *Rai v Chapman*, above n 47. Chapman had also failed to repay the money owed from the original judgment.
53 At [8].

The facts of *Chapman* were similar to those in *Healy Holmberg Trading Partnership v Grant*. In this case the applicant claimed that the appointed liquidators, Grant and Khov, acted unreasonably and improperly by taking significantly high fees for themselves.[54] The Court first acknowledged that liquidators appointed by shareholders resolution are not bound by reg 28 of the Liquidation Regulations 1994.[55] This means that the Court has no formula to determine what a reasonable fee is for liquidators appointed via this method, as the case was here. Rather, it must refer to previous jurisprudence to decide a fee for the case before it, taking into account the complexity of the liquidation, the experience of the practitioner, and the actual work carried out.

Citing Hammond J in *Re Goldamost Dynamics (NZ) Limited (In Liquidation),* Robinson J noted "liquidations are not a bottomless well from which insolvency practitioners may drink" and that "where there is demonstrated misconduct on the part of the liquidator, fees may be disallowed in whole or in part".[56] On the facts, his Honour observed that the liquidators could not provide sufficient evidence that allowed the Court to identify the true profit from their fees, and that they had been guilty for double charging in a number of instances.[57] Additionally, he established that there was evidence that unnecessary costs were incurred as a result of the practitioners' inadequate preparation for the liquidation as a whole.[58] Specifically, they made little effort to obtain the best possible price for the assets they seized. Robinson J, therefore, found that the liquidators were guilty of misconduct and the remuneration for their work was fixed at $20,000.[59]

The distinction between liquidators appointed by the Court and those appointed by shareholders was also discussed in *Re Roslea Path Ltd (in liquidation).*[60] Heath and Venning JJ drew attention to the difficulties of determining what 'reasonable remuneration' is when private individuals are appointed under s 241(2)(a) of the CA. In practice, it means that creditors must take an active stance in challenging remuneration charged by these liquidators. Otherwise "unscrupulous liquidators may charge as they like."[61] Their Honours held that fair and reasonable remuneration was reflected in the value of services provided. However, value in this sense went

54 *The Healy Holmberg Trading Partnership v Grant* HC AK CIV 2009-404-002279 [15 December 2009] at [8]. The liquidators charged fees of $74,825.46 (charged themselves out at $350 an hour) and there was an additional deduction of $27,939.84 for unspecified disbursements. The applicant accordingly sought relief under s 284 (1)(e) and (f).

55 At [32]. Reg 28 of the Liquidation Regulations 1994 specifies that the Official Assignee and Court appointed liquidators are to charge fees of no more than $200 per hour, and employees of the liquidator no more than $140 per hour.

56 At [40].

57 At [41].

58 At [49].

59 At [64].

60 Central to this case was an order under s 284(1)(f) of the CA to deduct some of the remuneration of interim liquidators appointed over a farming business.

61 *Re Resola Path Ltd (in liquidation)* [2013] 1 NZLR 297 at [40].

beyond mathematical application of hourly rates and hours administering the company's affairs. Instead, it had to be proportionate to the nature, complexity and extent of the work undertaken.[62] Although *Re Roslea Path* was a liquidation case, there is "no reason in principle why the Court's approach to fixing a liquidator's remuneration should differ from that applied to a receiver or an administrator."[63]

These cases raise the question whether different remuneration procedures should apply to liquidators if they are appointed by different mechanisms. In *Re Roslea Path* Heath and Venning JJ stated that "the premise [that the] liquidator is an experienced insolvency practitioner in whom the Court could have trust and confidence in is not a feature of the 1993 Act".[64] Therefore, it is arguable that there needs to be more regulation around the fees that IPs appointed by shareholders can charge. This is, of course, in addition to the changes that are needed with regard to the regulations that govern the criteria for admission, and the existing supervision and enforcement provisions.

(2) Section 286

This section gives the Court the power to make a range of orders. Most important are orders for a liquidator to comply with a relevant duty imposed on him or her (s 286(3)),[65] an order removing the liquidator from office (s 286(4)), and an order prohibiting the liquidator from acting as such for a specified period (s 286(5)). The persons who have standing to apply for these orders are listed in s 286(1). The list includes a liquidator,[66] a liquidation committee, a creditor, shareholder, director, other entitled person, and the OA. It also includes in some circumstances a receiver, the President of CAANZ, and the President of the NZLS.[67] In contrast to s 284, no special leave is required from the Court for any party. However, a number of procedural requirements must be satisfied.

(a) Procedural requirements

First, a notice of the failure to comply must be served on the liquidator not less than five working days before the date of the application.[68] This is to give the liquidator the opportunity to remedy the alleged failure and to avoid the Court's involvement.[69] Second, the failure to comply must still be continuing when the application is heard. If these two requirements are met, it lays the

62 At [102][108].
63 At [182].
64 At [36].
65 The duty may arise under statute, the rule of law or the Court. See s 285 of the CA.
66 It also includes a person seeking appointment as a liquidator.
67 Under the Insolvency Practitioners Bill 2010, it is proposed that the Registrar of Companies be added to the list.
68 Companies Act 1993 a 286(2). "Failure to comply" is defined in s 285 of the Companies Act 1993.
69 Taylor and Slevin, above n 4, at 618.

basis for the Court to make an order enforcing the liquidator to comply with their duty or relieving the liquidator from having to comply either wholly or in part.[70] The Court may also remove the liquidator from office if these two requirements are met or if the person becomes disqualified under s 280.[71] If the Court is satisfied that a person is unfit to act as a liquidator by reason of persistent failures to comply or the failure is considered serious, the person may be prohibited from acting as a liquidator.[72] However, this order has an additional procedural requirement: the applicant must particularise the ground upon which the order is sought.[73] The period of time the liquidator will be prohibited for is a matter for the Court, which may be an indefinite period.[74]

(b) Removal orders – specific examples

Where the liquidator becomes disqualified under s 280, removal under s 286(4) will not generally be complicated as demonstrated by *Commissioner of Inland Revenue v Xu*. The applicant argued that the liquidator, Xu, had a clear conflict of interest as he, and his employer, provided professional services to the company less than two years before it entered liquidation and he had a continuing business relationship with the company, having shared their operation premises.[75] There was also evidence that Xu had failed to comply with a number of statutory obligations.[76] Gendall J was, therefore, satisfied that there were sufficient circumstances to remove Xu from office under s 286(4)(a).[77]

(i) Is s 286(4) a stand-alone removal provision?

Orders to remove liquidators from office, on the basis of general misconduct, are regularly dismissed by the Court if they fail to satisfy the stringent notice requirements.[78] This has given rise to an issue of whether s 286 is a stand-alone section that gives the Court the power to remove a liquidator, or whether s 284 also grants the power of removal under the auspices of its supervisory controls. Associate Judge Bell in *McMahon v Ah Sam* sought to clarify the position.[79] His Honour drew attention to the Companies Act

70 Companies Act 1993, s286(3).
71 Companies Act 1993, s286(4).
72 Companies Act 1993, s286(5).
73 Namely a matter of persistent failures or the seriousness of the failure. See *Official Assignee v Norris*, above n 40.
74 Companies Act 1993, s286(5)(b).
75 *Commissioner of Inland Revenue v Xu* [2009] NZCCLR 10 at [9].
76 At [11]. This included failing to advise the Registrar of his appointment within 10 working days and failing to send a report to the creditors within 5 working days.
77 Accordingly, an order was also made reversing Xu's final report under s 284(1)(b).
78 See generally *Rai v Chapman*, above n 47, at [21]; *The Healy Holmberg Trading Partnership v Grant*, above n 54, at [30]; *Official Assignee v Norris*, above n 40.
79 In this case the actions of the liquidator were not considered inappropriate. However, the judgment is important as it clarifies the scope of ss 284 and 286.

1955, which allowed the Court to remove a liquidator "on cause shown".[80] However, he noted that the provisions under the 1993 Act are quite different, and that ss 284 and 286 grant separate powers.[81] He interpreted s 286 to be a stand-alone provision that enables the Court to remove a liquidator. His Honour found that "the carefully prescribed procedures under that section cannot be outflanked by applying under s 284."[82] He went on to note that s 286 has been criticised for being "too narrow" especially when compared with the wide-ranging power under the 1955 Act.[83] However, the reasons for these procedural requirements were to "spare liquidators from being subject to general wide-ranging attacks".[84] Associate Judge Bell remarked that it was not his job to comment on the law further, but simply to apply it.

On the basis of this authority s 284 cannot be used to remove a liquidator from office.[85] However, in *Hyndman v Newson,* seven months after *McMahon* was delivered, Associate Judge Osborne declined to interpret s 286 as a stand-alone provision. His Honour concluded that "the s 284(1)(a) jurisdiction includes in appropriate circumstances the removal of a liquidator".[86] This decision, therefore, casts doubt on the scope of the provisions and adds further uncertainty, making reform of these sections necessary.

(ii) Reviewing a liquidator's appointment: s 283(4)

A vacancy in the office of liquidator of a company may arise if the holder of that office resigns, dies or becomes disqualified under s 280.[87] In the event of a resignation, the departing liquidator may appoint a successor liquidator.[88] However, the Court may review the appointment of the successor liquidator and, if appropriate, appoint another person.[89] This limited provision, therefore, provides another avenue to remove a liquidator (separate from s 286(4)) if the liquidator's initial appointment is declared invalid. The persons entitled to make an application for review include the company; a shareholder or other entitled person; a director; or a creditor of the company.[90] The case of *Fisher International Trustees Ltd v Waterloo Buildings Ltd (In Liquidation)* illustrates this procedure and, also highlights the high threshold that is required for removal under this method. The director of Waterloo Buildings Limited, Brent Clode, initially appointed his brother-in-law, Michael Cooper

80 Companies Act 1955, s237(1).
81 *McMahon v Ah Sam* [2014] NZHC 659 at [13].
82 At [27].
83 At [34].
84 At [34].
85 This was certainly the approach taken in *Chapman, Healy Holmberg Trading Partnership,* and *Norris.*
86 *Hyndman v Newson* [2014] NZHC 2513 at [51].
87 Companies Act 1993, s283(1).
88 Companies Act 1993, s283(2).
89 Companies Act, s283(4) and (7). See *Re Hilltop Group Ltd (in liq)* (1998) 8 NZCLC 261, 505 (HC).
90 Companies Act 1993, s283(4).

as liquidator.[91] However, Cooper later had to resign from office, as he was declared bankrupt. Accordingly, Brent made a second appointment, Peter Clode, who was supposedly Brent's brother and a sports masseuse living in the United States.[92] Peter was later replaced by one of Brent's Facebook friends, Melisa Watson. Watson had a Bachelor of Science, but did not appear to have any significant experience in winding up companies.[93] It was also suggested that she was under the influence of the company's sole director.[94]

The creditor, Fisher International, challenged the appointment of Watson under s 283(4) of the CA, arguing that she was not qualified or independent and should be replaced as liquidator. White J noted that under ss 256 - 258A a liquidator has a number of statutory duties that require a level of skill, and competence. As such, they should have the appropriate qualifications, experience and resources to carry these duties in a reasonable and efficient manner.[95] His Honour stated: "the Court has a duty, in the wider public interest, to ensure that interests of persons concerned in the winding up are best served by the appointment."[96] Citing *Re Trafalgar Supply (In Liquidation),* he also noted that there must be a factual foundation to support any suspicion before the person's appointment can be reviewed.[97] This would need to be proven on the balance of probabilities.[98] However, in the circumstances, a further hurdle needed to be satisfied: the liquidator had a lack of independence that had been overwhelmingly demonstrated, and that there was a great urgency to replace them.[99]

Despite being satisfied that there was a factual foundation for suspicion, the Judge was not convinced that it had been overwhelmingly demonstrated or that it was urgent to replace her. An order was, therefore, made to file and serve an affidavit to prove that she was appropriately qualified, experienced, and impartial.[100] In a subsequent hearing, Watson failed to take the opportunity given to her.[101] White J held that this behaviour showed that she was not competent to act as a liquidator and removed her from her position.[102] This case exemplifies the frustrations on behalf of the judiciary, which expressed that IPs should be appropriately qualified to take an appointment of such responsibility. However, it is limited in the way it can challenge appointments, given that there are no positive statutory requirements to take office.

91 *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liquidation) and* HC AK CIV-2009-404-00640 [12 November 2009] at [7].
92 Jane Phare "Clode Meets his Waterloo" (8 November 2009) <http://www.nzherald.co.nz>.
93 *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liquidation)*, above n 91, at [5].
94 Westlaw NZ *Company Law* (online looseleaf ed, Thomson Reuters) at [CA283.02].
95 *Fisher International Trustees Ltd*, above n 91, at [19][20].
96 At [21].
97 At [23].
98 At [25].
99 At [28].
100 At [31].
101 *Fisher International Trustees Ltd*, above n 91. She did not make an attempt to provide any affidavit evidence, nor did she make an attempt to be heard orally.
102 At [7].

(iii) Suitability of incoming liquidator – criteria of the Court

The decision of *Waterloo Buildings* is also important as it discussed the competence requirements to be considered following an application by creditors under s 243(7) to replace a liquidator appointed by the Court.[103] The requirements, which were established in *Jacobsen Creative Surfaces Ltd v Smiths City Ltd,*[104] are also relevant to the exercise of the Court's discretion under s 283(4) today.[105] Briefly, the incoming liquidator should be independent, competent and have sufficient experience and resources to conduct the liquidation. They should also consider the wishes of the creditors and contributories, have familiarity with the company, and carry out the liquidation efficiently and promptly.[106] These criteria stand alongside the disqualifying requirements listed in s 280.[107] However, as demonstrated, these specific criteria need not be satisfied when private individuals are appointed by shareholders or the board of directors under s 241(2)(a) and (b). It is, therefore, arguable that similar criteria, particularly those that require experience and competence, should be incorporated into the statutory regime to ensure that appropriate individuals are appointed at the outset. This will allow the company to be wound up in a more efficient manner.[108]

(c) Prohibition orders – specific examples

The recent case of *Commissioner of Inland Revenue v Kamal* highlights the procedural difficulties of s 286(5). Kamal was the liquidator of two companies known as Hillman Ltd and GDZ Ltd. The Commissioner alleged that Kamal had a continuing business relationship with the directors of both companies. Accordingly, she claimed that Kamal failed to certify that he was disqualified by s 280(1) of the CA. [109] The Commissioner requested that Kamal rectify his failures by resigning from the companies and providing an undertaking that he would not accept appointment as liquidator of any company for five years.[110] If Kamal did not do as requested, the Commissioner advised that she would apply for a prohibition order under s 286(5). Kamal resigned as liquidator from the companies but did not agree to the undertaking.

Kamal was subsequently able to strike out the application for the prohibition order. This was because Kamal's "failures to comply" were no longer "continuing" as required by s 286(5), when the Commissioner's

103 Companies Act 1993, s243(7).

104 *Jacobsen Creative Surfaces*, above n 27. These factors were developed to provide guidance when appointing a replacement liquidator under s 235(c) of the Companies Act 1995. The equivalent provision is today found in s 243(7) of the Companies Act 1993.

105 *Fisher International Trustees Ltd*, above n 91, at [22].

106 *Jacobsen Creative Surfaces*, above n 27, at 437.

107 Lynne Taylor "The Regulation of Insolvency Practitioners in New Zealand" (2008) 16 Insolv LJ 150 at 156.

108 Companies Act 1993, s253.

109 *Commissioner of Inland Revenue v Kamal* [2016] NZHC 1053 at [9][10].

110 At [20].

proceedings were filed.[111] The Commissioner sought to rely on the Court's inherent supervisory jurisdiction under s 284(2) to prohibit Kamal from taking office in the future. However, Smith J stated that this provision could not be relied on when interpreting s 286.[112] His Honour drew attention to the "arguably unfortunate consequence" of this interpretation noting that "a defaulting liquidator will always be able to avoid a prohibition order by the simple expedient of resigning before the creditor's proceeding is commenced."[113] His Honour stated that if this limitation was not intended by Parliament, it ought to be corrected by the legislature. However, until this was done, he could not stretch the wording to bear a contrary interpretation.[114]

In *Official Assignee v Norris,* the OA also sought to rely on s 286(5). However, the Court held that the notice given by way of a draft statement claim was not 'notice' as Norris was left in a position not knowing how to rectify his failure to comply.[115] Furthermore, the OA did not specify the grounds on which he sought the prohibition order, namely he did not specify whether he was relying on "the seriousness of the alleged failures or their persistency".[116] In *Rai v Chapman* the Court noted that it had the power to make a prohibition order under s 286(5) though, while Chapman's conduct was concerning, it considered that the circumstances were not serious enough to make such an order. [117] At present, the statute provides little guidance of when conduct will be 'serious' enough to warrant a prohibition order.

(i) A lack of 'fitness' will not warrant a prohibition order

The case of *Kamal* also confirms that previous convictions, including those relating to dishonesty, will not preclude a liquidator from taking office. Kamal had previous convictions under the Tax Administration Act 1994 for aiding and abetting a company in providing false income tax and GST returns, and by supplying misleading information to the Commissioner.[118] In light of this, the Commissioner argued that Kamal was not 'fit' to act as a liquidator and should be prohibited from acting. The Commissioner argued that the list in s 280, which disqualifies liquidators from acting, is not exhaustive.[119] On this interpretation she relied on s 286(5), as well as the Courts supervisory jurisdiction under s 284, to found a broad duty of fitness.[120] However, the Court was reluctant to adopt this argument finding

111 At [68].
112 At [69].
113 At [77].
114 At [78].
115 *Official Assignee*, above n 40, at [57].
116 At [74]. The proceedings were stayed until the OA gave sufficient notice and properly particularised its claim.
117 *Rai v Chapman*, above n 47, at [22].
118 *Commissioner of Inland Revenue*, above n 109.
119 At [36].
120 At [45].

that there is no overarching 'fitness' requirement for liquidators. Smith J was of the opinion that, because Parliament had set out such a lengthy and detailed list in s 280, it was not appropriate to add to that list.[121] Undoubtedly, this case reinforces that the absence of a 'fit and proper' person test in the legislation ought to be reviewed.

(3) General misconduct with no ss 284 or 286 application

The recent judgement of *McKay v Johnson* highlights once again the need for regulation of IPs.[122] However, the Court made no mention of removing or prohibiting Smith from office under ss 284 or 286. The key issue before the Court was whether Smith had received monies belonging to the companies that were secured to Westpac, and failed to account for such receipts.[123] Westpac had only become aware of Smith's appointment in March 2014, when he filed the first liquidator's report identifying Westpac incorrectly as an unsecured creditor.[124] Subsequently, Smith was ordered to file an affidavit setting out, inter alia, details of the companies' assets that he had dealt with since his appointment, and the details of any assets that he had previously had in his possession. Smith's affidavit evidence was considered deficient and it was established that Smith had failed to comply with his statutory duties to file reports in respect of the companies at six-month intervals.[125]

In a later affidavit, Smith made a claim that had never been advanced. This was that, in December 2013, he had sent notice to Westpac under s 305 of the CA requiring Westpac's election, which if defaulted, its security would be deemed abandoned.[126] Annexed to that document was a letter recording discussions of a meeting where the s 305 notice had been considered. [127] The result of these documents, Smith claimed, was that Westpac's security was invalid.

The Court held that Smith had fabricated the documents. This was supported by forensic evidence that suggested the documents were created on dates that were significantly later than those suggested by Smith.[128] It was also relevant that Smith had a history of dishonesty, which included convictions for tax evasion, theft, fraud and falsifying documents.[129] Muir J noted that the work undertaken by a liquidator must result in an indisputable

121 At [57][58].
122 *McKay v Johnson* [2016] NZHC 1691.
123 At [4].
124 At [7].
125 At [13][17]. Under s 255(2)(d) of the CA the liquidator is required to "prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar, a report … on the conduct of the liquidation during the preceding 6 months."
126 At [20].
127 At [15].
128 At [32]. This finding enabled the Court to consider the liability of Smith for conversion by not accounting to Westpac secured assets.
129 At [28].

benefit to the secured creditor.[130] However, it was clear that Smith had failed to act in this way. Smith had set up two bank accounts whereby he swept the companies' funds from the pre-liquidation accounts into the liquidations account, and the disbursed funds totalling $852,988.54 were secured to Westpac.[131] Accordingly, Smith was ordered to pay $540,402.82 plus interest.

(4) Summary of case law

The case law confirms two things. First, there are a number of incompetent and reckless individuals that are able to enter the profession with ease. Some individuals appear to take office as an IP in an attempt to help friends or relatives out of financial difficulties without realising the level of responsibility the statutory duties impose. Other self-interested individuals have charged absurd fees for the amount of work they carried out, and even fraudulently obtained monies belonging to creditors. Second, the case law confirms that these individuals are able to practice with virtually no accountability. When creditors, or others concerned, do challenge the conduct of incompetent and unscrupulous practitioners in Court, the procedural difficulties of ss 284 and 286 often allow them to circumvent punishment. Consequently, it is arguable that the jurisprudence is not truly representative of the extent of the problem. Challenging the conduct of IPs should be affordable, accessible and relatively easy. It should also preclude incompetent individuals from practising in the first place. However, the current regime does not provide this.

C. The Response Thus Far

The absence of meaningful regulation of IPs has been the subject of extensive debate among Government officials, academics and even the media in recent times.[132] There is consensus that there is a need for greater regulation of IPs. However, the Government has been extraordinarily slow to respond with a definitive recommendation to reduce the regulatory gap. The length of time is unusual as the same problem was identified in the early 2000s. The Law Commission in its 2001 Study Paper *Insolvency Law Reform Promoting Trust and Confidence*, recommended that the regulatory regime should minimise the concerns of "rogue" liquidators.[133] The issue rested for a number of years, but in 2004 the NZ Ministry of Economic Development released

130 At [57].
131 At [98].
132 Hamish Fletcher "Business Insider: Sheriff fixing to draw a bead on liquidators?" (6 August 2016) <www.nzherald.co.nz>.
133 NZLC *Insolvency Law Reform: Promoting Trust and Confidence* SP 11 (2001) at [157]. It raised doubts about the safeguards that were in place, which ensured that only properly qualified and impartial practitioners were being appointed.

a Discussion Document considering IP regulation.[134] Frustratingly, nothing eventuated from these deliberations either. The Insolvency Practitioners Bill (IPB), which was introduced in April 2010, has since put IP regulation back on the agenda. However, any legislative progression of the Bill has come to a standstill.

(1) Insolvency Practitioners Bill

The explanatory note to the IPB stipulated that at present there are a number of practitioners continuously underperforming.[135]Accordingly, the Bill sought to strengthen existing remedies to deal with rogue practitioners. It introduced "a negative licensing system that [would give the Registrar] the power to restrict or prohibit individuals from providing corporate insolvency services."[136] It also sought to introduce a number of new disqualifying requirements. For example, someone who has been convicted of a crime involving dishonesty would not be able to be appointed, nor would someone who has been expelled from the NZLS.[137] It considered that a licensing system would not be cost effective.[138]

The IPB was referred to the Commerce Select Committee in August 2010, who reported back in May 2011. The Committee recommended that the Bill be passed, albeit with a number of significant changes. Most importantly, this included the abandonment of the proposed negative licensing regime in favour of a registration system for IPs. The Committee was of the opinion that the proposed system "would not address the problems and risks associated with practitioners who are dishonest, or lack independence".[139] Furthermore, the Committee noted "it would be preferable to prevent such practitioners from undertaking insolvency duties before damage has been done."[140] As a leading NZ law firm commented, the Committee favoured an approach that was like a fence at the top of the cliff, as opposed to an ambulance at the bottom of the cliff that was suggested in the Bill.[141]

The objective of the recommended registration system was to enable the public to access information about practitioners, and also for the Registrar to

134 Ministry of Economic Development *Draft Insolvency Law Reform Bill Discussion Document* (2004).

135 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 2. This is because it is possible for people who have very little knowledge of commercial law or the relevant legislation to wind up an insolvent company

136 At 2.

137 Insolvency Practitioners Bill 2010 (141-1) cl 5. It, however, should be noted that the Court will retain a power to appoint a practitioner even if they are excluded by the specific categories.

138 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 2.

139 Insolvency Practitioners Bill 2010 (141-2) (Select Committee Report) at 1.

140 At 1.

141 James McMillan "All Insolvency Practitioners to be Registered" (11 May 2011) <www.chapmantripp.com>.

collect information from IPs in order to regulate them more effectively.[142] A person would be eligible for registration if they satisfied two requirements. First, that they are a natural person over the age of 18, and second if they do not fall within one of the specific categories.[143] It was proposed that once the IP is registered, their full name, business address, membership of relevant professional organisation (if any) would be specified.[144] The Registrar would also be given the power to cancel a person's registration in certain circumstances.[145]

With respect, the proposed IPB as it stands does not address the regulation gap that exists for IPs in NZ. The Select Committee noted that a certain class of individuals need to be excluded under the registration system, yet paradoxically it recommended that the eligibility requirements for registration should be minimal.[146] The registration scheme merely provides that first, someone has bothered to apply to register and second, that they are not otherwise disqualified.[147] It is also arguable that the registration system will provide false assurance that the practitioners are in fact qualified and experienced to take appointments. This is misleading for the public and undesirable. The register is a step in the right direction when compared to the negative licencing scheme. However, the proposed system will not exclude those IPs that are incompetent and unethical from practising, at least not before the damage is done. There are no positive requirements such as academic qualifications, professional experience or a 'fit and proper' person test. Furthermore, the Bill does not adequately amend the provisions that allow the Court to hold IPs account, which are fraught with problems as illustrated by the case law summary.

(2) Working Group

In November 2015, the Minister of Commerce and Consumer Affairs, Paul Goldsmith, announced the formation of the IRWG to evaluate NZ's corporate insolvency laws, including the regulation of IPs.[148] A fundamental reason for the establishment of the group was to determine whether the

142 Insolvency Practitioners Bill 2010 (141-2) (Select Committee Report) at 4.

143 These 'specific prohibitions' include most of the disqualifying requirements presently set out in s 280 of the CA with a number of additional factors.

144 Taylor and Slevin, above n 4, at 622.

145 Insolvency Practitioners Bill 2010 (141-2) (Select Committee Report) at 5. These circumstances are: (1) if the person fails to comply with the requirements of the legislation on two or more occasions or the failure is considered serious or significant; (2) if their registration is based on false or misleading information; or (3) if the person no longer meets the eligibility requirement for registration.

146 At 4.

147 Brown, above n 12, at 231.

148 Paul Goldsmith, New Zealand Government "Expert Group Set Up to Review Insolvency Law" (press release, 18 November 2015) <www.beehive.govt.nz>.

IPB should be withdrawn, progressed or replaced.[149] There is no official explanation for the delay between the Select Committee Report on the IPB and the establishment of the IRWG. However, it is evident that different Ministers have prioritised IP regulation more than others.[150] The IPB was also subject to wide criticism. [151] This made research into an alternative option necessary, resulting in more delays.

In July 2016, the working group released the first of two reports, which examined and provided independent advice on the regime that regulates IPs. The report undoubtedly confirms that the status quo is unsatisfactory.[152] This includes the statutory proposals for reform in the IPB. In brief, the group identified two significant reasons why a number of IPs fall short of the standard that the public are entitled to expect. First, it is too easy for an individual to become an IP. The current disqualifying requirements do not guarantee that a person with integrity, knowledge or the appropriate experience is carrying out the roles that are often associated with immense complexity. Second, there is a lack of accountability for poor behaviour. The likelihood of a creditor, or other concerned party challenging the conduct of an IP in Court are slender. This is not only because of the costs associated with litigation, but also because of the technical hurdles in the primary legislation.

For practical reasons, the recommendations of the IRWG will be discussed in the forthcoming discussions. This paper contends that the working group makes some perfectly acceptable recommendations, though does not go far enough in other recommendations to rectify the regulatory lacuna. It is important to note that the report is not yet law, but merely suggestions at this stage.

III. Exploring the Options for Reform

A. Examination of the Regulation Regimes in other Jurisdictions

It is necessary to examine the regimes that regulate IPs in jurisdictions similar to NZ. For ease of comparison, the examination will be limited to the regulatory regime that governs liquidators. Australia provides a helpful comparison given the Trans-Tasman Mutual Recognition Act 1997.

149 Ministry of Business, Innovation and Employment "Terms of Reference Insolvency Review Working Group" (15 October 2015) at 2.

150 Simon Power was the Minister of Commerce when the Bill was introduced. He also held office in this position for the Bill's first reading, and when the Select Committee reported back. Power was succeeded by Craig Foss who introduced the Bill for a second reading in November 2013. The Bill did not progress past this stage and Foss made no significant attempts for it to be. Paul Goldsmith assumed office in October 2014 and eventually set up the working group the following year.

151 See generally INSOL New Zealand *Consultation Document: Insolvency Practitioner Regulation* (June 2013).

152 Ministry of Business Innovation and Employment, on behalf of Insolvency Working Group "Review of Corporate Insolvency Law" (Report No 1) (27 July 2016) at 3.

This Act aims to, inter alia, enable persons who have obtained the same occupation in either NZ or Australia to practice without further testing or examination.[153] At present, licensed IPs in Australia are able to practice in NZ, though the reverse situation is not permitted, given Australia's more onerous requirements for entry. The UK has analogous company laws given our colonial history and similarities in corporate insolvency procedures, making it a useful jurisdiction for comparison.[154] Ireland, on the other hand, provides a practical comparison as it has a similar population size to NZ and thus number of practitioners.[155] All jurisdictions vary in the regulatory model that they use. However, they all have similar prerequisite criteria to be appointed as a liquidator. This comprises academic qualifications, sufficient experience in conducting liquidations, and a 'fit and proper' person test.

(1) Australia

The regime in Australia is considered to be one of the most onerous in the developed world.[156] This is a reflection of the size of the industry, and a response to high levels of corporate and regulatory failure in the past.[157] The Corporations Act 2001 (Cth) (Corporations Act) is the primary statute that regulates IPs in Australia. The Australian Securities and Investments Commission (ASIC), an independent Commonwealth Government Body, is given the power of general administration of this Act.[158] ASIC must register a person wishing to be appointed as liquidator provided they satisfy a number of stringent requirements.[159] There are 703 liquidators registered in Australia today.[160] ASIC also monitors whether the liquidators are sufficiently performing their duties, and has the power to bring complaints before the Companies Auditors and Liquidators Disciplinary Board, who may refer the matter to the Administrative Appeals Tribunal or the Federal Court if the matter is serious enough.[161] The Courts also maintain a broad supervisory and investigatory function over IPs and, like in NZ, have the power to review any act, omission or function of liquidators. NZ may seek guidance from the supervision powers that ASIC has over IPs. However, it may not be

153 Trans-Tasman Mutual Recognition Act 1997, s15.
154 NZLS "Submission on the Insolvency Practitioners Bill" (11 October 2010) at 3 <https://www.parliament.nz>.
155 Brown, above n 12, at 237.
156 This also makes it one of the most successful in excluding rogue and incompetent individuals from the profession.
157 Brown, above n 12, at 150.
158 Corporations Act 2001 (Cth), s5B. ASIC was established by the Australian Securities and Investments Commission Act 2001 (Cth).
159 Anneli Loubser "An International Perspective on the Regulation of Insolvency Practitioners" (2007) 19 SA Merc LJ 123 at 131. These rules are stipulated in s 1282 of the Corporations Act 2001 (Cth).
160 Australian Securities and Investment Commission *Australian Insolvency Statistics* (October 2016).
161 Brown, above n 12, at 234.

particularly feasible to establish a similar independent body in NZ given the size of the industry.

(2) United Kingdom

Since 1986 the UK has adopted a co-regulatory model for its IPs.[162] Staunch criticism of the preceding self-regulatory model was a driving factor for reform.[163] In order to practice as a liquidator today, a person must have a licence from one of seven recognised professional bodies (RPB),[164] or directly from the Insolvency Service (IS). The IS operates on behalf of the Secretary of State for Business, Innovation and Skills (SOSBIS)[165] and has an overarching supervisory responsibility over the RPBs by conducting regular visits and practice reviews.[166] The RPB's have their own membership rules, though they all must ensure that the applicant meets a number of minimum requirements that are stipulated in the Insolvency Act 1986 (UK) and the Insolvency Practitioners Regulations 2005 (UK). Each RPB has its own procedures to deal with complaints and disciplinary action. However, in order to maintain some degree of consistency, all bodies are subject to a memorandum of understanding with the SOSBIS. The Joint Insolvency Committee also meets on a quarterly basis. This group comprises representatives from each RPB and is mainly concerned with the harmonization of professional and ethical standards amongst IPs.[167] There are approximately 1,700 IPs licenced in the UK today, the majority of which are licenced by the Institute of Chartered Accountants in England and Wales (a RPB).[168] The co-regulatory model used in the UK provides a possible option for NZ. However, caution should be given to whether there should be multiple regulatory bodies.[169] This is because the inevitable variation in style and form of regulation among the different bodies may lead to inconsistency.[170]

162 A number of reforms were introduced following the completion of the Cork Report, a report produced by an insolvency review committee led by Sir Kenneth Cork.

163 Brown, above n 12, at 236.

164 The RPBs must be recognised under the Insolvency Act 1986 (UK), s391. The seven RPB's are: The Association of Chartered Certified Accountants (ACCA); The Insolvency Practitioners Association (IPA); The Institute of Chartered Accountants in England and Wales (ICAEW); The Institute of Chartered Accountants in Ireland (ICAI); The Institute of Chartered Accountants in Scotland (ICAS); The Solicitors Regulation Authority; The Law Society of Scotland.

165 The Insolvency Service "How Insolvency Practitioners are Authorised in Great Britain" (7 April 2014) <www.gov.uk>.

166 Finch, above n 1, at 184.

167 Insolvency Service, above n 165, at 3.

168 Finch, above n 1, at 183.

169 The UK Government in a report indicated that seven regulatory bodies are far too many, and that one single-regulator should be a long-term goal. See The Insolvency Service *Consultation on Reforms to the Regulation of Insolvency Practitioners* (February 2011) <www.bis.gov.uk>.

170 Finch, above n 1, at 184.

(3) Ireland

In the past, Ireland has used a limited regulatory model which, like NZ, imposed no positive statutory requirements.[171] However, the Irish Government recently introduced a number of reforms through the Companies Act 2014 (IE), resulting in a co-regulatory model similar to the UK. Today, liquidators need to be registered with a prescribed accountancy body (PAB), the Law Society of Ireland (LSI) or a similar body recognised by the Irish Auditing and Accounting Supervisory Authority (IAASA). Approximately 230 liquidators are registered with these bodies.[172]

Chartered Accountants Ireland (CAI) is the most active PAB in Ireland and the Chartered Accountants Regulatory Board (CARB) issues insolvency practice certificates, monitors compliance, and takes disciplinary action where appropriate.[173] The IAASA directly regulates the liquidators that are not members of a PAB or the LSI, and also supervises how these bodies regulate and monitor its members.[174] Ireland's co-regulatory model has only been in place since June 2015, thus it is too early to determine the actual effect it has had in the insolvency industry. However, the reforms have no doubt been welcomed with open arms. One observation of the Irish regime is that the Government has a less active stance compared to the UK, leaving the majority of the regulation to the accounting agencies. It will be useful for the Government to have an active role, particularly in drafting the licensing criteria. Furthermore, selecting a professional body that largely focuses on insolvency, such as RITANZ, will be beneficial. This will allow those wishing to practice solely in the insolvency industry to be distinguished from the accounting profession.

B. Criteria for Admission

All of the jurisdictions discussed above have similar requirements to practice as a liquidator. These requirements reflect the position of responsibility and are designed to protect the general body of creditors, establish confidence in the insolvency system and to ensure the best possible returns.[175]

171 Christopher Symes "A Postcard from "Mourning" Ireland: The Freckled Nation of Insolvency" (2012) 12(6) Insolv LB 126 at 127. Like NZ, this meant that the regime was largely "reactive".

172 Brown, above n 12, at 237.

173 At 237.

174 Companies Act 2014 (IE), s904(1)(a).

175 Colin Anderson and Catherine Brown "Mind the Insolvency Gap: Lessons to be Learned from Audit Expectations Gap Theory" (2014) 22 Insolv LJ 178 at 180.

(1) Qualifications

The specific qualifications required to take office vary in each jurisdiction. In Australia, a person must have completed a degree, diploma or certificate from a university or institution comprising at least a three-year course of study in accountancy, as well as a two-year course of study in commercial law (including company law).[176] Unlike Australia, liquidators are not required to have an accountancy background in the UK, though in practice most will. Rather, a person must first pass the Joint Insolvency Examination Board (JIEB) exams. These exams comprise three separate exams and cover material in liquidations; administrations, company voluntary arrangements and receiverships; and personal insolvency.[177] A person will be qualified in Ireland if they fall into one of the five listed categories. [178] These categories predominantly rely on the qualification requirements to practice as a chartered accountant or lawyer.

(2) Experience

The person must have experience in winding up corporate entities in each jurisdiction. Experience simply enables people to develop particular skills to deal with issues that may arise, which often occur early in an IP appointment. NZ High Court authority has noted that, when an IP is known to be experienced, the Court is more likely to have confidence in them to abide by ethical standards of any professional organisation to which they belong, and to adhere to their fundamental obligation as officers of the High Court.[179]

In Australia, it is expected that the person has worked in corporate insolvency full time for the past five years, and three of those years at a very senior level.[180] Examples of the complexity and breadth of a person's experience, and how they resolved complex tasks must be provided. Additionally, two referees must accompany this evidence that supports the experience claimed.[181] In the

176 Corporations Act 2001 (Cth), s1282(2)(a)(ii). The person may also have in the opinion of ASIC, qualifications that are equivalent to those mentioned in subparagraph (ii).

177 Finch, above n 1, at 183.

178 Companies Act (IE), s633. This includes if the person is (1) a member of a prescribed accountancy body (PAB); (2) a member of the Law Society of Ireland (LSI); (3) a member of another professional body recognised by the Supervisory Authority; (4) a person who is qualified as a liquidator in the European Economic Area; or (5) a person who, in the opinion of the Supervising Authority, has obtained sufficient relevant experience in winding up companies.

179 *Re Resola Path Ltd*, above n 61, at [107].

180 Senior level work will typically involve preparing draft documents for creditors on behalf of the external administrator, supervising a team that reports back, and forming opinions and making professional recommendations about the financial and legal position of the corporate entities.

181 Australian Securities and Investment Commission *Registered Liquidators – ASIC's Approach to Registering Liquidators* (November 2016) at 1. One of the referees must be from a registered liquidator who has supervised the person over the past three years <http://asic.gov.au>.

UK, the applicant[182] must have completed either 30 cases as an office holder over the past 10 years, or acquired 7,000 hours of insolvency work experience, with 1,400 of those hours being in the last two years.[183] In regard to the latter, the person must also demonstrate that they have engaged in higher insolvency work as defined by the regulations.[184] In Ireland, the experience requirements are not specified in the legislation. Instead, the IAASA relies on the experience requirements of the co-regulatory bodies before an individual can carry out liquidations. For example, the CARB requires the individual to obtain two years of "post membership experience" in corporate insolvency work before they can be issued with an "insolvency practicing certificate".[185] If the person is not an accountant or lawyer, the IAASA will determine whether, in the opinion of that body, they have "sufficient experience".[186]

(3) 'Fit and proper' person

In each jurisdiction, the applicant must also be a "fit and proper" person. This test dates back to the 18th century in England when candidates running for town councils were elected.[187] Since then it has been used in a subjective manner to determine whether an applicant is suitable for a specific profession.[188] Generally, for someone to prove that they are a fit and proper person, they must show integrity, reliability and honesty.[189]

In Australia, the applicant must be capable of performing the tasks required. This requires an examination of the person's personal and practice capacities. ASIC must be satisfied that the person has access to, inter alia, adequate human and technological resources, and appropriate processes for ongoing supervision and training. An applicant's personal capacity will be assessed by his or her ability to perform duties and functions relevant to corporate insolvency. Furthermore, applicants must demonstrate that they are honest, have integrity, a good reputation and are personally solvent.[190] In the UK, the RPB must take into account an applicant's history of inappropriate

182 The regulations distinguish between applicants who have never been authorised to act as an IP and those who have held office previously.

183 Insolvency Practitioners Regulations 2005 (UK) reg 7.

184 Regulation 5 "Higher insolvency work experience" means engagement in work in relation to insolvency proceedings where the work involves the management or supervision of the conduct of those proceedings on behalf of the office-holder acting in relation to them.

185 CARB *Guidance on Public Practice Regulations* (5 January 2015) at 29.

186 IAASA *Consultation Document on the Authorisation Process of Certain Individuals as Liquidators* (25 June 2015) at 2. This determination is made on a case-by-case basis.

187 E P Hennock *Fit and Proper Persons: Ideal and Reality in Nineteenth-Century Urban Government* (Edward Arnold, London, 1973).

188 Magda Slabbert "The Requirement of Being 'Fit and Proper' Person for the Legal Profession" (2011) 14 Potchefstroom Elec LJ 208 at 209.

189 At 212. More aspects will come into play depending on the circumstances in which it is being applied.

190 Australian Securities and Investment Commission *Registered Liquidators – ASIC's Approach to Registering Liquidators*, above n 181, at 34.

behaviour and criminal offences, if any.[191] In Ireland, the IAASA again relies on the tests applied by the co-regulatory bodies. For example, the CARB conducts a review of the applicant's financial integrity, disciplinary record and financial standing.[192]

(4) Miscellaneous

A number of miscellaneous requirements should also provide guidance. Each jurisdiction has a requirement to obtain sufficient indemnity insurance.[193] The purpose of this insurance is to ensure that finances are available in the event that a registered liquidator needs to compensate creditors or other claimants for loss suffered that is caused by inadequate or improper performance of their legal obligations. The UK legislation also stipulates that if a liquidator is seeking renewal of a licence to practice, which they must do every three years, they must also demonstrate that they have completed at least 108 hours of continuing professional development (CPD) in between the applications.[194] Activities that may satisfy this requirement include attendance of courses, seminars or conferences, or producing written material for publication.[195] Lastly, in each jurisdiction the person must not be disqualified by the specified factors in the legislation. These factors are similar to those set out in s 280 of the CA.[196] Interestingly in Australia, the liquidator will not be able to take office if they are not ordinarily resident there.[197]

It is noteworthy that the Australian Government has recently introduced the Insolvency Law Reform Bill 2015, which aims to strengthen existing bankruptcy and corporate insolvency laws even further.[198] The Bill is the product of a long-winded review process that was deemed necessary following, among other factors, the actions of an Australian IP that was disqualified for

191 Insolvency Practitioners Regulations 2005 (UK) reg 6(a)(f). This includes whether the applicant has: (1) been convicted of an offence involving fraud or dishonesty; (2) contravened any insolvency legislation; (3) engaged in any deceitful, oppressive or improper conduct in the course of their profession; (4) access to adequate control systems to support professional conduct; (5) previously carried out their practice, and will continue to do so, with independence, integrity and professional skills; and (6) formerly failed to disclose any conflict of interest when acting as an IP.

192 CARB *Guidance on Public Practice Regulations*, above n 185, at 31.

193 For Australia see Corporations Act (Cth), s1284; for the UK see Insolvency Practitioners Act 1986 (UK), s390(3) and Insolvency Practitioners Regulations 2005 sch 2 cl 3; for Ireland see Companies Act 2014 (IE), s634. This insurance in Ireland also must comply with the recently introduced regulations: Companies Act 2014 (Professional Indemnity Insurance)(Liquidators) Regulations 2016.

194 Insolvency Practitioners Regulations 2005 (UK) reg 8(2)(b).

195 Regulation 8(3)(b)(i) and (ii).

196 For Australia see Corporations Act 2001 (Cth), s532; For the UK see Insolvency Practitioners Act 1986 (UK), s390(4); For Ireland see Companies Act 2014 (IE), s635.

197 Australian Securities and Investment Commission *Registered Liquidators – ASIC's Approach to Registering Liquidators*, above n 181, at 4. Ordinarily resident is not defined in the Act, though it is presumed that a common-sense approach will be taken.

198 These changes will mainly be made to the Corporations Act 2001 (Cth).

life in 2009 for serious misconduct.[199] A number of the reforms require brief comment. First, liquidators will now be required to renew their registration every three years in order to promote professionalism and competence in practitioners.[200] Second, creditors will benefit from increased rights, including the ability to appoint an independent specialist to review the performance of an incumbent IP.[201] Third, the Bill introduces statutory default remuneration amounts for liquidators. And fourth, ASIC will be granted additional surveillance powers to review the conduct of IPs.[202] The Bill received royal assent on 29 February 2016 and is likely to come into effect in early 2017.

C. Suggested Reforms

The above comparison confirms that IPs in NZ are, by international standards, under-regulated.[203] Furthermore, the proposals made in the IPB will not move NZ any closer to the systems of insolvency regulation common overseas.[204] It is, therefore, fitting to investigate an option that will place NZ on more of an equal footing with other developed nations like Australia, the UK and Ireland. It is first necessary to explore possible regulatory models, and then the criteria for admission.

(1) Self-Regulation

Self-regulation is an option that relies on industry bodies to encourage and promote its own ethical and professional standards. It is a system of private regulation, whereby the Government has no active stance.[205] In January 2016, RITANZ, in collaboration with CAANZ, developed a framework of self-regulation for IPs.[206] Those individuals that meet the criteria specified in the framework will be able to hold themselves out as an "Accredited Insolvency Practitioner" (AIP).[207] Once a person is granted with accredited status, the person's name, business details and the date at which they became accredited are added to the CAANZ public register. As at August 2016, there are 94 AIP's registered under the scheme.[208]

199 *Australian Securities and Investments Commission v Stuart Karim Ariff* [2009] NSWSC 829.
200 Insolvency Law Reform Bill 2015 cl 20-1.
201 At cl 80-50.
202 Paula Pyburne *Insolvency Law Reform Bill 2015* (Bill Digest No. 82, 22 February 2016) <http://parlinfo.aph.gov.au>.
203 INSOL New Zealand, above n 151, at 5.
204 At 5.
205 Eva Hüpkes "Regulation, Self-regulation or Co-regulation?" (2009) 5 JBL 427 at 427.
206 RITANZ is an organization affiliated with the International Association of Restructuring, Insolvency and Bankruptcy Professionals, also known as INSOL.
207 This criterion will be discussed in Part D of this section.
208 Chartered Accountants Australia and New Zealand "AIP Register" (25 August 2016) <http://www.nzica.com>. The practitioners' status becomes subject to annual review.

In regard to compliance, CAANZ continue to have a supervisory role over its members. RITANZ members who are not affiliates of that body will also become subject to the New Zealand Institute of Chartered Accountants' (NZICA) rules, which regulates NZ residents of CAANZ.[209] This includes the Service Engagement Standard of Insolvency, SES 1, which sets a code of ethics containing fundamental principles that should guide how IPs conduct their professional obligations.[210] The Professional Conduct Committee, the Disciplinary Tribunal and the Appeals Council, which were established by the New Zealand Institute of Chartered Accountants Act 1996, operate to deal with complaints and disciplinary action of AIPs.

The newly introduced self-regulatory framework is certainly welcomed. The public can be assured that those individuals who have accredited status are qualified, experienced and fit to carry out the insolvency appointments, something that the current regime or the proposed IPB does not guarantee. The accreditation criterion also aligns NZ with other equivalent overseas models. However, and most importantly, the accreditation process is not mandatory. Equivocally, it is not even a requirement for members of the CAANZ to be accredited to accept regulated insolvency appointments.[211] This model is, therefore, not likely to address the problem that is most pertinent: rogue and incompetent practitioners. As the IRWG notes, under this option the status quo prevails, which is not a viable long-term option.[212] Therefore, although this is a perfectly acceptable stepping stone, it is not the final option for reform that should be accepted.

(2) Government Licensing

Another possible option of reform would be to establish an independent Government body that would directly regulate IPs. This would require inaugurating a licencing regime, compliance body and disciplinary board specifically for IPs. This is essentially the option that has been implemented in Australia.

This option is not particularly appealing for NZ. Although it would have the positive consequence of limiting, or even precluding, incompetent practitioners from acting, it does have a number of drawbacks. The first is that it is simply not cost-effective. Although the exact number of IPs in NZ has not been established, it is estimated that there are around 100 that regularly take appointments. This number is markedly less than the number

209 New Zealand Institute of Chartered Accountants Rules 2015.

210 Service Engagement Standard 1: Performance of Insolvency Engagements (New Zealand Institute of Chartered Accountants, February 2003) para 8. The principles are integrity, objectivity and independence, competence, quality performance and professional behaviour.

211 However, from 30 November 2015, RITANZ requires that its members are accredited before they accept insolvency engagements.

212 Ministry of Business Innovation and Employment, above n 152, at 25.

of acting IPs in Australia where the regime is successful.[213] The Government considers that the insolvency profession in NZ is merely not large enough to fund an independent body to regulate it. It estimates that it would cost several thousand dollars per person each year to operate. These costs would eventually be borne by creditors, which is not particularly attractive. [214]

The second reason why this option is not desirable, which was highlighted by the IRWG, is that an independent Government body would not have sufficient market knowledge that a professional body may have.[215] Further, it has been contended that this option may exclude practitioners' involvement from their own regulation. [216] There is much to commend about involving those who act on the frontline, as evinced by lawyers with the NZLS.

(3) Co-Regulation

Another option of reform for NZ would be to adopt a co-regulatory model, similar to the one that operates in the UK and Ireland. This is the option that that this paper endorses, and also the option that was recommended by the IRWG.[217] Under this regime, an existing professional body (or bodies) would be given overall regulatory power, while a Government entity retains a supervisory role over these bodies. These parties should be partners that work together to produce a model that is efficient, effective and fair.[218] The professional body would be required to determine applications and issue licences in accordance with the standards set by the Government entity, monitor compliance of ethical and professional standards, conduct practice reviews, investigate complaints and, where appropriate, take disciplinary action. This option is far more cost-effective than Government licensing as it provides a mechanism of regulation that leverages off the architecture that is already in place by professional bodies in the insolvency industry.

Serious consideration will need to be given to who the appropriate professional body will be. The IRWG suggested making both CAANZ and RITANZ accredited professional bodies.[219] However, this paper contends that having more than one body is unfavourable. Despite having a monitoring Government entity, there is a possibility that inconsistency will develop between professional bodies with regard to compliance and disciplinary standards. This is a problem that exists in the UK.[220] Having

213 There are over 700 liquidators alone. This does not include administrators and receivers.
214 Insolvency Practitioners Bill 2010 (141-1) (explanatory note) at 2.
215 Ministry of Business Innovation and Employment, above n 152, at 27.
216 James McMillan "Submission to the Ministry of Business, Innovation and Employment by Kensington Swan on Report No. 1 of the Insolvency Working Group relating to insolvency practitioner regulation and voluntary liquidations" (7 October 2016) <www.kensingtonswan.com>.
217 Ministry of Business Innovation and Employment, above n 152, at 23.
218 Hüpkes, above n 205, at 427.
219 Ministry of Business Innovation and Employment, above n 152, at 30.
220 Loubser, above n 159, at 130.

one body is more likely to lead to transparency in the regulation of IPs generally, and remove any confusion the public may face when they wish to make a complaint about an IP.[221] Lastly, given the small size of the insolvency industry in NZ, it is a number that can easily be accommodated under the auspices of a single body.[222] Arguably, the more favourable candidate for this position is RITANZ. This is because its focus is confined to insolvency and turnaround services, as opposed to the accounting profession generally, like CAANZ. Similarly, this body already carries out what the IRWG identifies as frontline regulation.[223]

Consideration will also need to be given to who the supervising Government entity will be. The IRWG made no formal recommendation but suggested either the Financial Markets Authority (FMA) or the Registrar of Companies. The Registrar has more industry knowledge and existing responsibilities relating to insolvency under the CA, including its general power of inspection under s 365.[224] The FMA, on the other hand, already has occupational regulation-related responsibilities, such as oversight responsibility under the Auditor Regulation Act 2011. Under this Act, the FMA prescribes the licensing and registration criteria of auditors and monitors the regulatory systems of accredited bodies. [225] These are functions that would be easily transferrable to the insolvency sector. This paper contends that the more appropriate body of the two is the FMA. It is already very familiar with co-regulation principles and practices. Furthermore, it will develop industry knowledge by working alongside the chosen professional body.

D. Suggested Licensing Criteria for an IP in New Zealand

The IRWG simply suggested that an IP would need to be a fit and proper person, and be "sufficiently skilled".[226] It did not discuss any possible criteria in detail, but suggested that it could build upon the CAANZ/RITANZ criteria. The criteria for accreditation reflect many of the requirements operative in Australia, the UK and Ireland.

The fact that IPs are presently able to practice as an IP without any qualifications whatsoever seems absurd, particularly as they are able to charge themselves out at $350 plus an hour.[227] In order to be qualified under the CAANZ/RITANZ criteria, the applicant must be a member of either of these professional bodies. If the member is not a practising chartered accountant, it relies on the existing membership requirements of RITANZ, which restricts

221 At 130.
222 Chapman Tripp "Chapman Tripp submission to the Insolvency Working Group" (7 October 2016) <www.chapmantripp.com>.
223 Ministry of Business Innovation and Employment, above n 152, at 24.
224 At 30.
225 Auditor Regulation Act 2011, s5.
226 Ministry of Business Innovation and Employment, above n 152, at 24.
227 *The Healy Holmberg Trading Partnership*, above n 54, .

entry to individuals who practice in the insolvency field, such as lawyers. This requirement is not likely to be burdensome because the majority of IPs in NZ come from the accounting or legal profession with appropriate qualifications already. This is the approach adopted in Ireland. However, there a liquidator will also be qualified if they are a member of a professional body recognised by the supervising authority. This option should be adopted in NZ to extend to practitioners that are qualified under sufficient authorities abroad, such as ASIC. If the foreign applicant is not a member of an Australian authority, it will be appropriate for them to sit an exam similar to the UK JIEB exams to determine the applicant's understanding of corporate insolvency laws in NZ.[228]

The IP should be able to demonstrate that they have practical experience in corporate insolvency work. The current CAANZ/RITANZ criteria suggests that the applicant must have 1,000 hours of practical experience in insolvency work at a senior level in the preceding three years (2,000 if they are not a chartered accountant). In order to ensure that there is consistency, it will be preferable to only have one standard, and not separate hour requirements depending on the person's membership. A requirement of 2,000 hours is more in line with international standards. It should also be possible for a person to be licensed who has not obtained the appropriate hours, but can show that they are otherwise competent, also known as a grandfather clause.

A "fit and proper" person test should also be employed. It is helpful to determine the way in which the test has been applied in the legal profession in NZ to understand how it works in practice. Under s 55 of the Lawyers and Conveyances Act 2006 (LCA), for a person to be admitted as a solicitor and barrister of the High Court, the matters taken into account include whether the person, inter alia, is of good character; has been convicted of any offence; or has been subject to any mental or physical health condition.[229] The judiciary suggests that the test requires that the person must possess "such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with [a client's] business and private affairs."[230]The person seeking admission must have probity and trustworthiness,[231] and recognise that they are in a delicate position that "carries exceptional privileges and exceptional obligations"[232] The position of an IP has considerable similarities to that of a lawyer. Practitioners are entrusted with significant monies and assets, which will often influence the livelihoods of creditors. They are the person to whom creditors turn to when they are in a difficult and often emotional situation, much like a lawyer. This

228 Australia should be excluded given the objectives of the Trans-Tasman Mutual Recognition Act 1997.

229 Lawyers and Conveyances Act 2006, s55(a), (b), (c) and (l).

230 *Re Lundon* [1926] NZLR 656 at 658.

231 *Re Owen* [2005] 2 NZLR 536.

232 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298.

gives rise to a general duty of care.[233] Therefore, it is arguable that a similar sort of fitness for purpose test should be adopted in the insolvency profession.

The existing fitness for purpose criteria under the CAANZ/RITANZ regime requires the body to take into account 11 factors. These factors are mainly focused on whether the applicant has been convicted of any crimes that involve perverting the course of justice, such as those relating to bribery, corruption, forgery or fraud. It also includes if they have been dismissed from any position of management, trust, or fiduciary obligation. [234] The factors mainly focus on improper behaviour that has been detected. In other words, they are restricted to negative considerations and do not assess the applicant's eligibility entirely. Therefore, this paper contends that it is beneficial to add general positive requirements such as if the person is of good character, like that used in the LCA. Or a requirement to demonstrate honesty, integrity, and good reputation as used under the Australian regime. These positive factors are more likely to ensure that the appropriate person takes office.

Presently an IP may take regular appointments despite not living in the country or having a NZ business address.[235] Arguably the status quo enables practitioners to act without accountability, and does not allow them to sufficiently comply with their duties. For example, their physical absence may compromise their duty to have regard to the views of creditors and shareholders, or to report any suspected offences.[236] Where non-resident IPs have been appointed, they have often had to resign once it became evident that it was unfeasible to conduct their obligations from abroad.[237] This does not ensure that that the company is wound up reasonably or efficiently.[238] The requirement to be a resident is articulated in the Australian regime in order to avoid these problems.[239] Accordingly, this paper contends that NZ adopt the same approach.

The list of disqualifying requirements for liquidators is already convoluted and does not need additional factors added to it. [240] In fact, the IRWG fittingly recommended that some of the factors be removed. This includes the "professional services relationship" provision and the "continuing business relationship'" provision.[241] These provisions unnecessarily exclude the more experienced and capable IPs who are actually most suitable for

233 *Sleepyhead Manufacturing Co Ltd v Dunphy* (2006) 9 NZCLC 264,000 (HC) at [26].

234 Chartered Accountants Australia and New Zealand "Accreditation Framework" (2016) <www.nzica.com>.

235 Lynne Taylor "Further Changes Mooted to the Regulation of Insolvency Practitioners in New Zealand" (2011) 19 Insolv LJ 209 at 216.

236 Companies Act 1993, s258 and 258A.

237 See *Fisher International Trustees Ltd v Waterloo Buildings Ltd (in liquidation)*, above n 91.

238 Companies Act 1993, s253.

239 Corporations Act 2001 (Cth), s1282(2)(5).

240 Companies Act 1993, s280. See also ss 239F of the CA for the list that disqualifies administrators and s 5 of the RA for the list that disqualifies receivers.

241 Ministry of Business Innovation and Employment, above n 152, at 2021. These factors are found in s 280(1)(ca) and (cb) of the Companies Act 1993.

appointment.[242] For example, where a professional has been brought in at the end of a company's trading life, they will later be excluded from acting as the liquidator. Paradoxically, this is the person who is likely to have the most knowledge about the company, and who will be most able to perform the liquidation efficiently. Similarly, where the IP is more experienced, it is more likely that they will have a relationship with the trading banks, namely the secured creditors, thus disqualifying them from appointment. This situation is undesirable.

A number of other factors listed in s 280 also need to be removed if the proposed regime is adopted. This is because many of the factors already listed would be used to determine whether, in the opinion of the professional body, the person is a fit and proper person for appointment. Specifically, this paper contends that the criteria that disqualify persons who have been prohibited from managing companies,[243] limited partnerships,[244] incorporated or unincorporated corporate bodies,[245] or for being unfit to act as an administrator[246] be removed from s 280(1). It is also unnecessary to specify that persons will be disqualified if they have been prohibited from acting as a liquidator or receiver previously.[247] The existing disqualifying requirements will thus be restricted to age,[248] conflicts of interest,[249] undischarged bankrupts,[250] and mental incapacity and incompetence in managing properties.[251] This position is more harmonised with international standards.

The CAANZ/RITANZ regime contains a number of factors that this paper contends are perfectly acceptable and should be added to the criteria for appointment. This includes the requirement to engage in CPD, have adequate professional indemnity insurance cover, and to pass all practice reviews conducted by the professional body.[252]

242 At 20.

243 Companies Act 1993, s280(1)(k) and (l). A person may be prohibited by way of an order under ss 382, 283, 385 or 385AA of the Companies Act 1993 or by way of an order under s 299(1) of the Insolvency Act 2006 for reason of bankruptcy.

244 Companies Act 1993, s280(1)(kaa). See ss 103A, 103B, 103D or 103E of the Limited Partnership Act 2008.

245 Companies Act 1993, s280(1)(ka). See the Financial Markets Conduct Act 2013 or the Takeovers Act 1993.

246 Companies Act 1993, s280(1)(m). See s 239ADV of the Companies Act 1993.

247 Companies Act 1993, s280(1)(g) and (h). See 286(5) of the Companies Act 1993 and s 37(5) of the Receivership Act 1993.

248 Companies Act 1993, s280(1)(a).

249 Section 280(b), which prohibits a creditor of the company, and (c), which prohibits a person who has within the last two years been a shareholder, director, auditor or receiver of the company in liquidation or a related company.

250 Section 280(1)(d).

251 Section 280(1)(e) and (f).

252 Chartered Accountants Australia and New Zealand, above n 234. Further discussion on these factors is not necessary.

The above criteria, if adopted, will bring NZ into line with international standards of IP regulation. The regulation requirements will also enable someone who is registered as an IP in NZ to practice in Australia.[253] Most importantly, the collective benefit for creditors the corporate insolvency procedures are designed to ensure is more likely to be attained with these conditions. It guarantees that all persons carrying out these roles are qualified, experienced and fit to be appointed to this position of immense trust and responsibility.

E Recommendations

The current statutory regime and case law summary confirms that there is a need for greater regulation of IPs in NZ. This paper, therefore, recommends that NZ:

1) Does not proceed with the current IPB. It does not ensure that IPs are sufficiently qualified, experience or competent for appointment.
2) Adopts a co-regulatory model for IPs. RITANZ is the best candidate to carry out the frontline regulation given its confined focus in insolvency services, and the FMA is the most appropriate supervising body. This is because it already has supervisory functions over other registered professionals (such as auditors) that can be extended to the insolvency profession without difficulty.
3) Introduces a licensing scheme that ensures the applicant:
    1. is appropriately qualified;
    2. has sufficient experience in the winding up of companies;
    3. is a fit and proper person for appointment;
    4. is ordinarily resident in NZ;
    5. has sufficient indemnity insurance;
    6. is not disqualified by the factors in the primary legislation;
    7. engages in continuing professional development; and
    8. passes all practice reviews.
4) Amends the technical difficulties in the legislation that enable interested parties to hold IPs account. Priority should be given to ss 284 and 286 of the CA.

IV. Conclusion

IPs play a fundamental role in the corporate insolvency procedure. They are placed in a position of trust and responsibility to ensure that the interests of creditors and other concerned parties are protected. However, the present

253 See Trans-Tasman Mutual Recognition Act 1997, s15.

statutory regime does not adequately ensure that the appropriate individuals are appointed to office. The Government has recognised the current lacuna in the regime, but has been unusually slow to implement any significant changes to address the problem. The IRWG has recently made a number of useful, although incomplete, recommendations for change. Although, it is unclear whether and, if so, when these will be acted upon.[254] In the meantime, incompetent and/or dishonest IPs may continue to take advantage of the weak insolvency regulation.

It is evident that greater regulation of IPs is needed, and similar jurisdictions including Australia, the UK and Ireland provide helpful guidance for the form it should take. This paper has argued that NZ adopts a co-regulatory model whereby RITANZ is given the overall power to regulate entry into the profession, compliance and disciplinary action. The FMA should be given a supervisory role over this body and the power to set the licensing criteria. In order to bring NZ into line with international standards, this criterion should include minimum academic qualifications related to accounting and/or law, professional experience, and a fit and proper person test. Additional requirements such as indemnity insurance, being resident in NZ and engaging in CPD will also be beneficial.

Consideration also needs to be given to the provisions in the CA and the RA that allow the Court to review the conduct of an IP. An analysis of the amendment options is beyond the scope of this article. However, removing the procedural difficulties in ss 284 and 286 of the CA should be given priority.

The strengthening of the regulation of IPs will benefit company law at large. This is because the performance of IPs is undoubtedly intertwined with the behaviour of shareholders, directors and creditors. Moreover, the proposed changes will facilitate international recognition and assist IPs that are licensed in NZ to practice abroad if they wish to do so.[255] The recommendations made, therefore, demand consideration more than ever.

254 Recent developments are promising. However, at the time of writing this paper, the IPB is not formally before Parliament for consideration. See Fiona Rotherham "Insolvency Practitioners to be Licensed under New Regime to Stop Poor Behavior, Goldsmith Says" (30 November 2016) <www.nbr.co.nz>.

255 INSOL New Zealand, above n 151, at 5.

BOOK REVIEW

DISASTER LAW

By Kristian Cedervall Lauta, Routledge, 2015

W. John Hopkins*

Disaster law is a young discipline. Indeed, it is youthful enough for some to remain sceptical about its very existence. Nevertheless, despite the academic debates as to the boundaries and existence of the concept as a distinct academic subject, there is no doubt that law and disasters is an increasing focus. These legal developments can be traced to an increasing interest in disaster risk management (DRM) more broadly and its emergence from the shadows in the aftermath of several recent events. While the Indian Ocean Tsunami may have placed the study of disaster management front and centre, globally, it was the trifecta of Katrina, Canterbury and Fukushima that created a rude awakening for the developed world. Disasters are not merely something of concern to developing states. For reasons that are too complex to explore here, the interconnected nature of the world and the fragility of developed societies means that vulnerability is relative and encompasses all societies.

It is this generalisation of disasters that has taken the field of disaster management, if not to the heart of state decision making, then at least somewhere relevant, rather than its previous place in the forgotten extremities. However, although DRM has increasingly developed as a coherent subject bringing together scientists, engineers and social scientists, the legal academy has seemed reluctant to engage coherently with the subject. Those that have done so have largely engaged in relatively functional analysis or practical studies on the delivery of specific goals. For this reason, disaster law as a discipline has seemed somewhat adrift and more a servant of others than a discipline of its own. Cedervall Lauta in his book puts an end to this theoretical lacuna by providing a robust and rigorous basis upon which to build a more theoretically coherent discipline.

The text sets out explicitly to achieve this end, something it does through two distinct methodologies. The first section of the work develops a strong theoretical framework linking legal development with wider understandings of the nature of disaster outside the legal field. This is followed by two comparative sections examining the legal framework of disaster management and disaster responsibility. A final chapter addresses the overall development of disaster law as a legal discipline and the politico-legal nature of the emerging subject area.

* Dr. W. John Hopkins, Associate Professor, Law School, Unviersity of Canterbury

The work proper begins in chapter 2 with a discussion of the nature of "disaster" in the modern world. This is an issue that is rarely properly understood in legal studies on the issue, particularly at the domestic level. It is refreshing to find such a well written introduction to the field, starting with the classical work of Quarantelli. This outlines the developing nature of the concept of disaster from a divine intervention to a socio-economic phenomenon (via the interlude of "natural disaster"). Although most disaster scholars would see such a development as obvious, it is not something that is widely understood in legal studies of the topic. Although few lawyers would accept the divine intervention model, the continued acceptance of disaster as "natural" is remarkably widespread and Cedervall Lauta provides a clear and easily accessible correction for the reader. This discussion of the nature of the concept of disasters is complemented by discussions on risk, vulnerability and impacts. Some of the examples used are particularly vivid in illustrating the relative nature of disasters and their human source (0.2 mm of rain causing a disaster in the Chilean Desert – two hours' worth of rain on an average Danish winter's day), was a particularly memorable example.

After discussing the concept of disasters, Cedervall Lauta turns to the related and often conflated idea of emergencies. Cedervall Lauta provides an overview of the various legal approaches to emergencies both in theory and practice and concludes that the difference between the two notions require disasters to be treated separately. In particular, the state of Schmittian exception is challenged and instead replaced with the idea that disaster and management is part of the legal system. It, therefore, needs to be juridified rather than placed outside the law. This is a welcome analysis of the often too-easily accepted concept of exceptionalism which runs through emergency (and disaster) management in many states, including New Zealand. That the New Zealand model comes with a thin veneer of legality (in the form, for example, of the Canterbury Earthquake Recovery Act) does not change the fundamental point. One innovative consequence of this approach is to distinguish disasters caused by acts of war from those of nature. The latter is society's "fault", the former has external blame attached.

The theoretical section is then followed by two chapters which turn to comparative method. These examine first the juridification of disaster management, based upon the idea that such management is a responsibility of the state as recognised by the European Court of Human Rights. This canvasses the regional (focussing specifically on the EU and Nordic examples) and now global responses to disaster threats which have created a truly multi-level (if patchwork) body of disaster management law and governance structures. The limits of this development, particularly at the international level, are clearly identified by Cedervall Lauta but that it exists seems difficult to refute.

The final comparative section examines a much more controversial area which sits somewhat apart from the previous chapters. This is the question of responsibility and liability for disasters. The shift in the understanding of disasters which now sees them as social phenomena rather than externally caused divine or natural events brings with it the question of responsibility. If one no longer blames nature or god for the consequences of events, can one blame individuals? The chapter again provides an interesting overview of the case law and legislative frameworks in a number of jurisdictions, particularly the United States. As one might expect, significant time is also spent exploring the l'Aquila case and that of the Fukushima nuclear plant. This chapter poses some interesting questions around the normalisation of disasters within legal systems, as evidenced by the increasing allocation of liability for their occurrence. Although perhaps slightly disconnected from the previous chapters it certainly emphasises the fact that disasters are now an accepted part of the "normal" legal process and is a good correction for the general "public law" conception of disaster management law that is certainly the case in New Zealand.

The text concludes with an overview of the state of disaster law, taking the reader through the various theoretical ideas developed in the rest of the text. This is a dense and coherent conclusion, which might be improved if the author had been clearer in supporting one or other approach (risk vs theoretical) but it is nevertheless clear evidence of the central tenet of the text that disaster law is a coherent subject in itself, at the heart of modern law, not its periphery. At the heart of Cedervall Lauta's idea is that such disasters remain unforeseeable and legal systems must plan to accommodate such unforeseeability.

Overall, Cedervall Lauta provides a welcome and long overdue theoretical discussion of the field of disaster law that is essential reading for those wishing to explore the subject. Most importantly, the theoretical basis is closely tied to its practical importance. For those who have experienced the rather slipshod make do and mend approach to disaster management, particularly beyond the response phase, in New Zealand, such a text is a welcome breath of fresh thinking. Academics, practitioners and students in the field would benefit from reading such an accessible and thought-provoking text. This is particularly true in a country such as New Zealand, where the next disaster is unforeseeable, but inevitable. With greater understanding of the concept of disaster, New Zealand may be able to develop a legal framework capable of withstanding its impact. Aotearoa can ill afford another Canterbury.