The Difficulties

In reaching this decision the Privy Council has created two areas of difficulty. First, it has formulated a test that is likely to be too narrow to adequately meet the aims of s 36. The test explicitly rules out all conduct that non-dominant firms could undertake. This overlooks the unique position of a monopoly supplier of an essential facility, and the fact that certain conduct, when undertaken by a dominant firm, can become a misuse of that position by virtue of its unique position. A firm in a competitive market may indeed seek to recover the cost of providing a service, but the reality is that this opportunity cost is lower in a competitive market due to the constraints of competition.

Second, it has ensured that s 36 cannot be relied upon to prevent monopoly rents being demanded by dominant firms who control access to essential facilities. Effectively, the Rule requires Telecom to be indemnified for any loss of profit due to the entry of a competitor into the market. The response offered by the Privy Council, that the Government retains the right to regulate prices, is unrealistic in terms of current non-interventionist policies. This decision could, therefore, have broad ramifications for monopoly suppliers in other deregulated industries.

Kieren Deeming

Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667. Court of Appeal. Cooke P, Casey, Hardie Boys, Gault and McKay JJ.

The New Zealand Bill of Rights Act 1990 ("the Act") has, until now, mainly been used by New Zealand courts to guide them in the interpretation of statutes, and as a tool for modifying existing common law remedies. The significance of *Simpson v Attorney-General (Baigent's Case)*[1] is in its creation of the new cause of action of breach of the Bill of Rights, for which monetary compensation can be sought. The case also raises questions as to what extent statutory immunities, when interpreted in the light of the Act, will extend to cover the actions of Crown agents.

According to the pleaded facts, police gained a search warrant for an address, believing it to be the house of a drug dealer. It was, however, Mrs Baigent's address.

The appearance of the property would have indicated that it was unlikely to be a centre of cannabis dealing. Mrs Baigent was not at home, but her son was. He told the police that they had the wrong address. Nevertheless, they commenced the search, and rifled through the son's dresser, drawers and wardrobe. During the search, the son telephoned his sister, a barrister. She too informed the police that they had the wrong address, and asserted that the search was unlawful. The detective in charge of the team was alleged to have replied:[2] "We often get it

1 [1994] 3 NZLR 667.
2 Ibid, 684.

wrong, but while we are here we will have a look around anyway." The search continued for a short time after this conversation, but nothing of an incriminating nature was found.

Civil proceedings were brought against the Attorney-General in the High Court,[3] pleading:

(i) negligent procurement of the search warrant;
(ii) trespass to property;
(iii) abuse of process in the execution of the search warrant; and
(iv) breach of s 21 of the Act by making an unreasonable search.

Master Williams QC, in the High Court, struck out the claims on the basis that no cause of action lay for mere negligent procurement of a search warrant, and that the other causes of action would be defeated by the statutory immunities available to the individual officers (under ss 26 and 27 of the Crimes Act 1961 and s 39 of the Police Act 1958), and to the Crown (under s 6(5) of the Crown Proceedings Act 1950).

The Outcome

The Court of Appeal struck out the first cause of action on the same grounds as Master Williams QC. In relation to the second and third causes of action, the Court held that they should be reinstated, because the statutory immunities did not apply. Section 39(2) of the Police Act applies to officers acting "in obedience" to a warrant, and ss 26 and 27 of the Crimes Act protect those "executing" a search warrant. If, as the alleged facts indicated, the police officers had not acted reasonably or in good faith, they would no longer be acting in obedience to or in execution of the warrant, and their actions would fall outside the immunities. Section 6(5) of the Crown Proceedings Act confers an immunity in tort on the Crown in respect of an agent's actions in "discharging or purporting to discharge" responsibilities "in connection with the execution of judicial process". The pleaded facts would support a conclusion that the police, knowing they were searching the wrong house, were not discharging or even purporting to discharge their responsibilities in relation to the warrant.

However, the most significant aspect of the case is the holding of the majority of the Court that a new remedy should be established, awarding damages against the state for a breach of the Bill of Rights Act. This cause of action lies directly against the state in public law, and therefore avoids immunities protecting the state and its agents against actions based on liability in tort.

A Bill of Remedies?

The majority's reasoning was based on the notion that rights, of necessity, imply remedies, and that Parliament must be taken to have intended that remedies be available when rights affirmed in the Act are infringed. Justices Hardie Boys[4]

3 [1990-2] 3 NZBORR 400.
4 Supra at note 1, at 697.

and McKay[5] referred to the statement of Holt CJ in *Ashby v White*:[6]

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; ... want of right and remedy are reciprocal.

Each judgment of the majority evidenced guidance from foreign jurisdictions. President Cooke commented:[7]

> In other jurisdictions compensation is a standard remedy for human rights violations. There is no reason for New Zealand jurisprudence to lag behind.

The majority noted that other jurisdictions, particularly Ireland and the United States, have developed remedies for infringement of constitutional rights, notwithstanding a lack of express remedial clauses, and therefore held that the absence of an express remedies provision in the Act should not be a hindrance. To decide otherwise would be to relegate the Act to mere "legislative window-dressing, of no practical consequence".[8]

The majority judgments drew much support from *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*[9] in which the Privy Council awarded damages directly against the state for breach of the relevant constitution. Each judgment referred to Lord Diplock's statement:[10]

> The claim for redress ... is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is liability in the public law of the state.

The Act is also an affirmation of New Zealand's commitment to the International Covenant on Civil and Political Rights 1966.[11] By its accession to the First Optional Protocol to the Covenant in 1989, New Zealand accepted that individuals could seek relief for breach of the Covenant from the United Nations Human Rights Committee. Justice Casey stated that this also implied that remedies are available under the Act, stating:[12]

> [I]t would be a strange thing if Parliament ... [having passed the Act] must be taken as contemplating that New Zealand citizens could go to the ... Committee ... for appropriate redress, but could not obtain i[t] from our own Courts.

Justice Hardie Boys went further by commenting that our Courts are *obligated* to provide such remedies at domestic law, so that citizens do not need to resort to international tribunals.[13]

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5 Ibid, 717.
6 Raym 938,953, 938,953-938,954.
7 Supra at note 1, at 676.
8 Ibid, 691 per Casey J.
9 [1979] AC 385.
10 Ibid, 399.
11 Ratified by New Zealand in 1978.
12 Supra at note 1, at 691.
13 Ibid, 700.

The Dissent

There are difficulties with the decision, many of which are outlined in the dissenting judgment of Gault J. The major concern is that the decision carries the Act to a higher constitutional status than that envisaged by Parliament. The Act is not entrenched, and contains a directive in s 4 that enactments are not to be in any way invalid or inapplicable solely by reason of their inconsistency with the Act. Justice Gault stated that in the context of this case, the only reason for fashioning a new non-tortious cause of action would be to circumvent the Crown's immunity in tort provided in s 6(5) of the Crown Proceedings Act. This would not be appropriate because it would effectively disregard s 4 of the Act.[14]

His Honour also argued that Parliament must have intended that where the existing law, either in its current state or through modification and development, provides effective remedies, there is no need to create a new cause of action. The statutory immunities referred to above all essentially protect those who are executing warrants from proceedings in tort. As provided for in s 6 of the Act, the statutory immunities must be read consistently with the Act where possible. Justice Gault, interpreting these sections in the light of s 21 of the Act, took the view that any unreasonable search or seizure cannot be regarded as the execution of a search warrant, and thus is not covered by the statutory immunities. He therefore held that where s 21 is infringed, the torts of trespass and abuse of process can provide adequate remedies, and that no separate cause of action is required specifically for a breach of the Act.

This approach is, in itself, far-reaching. It would have the effect that any unreasonable search, even if carried out in good faith, would be open to proceedings in tort by avoiding statutory immunities.[15] However, the new remedy may have a similarly low threshold. The majority judgments seem to suggest that a mere breach of the Act will entitle relief, without either showing bad faith, or being beyond the justifiable limits of s 5. In that case, there would appear to be no difference between the threshold that the majority applies in relation to the Bill of Rights remedy, and that which Gault J applies to circumvent the statutory immunities and allow tortious actions.

Implications of the Decision

Justice Gault felt that the new remedy could have extensive and undesirable consequences. As an example, he suggested that the decision could mean that a person who is discriminated against contrary to s 19 of the Act could bypass the special enforcement provisions of the Human Rights Commission Act 1977[16] and sue directly for damages. However, given the tenor of the majority's decision, this scenario is unlikely. The majority emphasised that effective remedies must be available for breaches of affirmed rights. This implies that where remedies already exist for breach of a right, there will be no need to plead the Bill of Rights remedy, or at least existing remedies must be sought first. It was only because no remedy

14 Ibid, 708.
15 President Cooke explicitly required proof of bad faith: ibid, 674. However, the positions taken in the other majority judgments are unclear.
16 Repealed and replaced by the Human Rights Act 1993.

existed for a breach of the right affirmed under s 21 that the Bill of Rights remedy was created. Given this, it is perhaps unlikely that a flood of new claims will be lodged, and it may be significant that at the time of writing, only one other case has been successful on the same point.[17]

Ultimately, whether *Baigent's Case* is a negative or positive development remains to be seen. The case represents a further step towards the Act becoming New Zealand's de facto written constitution. It is of some concern that the decision appears to ignore Parliament's intention in passing the Act. When introducing the relevant Bill for its second reading, Sir Geoffrey Palmer expressly stated that the Act would create "no new legal remedies".[18]

However, the majority's opinion that a right without a remedy is meaningless, is convincing. If Parliament is dissatisfied with this result, an amendment to the legislation barring this new remedy could be forthcoming.

*Adam Mikkelsen**

*BA

Invercargill City Council v Hamlin [1994] 3 NZLR 513. Court of Appeal. Cooke P, Richardson, Casey, Gault and McKay JJ.

Invercargill City Council v Hamlin[1] gave the Court of Appeal an opportunity to reconsider the state of the law in regard to building negligence. The Court discussed issues of proximity, limitation, and discoverability. Importantly, it addressed whether New Zealand law should limit the liability of local authorities for negligent inspection and approval of building foundations. The decision follows a well established line of authority which England departed from in 1991 in the case of *Murphy v Brentwood District Council.*[2]

In 1972 the plaintiff, Hamlin, purchased a section from a building company, which also contracted to build his house on it. Earlier the same year the Invercargill City Council ("the Council") had issued a building permit to the building company. The land on which this section was located was low-lying and wet. In addition, it had been the subject of the Council's land-fill scheme. When laying the foundations, the building contractor failed to set the foundations to a depth suitable for the boggy section. During the two months of construction the Council's building inspector made a number of inspections of the property.

In the following years the house developed minor defects. In 1989, Hamlin was alerted to the seriousness of the problem and sought professional advice. He was informed that the foundations were seriously faulty.

Hamlin successfully sued the building company and the Council in the High Court.[3] However, the company was insolvent and the award of damages against it was futile. The Council as second defendant was held liable for the cost of repairs. It appealed to the Court of Appeal.

17 *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720. This case was heard and delivered concurrently with *Baigent's Case.*

18 510 NZPD 3450 (14 August 1990).

1 [1994] 3 NZLR 513.

2 [1991] 1 AC 398 (HL).

3 *Hamlin v Bruce Stirling Ltd* [1993] 1 NZLR 374.

The Appellant's Arguments

The Council contended that the Court should abandon its position and conform to the English approach on two separate points of law.

The Council argued that the House of Lord's decision in *Murphy v Brentwood* should be followed. This case reassessed the principles upon which a duty of care owed by a local authority to a home-owner had been founded. It concluded that local authorities should not be held liable since there is no reliance on them by home-owners. The Council asserted that no such reliance can be established in New Zealand. Any reliance which does exist would be as a result of social expectations due to the development of the law in this area, rather than any real reliance on local authorities.

On the second point of law, the Council submitted that the similar wording of New Zealand's Limitation Act 1950, and the United Kingdom's Limitation Act 1939, meant the Court was obliged to follow the reasoning of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber and Partners.*[4] This case held that a cause of action for negligence in the workmanship of a building accrues at the date when physical damage occurs to the building. This would mean that Hamlin's claim was barred under the Limitation Act 1950.

The Decision of the Court of Appeal

Prior to *Hamlin*, the Court of Appeal had already had an opportunity to consider the state of the law in light of *Murphy*.[5] It indicated that negligence law in New Zealand would continue to follow the path already established, and that it was not prepared to implement the changes set out in *Murphy*.

In *Hamlin*, the Court reconfirmed the liability of councils in New Zealand. It considered that a purchaser of a property relies upon the fact that the building complies with building codes and regulations. Because of the nature of the building industry, social conditions and the different insurance legislation, New Zealand's situation could be distinguished from that of England.

However, there was no actual evidence put before the High Court or the Court of Appeal in regard to these distinguishing factors. While the Court of Appeal pointed to several relevant considerations in respect of reliance in New Zealand, it did not actually differentiate them by comparison with England.

The Court had no difficulty in continuing the divergence from English authority. President Cooke noted that:[6]

> While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point.

Justice Richardson considered that any change to the New Zealand position

4 [1983] 2 AC 1 (HL).
5 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282.
6 Supra at note 1, at 523.
7 Ibid, 527.

would have to be effected through legislation and not the Courts. He noted that the Building Act 1991 was not altered after *Murphy* and stated that:[7]

> [T]here is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field .... Ultimately we have to follow the course which in our judgment best meets the needs of this society.

His Honour referred to several policy considerations relevant to a change of the law in this area. He considered that there would be significant effects on the community, especially home-owners and the building industry. There would also be widespread economic implications, since risk allocation and insurance practices would change.

On the point of limitation, the Court refused to follow *Pirelli.* Instead, the Court followed the New Zealand line of authority that time begins to run when the defect in the building becomes apparent or manifest. This is known as the "reasonable discovery" test. The Court held that Hamlin acted as an ordinary prudent home-owner in seeking independent expert advice in 1989. It was on this date that time began to run. The claim was therefore within the six year limitation period as set out in s 4 of the Limitation Act 1950.

Justice McKay dissented on this point. The similarities between the United Kingdom and New Zealand legislation led to his conclusion that *Pirelli* is the correct approach. He stated that time runs from the accrual of the cause of action, "[which] has always meant the time when all the facts necessary to establish the claim are in existence, whether or not they are known or ought to have been discovered."[8]

Appeal to the Privy Council

On 27 November of this year, the Judicial Committee of the Privy Council will hear an appeal from the Council. If the Privy Council considers that the building culture of the two jurisdictions is similar, it may overturn the decision on the basis of the authority of *Murphy.*

This would require a successful argument by the Council negating the existence of reliance by New Zealand home-owners on local authority inspections, and asserting that local authorities are not sufficiently proximate to warrant the imposition of such a duty.

However, it is likely that the Privy Council will give substantial consideration to the social conditions factor. It will then have the option to not apply *Murphy* if it finds that the social conditions of New Zealand differ materially from those which exist in England, and that they warrant a different outcome.

A decision in accordance with *Murphy* would bring New Zealand into line with English authority. It would possibly prompt New Zealand courts to follow the contractual approach outlined in both *Murphy* and *Linden Gardens Trust v Lenesta Sludge Disposals Ltd.*[9] However, in *Hamlin* Richardson J addressed the possibility of remedies based on a contractual relationship, and expressed reluctance to follow the framework proposed in *Linden Gardens* without a serious analysis of all

8 Ibid, 544.
9 [1994] 1 AC 85 (HL).

its social and economic factors.

Recently, the Supreme Court of Canada has indicated support for the contractual approach. In *Winnipeg Condominium Corp No. 36 v Bird Construction Co Ltd*[10] it decided that the appropriate remedy for the plaintiff for defective stone cladding was, or should have been, a remedy in contract or protection by way of insurance. The Court refused to extend liability in tort on the basis of lack of proximity between the plaintiff and defendant.

However, in the recent decision of *Bryan v Maloney*,[11] the High Court of Australia did not follow *Murphy*. The case also involved a house built with inadequate footings and was concerned with whether the duty owed by the builder extends to subsequent purchasers of the house. The Court held that the contractual approach was not to be followed and tort liability was imposed on the builder to the third owner of the house.

It will therefore be interesting to ascertain the Privy Council's stance, given these recent decisions of the highest appellate courts of other Commonwealth jurisdictions.

In relation to the limitation test, the Privy Council may find that the similarities between the New Zealand and United Kingdom Limitation Acts warrant a conformity of approach, especially in light of the parallel development of the two Acts. This reasoning found favour in McKay J's dissenting judgment.

Because the proceedings were commenced in 1990, prior to the enactment of the Building Act 1991, the six year limitation under the Limitation Act 1950 applied. The Building Act, however, will probably assist future claimants because of its extension of time from six to ten years. If the Privy Council decides in favour of the *Pirelli* test then at least this extension will go some way towards assisting claimants.

The decision of the Privy Council as to whether it allows the New Zealand courts to continue their independent and firmly established approach, in relation to tortious liability of local authorities, and the accrual of the cause of action, will therefore be eagerly awaited.

*Kavita Deobhakta**

*BA

University of Canterbury v Attorney-General [1995] 1 NZLR 78. High Court. Christchurch. Williamson J.

The extent to which the law of restitution forms part of the law of New Zealand remains a matter of some debate. Nevertheless, the courts' willingness to grant remedies based upon a restitutionary analysis has persisted. This is consistent with the trend of case law in other jurisdictions,[1] and it may indicate that the time has come for New Zealand's courts to definitively adopt the law of restitution.

University of Canterbury v Attorney-General[2] demonstrates the value of a restitutionary principle in allowing the recovery of money paid due to a mistake of fact. The case involved a charitable trust established in 1943 to administer two

10 (1993) 101 DLR (4th) 699.
11 (1995) 128 ALR 163.
1 See the House of Lords decision in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 for the adoption of the principle of unjust enrichment into the law of England.
2 [1995] 1 NZLR 78.

scholarships, with the University of Canterbury ("the University") named as trustee. An initial sum of 10,000 pounds was transferred to the trustee by the settlor. The scholarships of fifty pounds each were to be awarded annually.

In 1989 the settlor's only surviving son indicated to the University that he would be willing to enlarge the trust fund, and inquired as to whether this would be an agreeable means of increasing the amounts of the scholarship awards. The University did not reply to this query directly, but thanked him for his generosity and stated that this would present no problem. As a result, 5000 shares were added to the trust. Subsequently, the donor discovered the extent of the trust's value, which by 1992 was over a quarter of a million dollars, and requested the return of the shares in order to donate them to another educational charity with greater need.

The litigation arose as an application under s 66(2) of the Trustee Act 1956. Following the donor's application to the University to have the shares returned, the matter was referred to the Attorney-General in his capacity as protector of charities. Since the Attorney-General considered the return of the shares to be inappropriate, the University made this application to the Court to ascertain the fate of the shares.

The donor contended that the shares had been transferred to the University due to a mistake of fact, and that they should therefore be returned. The University agreed with this submission, but the Attorney-General felt that as the donor had fulfilled his intention of augmenting the trust fund, restitution should not be allowed.

Requirements of a Restitutionary Remedy for Mistaken Payments

Restitution is based upon the principle of unjust enrichment. Thus, three factors must be present in order for the plaintiff to be entitled to a restitutionary remedy. First, there must be an enrichment. Second, the plaintiff must show that this enrichment was at his or her expense. Finally, the existence of an unjust factor must be demonstrated for recovery to ensue.

Restitution for mistaken payments appears to satisfy these three requirements with relative ease. The enrichment is the sum of money received by the defendant. This amount is a deduction from the plaintiff's wealth, and the gain of the defendant correlates directly to this loss. Lastly, the unjustness is constituted by the mistake of the payor, which negatives the voluntariness with which the payment is made. However, the law has proved to be more restrictive than this, and additional qualifications upon the plaintiff's ability to recover have been introduced.

The first qualification is that the mistake must have been sufficiently fundamental. This requirement ensures that the courts will not be inundated with a flood of restitutionary claims by plaintiffs who have changed their mind subsequent to payment, and who can now point to some trivial or invented mistake as the basis for the return of the money. The second additional ingredient is that the mistaken payment must have been made in contemplation of some liability owed by the payor to the recipient.

The rationale behind these extra requirements is that the law should ensure the sanctity of transaction and receipt. When a payment appears to have been absolutely acquired, the recipient should not be required to remain in a position which will facilitate the repayment of the wealth, as if the amount received was a contingent liability. It is foreseeable that in many instances payors who subsequently undergo a change of mind will insist upon the return of the amount paid.

This is a commercially unacceptable proposition, and could lead to absurd results.

The Decision

In the instant case, Williamson J held that:[3]

> Not all cases of payments or transfers under a mistake of fact will result in repayment or restitution. It will depend upon the type of payment, *the nature of the mistake* and any effect of the payment.

His Honour then referred to the case of *Morgan v Ashcroft*[4] in which Greene MR suggested that a mistake must be fundamental or basic in order to allow recovery of a payment.[5] Justice Williamson proceeded to find that the mistake of the donor was sufficiently fundamental to enable recovery on the basis of mistake.

However, the leading authority on mistaken payments in New Zealand, *Thomas v Houston Corbett and Co,*[6] does not require that the plaintiff's mistake be fundamental, only that the mistake be causative of the payment. Moreover, *Morgan v Ashcroft* has been criticised by Goff and Jones,[7] who also suggest that where the payment is a gift, as in the present case, the plaintiff should be under a lesser obligation to prove the extent of the mistake, as the recipient is a volunteer. Concomitant with this lesser onus, however, is the requirement that a change of position defence be available to the recipient, for situations in which the recipient has relied on the payment.[8]

At present s 94B of the Judicature Act 1908 partially establishes a defence of change of position in New Zealand,[9] which would suggest that the requirement of fundamentality could be removed. It is therefore submitted that on the basis of both authority and the existence of a statutory defence, the mistake of the plaintiff need not be fundamental to allow recovery of the payment, especially when that payment is a gift. This outcome is desirable, as it will often be unclear whether in fact a mistake is fundamental.

Although the second qualification requires the mistaken payment to have been made in connection with a liability owed by the payor to the recipient,[10] in many cases the courts have allowed recovery where the payor was under no liability whatsoever.[11] In this case, Williamson J relied upon the decision in *Lady Hood of Avalon v Mackinnon,*[12] where a settlor was allowed to recover her payment, having made an unnecessary additional settlement in favour of her daughter.

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3 Ibid, 84. Emphasis added.
4 [1938] 1 KB 49 (CA).
5 Ibid, 66.
6 [1969] NZLR 151 (CA). See too the judgment of Goff J in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, cited in the present case by Williamson J, supra at note 2, at 85.
7 Goff and Jones, *The Law of Restitution* (4th ed 1993) 120-121, cited by Williamson J, supra at note 2, at 84-85.
8 Burrows, *The Law of Restitution* (1993) 421-431. This defence was recognised by the House of Lords in *Lipkin Gorman v Karpnale Ltd,* supra at note 1.
9 For the limits on this defence as enacted by the statute see Kos and Watts, "Unjust Enrichment - The New Cause of Action" New Zealand Law Society Seminar (1990) 113-115.
10 This approach originates in cases such as *Aiken v Short* (1856) 156 ER 1180.
11 See primarily the criticism of this approach in *Barclays Bank Ltd v WJ Simms Sons & Cooke (Southern) Ltd,* supra at note 6.
12 [1909] 1 Ch 476, cited extensively by Williamson J, supra at note 2, at 83-84. This case did not involve a charitable trust, to which special consideration must be given – see infra at note 14.

However, the New Zealand approach seems to have been settled by the Court of Appeal in *Weld v Dillon.*[13] In that case the Court adopted the qualification that a mistaken payment will only be recoverable if made in contemplation of liability on the payor's behalf. While it is contended that this approach is artificial, and will possibly deny recovery in every case where the payment is a gift, it is submitted that Williamson J was nevertheless bound by this decision, although it appears not to have been presented to him in argument. Clearly, there is now some degree of confusion in the law. An authoritative decision by the Court of Appeal overruling *Weld v Dillon* is therefore desirable.

Conclusion

The difficulty for Williamson J arose from the requirement that exceptional circumstances be present before property given to a charitable trust can be recovered by a settlor.[14] Nevertheless, it is clear that a mistake can be enough to allow recovery from charitable trusts,[15] and in this case his Honour stated that:[16]

> [T]he law as to mistake of fact may be applied to transactions involving charitable trusts but greater scrutiny must be exercised in relation to such claims.

Following the authority of *Weld v Dillon* it is apparent that recovery in the present case was not actually available, because the donor was under no liability to the payee. However, the donor had indicated that he would reinvest the shares in a more needy educational charity, and the return would not have prejudiced the award of scholarships, nor the trustees. These may have been central factors in Williamson J's decision to allow the donor to recover his settlement. His Honour could have, perhaps, distinguished *Weld,* but it is submitted that the best option for the future is reconsideration of that case at the highest level.

Joshua Bayliss

13 (1914) 33 NZLR 1221. See Kos and Watts, supra at note 9, at 108.
14 *Re Wright* [1954] Ch 347 (CA).
15 See *Saunders v Anglia Building Society* [1971] AC 1004 (HL), cited by Williamson J, supra at note 2, at 81.
16 Supra at note 2, at 84.

COURTS AND POLICY: CHECKING THE BALANCE, edited by B.D. Gray and R.B. McClintock. Brooker's, in association with the Legal Research Foundation, Wellington, 1995. xxiii and 292pp. $45.00.

Courts and Policy is a collection of papers by some of the more prominent public lawyers and academics in New Zealand, Australia, and England. The papers were delivered at a conference organised by the Legal Research Foundation in August 1993. The theme of the conference was the constitutional balance between the three central branches of government. It is not possible in such a short review to discuss the individual contributions in any great detail – the object here is to highlight some of the more salient and controversial points in each.

The first paper, by Sir Geoffrey Palmer, calls for reform in the areas of judicial selection and accountability. Palmer draws on his experiences as Minister of Justice and Attorney-General, and provides some valuable insights. He concludes that while neither political elections nor a judicial commission would be a desirable change, some legislative measures to codify judicial independence and ensure a wider consultative process are necessary.

Palmer suggests that selection ought to be coordinated by the Attorney-General's office alone, rather than in conjunction with the Minister of Justice, as is presently the case. He argues that this would centralise the resources. The Attorney-General would be required to consult in confidence with Law Societies, the judiciary, and the Justice and Law Reform Select Committee before selection. Palmer also favours adopting the British practice of keeping systematic records in the Attorney-General's office of relevant information on lawyers who are possible future candidates.

While such measures would be welcomed in New Zealand, ultimately, as Palmer notes, "it is people who make the system work".[1] Although the New Zealand bench may remain unrepresentative,[2] it is generally thought of as high calibre. Palmer argues that a more representative bench may not significantly alter the outcome of judicial decisions, which may be compared with the view expressed previously by Sir Robin Cooke.[3] Although Palmer's claim is questionable, his comment that it may enhance public perceptions of the judiciary is not. His proposed legislative changes however, will not provide any guarantee of greater representation. This will come from greater involvement of women and minorities in the law generally.

On the issue of accountability, Palmer concedes that "[j]udges can only be made more accountable by sacrificing their independence".[4] In fact, he favours increasing their security of tenure by strengthening their protection against removal, and by affording District Court Judges the same security as High Court Judges. Inevitably the desire for formal accountability of judges must give way to independence, for independence is essential to ensure that judges are free from extraneous influences and all authority save that of the law.[5]

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1 At 88.
2 Palmer recalls, at 41, trying to appoint both a woman and a Maori to the bench, but being unable to obtain the concurrence of the judiciary.
3 Sir Robin Cooke, "Introduction" (1990) 14 NZULR 1, 7.
4 At 89.
5 Cf Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195, 201.

Associate-Professor Hodge, in his paper, takes an historic look at the question of judicial review of legislation. He begins with a colourful account of the lives of Bacon and Coke CJ, who played important parts in the events of the seventeenth century which led to the separation of powers in the Westminster system. Hodge recalls that whilst judicial review is looked on favourably in the United States,[6] there are historically many decisions that would be unacceptable today. To his list may be added a more recent decision of the Supreme Court,[7] in which the Court invalidated an affirmative action programme aimed at redressing past imbalances in electoral boundaries. The Court therefore failed to perform what Professor Mulgan in his paper called its "democratic function of protecting minorities against political oppression from majorities".[8]

Hodge prefers a less activist role for the courts in judicial review of legislation.[9] He believes that the Parliamentary system has served New Zealand well, and that there is ample protection from watchdog bodies.[10] However, the matter is more complex than Hodge allows. There are well known recent instances of excessive use of executive control of the legislature in New Zealand.[11] It is not only "the big moral questions"[12] that the courts will have to determine, but also excesses of executive power when the legislature is controlled by a single party. As Mulgan notes, moral issues have traditionally been determined by "free" or conscience votes that are very different from those under control of the party "whip" system, which usually gives effect to cabinet decisions.[13] That situation may change under the new proportional representation system in New Zealand. Hodge's paper covers such a broad topic that a full treatment of the issues raised would have been impossible. However, it would have been enhanced if he had expanded upon some of the recent controversial cases that prompted a sharp reply by Sir Robin Cooke in his foreword.[14]

Sir Kenneth Keith's paper discusses the relationship of law and morality. He draws on international law as well as common law, applying principles relating to casualties of war and danger at sea to the municipal concern of health care. This discussion is timely considering the introduction of legalised euthanasia in the Northern Territory of Australia and the current debate in New Zealand. He quotes a pithy observation by Lord Browne-Wilkinson in *Airedale NHS Trust v Bland*:[15]

> How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question.

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6 Coke CJ's famous dicta in *Dr Bonham's Case* (1610) 8 Co Rep 107a; 77 ER 638, became more accepted in the United States than in Britain.
7 *Shaw v Reno* 113 S. Ct. 2816 (1993).
8 "The Westminster System and the Erosion of Democratic Legitimacy", at 265, at 266.
9 At 111.
10 For example, the Privacy Commissioner, the Human Rights Commissioner, and the Ombudsman.
11 For example, the Clutha Development (Clyde Dam) Empowering Act 1982. See Brookfield, "High Courts, High Dam, High Policy: The Clutha River and the Constitution" [1983] NZ Recent Law 62. Further examples are given by Sir Geoffrey Palmer in *New Zealand's Constitution in Crisis* (1992) 65.
12 Hodge mentions, at 111, abortion, race relations, and capital punishment as examples.
13 At 279-280.
14 At x-xi.
15 [1993] AC 789, 885 (HL); quoted at 148.

In this reviewer's opinion, the answer is contained within the question – it would seem unjust to prolong a life in the circumstances that his Lordship envisages. However, there are many other valid viewpoints to be considered, and thus one should accept Sir Kenneth's point that the Courts are not the appropriate forum for determining such moral issues.

Sir Kenneth also asserts that although a Diceyan Parliament retains the ultimate power over the legal position, it is in fact limited by moral constraints. Professor Brookfield, in his introduction, cautions that the theoretical difficulties of a capricious Parliament remain.[16] As Hodge observes however, New Zealand's constitutional history suggests that the likelihood of Parliament acting in such a manner is remote.[17] The breaches of constitutional conventions that have occurred cannot be said to have amounted to an indifference to basic human rights.

Lord Justice Hoffman, in the *Airedale* case, is quoted as saying:[18]

> [Euthanasia] is not an area in which any difference can be allowed to exist between what is legal and what is morally right.

The law can never be absolutely harmonious with morality, for there is no consensus on "moral" issues. If there were, there would be little need for a legal system. Sir Kenneth's paper identifies some rights which are deeply embedded within the Western legal tradition, and gives some suggestions as to how those rights could be translated into law.

Lord Woolf in his paper discusses the separation of powers in the United Kingdom from the perspective of one who had recently delivered the leading judgment in a significant House of Lords decision on the subject.[19] He recounts briefly some of the more "activist" decisions of the House of Lords, citing them with general approval. In some areas, Lord Woolf's views are as controversial as those of the New Zealand Court of Appeal.[20] He supports the judicial formulation, "without the assistance of a Bill of Rights[,] of the broad principles which are an inherent part of any developed democratic society".[21] It leads one to speculate, given his Lordship's judgment in *New Zealand Maori Council v Attorney-General*,[22] whether he would include, in the New Zealand context, the Treaty of Waitangi. His assertion that the common law provides as great a protection of human rights as the European Convention is questionable, given the regularity with which Britain has been brought before the European Court of Human Rights.

Professor Walker prefers the latent power of the courts to uphold common law rights to be reserved for the most extreme (and unlikely) situations where Parliament purports to breach the moral restraints mentioned by Sir Kenneth. He is not an adherent to Dicey's theory, but neither does he approve of the extent to which the High Court of Australia has recently changed the law in the decisions of

16 At 5.
17 At 111-112.
18 Supra at note 15, at 825 (CA); quoted at 149.
19 *M v Home Office* [1994] 1 AC 377 (HL). This decision overturned *R v Secretary of State for Transport, Ex parte Factortame Ltd* [1990] 2 AC 85 (HL).
20 Lord Woolf expresses doubt as to the legitimacy of privative clauses, at 179-180. See also *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) per Cooke J.
21 At 182. Lord Woolf supports Justice Thomas's call for a more principled and less precedent based approach on the part of the judiciary. See Thomas, *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (1993) 23 VUWLR, Number 1, Monograph 5.
22 [1994] 1 NZLR 513 (PC).

Commonwealth v Tasmania[23] and *Mabo v Queensland.*[24] He supports the notion that a Bill of Rights should be implied in the Australian Constitution, because he sees it as essential for the protection of democratic values.

His paper may be contrasted with Sir Michael Kirby's paper, "The Exciting Australian Scene". Sir Michael, noting the universal rejection of the formalist myth that judges never make law, largely approves of the High Court's activism. He says "[i]t is probably more noticeable because [it has been] long postponed".[25] With respect however, in ascribing the controversy principally to a lack of public understanding of the nature of the judicial function, Sir Michael oversimplifies the matter. The subject matter of the cases he mentions would scarcely have been less controversial if there had been a general acceptance of a greater role for the judiciary. On the other hand, the value of public debate and understanding about constitutional structures should not be underestimated. As Walker cautions:[26]

> People will not plan, invest and produce in an economy that lacks a balanced constitution and the rule of law, where the fruits of one's foresight and effort can be swept away by arbitrary changes of policy or law.

Sian Elias QC has no time for Diceyan or even Montesquiean theories of the constitution. In her opinion, judges under the present system have no choice but to invalidate legislation that is incompatible with the Treaty of Waitangi. Further, her definition of the Treaty and its terms, while more coherent than many, is among the more radical of recent writings. It is a definition that she acknowledges will be disquieting to those who adhere to liberal notions of equality, majority rule, and human rights. There is plenty of scope for disagreement with her analysis, in particular her disarming postulation that Diceyan orthodoxy may be freely ignored, but its challenging nature is an asset.

Professor Mulgan places present day problems with the constitution squarely on the shoulders of politicians, as opposed to judges. He believes that proportional representation, rather than increased legal checks on Parliamentary power, will best provide a solution. He notes that legal checks, such as a written constitution or an upper chamber, were once seen as the goal of an elite wishing to protect its own control of power. They are now, however, classified as an agenda of the left who advocate restraint on politicians.[27]

Having an unwritten constitution creates inherent difficulties in defining the precise limits between the branches of Government. As the Australian developments show, a written constitution provides no guarantee of certainty either. In the end, if the overall goal is a democracy that protects minority rights, the preferable role for the courts is that which Mulgan advances. He suggests a role of checking and restraining the other branches, rather than being actively involved in policy making.[28] Too large a role for the courts may lead to an erosion of public confidence, and to increased litigation with little chance of success.[29]

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23 (1983) 158 CLR 1.
24 (1992) 175 CLR 1.
25 At 263.
26 At 183.
27 At 281.
28 Ibid.
29 See, for example, *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451.

Overall, *Courts and Policy* provides a wealth of stimulating material on public law, and the essays are as intellectually powerful as would be expected from the authors. Unfortunately, the quality of the production leaves a lot to be desired. The printing quality is sub-standard and there are a number of typographical errors. More importantly, the index is seriously deficient considering the wide scope of the book. However, these complaints do not detract from the force of the arguments presented. Perhaps the greatest recommending feature is that the authors, while holding eminent positions within their respective professions, have not hesitated to be both controversial and challenging.

James Wilson

THE PRIVACY ACT: A GUIDE, by Elizabeth Longworth and Tim McBride. GP Publications, Wellington, 1994. xx and 315pp. $39.95.

The authors of *The Privacy Act: A Guide* state that their purpose is to provide practical assistance to individuals and agencies seeking to understand their rights and obligations under the Privacy Act 1993 ("the Act"). The Privacy Commissioner, Bruce Slane, notes in the foreword that the authors had "set themselves a difficult task" in writing a book to explain the Act's implications, without the work being too long or lacking sufficient detail to be useful.[1] This reviewer's impression is that the authors have achieved their objectives.

The Act protects "personal information" held by any "agency" concerning any "individual".[2] It establishes twelve Information Privacy Principles ("IPPs") to protect privacy of personal information. The IPPs must be adhered to by all agencies handling personal information unless they are specifically exempted.[3] These principles, detailed in Chapter Six of the *Guide*, cover the means of collection, use, storage, accuracy, and disclosure of personal information. They also control access to and correction of information. The principles extend to all personal information held by agencies which is not already publicly available.

Whilst simplicity in a statute can be a double-edged sword, the plethora of detail in the Act, does not enhance clarity. For those obliged to comply with this complex Act, this introductory book will provide welcome guidance. The *Guide* explains the Act's provisions in lay person's terms and analyses their effect on various industries.

The IPPs are examined individually, and practical guidance is given for the implementation of each one. For example, IPPs six and seven, dealing with rights of access to, and correction of information, are predicted to be expensive to administer. The authors suggest that a privacy officer be appointed to deal with compliance throughout the agency. The officer ought to be someone who has the respect of management, and who has some say in budgetary matters. The inference is that only then will a compliance program be taken seriously.

The *Guide* also undertakes case studies of industries specifically affected by the Act. The health, employment, direct marketing, banking, finance, and credit

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1 At v.

2 The term "agency" covers all organisations, businesses, departments, corporate bodies, and individuals subject to the Act. The term "individual" covers only natural persons.

3 The news media and law enforcement agencies are exempted from compliance with most of the IPPs.

industries are examined. Chapter Sixteen of the *Guide* is concerned with the area of employment. It looks at, among other things, the obligations of personnel managers with regard to IPPs six and seven. The Chapter details how corrections to personnel files should be made, and explains the reasons that can be given for refusing employees access to personal files, for instance, where the information held is "evaluative".[4] The authors also make suggestions for employers wishing to implement employee surveillance programmes – to do so carefully, and with consent, is the essence of their advice.

When the Privacy of Information Bill 1991 was introduced into Parliament, the Right Honourable David Lange, commenting on the direct marketing industry noted that:[5]

> [You] would have been offered within 6 weeks, 14 Para pools, 29 cars, a bull worker, and a diet programme - all because [you] had subscribed to the *Readers Digest.*

It is fair to say that the direct marketing industry will be the industry most affected by the Act.[6] The scenario envisaged by Lange could soon be a thing of the past. The information available to them will diminish and they will have the additional burden of gaining consent before using the information. The authors suggests what may be done with personal information that is gathered by the direct marketing agency itself, within the limits of the IPPs. The *Guide* also gives advice to those approached by direct marketing companies. It explains how to ensure personal information is not used for any purpose other than that which was originally intended by the individual concerned.

Privacy codes of practice are an innovation under the Act. They are created and maintained under the supervision of the Privacy Commissioner.[7] In this way the spirit and intent of the Act can be maintained in a situation where the IPPs are not completely appropriate. The Health Privacy Code 1994, examined in some detail in Chapter Fifteen, is the first code of practice to be established under the Act. The authors explain that the volume and nature of information handled by health sector agencies required specially tailored provisions addressing the privacy issues peculiar to the health industry.[8] The *Guide* gives advice on how the Code will affect both patients and health providers in the present commercial health environment.

The *Guide* does not intend to be critical of the Act, but some relevant theoretical and background issues are looked at. The authors comment on competing interests inherent in privacy protection and the need for a suitable balance to be struck between an individual's interests in privacy on the one hand, and the interests of society and other individuals on the other. The IPPs reflect the desire to balance those interests, but the burden of this task seems to be borne more by private sector agencies than by the public sector. The authors note that Parliamentary debate on the Privacy Bill centred on how to allow for the protection of privacy without restricting certain public sector agencies in their quest to eliminate welfare fraud. This resulted in an Act which requires private sector agencies to

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4 Section 29(3) of the Act defines "evaluative material" as evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility or qualifications of the individual.

5 518 NZPD 3856 (5 August 1991).

6 See Chapter Eighteen.

7 An industry that has difficulty complying with the Act, or that needs more specific direction on the Act's Principles, is able to apply to the Privacy Commissioner for an industry code of practice that will then replace the Act, or parts thereof, for that industry.

8 For example, patient confidentiality.

cope with substantial increases in administration and compliance costs, while surprisingly relaxed standards are imposed on government agencies carrying out data matching functions in pursuit of welfare fraud.[9] It remains to be seen how seriously both sectors take their new obligations.

The *Guide* takes a practical approach to the features of the Act it describes. It examines how the principles work in practice, what has to be done to implement them, and what flexibility is allowed. It also looks at the statutory provisions from different perspectives. For example, Chapter Thirteen, which deals with the complaints procedure, looks at the process both from the complainant's perspective as well as the agency's. Whilst this is helpful, it is not a complete guide to the procedure. Agencies and individuals dealing with the Act will not be able to rely on the *Guide* alone. The principles are to be applied in a manner appropriate to the particular agency in question. The *Guide* must be used only as an introduction, and should be read in conjunction with the Act to achieve a full understanding of its implications. Indeed, the authors acknowledge this at the beginning of the book.

Despite this, *The Privacy Act: A Guide* achieves its goal of providing practical advice to those grappling with the requirements of the Act. The book is user friendly and well written with short chapters and good sized print. Detail about the IPPs is deliberately repeated, as the stated intention was to create a book that provided enough practical information about the topic to be useful, while avoiding endless cross-referencing. This tactic is good. By the end of the book, this reviewer was beginning to understand what is involved with complying with the Act.

Charlotte Stracey Clitherow

THE LAW OF COMPANY RECEIVERSHIPS IN NEW ZEALAND AND AUSTRALIA (Second edition), by the Honourable Peter Blanchard and Michael Gedye. Butterworths, Wellington, 1994. xlix and 376pp. $157.50.

The release of the second edition of *The Law of Company Receiverships* in 1994 is particularly appropriate. As the authors acknowledge in the preface, "statute law on both sides of the Tasman ... looks very different from the way it looked in 1982, when the first edition appeared."[1] Changes to statute law in that time include amendments to the Companies Act 1955 in 1983, 1985 and 1993; the new Companies Act of 1993, and the Receiverships Act 1993. Australia has replaced the Companies Code with the Corporations Law, which was itself extensively amended in 1993. In addition, much political and economic change has taken place since the first edition appeared. The advent of CER, and changes to foreign investment rules, mean that many more companies from both countries hold assets in the other jurisdiction. Consequently, receivers may have to deal with two sets of laws. It is more important than ever that the book deals with receiverships in New Zealand *and* Australia.

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9 Part X of the Act authorises specific government agencies to exchange and match personal information. Section 7 of the Act protects actions authorised by statutory provisions and other law which would otherwise breach the IPPs. For example, there are a number of government agencies that may compulsorily acquire information without first obtaining consent from an individual.

1 At v.

However, the result of this series of changes is that the laws relating to receiverships in New Zealand and Australia, which were substantially similar in 1982, are now quite different. Therefore, a book on receivership law for both jurisdictions is in essence two books – one for New Zealand and one for Australia. The result is a second edition that is substantially longer than the first.

At present, the law relating to companies in New Zealand is particularly complicated, with two Acts in force. All companies registered under the 1955 Act must re-register under the 1993 Act by 30 June 1997, and all newly incorporated companies are now governed by the 1993 Act. The authors, in order to avoid unnecessary confusion, refer only to the 1993 Act. This seems sensible. Apart from the confusion element, if the second edition is in print for as long as the first, there would be nothing to be gained by referring to provisions which will soon be defunct. In addition, much of the 1955 Act has been amended to bring it in line with the 1993 Act, and the Receiverships Act 1993 is applicable to companies under either regime. However, for those still dealing with 1955 Act companies, the authors have included a helpful table setting out comparative provisions between the two Acts.

The book is aimed at practitioners in the receivership area. Practitioners have long commented on being able to find answers to problems in this book, where more comprehensive and theoretical textbooks have failed to provide them. However, the book goes beyond its practical focus, with chapters on the nature of company charges and receivership. These chapters provide a historical and theoretical basis for much of the material covered in the text, and put the modern case and statute law in a wider perspective. In addition, the book covers the appointment of receivers, their conduct and duties, various priority questions, Crown claims, and liquidation. It is a credit to the authors that they have managed to provide a comprehensive summary of the law, while maintaining a clear and readable style throughout.

The structure of the book is logical and helpful. Each chapter is divided into numbered paragraphs, with a heading outlining the particular sub-topic. At the foot of each paragraph are the footnotes. This avoids the problem of the text being broken up with numerous cases, and provides for simple checking of references as well as cross-referencing between paragraphs.

The book aims to provide a statement of the law as the authors see it. As such, the book is somewhat lacking in critical analysis of much of the material it covers. In this respect, someone intending to engage in substantial research on any of the topics covered would need to consult a variety of other sources. However, the book does not pretend to be anything other than a statement of the law. To critically analyse all it surveys would both blur its aims and alienate its readers, most of whom will undoubtedly be looking for clear and concise statements of the law, without wanting to refer to esoteric analyses. However, this book is not without opinion . The authors are critical of various law reform proposals, and express their views on likely interpretations of statutory provisions which have not yet been the subject of litigation.

The book's coverage of the separate jurisdictions of New Zealand and Australia works reasonably well. Discussions of much of the case law, and historical or theoretical points, do not need separate New Zealand and Australian paragraphs. Where the same topic gives rise to different law or statutes in the two countries, separate paragraphs follow one another. This is a useful feature of the book. Comparisons between the New Zealand and Australian approaches to the same problem can be made quickly and easily.

However, one may question the need to cover both jurisdictions in the same

text. In 1982, when the original edition was published, much of the law relating to receiverships in New Zealand and Australia was the same. Since then, the law has become increasingly divergent, and separate reference is needed in many areas. Given that the average practitioner or student will rarely need to make reference to the particular receivership provisions of their Trans-Tasman neighbour, particularly if it contrasts with their own law, one wonders whether separate volumes for New Zealand and Australia, utilising the same material, could have been published at a lesser cost. However, as a study in comparative law, the coverage of the two jurisdictions is interesting, if nothing else. In addition, as mentioned above, there are undoubtedly those who must work in both countries in the area of receivership, and this number will undoubtedly grow. For these practitioners, the combination of jurisdictions will be invaluable.

The end result is a fine overview of the various legal aspects of receivership. The book is clear, concise and helpful, and will undoubtedly be as widely used as the edition it replaces. As with the first edition, the book is highly comprehensive without being excessively lengthy. Further, it is an attractively presented book in a durable binding.

*Adam Mikkelsen**

*BA

COMPANY LAW IN CONTEXT, by David Wishart. Oxford University Press, Auckland, 1994. xii and 305pp. $59.95.

Company Law in Context is designed as an introduction to the law of companies for students of various disciplines. As the title suggests, the aim of the book is to explain the law in a context familiar to a wide range of readers. The purpose of this review is to evaluate to what extent the author achieves this. Wishart does not attempt to follow the traditional path of company law texts with their structured and technical summaries of the law. In both style and content, he takes a refreshingly unorthodox approach to the subject. Rather than focussing on discrete categories of law, the author selects four broad themes and analyses the law and its concepts through these.[1]

In introducing the nature of companies, the author follows the history of a well-known New Zealand firm, Hamilton & Co.[2] He introduces the reader to the basics of business and describes how the law views each step in the firm's development. Concepts central to business and company law are canvassed, including control and ownership, investing, creditors, employees, and consumers. These are all related back to the firm so that the reader can appreciate how concepts of law and business interact. This approach works well, building a foundation on which to introduce more complex legal ideas.

Having laid the foundation, the author then describes the modern company and its capabilities.[3] This involves a summary of both the 1955 and 1993 Company Acts. This summary, never strays far from the from societal perspective, and

1 These themes are: the nature of a company, the societal perspective, the associational perspective, and the concept of the company and the markets.
2 Chapter Two.
3 Chapters Eight to Eleven.

finishes with a consideration of how society is protected from possible abuses of company law.

Wishart puts the reader at ease with his informal style. He explains concepts using personal anecdotes and actively includes the reader as much as possible. For example, when developing the concept of secured borrowing, he refers to his own experience of raising a mortgage on his house. This style departs significantly from the usual approach in company law texts, where the emphasis is more on quick, succinct statements of law.

The text is easy to follow and enjoyable to read. Wishart writes in fluent, unbroken chapters. While this does not allow the student to rapidly extract the essential concepts of the law, it is effective because the author's logical development of a particular area can be followed without being distracted by numerous sub-chapter breaks, which are customary in company law texts. Although there is a lot to be said for the traditional approach, Wishart provides a necessary and refreshing supplement.

The author develops ideas logically and effectively within this framework, giving the reader both a contextual and specific understanding of the law. The chapter dealing with transactions best illustrates this style.[4] The author begins by explaining the philosophical, historical, and economic factors which have shaped the concept of borrowing in Western society. He then clearly explains the elementary concept of secured borrowing with reference to everyday examples. This method ensures that there is no gap in the reader's understanding which could prevent comprehension of the subsequent material. Once these theoretical baselines are established, the author puts the topic into the context of business, providing practical suggestions as to why a company might choose between raising equity or debt finance in particular situations. Finally, the author completes the picture with a reasonably detailed consideration of the 1993 company law reforms in New Zealand.

The author gives a comprehensive account of the history of company law, the development of concepts such as "legal personality",[5] and discusses modern trends in relation to the overall picture. He does not avoid analysis of important case law, examining closely certain cases in relation to important areas of debate.[6] In terms of substantive content, each chapter provides a comprehensive consideration of the law and the effect of the 1993 reforms on the relevant area. The author manages to refocus the discussion at the close of each section with the aid of summary segments. This further serves to keep the reader in contact with the complete picture.

A noteworthy aspect of Wishart's writing is his concise style. Despite his relatively informal manner, he is able to assemble a lot of information in a relatively short space. Unlike some of the more conservative texts, the author manages to inject flashes of wit and humour into what is perhaps a fairly dry area.

As mentioned earlier, this book is not designed as a study handbook for students preparing for exams. Rather, it is intended to introduce the reader to other fields of learning such as economics, accountancy, and the social sciences. In that regard, the book asks important questions about company law such as why, as a reflection of society, has it developed in the way it has? This does not detract from the value of the book as a good substantive text on company law. Rather, the book emcourages the reader to discuss present trends and issues and consider options for

4 Chapter Ten.
5 Chapters Four to Seven.
6 See, for example, *Re Manurewa Transport Ltd* [1971] NZLR 909.

further development. Overall, the book achieves its aim by giving the reader a more global understanding of company law. While Wishart's achievement must be applauded, this reviewer predicts that it may be an under-utilised resource for readers seeking a quick summary of the law.

Jonathan Grant

INSIDER TRADING, NOMINEE DISCLOSURE AND FUTURES DEALING: AN ANALYSIS OF THE SECURITIES AMENDMENT ACT 1988, by Adrian van Schie. Butterworths, Wellington, 1994. xxvi and 160pp. $76.50.

The Securities Amendment Act 1988 ("the Act") was passed in order to deal with the problem of insider trading. This is traditionally a difficult area in which to legislate and as a result, the New Zealand legislation is somewhat novel in its approach. This has brought with it a number of problems. In order to make prosecution easier under the Act, elements such as causation and intent do not need to be proved, and the traditional burden of proof has been shifted in places. As the author says in his introduction; "[t]he net has been cast very wide and so is bound to tangle [with] the feet of the innocent."[1] Both the commercial community and elements of the judiciary have found the Act difficult to accept in this regard. The Act has been "roundly criticised" by many.[2]

The author does not hesitate to strongly criticise the Act where necessary, and feels that review of its provisions is needed. Some of the statutory constructions of the Act can lead to what are termed "absurdities".[3] He is critical of the provisions dealing with the status of insiders and inside information in ss 2 and 3.[4] He is concerned also that the Act, by its generality of definitions, is on its face unjust, and that only considerable judicial ingenuity will cure this. Thus the book is addressed to the not inconsiderable number "of those who have to live with the Act in the meantime",[5] and seeks to provide a workable guide to an Act fraught with problems.

In this respect, the book provides a much needed summary of the actual and potential application of the Act, and could be used not only by lawyers but also by companies and securities firms who have to deal with the legislation. As Bob Dugan notes in the foreword, the Act impinges significantly upon the daily affairs of companies and their shareholders and advisers.[6] For this group, the book will be useful.

The book follows the structure of the Act, with three sections covering insider trading, disclosure of interests, and futures contracts. It is set out in the usual Butterworths style, with footnotes inserted at the foot of the paragraphs dealing with set topics. It is an excellent summary of the potential application of the Act and the difficulties in interpreting and constraining the scope of it. Indeed, a chapter in Part I of the book deals specifically with problems arising out of the Act.

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1 At ix.
2 At 3.
3 Supra at note 1.
4 At 12–16.
5 Supra at note 1.
6 At v.

Van Schie comments on the "tipping" provisions,[7] and the insoluble difficulties which the Act may create for directors in relation to takeovers and acquisitions. He gives examples of situations that could give rise to injustices under the Act, and notes that a strict application of s 9 would mean that directors could no longer safely recommend a favourable bid to shareholders in order to encourage them to sell, for fear of being caught under the Act.

Although the Act has generated much consternation, very little case law had emerged at the time of writing.[8] Thus, the author had to base his conclusions on his own research, various reports made before enactment, an opinion of a QC on aspects of the Act, and two High Court decisions. The date of publication prevented consideration of the most important case on the Act to date; the Court of Appeal decision in *Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd.*[9] This decision answers some of the queries raised by the book, especially in relation to a defence of total absence of fault, which the Court rejected. The judgment in *Kincaid v Capital Markets Equities Ltd,*[10] which considered the admissibility of a report by the Securities Commission in relation to the bringing of proceedings under s 18, has also been delivered.

However, these cases do not make any less relevant what is contained within the text. The latest cases would indicate that much of the analysis in the book is consistent with Courts' thinking. Hopefully this comprehensive examination of the Act will be valuable for some time – at least until the Act gets the review the author believes it needs.

*Adam Mikkelsen**

*BA

7 These provisions make insiders liable for giving information, or tips to any other person in a number of ways. See ss 9, 11, and 13 of the Act.
8 The book states the law as of 30 December 1993.
9 [1994] 2 NZLR 152.
10 [1994] 3 NZLR 738.

BOOKS RECEIVED

VAN SCHIE, A. *Insider Trading, Nominee Disclosure and Futures Dealing.* Butterworths, Wellington, 1994. xxvi and 160pp. $76.50.

BLANCHARD, THE HONOURABLE P. and GEDYE, M. *The Law of Company Receiverships in New Zealand and Australia (Second edition).* Butterworths, Wellington, 1994. xlix and 376pp. $157.50.

GRAY, B.D. and McCLINTOCK, R.B., editors. *Courts and Policy: Checking the Balance.* Brooker's, in association with the Legal Research Foundation, Wellington, 1995. xxiii and 292pp. $45.00.

LONGWORTH, E. and McBRIDE, T. *The Privacy Act: A guide.* GP Publications, Wellington, 1994. xx and 315pp. $39.95.

PATTERSON, W.M.. *Family Protection and Testamentary Promises in New Zealand (Second edition).* Butterworths, Wellington, 1994. xxxvi and 391pp. $157.50.

ROSS, M. *Director's Liability and Company Solvency – the new Companies Act.* CCH, Auckland, 1994. ix and 133pp. $48.35.

SKINNON, J.C. and SLIGO, L. *Companion to the Consumer Guarantees Act 1993.* Butterworths, Wellington, 1994. xxviii and 155pp. $40.50.

BECK, A. and BORROWDALE, A. *Guidebook to New Zealand Companies and Securities Law.* CCH, Auckland, 1994. vii and 426pp. $72.00.

AUSTIN, G. *Children: Stories the Law Tells.* Victoria University Press, Wellington, 1994. 199pp. $34.95.

PALMER, G. *Environment: The International Challenge*. Victoria University Press, Wellington, 1995. 191pp. $29.95.

WISHART, D. *Company Law in Context*. Oxford University Press, Auckland, 1994. xii and 305pp. $59.95.