

LEGISLATION NOTE

CRIMINAL JUSTICE ACT 1985

The Criminal Justice Act, which came into force on 1st October 1985, has heralded a marked change in sentencing policy in New Zealand. At the very least, it indicates a substantial and considered effort by the legislature to combat an increasing crime rate, through an expanded range of sentencing policies and options available to the courts.

The effect of this it is hoped, will be to strike a balance between humane and realistic treatment of a person convicted of a lesser offence, and the need to exercise a sufficient deterrent to violent offenders.

I. Sentencing Policy in 1986

Since the passage of the act several objectives have emerged as the keystone of legislative intent, with the result that policy in 1986 is geared toward reparation or a concern for the victims plight, and a new sentence of reparation is available in its own right to compensate victims in cases involving damage or loss to property. There is a corresponding shift in emphasis from traditional sentencing options, namely the imposition of some form of custodial sentence, to an attitude that heavier reliance should be placed on existing community organisations and resources in order that the offender can strengthen his/her ties with the community. This is reflected in the "community based" sentences in the Act — reparation and community care — both of which are considered later.

These notions are counterbalanced by new provisions in the Act which deal with violent offenders, with a particular emphasis on the need to imprison such offenders in order to protect the public. The then Minister of Justice, Mr McLay had these motives in mind from the infancy of the legislation as quoting from his speech at the Bills first reading he stated in the 1983 New Zealand Parliamentary Debates at page 4793:

[The Bill] incorporates sentencing provisions designed to ensure that violent offenders receive appropriate custodial penalties for their offences, but that less serious types of offences, particularly property offences do not result in imprisonment in cases that could satisfactorily be dealt with by other means.

Section 7 codifies this limitation on imprisonment as it states in subsection (1):

Where an offender is convicted of an offence punishable by imprisonment, the court shall, in considering the sentence it should impose, have regard to the desirability of keeping offenders in the community so far as that is practicable and consonant with promoting the safety of the community.

It further states on s7(2) that:

Where the court considers that it should impose a sentence of imprisonment, the term of the sentence shall be as short as is, in the opinion of the court, consonant with promoting the safety of the community.

Two points are evident here. Firstly, s7(1) makes it mandatory for the court to bear in mind the principle that the offender should not receive a custodial sentence if avoidable.

Secondly, the courts retain an unfettered discretion to decide what is consonant with promoting the safety of the community, of which the likelihood of the defendant re-offending is a prime consideration. In *R v Tua* Unrep. High Court T 131/85, the offender had 27 previous convictions, including 15 for burglary and was up on a charge of wounding with intent and burglary. Vautier J commented at page 5:

It must clearly be accepted that the shorter the sentence in your case the less the safety of the community will be promoted because of the strong likelihood of your re-offending.

SECTION 6

With the implementation of s6, the reluctance of the legislature to enact custodial penalties for lesser offences is evident. Section 6 states:

Where an offender is convicted of an offence against property punishable by imprisonment for a term of 7 years or less, the court shall not impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, any other sentence that it could lawfully impose would be clearly inadequate or inappropriate.

A major consideration in passing the legislation is that increasing custodial penalties across the board is not an effective deterrent to the crime rate. This is allied to the belief that the continued subjection to other offenders in a prison environment only reinforces tendencies to reoffend.

The "special circumstances" referred to in this section have at the time of writing, still to be judicially considered. However the court will always bear in mind s7 when deciding whether to impose a custodial sentence.

There has however, been judicial concern directed at this section. The argument is that s6 is statutory recognition that offences against property are now regarded as being of secondary importance. The writer respectfully submits an alternative view, that with the enactment of s11, the legislation has provided that monetary compensation to the victim is now of prime importance. Some judges may continue to favour the deterrent approach, believing this to be the only real effec-

tive remedy; however, the shift from this approach to a more 'radical' concern for reparation of the victim is a sensible and reasoned policy.

It is pertinent to note that burglary is excluded from the possible range of sentences falling under the ambit of s6 as that offence carries a maximum of 10 years imprisonment.

SECTION 5 — THE BALANCE

This section shows that for the first time the law will place a particular emphasis on crimes of violence. Section 5 provides:

- (1) Where
 - (a) An offender is convicted of an offence punishable by imprisonment for a term of 5 years or more; and
 - (b) The court is satisfied that, in the course of committing the offence, the offender used serious violence against, or caused serious danger to, the safety of any other person,
 the court shall impose a full-time custodial sentence on the offender unless the court is satisfied that because of the special circumstances of the offence or of the offender, the offender shall not be so sentenced.
- (2) In determining the length of any sentence of imprisonment to be imposed in any such case the court shall have regard, among other matters, to the need to protect the public.

The interpretation of s5 of the Act has been considered in the previously mentioned *R v Tua* decision. Tua pleaded guilty on charges of wounding with intent to injure and burglary, after being caught by a Police Officer in the act of committing a burglary. He subsequently attacked the officer, inflicting a wound requiring seven stitches. The Court was obliged to consider s5 as the wounding charge carries with it a maximum of 14 years imprisonment. The judge further considered that Tua's action was of a serious nature because it was a policeman whom he attacked, even though the officer's wounds were minor. Vautier J rightly considered that s5 imposed a positive obligation on the courts in cases where serious violence has been used, to impose a custodial sentence. What is interesting, is the liberal interpretation his honour gave the section, in reasoning that attacking a Police Officer constituted serious violence simpliciter, rather than the actual extent of the attack. Vautier J's argument was couched in terms of an "attack on the frontline of the community" (at page 3), and this was central to his sentence of 3 years for wounding with intent and 2 years (to be served concurrently) for burglary.

Tua and Spring — a Lack of Consistency?

The *Tua* decision can be considered in the light of *R v Spring* unrep. CA 107/85. The defendant Spring was involved in a fight in a pub and injured the complainant with a beer glass, inflicting a cut which required 17 stitches — more serious than suffered by the Police Officer in *Tua*. The defendant was charged and subsequently convicted of assault with intent to injure — a lesser offence than that which *Tua* was

charged with, carrying a maximum of three years imprisonment. Consequently the court was not obliged to consider s5, but a deterrent penalty was clearly warranted. Spring received six months periodic detention and a fine of \$1500.00. In sentencing the court was mindful that it was Spring's first resort to violence, and the judge was guided by the stipulations in s7(1).

The two cases stand a little uneasily, and judicial consistency can be put under the spotlight, particularly in light of the fact that it was also Tua's first resort to violence. Full weight should be given to the facts that Tua assaulted a Police Officer and that he did have previous convictions, but it is submitted that if Spring's sentence is regarded as a sufficient deterrent, then the Court was unduly harsh on Tua. The alternative to this is that Spring committed a wilful and serious assault and the writer submits that the court could have looked at ways of imposing a limited custodial sentence.

Another area of concern lies in the area of Police discretion to lay charges. Spring was white and middle class with no previous convictions, and the charge laid carried a maximum penalty of three years. By charging Tua with wounding with intent, the police can ensure that the requirements of s5 will be considered and a custodial sentence imposed.

SECTION 5(b) — "SPECIAL CIRCUMSTANCES"

What is intended by these words in s5(b) is open to interpretation. Certainly, in light of the *Tua* decision two factors can clearly be established. These are that age (Tua was only 18) and the first offence of violence do not amount to special circumstances which obviate the mandatory provisions contained in s5. Future case law will no doubt provide a "shopping basket" of special circumstances.

II. New Community Based Sentences

(1) REPARATION — SECTION 11:

Reparation, as previously mentioned, is now a separate penalty in its own right, although it can and will be used in conjunction with other sentences. Section 11 stipulates that in every case where reparation may be imposed the court shall do so unless it would be inappropriate.

Section 22 provides that the reparations sentence relates only to offences against property and not to injuries sustained by the victims person. To assess the damage or loss, s22(13) makes provision for an adjournment to proceedings to allow a reparation report to be prepared, which also takes into account the means and other relevant consideration regarding the offenders ability to pay. Once drafted a copy of the report is made available to the victim, and under s23 takes the unprecedented step of providing for an agreement between the offender and victim as to the value of the loss.

The scope of the section is illustrated in *R v Twigg* unrep. 9.10.85 Auckland District Court. The defendant distribution manager made voluntary reparation to his employer of \$55,115.00, which led to a

sentence of six months periodic detention in circumstances which before 1st October 1985, would have led to a custodial sentence being imposed.

There is however, an anomaly in s22. The section provides that reparation may be ordered by the court if loss or damage was caused by any act or omission of the offender during the offence. Therefore serious problems arise in respect of burglary, an offence which is made complete upon the act of breaking and entering. The loss resulting is not consequential to the actual offence (see s241 of the Crimes Act) and thus as a matter of strict statutory interpretation, reparation will not be available. The writer submits that the legislature will have to amend this section accordingly, while during the interim it is hoped that the courts will give the section a liberal interpretation to uphold the spirit of the law.

As a subsidiary point, in the majority of cases a reparation sentence may be unrealistic to impose due to the defendant's state of impecuniosity. However, as was pointed out in his case comment on *Russell v Police* noted in [1985] Recent Law 385 by Mr Brookbanks, impecuniosity may not amount to a special circumstance within the meaning of s6, disallowing anything other than a custodial sentence being imposed. He maintains at page 386 that one purpose of s22 is to "assess the offender's capacity to contribute to reparation relative to his/her means at that time".

(2) COMMUNITY CARE — SECTIONS 53 and 57

In an address to the Royal Federation of New Zealand Justices Association Mr Palmer has described this sentence as "offering the prospect of personal development and re-integration with society". This sentence applies in situations where the offence charged with would normally carry a term of imprisonment. The Community Care programme is not to exceed 12 months and may not be served cumulatively with any other sentence, but it may be combined with either a fine or reparation. The terms of the sentence itself are considered jointly between the court, the offender and the leader of the community programme involved. A point to note is that inmates have an option of enrolling in a Community Care programme when released on parole, in order to smooth the transition to the outside world. The programme involves the offender attending counselling and support groups relative to their needs and stipulates no penalty if the sentence is breached.

(3) ADVISORY COUNCILS — SECTIONS 134 AND 135:

This is a completely new concept designed to encourage community support for the offenders and to aid their participation in suitable activities and to advise the Department of Justice of new and existing community based activities that might be available to offenders, while also encouraging informed interest in the community of criminal justice policies and problems.

(4) SUPERVISION SECTION 46

Probation is termed supervision in the new act although it is substantially the same sentence. However, s15 now provides that a probation officer may provide a report on an offender, while s15(5) gives an officer the power to recommend to the court an effective method of dealing with the offender, by advising upon the sentence to be imposed, based on his or her report findings.

Conclusion

The Provisions discussed in this note indicate a marked change in sentencing policy. Greater community involvement is called for if these new policies are to effectively reduce crime. The Act places much emphasis on motivating offenders to help themselves and this approach has been viewed dubiously in some quarters. At the same time there is a movement towards recognising the victims of property offences and accommodating them when justice is dispensed. On the other hand the law has come down hard on violent offenders and those who cause serious danger to other people, with the old principle remaining that these people must be deterred from further offences of this nature by the prospect of prolonged incarceration. That then is the focus of the Criminal Justice Act 1985 — its effectiveness or otherwise will be reflected in the crime rate statistics of the future.

— Gary Norris

COMPETITION POLICY — THE COMMERCE ACT 1986**Introduction**

The Commerce Act 1986 came into force on the first of May of this year after much discussion and debate since its introduction into Parliament in June the previous year. It repeals the 1975 Act which was generally considered to be ineffective. J A Farmer in a seminar given on *The Harmonisation of Australian and New Zealand Trade Practices Law after C.E.R.* (University of Auckland School of Law. Papers presented at the "101" celebrations to mark 101 years of law teaching at the University of Auckland) said at page 14 that:

... the [1975] Act represents an abdication of Parliamentary responsibility, a denial of the concept of law and a lack of clear thinking as to economic policy. When one adds to that the absence of any effective enforcement machinery and the failure to create private rights, very substantial doubts must arise as to the desirability of using the New Zealand Act as the model for any harmonisation process

By comparison with its New Zealand counterpart, the Australian Trade Practices Act of 1974 is a bold and strong piece of legislation. Its philosophy is clearly stated. It provides effective enforcement machinery.

The 1986 Act is a clear attempt to meet this criticism, and is substan-

tially similar to the Australian Trade Practices Act 1974. The requirements of the Australia New Zealand Closer Economic Relations Trade Agreement in this area of law have been carefully considered in passing this Act.

In introducing the Commerce Bill the Hon. David Caygill, Minister of Trade and Industries, stated in the 1985 New Zealand Parliamentary Debates at page 4681 that:

The Bill represents a key part of the Government's policy to improve the performance of the economy and to restore and maintain long-term growth. The Bill must be viewed against the background of the fundamental economic change that is occurring in the New Zealand economy because of the Government's initiatives. As its long title states, the purpose of the Bill is to promote competition in New Zealand markets. By doing so the Bill will ensure that, as New Zealand moves away from Government regulation of markets, that position will not be replaced by anticompetitive behaviour by individual companies or groups of traders.

1. General Framework of the Act

By way of overview it can be noted that the Act deals with three aspects of competition policy: restrictive trade practices (part II), mergers and takeovers (part III) and price control (part IV). The Act creates a restructured Commerce Commission (part II) and also provides for authorisation of various trade practices and mergers and takeovers (part V). There are a number of provisions providing for a more rigorous enforcement of the new legislation, namely, fines, pecuniary penalties, injunctions and damages (part VI).

2. New Structure and Enforcement

The Act sets up a new institutional structure by replacing the previous Commerce Commission (which had quasi-judicial functions) and the Examiner of Commercial Practices with a single body comprising a reconstituted Commerce Commission. The new body has functions primarily of an investigative and administrative nature. There is a right of appeal to the High Court against any determination of the Commission in respect of any matter under the Act.

In the restrictive trade practices area the High Court has jurisdiction to determine claims brought by the Commission for pecuniary penalties (not exceeding \$100,000 in the case of an individual or \$300,000 in the case of a corporation) for breaches of the provisions of Part II. Moreover, rights of private action, including the remedies of injunction and damages, can be heard by the High Court. For contravention of the merger and takeover provisions, the High Court is able to impose fines not exceeding \$300,000 and, at the suit of the Commission, grant injunctions and other orders including divestiture.

3. Restrictive Trade Practices

The previous legislation provides for the regulation of prohibited practices, practices which may be approved and examinable practices against which orders may be made. The new Act, following the Aus-

- tralian Trade Practices Act of 1974 substitutes this approach with:
- a general prohibition on agreements, arrangements or understandings which “substantially lessen competition in a market” (s27).
 - a prohibition on covenants substantially lessening competition (s28).
 - a prohibition on contracts, arrangements or understandings containing an exclusionary provision (s29).
 - a provision which deems price fixing agreements to have the effect of substantially lessening competition in a market (s30).
 - an absolute prohibition on mandatory resale price maintenance (ss37–38) (although there is an exemption for certain types of recommended prices, ss43–44).
 - a provision which enables most restrictive practices (except mandatory resale price maintenance) to be capable of authorisation by the Commerce Commission, provided it can be demonstrated that they result in a “benefit to the public” which outweighs any substantial lessening in competition (s58).

In addition, the Bill provides (s36) that traders in a dominant position in a market shall not use their position for the purpose of:

- (a) Restricting the entry of any person into that or any other market; or
- (b) Preventing or deterring any person from engaging in competitive conduct in that or any other market; or
- (c) Eliminating any person from that or any other market.

It should be noted that one practice which is not dealt with by the Act is exclusive dealing. In contrast, s47 of the Australian Trade Practices Act 1974 prohibits this practice. An important question is whether this deliberate omission indicates Legislative intent that this practice should not be caught by the Act or whether exclusive dealing is caught under the more general provisions of ss27 and 36.

Unlike the Australian legislation, the New Zealand statute now defines competition as meaning “workable or effective competition” (s3(1)). The phrase “effective competition” previously appeared in the 1975 Act and in *Re Application by Visionhire Holdings Ltd* (1984) 4 NZAR 288, 290 the Commission explained this concept as follows:

... broadly it envisages a market structure in which there is an absence of power in any relevant market to raise and/or decrease services or to exclude entry by others to such a market.

Behaviour in the marketplace and the conduct of participants may influence the determination of the Commission as to whether effective competition exists in any given market. The use of the concept “workable competition” represents an acknowledgment by the legislature that New Zealand has a concentrated and fairly small economy which must be made as competitive as is reasonably possible.

An understanding of the concept of “market” is central to understanding the concepts of “substantially lessening competition” or “dominant position”. Section 3(1) provides that “market” means a

market within New Zealand that may be distinguished as a matter of fact and commercial common sense. In *Re LD Nathan & Co Ltd* (1979) 2 NZAR 321, 360 the Commission decided:

The relevant market, therefore, was that market determined by the products, activities and geographic areas taken into account by the Commission in its deliberations.

Assessment of market definition therefore involves three basis steps, namely, an assessment of the relevant product market, the relevant functional market, and the relevant geographic market.

4. Mergers and Takeovers

It must firstly be determined whether a particular transaction constitutes or discloses a "merger or takeover proposal" as defined in s47(1). Reference must then be made to s50 which creates the prohibition on implementing any merger or takeover proposal coming within the First Schedule to the Act, without a clearance or authorisation from the Commerce Commission. The number of proposals requiring clearance or authorisation will be significantly reduced through changes to the list of specified industries and a revision of the minimum asset threshold levels. These are lifted from \$20 million and \$2.5 million to \$100 million and \$5 million respectively. The change in threshold levels will mean that the resources of the Commission will be directed more towards the restrictive trade practices area.

The procedures of the Commission in respect of mergers and takeovers covered by the legislation have been simplified. The Commission shall grant a clearance order under s66(3)(a), if it is satisfied that the proposal:

... would not result or would not be likely to result in any person (whether or not that person is a participant in or otherwise a party to the merger or takeover proposal) acquiring a dominant position in a market or strengthening a dominant position in a market ...

The original test proposed in the Bill was whether the proposal would have the effect of "substantially lessening competition". This was objected to as it would have had the effect of disqualifying a great many merger or takeover proposals from the outset, since aggregation of market share and a corresponding reduction in competition will be inherent in the proposal. When the Bill returned from the Select Committee it was altered to its present form.

The test for market dominance is defined in s3(8) which provides guidelines as to the factors the Commission should have regard to. There is a wide measure of discretion with the Commerce Commission and the Courts when interpreting the section. As similar criteria apply in Australia, discussions as to the definition of dominance found in cases will provide further assistance in interpretation of this concept. (In particular refer to the leading Australian case of *TPC v Ansett Transport Industries (Operations) Pty Ltd* (1978) 2 ATPR 40-071.)

When the proposal would result in one party acquiring a dominant position in a market, the Commission under s66(8) shall grant an

authorisation where any detriment resulting from the dominant position is outweighed by a benefit to the public.

This is a substantial change from the 1975 Act where the role of the Commission was to balance all the factors which by virtue of s80 were relevant to determining the public interest. Another major change is the onus of proof. Under the 1975 Act proposals were to be consented to unless considered to be contrary to the public interest. The present Act provides that a dominant operator having failed to qualify for a clearance has the onus of proving to the Commission the requisite public benefit which will outweigh the detrimental effects of strengthening a position of dominance.

There is no definition of benefit to the public in the Act. However, it is expected that the Commission and Courts will have at least some regard to the factors referred to in s80 of the 1975 Act notwithstanding its repeal. In Australia in *Re Queensland Co-operative Milling Association Ltd* (1976) 1 ATPR 40-012 a "balance sheet" approach was taken as to the likely benefits and detriments of the proposal. However, in *Re Howard Smith Industries Pty Ltd* (1977) 1 ATPR 40-023 more weight was given to the number of people who, on a wider scale, enjoyed direct benefits.

Therefore, for a definition of "benefit to the public" we will have to wait for decisions from the Commerce Commission and the Courts.

Conclusion

Competition law is supplementary to de-regulation, to ensure that industry self-regulation does not replace governmental regulation. The purpose of the legislation is not to interfere with individual rights but to promote freedom to compete, in the interests of better economic organisation and the protection of the consumer.

— Carolyn Colbert*

*The preceding discussion is based on an outline of the Commerce Act 1986, given in a seminar by D A R Williams, G T Ricketts and F X Quin, a copy of which can be obtained through the New Zealand District Law Society. This provides an excellent overview of the Act and a useful starting point for further research.

COPYRIGHT AMENDMENT ACT 1985

Copyright Law is developing rapidly. As society continued to press demands upon it, the judiciary responded with often confused and contradictory rulings on matters of interpretation. These decisions have led to a close scrutiny of the Copyright Act 1962, and this Amendment is seen as a response to a need for some statutory clarification.

Under the Act, protection is given to the author of an original work by s6, which gives a proprietary right in the original work. Opponents have maintained that exclusivity and extent of copyright under the Act has long had Draconian implications in stifling free market rivalry. However contention in the area of "literary" and "other works" as defined in the main act has not been as great as that in the field of commercial articles, which have invariably been classified as artistic works, and in particular the Amendment is aimed at clarifying this area of the law.

It is thus pertinent to examine the changes made by the Amendment and whether they have in fact achieved their purpose in clearing up this area of the law.

The first change made is the s2 list of what qualifies as an artistic work. This is modified by the inclusion of "models" next to "engravings". One would be excused for thinking that the definition of "artistic works" capable of protection from unauthorised reproduction was wide enough. However the Courts have still been forced to indulge in elastic thinking to stretch the boundaries of the categories of "artistic work" in order to dispense justice on the facts. Such construction, while both awkward and unwieldy, is a commendable means to an end.

In the *Wham-O Manufacturing Co v Lincoln Industries* [1984] 1 NZLR 641 case, the Court of Appeal seemed anxious to protect the plaintiff frisbee manufacturer, holding that the finished plastic product made from a mould or die was in itself an engraving and thus able to sustain copyright. However, in the *George Hensher Ltd v Restawhile Ltd* [1974] 2 ALL E R 420 decision, the unfortunate plaintiff, despite the apparent injustice involved, could not for all his originality, effort and skill succeed in his claim. The appellant to the House of Lords designed a model chair as a prototype for a new line in his upholstery business, referred to in the case as a "mock up". However, when the product was copied by other manufacturers, because the appellant could produce no drawings the House of Lords was unable to accept the argument that the "mock up" was a work of artistic craftsmanship and he failed to prove copyright. The 1985 Amendment has therefore closed this loophole to include within 'artistic works' the *Hensher* type model.

The second and probably the major change created by the Amendment, is the insertion of a new s20A and s20B into the principal act. The two new sections are closely interrelated and the philosophy behind their introduction is the same.

Over the past few years it has become increasingly clear that authors of artistic or literary works have been using copyright as a 'de facto' patent system. Patent and designs as covered under the respective statutes must, in the normal course of events, be applied for, approved and then registered. This process is cumbersome, esoteric and expensive, and is normally handled by trained patent attorneys. It is simpler, quicker and cheaper if one is able to rely upon copyright protection instead, as copyright requires no registration; the author's ownership attaches to him as his pen flows across the page or his tool chisels into the wood.

This rapid extension of the Copyright jurisdiction is typified in the *Wham-O* case where Davison CJ stated at 664:

The [Copyright] Act does not require that the work be novel in form but that it should originate from the author and not be copied from other work.

This has led to the impingement on what was previously regarded as patentable only; ie, "inventions", which has largely obviated the need for registration of commercial and industrial designs.

Section 20A is therefore an attempt to restore the demarcation of patent and copyright law in situations where a patentholder's rights under the Patents Act 1953, are falling back on copyright in the originality of the work, as a second vested ownership right, and this practice may have been thought by the legislators as too convenient.

The Amendment now allows an author of a literary or artistic work to choose to use copyright (or a patent specification, or design representation — where they apply) to protect his property, but he may not now duplicate his rights by using copyright to fall back upon when the registered protection fails.

Similarly, why should plaintiffs in maintaining copyright in artistic works circulating widely in the market place over a period of time, be able to exclude defendants active in the same market from material reproduction for up to 50 years after the death of the author?

The new s20B restricts artistic works lawfully applied industrially, whether in New Zealand or overseas, to a term of copyright commensurate with patents, ie 16 years at the most.

This move is a recognition of private enterprise, and the writer submits that any statutory enactment effecting prevention of monopolies must be applauded. An analogy may also be drawn with the action of passing off, where a defence of genericism through the commonly accepted usage of terms has been developed. Now in the commercial arena this statute has laid down that reward for originality of form should have a limit so that other frisbee manufacturers (*Wham-O*) or kiwifruit tray manufacturers (*Frank M Winstone (Merchants) Ltd v Plix Products Ltd* (Unrep CA 178/84)), can eventually adopt successful product forms and hopefully improve on them. There are two other points to note about this section, firstly, "lawfully applied industrially", is defined in s2, and secondly the Amendment provides that the section will not come into force until October 1986.

The application of this is ambiguous. Does the draftsman mean that the section applies only to artistic works applied industrially for 16 years running from the 1st October 1986? If this is the case, the relaxation of copyright to allow three dimensional reproductions would not be until the 1st October 2002. Rather, is the scope of the Amendment intended to be retrospective and thus exclude those works that at that date of 1st October had been already reproduced extensively for 16 years or more?

The writer submits that the latter interpretation is to be favoured as there does not seem to be much point in waiting until after the turn of the century to give effect to a rule enacted in 1986.

However it could be anticipated that the courts would construe against purported retrospective legislation that is not explicit, and therefore limiting the effect of the new provisions in the short term.

A key to the draftman's intention with s20B may be found in s10 of the Amendment which states that models made before the passing of the new Amendment are not affected by it.

The Amendment also adds to the process of determining upon whom the burden of proof lies in establishing whether or not copyright resides in the plaintiff, when the copies are three dimensional artistic works.

The new s27A lays down three preconditions that a plaintiff must prove before the defendant is presumed to have knowledge:

1. When copyright exists in an artistic work which has been reproduced in three dimensions to the public.
2. When there is a label or mark showing the owner or exclusive licensee.
3. The year in which the work was first made public.

It is to be noted that this section does not replace the rule that all copyright is presumed to be in the plaintiff's works unless challenged by the defendant in s27. Section 27A deals only with artistic works reproduced in three dimensions and encourages plaintiffs to exercise a standardised identification package that will not mislead defendants and waste time in unnecessary litigation.

Finally in the Amendment the legislature has seen fit to do away with the possibility of conversion damages for three-dimensional reproductions of artistic works which until now has been a right for the claimant under s25 of the principal Act.

Conversion damages have been generally measured by allowing the plaintiff to regain not only the profit accruing to the defendant in breach of copyright at the plaintiff's expense, but also by compensating the plaintiff for the full value at retail of the works subject to the conversion. In *Infabrics Limited v Jaytex Shirt Company Limited* [1981] 1 ALL ER 1057, 1069 Lord Scarman stated:

... the damages for conversion can be very great [The act] ... treats the owner of the copyright as if he were the owner of the infringing copies If the possibility of excessive damages is to be eliminated, legislation will be needed.

The harshness of the remedy is caused by the defendant being forced to pay twice over — once for his unjust enrichment in equity and again for the cost of manufacturing and selling the converted goods. It is the second element that separates conversion damages from account of profits and it is that element that either bankrupts or severely handicaps defendants unfortunate enough to have been recklessly or wilfully converting goods for a long period (up to 6 years in the Limitation Act 1950), or producing reproductions that are costly to manufacture, process or distribute.

Now by virtue of s25(2A) conversion damages in artistic works in three dimensions, such as frisbees or shirts with designs of racehorses on them (as in the *Infabrics* case) are not an automatic entitlement but a

remedy to be used in restricted circumstances. Such circumstances would include where there is:

1. A blatant flouting of the copyright or:
2. A disproportionately large benefit resting with the defendant due to the infringement or:
3. Ordinary damages are not sufficient or:
4. Any other conditions the court thinks fit arise.

The last ground is a discretionary power, standard in modern statutes, but one surmises that it is not a *carte blanche* to the court to root out any justifications for awarding conversion damages. Instead, it exists for a very special unforeseen case not falling within the previous three headings.

This part of the Amendment must also be seen as a change for the better as the object of the plaintiff's action is not generally to carve out the bulk of the defendant's assets and put them out of business, but to recover reasonable compensation for the tortious breach of a statutory proprietary right.

Conclusion

Overall the Copyright Amendment Act 1985 should be welcomed by copyright lawyers as well as business people involved in the design of commercial goods, architects, other participants in the building industry and many other manufacturers. With the one major reservation hanging over the temporal operation of S20B, it should be said that those involved in drafting copyright law, unlike many other areas of the law, are making a genuine attempt to keep up with the times.

— *Paul Shenkin*

THE FISHERIES AMENDMENT BILL 1985

The Fishing Industry in New Zealand, and in particular the inshore fin fish fishery is facing a significant overcapitalisation, estimated in 1983 to be in the vicinity of \$28 million. As a consequence of this there has been a continuing decline in the populations of preferred fish species, illustrated by the fall in the snapper catch from 17600 tonnes in 1978, to only 8729 tonnes in 1983 (Ministry of Agriculture and Fisheries, Annual Report 1985). Clearly therefore corrective action is necessary to prevent the further depletion and possible loss of certain fish species.

Existing Legislation

The Fisheries Act 1983, was enacted with the intention of removing outmoded legislation and replacing it with a statute designed to meet the

needs of a modern fishing industry. While not altering management approaches aimed at protecting the biological base of the fisheries resource, the Act did formalise a structure of consultation and regionally based management. However, the 1983 Act failed to address the question of maximising the economic benefits of the fisheries resource to either the fishing industry or New Zealand as a whole. The proposed amendment is aimed at this area, and it is hoped that, by increasing efficiency through restructuring to reduce in particular, the over capacity in the fish harvesting sector, the benefits of a valuable resource may ultimately accrue to all.

The Fisheries Amendment Bill

The Bill had its first reading on the 10th December 1985. It may be seen as having three major facets:

- (1) The introduction of a system of individual transferable quotas in the form of a new Part II A.
- (2) The re-drafting of Part IV of the existing Act entitled "Fishing Vessels and Methods of Fishing".
- (3) Amendments to the remainder of the Act to allow for the imposition of the individual transferable quota system.

Individual Transferable Quotas

The proposed Part II A establishes a system based on "individual transferable quotas". It permits the Minister of Agriculture and Fisheries to declare any species or class of fish in any quota management area, to be subject to quota fishing. Once the decision has been made to introduce quota fishing to a specified area, the Minister must then determine the "total allowable catch" which may be taken from that area or part thereof. The total allowable catch may further be limited in relation to the method employed to catch fish and/or to the period during which the fish may be caught. Where however, the quota management area falls within the Exclusive Economic Zone, the Minister is obliged to include any relevant total allowable catch determined by virtue of s11 of the Territorial Sea and Exclusive Economic Zone Act 1977. He is further required to specify by notice in the Gazette the periods for which previous fishing returns are to be used under s28E(1) of the Act in determining provisional maximum individual transferable quotas.

Once a total allowable catch has been arrived at, it may still be varied, although the Minister is restricted in his ability to reduce the amount of fish that may be taken in any given area. This may be done where the stock of a species of a fish has fallen significantly below the level necessary to maintain the total allowable catch and the imposition of other controls in the Act would be insufficient to maintain the stocks. Where an individual transferable quota is held on behalf of the Crown, it may be cancelled, provided that this does not infringe upon any rights created under the Territorial Sea and Exclusive Economic Zone Act 1977, thereby effectively reducing the amount of fish which

may be caught.

As it provides the background against which all individual transferable quotas are to be issued, it is necessary that the total allowable catch be accurately determined, and therefore the amendment proposes an increase in the level of fisheries research through the imposition of a Scientific Observer Scheme. Under the proposed scheme, certain fishing vessels will be required to carry a scientific observer on specified expeditions. The scheme is to be financed by a levy, payable by all specified fishing vessels.

In order to achieve the required reduction in fish harvesting capacity there are two stages to the issue of an individual transferable quota itself. Firstly, under s28E, the Director-General may issue a "provisional maximum individual transferable quota" to persons who have been issued with a fishing permit under s64 of the Act:

using as a basis the proportion that the commercial catch of the person in that quota management area of that species or class of fish as shown in the fishing returns of that person bears to the total commercial catch in that quota management area of that species of fish or class of fish in previous years.

Thus the issue of a provisional maximum individual transferable quota is to be based upon the catch histories of commercial fishermen. Provision for appeals against the issue of the quota may be made under s28H, within 28 days of the receipt of the notice of allocation from the Director-General, to the Quota Appeal Authority.

The second stage of the process involves the allocation of a guaranteed minimum individual transferable quota in accordance with s28F as proposed by the Bill. This is determined by reducing on a pro-rata basis, all provisional maximum individual transferable quotas for a given area until the total guaranteed minimum quota does not exceed the total allowable catch.

The issue of a guaranteed minimum individual transferable quota permits, under s28K of the proposed addition to the Act, the right to take fish of the species or class referred to in the quota, from the specified quota management area in accordance with the fishing permit held under s64. The quota applies from the date of the imposition of a quota management system in terms of s28B.

Once every commercial fisherman who has applied, has been allocated a guaranteed minimum individual transferable quota, the Bill proposes a programme of restructuring in an attempt to reduce the numbers of those involved in the fish harvesting sector.

Section 28L as noted in clause 7 of the Bill, permits that a person who has been allocated a provisional maximum individual transferable quota, may surrender it to the Minister "at a price stipulated by that person", within a reasonable time of that person having received notice of his allocation from the Director-General, not being a period of less than 28 days. Under s28(2) the Minister is not obliged to accept all or any of these offers.

Where the Minister has chosen not to accept these offers, then, in

order to reduce the provisional maximum individual transferable quotas below the total allowable catch by virtue of s28N, the said quotas may be reduced proportionately until they fall within the total allowable catch. Where this approach is taken no compensation is payable for reductions to the provisional maximum individual transferable quotas, although the latter may still not be reduced below the guaranteed minimum individual transferable quotas. Clearly therefore, the intention is to encourage offers in terms of s28L.

Having proceeded to this stage, and after expending considerable effort and resources, it is perhaps surprising to see that the Bill contains an abandonment section. Section 28M provides that when the Minister decides it would not be appropriate to continue with the quota management system, he may, after consultation with the Fishing Industry Board, by notice in the Gazette, declare that the taking of a species or class of fish within a quota management area is no longer subject to a quota management system.

It is to be hoped that the Minister will not resort to this section, but rather, that he will implement fully the other available procedures, in order to increase the prosperity and efficiency of an industry which is of benefit to the nation as a whole.

Once the procedures for implementing a quota system of fishing have been implemented, the proposed Part IIA of the amendment states that an individual transferable quota may be bought, sold or transferred provided that no one person returns a portion of a quota, being less than the amounts specified in the Bill. The Bill further provides that an individual transferable quota may be leased or used as a security, although in the latter instance no system of registration is to be provided. The individual transferable quota, it is submitted, will be a marketable item and its easy transferability raises questions relating to the aggregation of quotas by large companies, thereby squeezing out the owner/operator, traditional in the fishing industry. Thus s20W provides that no one person shall be entitled to aggregate more than 20 percent of the available quota for each species or class of fish in each quota management area, without the consent of the Minister. It is further stated in such cases that the Minister's consent cannot be retrospective, thus a company is prohibited from acquiring more than 20 percent of a quota and then applying for permission. It should also be noted however, that the Director-General may allocate to any one source greater than 20 percent of an available quota at the time of the initial application.

The Act as amended, would also prevent overseas companies or individuals from holding individual transferable quotas directly, subject however, to the terms contained in the Territorial Sea and Exclusive Economic Zone Act 1977, as that Act relates to fishing in New Zealand waters by foreign vessels.

Conclusion

It is hoped that the above has provided a brief summary of the prin-

cial aims of the Fisheries Amendment Bill, which is a rather long and in some ways technical amendment to the Fisheries Act 1983. The continued depletion of New Zealand's fish reserves make it essential that some form of action is taken to prevent the destruction of this valuable resource, whilst at the same time providing a set of conditions whereby at least some of those presently involved in the industry may in the future make a satisfactory living.

Clearly the implementation of the provisions in the Bill will cause pain in some areas, particularly in those communities in which fishing provides the major source of livelihood. Whether the compensation available to those who withdraw from fishing is sufficient is clearly a question that will raise much debate amongst those concerned.

Finally it is submitted that it seems a pity to enact legislation intended to enhance the future prospects of the fishing industry without providing a means whereby younger talent is encouraged. It is perhaps unfortunate that the amendment appears to leave no means of entry into the industry other than by purchase or lease of a previously allocated minimum quota, an acquisition likely to be beyond the means of most young persons wishing to commence fishing on their own account.

— *Karl Stolberger*