LEGISLATION NOTES

CORPORATIONS (INVESTIGATION AND MANAGEMENT) ACT 1989

The Corporations (Investigation and Management) Act 1989 came into force on 22 March 1989, and repealed the Companies Special Investigations Act 1958. According to the then Minister of Justice, Hon. Geoffrey Palmer, there are two broad purposes behind the Act:[1]

> The first is to enable action to be taken earlier in instances when a company is, or may be, operating fraudulently or recklessly. The second is to enable companies to be given a decent burial when ordinary remedies are inadequate.

The Act gives extensive powers to the Registrar of Companies to investigate and advise corporations "at risk" (s 4). It also updates and expands the 1958 Act's provisions concerning the imposition of statutory management on such corporations. In particular it widens the control given to people charged with winding up a large and complex corporate entity.

This note will briefly outline the major changes the Act has made, and discuss the recent case law that interprets some of the more significant provisions.

Scope of the Act

Like its predecessors, the Act applies whenever it is desirable to protect the interests of a corporation's members, or creditors, or beneficiaries under a corporation administered trust, and for any other reasons of public interest (s 4(b)). However it also extends to a corporation "that is or may be operating fraudulently or recklessly" (s 4(a)). The definition of this phrase in s 6 echoes the definition of "reckless and fraudulent trading" in s 320 of the Companies Act 1955. The definition of corporation as "a body of persons, whether incorporated or not", includes any business enterprise carried on by two or more people. However, it appears the Act is intended to apply primarily to large and complex commercial entities.

Registrar of Companies' Powers of Investigation

Part I of the Act deals with the Registrar's powers for determining whether a corporation should be placed under statutory management or declared to be "at risk".

The Registrar can now require a corporation to provide any information relating to its business, operation or management (s 9). Under the previous Act this power was limited to books and documents alone. Where a corpora-

1 492 NZPD 64-94 (13 September 1988).

tion fails to satisfy such a request, or the information is considered to be false or misleading, the Registrar may appoint an investigator to enter premises and copy or remove documents relating to the corporation's affairs (s 17).

Corporations "At Risk"

Part II introduces new powers under which the Registrar can declare a corporation to be "at risk" (s 30). Such a corporation is under a duty to consult the Registrar about its circumstances (s 31(1)(9)) and the methods to be used to correct its difficulties (s 31(1)(b)). The Registrar may give advice (s 32), but compliance is not mandatory. However, with the prior consent of the Securities Commission (s 33), the Registrar may give obligatory directions to the corporation (s 35), which will apply for not more than 21 days (s 34). Subject to a number of exceptions (s 36(2)), it is an offence under s 36 of the Act to disclose that notice that the corporation is at risk has been given under s 30 or s 31(2) of the Act.

Imposition of Statutory Management

Part III updates and expands the 1958 provisions for statutory management. Upon recommendation of the Securities Commission to the Minister of Justice, the Governor General may, by Order in Council, declare a corporation subject to statutory management (s 38(1)). For corporations acting recklessly or fraudulently the Commission must be satisfied, on reasonable grounds, that the imposition of statutory management will limit the risk of future deterioration of the corporation's financial affairs and fraudulent activity, or enable the corporation's affairs to be dealt with in a more orderly way (s 39(b)). With regard to other corporations to which the Act applies, the Commission must be satisfied that statutory management will preserve the interests of the corporation's members and creditors and the public, or will facilitate orderly or expeditious dealings with the corporation (s 39(c)).

Statutory Manager's Powers

The statutory manager assumes broad powers when empowered to manage the corporation (s 45). Directors and officers of the corporation are excluded from the decision making process (s 64). In exercising these powers the manager must have regard to: the need to protect the interests of members, creditors, beneficiaries or the public; the need to resolve the difficulties of the corporation; and the need to preserve the business or undertaking of the corporation (s 41(1)).

Moratorium Against Claims

One of the most dramatic consequences of statutory management is the operation of s 42, which prohibits the pursuit of any claim against the

corporation. This section effectively freezes the rights of creditors and third parties. As Master Williams QC said:[2]

> In summary, therefore, the provisions of sec 42 are an interference with the rights of those mentioned in the section in a manner which is at once dramatic and automatic.

First, the statutory manager or the court may give leave for an action to be commenced or continued against a corporation to determine whether any rights or liabilities exist. Second, the whole or part of s 42(1) may be waived by the statutory manager in favour of any class of creditors or creditor in respect of the whole or part of their claim (s 42(3)). Most litigation has been in respect of the former.

In *Wilson v Aurora Group Ltd, Annun v Aurora Group Ltd*[3] the Court was asked to review a refusal by the statutory manager to grant leave under s 42(2) to the plaintiffs to continue an action for specific performance and damages after the defendant corporation had been placed in statutory management. Master Williams QC examined the history of the legislation and found the principles of the 1958 Act of little assistance in interpreting s 42(2). Whereas the 1958 Act aimed primarily to preserve the assets of the company, the interests of members, creditors, beneficiaries and the public had become the paramount consideration. He held that the court's power to grant leave under s 42(2) was only for the purpose of determining whether a right or liability existed. That determination would not oblige the statutory manager to honour that right or meet that liability. In making a determination, the court was not limited by the considerations in the Act which circumscribed the statutory manager's decision making powers.

More recently in *Meates v Ryde Holidays*[4] Barker J cautioned that the court's discretion under s 42(2) ought not to be used where it would complicate the statutory manager's task.

The extent of the moratorium has been considered in *Mayfair Ltd v Brandon Brookfield*[5] and *Watson v Waitemata Electric Power Board.*[6] In *Mayfair* Master Williams QC found that equitable set-off could only be brought where the court felt it would be unjust to give judgment without consideration of a counter claim. However the counter claim in this case could not be brought because of s 42(1)(h) of the Act. In *Watson* Barker J concluded that the moratorium provisions did not prevent the defendant from exercising a statutory power to discontinue electricity supply for non-payment against a corporation under statutory management.

2 (1989) 4 NZCLC 65,275, 65,284.
3 Ibid.
4 Noted at (1989) BCL 175.
5 (1989) 1 NZ Conv C 190,165.
6 (1989) 4 NZCLC 65,344.

Other Powers of the Statutory Manager

Section 44 gives the manager the power to suspend the payment of debts or the discharge of obligations, notwithstanding the terms of any contract. This is deemed by s 44(2) not to be a breach or repudiation.

Section 46 ensures that the statutory manager is empowered to perform all functions under the Act: specifically, all powers of the corporation, directors, or governing body (s 46(2)). In addition the manager receives the powers of a liquidator under s 312 of the Companies Act to disclaim onerous property (s 46(3)).

Finally, reference must be made to the manager's power under s 51 to sell property or assets of the corporation that are subject to a security. When this occurs, the person entitled to the charge shall be paid out of the proceeds of sale in priority to all other claims other than the costs of the statutory manager (s 51(4)). In *McDonald v Australian Guarantee Corp (NZ) Ltd*[7] Wallace J held that a fixed charge holder's priority under s 51 was subject only to the manager's cost of sale of that specific piece of property, not other costs of management. The general provision in s 65, which states that all expenses properly incurred by the statutory manager will be paid in priority to all other claims, must be read subject to this interpretation of the specific provision of s 51. This case also discussed the court's jurisdiction under s 59 to confer additional powers on statutory managers. As the Act was intended to provide a broader and more effective solution to major corporate collapses, Wallace J found that s 59 should be construed so as to enable the court to increase rather than decrease the powers of the statutory manager: in this case, to deal with the complexities of inter-related subsidiaries in a corporate group. The statutory manager was allowed to pool the assets of a number of companies.

Conclusion

It cannot be doubted that the complexity of major New Zealand corporate entities increased dramatically in the 1980s. The 1987 stockmarket crash and the ensuing commercial crisis showed that in a small economy like New Zealand's the collapse of corporate highfliers could have detrimental effects on the economy as a whole. The passing of the Corporations (Investigation and Management) Act 1989 can be seen as an attempt by a market oriented government to mitigate the excesses of the economic system. An orderly and decent corporate burial, as proposed by Geoffrey Palmer, has been secured by this Act.

– *Andrew Webster*

7 (1989) 4 NZCLC 65,365 and (1990) 5 NZCLC 66,191.

LOCAL GOVERNMENT AMENDMENT ACT (NO. 2) 1989

During its term of office the Fourth Labour Government has substantially reformed major sectors of New Zealand society. These reforms are based on the government's desire to remove or renovate what it considers to be burdensome institutional legacies of the past which are inappropriate to fulfil the demands of the present. The Local Government Amendment Act (No. 2) 1989 was introduced to remedy perceived deficiencies of structure and function in the area of local government. In a speech made in early 1988, the then Deputy Prime Minister identified five principles of effective local government:[1]

1. the allocation of functions by community of interest;
2. the encouragement of operational efficiency including economies of scale;
3. the separation of commercial, regulatory and service delivery functions;
4. explicit trade-offs between objectives;
5. "clear and strong" accountability.

The Minister for Local Government, Hon. Michael Bassett, had felt that the structure of local government did not give effect to these principles. In his view a reduction was needed in the number of local authorities and clearly amalgamation of existing authorities was the key. Although there was provision under the Local Government Act 1974 (the principal Act) and the Local Government Amendment Act 1985 for restructuring by amalgamation, attempts to do so were largely unsuccessful because of the electors' power of veto. Electors in any district subject to a proposed reform could defeat that proposal if fifty percent voted against the scheme in a survey poll. They could thereby prevent the Local Government Commission from exercising the power granted to it by the aforementioned Acts.

In 1988 the Local Government Amendment Act (No. 3) was passed. Its stated aim was to "enable substantial reform of local government in New Zealand to take place before the triennial general elections in October 1989" (s 15A). To this end, the Local Government Commission was enjoined to "prepare such final reorganisation schemes as in its opinion are necessary to improve local government in New Zealand" (s 15(B)(1)). In order to fast-track these reforms ss 15A-15E removed the veto which electors previously possessed and public opposition was therefore no longer a factor which the Commission needed to consider when adopting a reorganisation proposal. Thus, the 1988 Amendment circumvented parochial opposition to amalgama-

1 11 TCL 465

tion and paved the way for the substantive changes that took place in 1989.

Although the Act emphasised change, s 15(C) allowed the Commission to confirm an existing system of local government. Provision was made in s 15E(2) for consultation with every local authority affected by the Commission's reorganisation scheme. It was unfortunate that in such an important area of reform the effectiveness of the consultative process was undermined by the stringency of the reform timetable imposed on the Commission. One council even alleged a bias on the part of the Commission towards change beyond the statute.[2] However, speed was considered essential in the implementation of these reforms. The Local Government Amendment Act (No. 2) 1989, while not the instigator of amalgamation, nevertheless embodies the approach taken by the Commission; and includes the relevant factors to be taken into account in the future.

Factors Relevant to Local Government

Section 5 of the Local Government Amendment Act (No. 2) 1989 crystallises the factors considered in the operation of local government (from 1 November 1989) by adding s 37K to the principal Act:

> The purposes of local government in New Zealand are to provide, at the appropriate levels of local government, –
> (a) Recognition of the existence of different communities in New Zealand:
> (b) Recognition of the identities and values of those communities:
> (c) Definition and enforcement of appropriate rights within those communities:
> (d) Scope for communities to make choices between different kinds of local public facilities and services:
> (e) For the operation of trading undertakings of local authorities on a competitively neutral basis:
> (f) For the delivery of appropriate facilities and services on behalf of central government:
> (g) Recognition of communities of interest:
> (h) For the efficient and effective exercise of the functions, duties and powers of the components of local government:
> (i) For the effective participation of local persons in local government.

The purposes outlined in s 37K are also the relevant criteria to be considered in relation to any reorganisation proposal suggested by the Local Government Commission (s 37ZT); boundaries and functions of a local authority (s 37ZU); and membership of a local authority.

Structure

Most public concern over the Act has been directed at its creation of a new structure of local government. Section 37L specified two types of local government: the smaller territorial authority, and the larger regional authority. The former has attracted more publicity.

Under the Act, a territorial authority may be either a district or city

2 See *Devonport Borough Council v Local Government Commission* [1988] 2 NZLR 203 (CA).

council. The district council replaces the former county council, governing districts which are predominantly, but not exclusively, rural. The creation of the district council has broken down the rigid barrier between town and country areas, while still catering for their sometimes different needs. The city council on the other hand is a familiar entity, but the Act has changed the requirements for its constitution. Section 37M states that a city must now have a population of at least 50,000 and a predominantly urban character. Formerly the threshold population was 20,000.

Every council must consist of between six and 30 members (s 101C). Where a district's population is 20,000 or above, it must be divided into wards (s 101D). This is a new feature of local representation under which candidates must compete in a particular ward to represent that ward. In this way, it is hoped that the needs of particular communities will be more precisely addressed (s 37K). Provision has also been made for the establishment of smaller districts called communities, which are independent of territorial authorities. These enable smaller sectors of society to regulate certain functions of local government through community boards, which are now the major growth area of local government reform. Although the original rationale for the creation of community boards was to give individual communities a voice in local and community affairs, under s 101ZY "the opportunity for delegation to the board (by the council) is extensive".[3]

The second tier of local government, the regional council, performs essentially the same role as the former regional authority and retains its structure.[4] Thus, this it can be seen that while the Act amalgamated the small boroughs and councils, it left the larger regional bodies largely untouched.

Other Provisions

To supplement the structural reforms there are numbers of other substantive changes, the most notable of which express the present government's free market bias.

The spirit of corporatisation has been introduced into the local government area by the establishment of local authority trading enterprises (s 594A-594 ZP). These sections are designed to remove the potential for conflict of interest between a council's policy-making and operational roles. A local authority may divest itself of its revenue-earning undertakings in favour of a local authority trading enterprise, which will continue to oversee the undertaking. The local authority will still be the guardian of the ratepayers' interest. It will perform this role by continuing to exercise any regulatory functions over a transferred undertaking (s 594E).

3 Sir Brian Elwood, Chairperson, Local Government Commission in NZ Local Government February 1990 12.

4 Its functions are detailed in s 375.

Brief mention should also be made of the forthcoming corporatisation of transport-related enterprises by the Local Government Amendment Act (No. 4) 1989. Section 594ZU of that Act makes it mandatory for a regional council to divest itself of any interest in such enterprises by 1 January 1993. Attempts will be made to sell these interests to local authority trading enterprises (s 594ZX). In depriving the regional council of its management of transport services the Act removes one of the council's main functions. Scope exists within the Act for deregulation of transport services by 1994. If the full potential of s 594ZX is realised, it is hoped that New Zealand will not repeat the recent English experience which has delivered wholly unsatisfactory service.

Conclusion

A large part of the practical effect of the Local Government Amendment Act (No. 2) 1989 was consummated in 1989, with the large scale reorganisation of local government. However, the Act provides guidelines for future developments, and will force local government to be more responsive to change.

Although a disproportionate amount of attention has focussed on the amalgamation issue, the Local Government Amendment Act (No. 2) 1989 achieves a great deal more. The separation of local authority functions is a major part of the Act, and should be seen as a positive policy. Further, the concept of community is emphasised by the increase in local representation. It would seem that this Act assures direct and constant community involvement in local government management.

– *Matthew Andrews*

EVIDENCE AMENDMENT ACT 1989

Introduction

The reform of both procedural and substantive aspects of the law of evidence in child sexual abuse cases has in recent years been the topic of a number of official reports. The Geddis Report of October 1988[1] in particular has raised issues which to some extent have been addressed by Parliament in the Evidence Amendment Act 1989.

In that report the Committee commented:[2]

> The court setting is an alien environment for a child and as such can be very intimidating. Courts are designed with adults in mind, so that the witness box and other furniture do not easily accommodate children. Testifying in such an environment can increase the child's feelings of being small and helpless. Some children have difficulty appreciating that it is not

1 *The Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children: A Private or Public Nightmare?* (1988) (Geddis Report), 23.

2 Ibid.

> them who are on trial. Where trial is in the High Court, the wigs and robes of the legal parties involved, along with the formality of the proceedings, may be offputting for the child. A child victim can feel very isolated in the courtroom since many of those present will be unfamiliar to them. Being physically separated form known and trusted adults can add extra stress.

It therefore recommended wider use of electronic technology to create a more sensitive environment for child complainants testifying in sexual abuse proceedings. Its recommendation went much further than the judicial discretion to allow screening of witnesses recognised by the Court of Appeal in the recent case of *R v Accused*.[3]

The Geddis Report further recommended that greater weight be given to the evidence of expert witnesses in these cases. The decisions of the High Court in *R v B*[4] and Court of Appeal in *R v Accused*[5] highlighted the judiciary's reluctance to admit expert evidence which addresses the credibility of a child witness's testimony.

Finally, the Committee called for major changes in the specific rules against hearsay, spousal immunity and similar fact evidence when a case of alleged child sexual abuse is before the court.

The most important areas covered by the Act are directions by the judge as to how evidence by child complainants is given (ss 23D, 23E and 23F), stipulations governing expert witnesses (s 23G), and the judge's directions to the jury.

Modes of Evidence (ss 23D and 23E)

Where the accused has been committed for trial in a case of a "sexual nature" involving a complainant less than 17 years of age, the prosecutor *shall* apply to the judge for directions as to the mode by which the complainant's evidence is to be given at trial (s 23D(1)). The judge *shall* hear and determine the application in chambers, after hearing from both parties (s 23D(2)).

In deciding which directions, if any, to give under s 23E the judge *shall*:

> have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused [s 23D(4)].

Section 23E(1) provides that the judge *may* give directions for the complainant's evidence to be given in any of the following ways:

(a) by videotape, where such evidence has been shown at the preliminary hearing, and with such excisions as the judge may feel are needed using her discretion under s 23E(2);
(b) by closed circuit television from outside the courtroom but within the court precincts, where the judge considers that the necessary facilities

3 [1989] 1 NZLR 660.
4 [1987] 1 NZLR 362.
5 (1988) 3 CRNZ 315.

and equipment are available;

(c) in court using a screen or one-way glass placed so that the complainant cannot see the accused but the judge, jury and counsel for the accused can see the complainant;

(d) in court using an audiolink with the complainant placed behind a wall or partition so that those in the courtroom can see the complainant while preventing the complainant from seeing them;

(e) by videotape from a place outside the court precincts, where those present *must* include the judge, the accused, counsel and any other person the judge considers fit, with such excisions from the complainant's videotaped evidence as the judge considers necessary.

Cross-examination and Questions

Under s 23F(1) the accused cannot personally cross-examine the complainant, but his counsel retains that right under s 23F(2). Section 23F(3) allows an unrepresented accused to put questions indirectly to the complainant by audiolink or otherwise (as the judge directs), through another person approved by the judge. The judge retains the right to question the complainant (s 23F(4)) and may also disallow intimidating or overbearing questions by the accused or in cross-examination by counsel for the accused (s 23F(5)).

Expert Witnesses

An expert witness must be a registered psychiatrist or psychologist experienced in treating sexually abused children (s 23G(1)). An expert can give evidence on the complainant's intellectual, mental and emotional attainment, the general developmental level of children of the complainant's age group, and the question of whether any of the evidence given by other witnesses is consistent with the expert's knowledge of the behaviour of sexually abused children of the complainant's age (s 23G(2)).

Directions to the Jury

Where any mode of giving evidence specified in s 23E is used, the judge *must* give a warning to the jury that no inference adverse to the accused is to be drawn (s 23H(a)). Under s 23H(b) the judge:

> shall not give any warning to the jury relating to the absence of corroboration of the evidence of the complainant if the Judge would not have given such a warning had the complainant been of full age.

Also the judge *shall not* give instructions to the jury on the need to scrutinise the evidence of young children generally with special care nor shall she suggest to the jury that young children have tendencies to invent or distort

23H(c)).

However, the judge still has a discretion to comment on specific matters raised by any evidence, or any matters raised by expert witness testimony during the trial (s 23H(d)).

How Effective Are These Changes?

The Act requires that the accused be in attendance when the complainant's evidence is given outside the court precincts (s 23E(e)). Unless provision for screening is also made under these circumstances, the attempt to lessen the trauma of the complainant will be unsuccessful.

Another serious oversight is the failure to provide for a support person to accompany the complainant, especially during cross-examination. This function could be fulfilled by counsel for the child, but other jurisdictions have found that it is important that this be a person familiar to the child and not necessarily a lawyer:[6]

> Although cross-examination can be anxiety producing for anyone, children do not understand its purpose, or why someone is trying to discredit them. A child is no match for a defense attorney.[7]

With regard to the expanded role which the Act prescribes for expert witnesses, Parliament appears to have had regard to both the Geddis Report and also the 1989 Justice Department Report on the Sexual Abuse of Children.[8] The latter suggested that such witnesses can give important evidence of the disclosure and diagnosis of sexual abuse and associated behaviour and thereby assist the court to assess the child's evidence, and whether in fact the child should give evidence at all.[9]

Videotaping of children's evidence has a number of advantages over oral testimony at a later date and provides good quality evidence, in part because it enables children to be questioned on details of the alleged offences before such details are forgotten or distorted. It is also possible by this means for child witnesses to be interviewed in a sensitive and appropriate manner; a comfortable environment has been shown to elicit more accurate responses. The fact that the judge can have parts of the child complainant's evidence removed from the videotaped evidence if it contravenes the rules of admissibility is problematic, especially in view of the strong criticism voiced of the rule against hearsay in such cases.

However, the discretion of judges to interview and assess child complainants alone if they so decide may not be effective. The Justice

6 Whitcomb, Shapiro and Stelwagen, "When the Victim is a Child: Issue for Judges and Prosecutors", US Department of Justice, 1985.

7 Ibid, 18; see also Spencer, "Video Technology and the Law of Evidence" [1987] Crim LR 76.

8 Whitney, "Child Sexual Abuse Study: Role of Expert Witnesses in Criminal Trials", NZ Department of Justice, 1988.

9 Ibid, 57 and 60.

Department study did consider this to be preferable, and concluded that evidence would be of better quality if questioning was conducted through a specialist with the necessary skills to communicate with children instead of having lawyers or judges question such witnesses directly. The trauma of the child would also be reduced.

Conclusion

While the 1989 Evidence Amendment Act is an important development in the procedure of child sexual abuse cases, there are still a number of areas of concern. Overall the very wide discretion accorded judges by this Act may be its main weakness. Lawyers are inherently conservative and judges more so. If the lack of speed with which judicial attitudes have changed in the area of corroboration of sexual offences is any indication, it may be some time before the reforms in this area become the accepted norm, rather than hard won and little used exceptions.

It is clear that the effective use of this Act depends largely on the ability of the legal profession to use a multi-disciplinary approach in this area. They must be prepared to admit that there are times when they do not possess the requisite skills, and to call on specialists to assist. Child abuse cases are a complex combination of law, psychology and medicine, and if the legal profession realises and compensates for its weaknesses, these cases will be more speedily and sensitively handled.

– *Anet Kate*

MOTOR VEHICLE SECURITIES ACT 1989

Introduction

The Motor Vehicle Securities Act was passed in April 1989 and became fully effective on 1 April 1990. Its purpose was to prevent the situation in which a person:[1]

> buys a motor vehicle and then finds that a finance company has the right to repossess it because the seller owed money to the finance company under a hire purchase agreement, a chattel mortgage, or some other form of security.

To overcome this problem the Motor Vehicle Securities Act 1989 establishes a central register of security interests in motor vehicles together with new priority rules to govern competing security interests. In order to gain protection under the Act it is necessary for the holder of a security interest to register that interest. Non-registration will not render the contract void between the parties, but will render it invalid as against a subsequent

1 488 NZPD 3860-3681 (3 May 1988).

purchaser who has checked the register, and lower in priority than a subsequent security interest that was registered first.

Application of the Act

The definition of motor vehicles in s 2 includes, inter alia, motorcycles, trailers and caravans, but excludes boats and aircraft. A 'security interest' is defined as an:

> interest in or a power over a motor vehicle . . . which secures payment of a debt or other pecuniary obligation or the performance of any other obligation.

Possessory liens and pledges are excluded.

Registration

Part I of the Act sets out the requirements for the registration of a security interest and the means by which the register may be checked prior to any proposed transaction involving a motor vehicle. Provisions for the appointment of a Registrar to establish and maintain the register are set out in ss 4 and 5. Section 9 provides that details of stolen motor vehicles may also be entered on the register. This is an important provision in that it extends protection beyond security interests. However, if a vehicle is stolen (s 30) or sold under mistake,[2] or the contract was effectively rescinded prior to the second purchase,[3] then the bona fide purchaser does not obtain good title to the vehicle. The Act does not guarantee title.

In order to obtain protection under the Act any person may enquire of the Registrar whether or not a security interest is registered in respect of any motor vehicle by supplying the registration number and the chassis number of that vehicle. Although the Registrar is obliged to state whether a security interest is registered (s 10), the Registrar is not generally permitted to supply details such as the amount of the debt (s 13), unless he is satisfied it is necessary in order to determine the priority of two or more competing security interests (s 50(6)).

Under s 14 upon discharge or extinguishment of the debt, the unsecured party must apply within 10 working days to the Registrar to have the security interest cancelled. Failure to cancel the registration renders the secured party liable to a fine of $1000 plus compensation to any person who suffers loss by reason of that failure (s 15). Further provisions to discharge or amend the register are established in ss 16-19.

What Constitutes Notice?

Section 29 is the most important provision with regard to notice. It states

2 *Ingram v Little* [1961] 1 QB 31.
3 *Newtons of Wembley Ltd v Wiltons* [1965] 1 QB 560.

that a person has notice of a security interest if that interest is registered or if she has actual knowledge of it.

Disposition of Motor Vehicles Subject to Security Interests

Where a motor vehicle subject to a security interest is sold by a dealer, the security interest is extinguished and the consumer acquires the vehicle free of that security interest (s 24). That the purchaser has notice under s 29 is irrelevant. Section 24 applies unless the security interest is disclosed in writing to the consumer before the contract becomes binding or the consumer expressly consents to the security interest (s 26). Where a dealer selling a motor vehicle subject to a security interest has notice of that security interest and it is extinguished by virtue of s 24 the dealer must pay the outstanding amount to the secured party within seven days of the sale (s 34). If the dealer fails to comply with s 34 a claim may be made to the Motor Vehicle Dealers Fidelity Guarantee Fund (s 35).

Where a motor vehicle subject to a security interest is purchased otherwise than by a consumer from a dealer, and the purchaser has no notice of the security interest at the time of the sale or exchange, the security interest in the motor vehicle shall be extinguished and the purchaser acquires the vehicle unencumbered. Where the title was vested in the holder of the security interest, title shall pass to the purchaser. In the case of a hire purchase or lease agreement where the person obtaining the interest in the vehicle does not have notice of the security interest, the secured party shall be bound by the terms of the hire purchase or lease agreement (s 28).

Exceptions

Sections 30 and 31 limit ss 27 and 28. The latter sections will not apply where the seller is not the debtor or a person having a superior interest to the debtor: for example, where she is a thief. Nor will it apply where the transaction is between two persons who are not consumers and the sale is not in the ordinary course of business.

Registration and the Companies Act

The provisions of Part II of the Act (ss 24-44) apply notwithstanding registration under the Companies Act 1955 (s 39). It is therefore necessary to register a security interest over a motor vehicle owned by a company under both Acts.

The extinguishment of a security interest will not affect a charge over the proceeds of the sale of the motor vehicle (s 40). Further, where a sale, hire purchase, or lease agreement is cancelled, the security interest will be revived (ss 41 and 42).

Priority of Security Interests

There are three basic priority rules. Under s 46 a registered security interest will have priority over an unregistered security interest. Where there are two or more registered security interests priority shall be determined by the time at which the applications were presented for registration, not at the time at which they were created (s 47). These two sections apply notwithstanding that the holder of the security interest had express, implied or constructive knowledge of the earlier interest or that the vehicle was in the possession of any other secured party (s 48). Unregistered security interests have priority as against each other according to the time of creation of the security interest. Sections 50 and 51 apply respectively to security for further advances and the postponement of priority.

Commentary

The Act was introduced and passed essentially as consumer protection legislation. There has been little criticism of its ability to perform that task. During the introduction and subsequent readings of the Bill there was substantial support from both sides of the House. The main concerns raised were the time it had taken to get such necessary legislation introduced, and practical issues such as whether adequate funding would be provided and whether the day-to-day operation of the system would mean that the protection would be accessible to those consumers it was designed to protect. It would appear that these concerns were largely unfounded.[4] In effect the Act has provided a relatively cheap and accessible method for the consumer to protect her interests when purchasing a motor vehicle, while at the same time providing lending institutions with a similar level of protection. The provisions will only be truly effective, however, if people check the register prior to purchasing a motor vehicle. Therefore, it is essential that the service continues to be well advertised.

The majority of criticism of the Act has arisen from concern that by passing this legislation the opportunity has been either lost or greatly delayed for the introduction of a single piece of legislation to encompass all security interests over personal property, replacing the three systems currently operating: Chattels Transfer Act 1924, Companies Act 1955 and now the Motor Vehicle Securities Act 1989.

The complications arising from the different priority rules found in the

[4] The system was set up at a cost of approximately $6 million. As it is fully computerised and situated in one location the running costs of the system will be low in relation to the level of protection provided. The cost of the service to the consumer is currently $13 for the registration of a security interest, with the telephone checks of the register being provided free from any part of the country. The added protection of a certificate may be obtained for $5 from most District Courts except Auckland, and from the High Courts in Auckland, Wellington and Christchurch.

common law and these three Acts have been well documented by McLauchlan in his recent article: "Motor Vehicle Securities: The quagmire deepens".[5] At the time this Act was being formulated by the Justice Department, the Law Commission was itself working on a comprehensive reform of personal property securities law, based on Article 9 of the United States Commercial Code, to completely replace the Chattels Transfer Act and the part of the Companies Act relating to securities registration.[6]

However, while this opportunity may have been lost, it was important for the sake of the consumer that the protection offered by the Motor Vehicle Securities Act be enacted as soon as possible. It should also be noted that the Law Commission's Report included draft legislation that would be necessary to incorporate the existing special provisions relating to motor vehicle dealers either into the proposed Personal Property Securities Act or another Act.[7] It will therefore not be impossible to enact more far-reaching reforms in the future. However, considering the nature of motor vehicles and the circumstances in which they are purchased, it is essential that some elements of the current system remain. Any system designed to protect consumers must be accessible in terms of cost, ease of use and the times during which it is available. Motor vehicles are easily identifiable from the registration and chassis numbers, and thus a simple enquiry can provide the information required. Because of the speed and efficiency of such a check the cost is low. The current system also operates in the early evening for most of the week, and at weekends, allowing the information to be accessed when consumers are commonly involved in the purchase of motor vehicles. It is essential that these consumer-oriented facilities remain if the Act is incorporated into a more comprehensive system.

– *Lynette Brown*

5 [1989] NZLJ 211.
6 "A Personal Property Securities Act for New Zealand", Report No. 8, 1989.
7 Ibid, 180.

OVERVIEW OF RECENT LEGISLATION

Legislation perforce reflects the policies of the government of the day. The most dominant such policies in 1989-1990 include privatisation, the environment, Maori rights and the Treaty of Waitangi, electoral reform and penal reform.

Privatisation

RURAL BANKING AND FINANCE CORPORATION OF NEW ZEALAND ACT 1989 privatised the Rural Bank, by transferring the Bank's assets to an incorporated company. The MINISTRY OF ENERGY (ABOLITION) ACT 1989 abolishes the Ministry of the same name. Under the STATE OWNED ENTERPRISES ACT (NO. 2) 1990, New Zealand Liquid Fuels Investment is privatised. The same fate strikes the Synfuels petroleum plant under the STATE OWNED ENTERPRISES ACT (NO. 3) 1990. The FINANCE ACT 1990 amends the State Owned Enterprises Act 1986 to permit the sale of Telecom.

Environment

The TRADE IN ENDANGERED SPECIES ACT 1989 enacts the obligations New Zealand agreed to under the Convention on International Trade in Endangered Species of Wild Flora and Fauna. The Act aims to promote the management, conservation, and protection of endangered, threatened and exploited species.

The MARINE POLLUTION PROTECTION AMENDMENT ACT 1990 creates a new offence of storing toxic or hazardous wastes. It also amends the existing offence of dumping or incinerating wastes. Finally the OZONE LAYER PROTECTION ACT 1990 places restrictions and prohibitions on the importation, manufacture and sale of certain ozone depleting goods.

Maori Rights and the Treaty of Waitangi

Recent litigation over Maori sovereignty and the Treaty of Waitangi has continued to generate legislation. The CROWN FOREST ASSETS ACT 1989 is an attempt to protect Maori rights over Crown forest land and assets as these were not covered by the TREATY OF WAITANGI (STATE ENTERPRISES) ACT 1988. The new Act provides for the transfer of Crown forest land to Maori ownership when a successful claim is brought to the Waitangi Tribunal. The Crown is also limited in its ability to grant licences over Crown forests land. Covenants must be created where applicable to protect archaeological sites and Wai Tapu areas.

The MAORI FISHERIES ACT 1989 is a compromise introduced by the government to cope with litigation that arose after it introduced a quota

management system to regulate the commercial fishing industry. Under this Act a Maori Fisheries Commission has been established which possesses rights to ten percent of the total allowable catch the Fisheries Act 1983 (as amended by the FISHERIES AMENDMENT ACT 1990) provides for in any quota management area.

The MAORI AFFAIRS RESTRUCTURING ACT 1989 is the second stage in the government's devolution programme. It abolishes the Board of Maori Affairs which was established in 1988 as the initial institution to facilitate the devolution of power. The Act transfers the administration of the Maori Land Court to the Department of Justice. It also establishes the Iwi Transition Agency which receives all the Department of Maori Affairs' programmes until it is transferred to iwi authorities or other agencies, or wound up. The final step in this reform will be implemented when the RUNANGA IWI BILL, now before select committee, is passed.

Finally, the ELECTORAL AMENDMENT ACT 1990 amends, inter alia, the 1956 Act by changing the definition of the Maori Electoral Population to include the proportion of persons of Maori descent not registered in any electorate, for the purposes of calculating electoral quotas.

Electoral Reform

The TERM POLL ACT 1990 provides for a referendum to be held on whether the parliamentary term should be extended to four years (to be held in conjunction with this year's general election). The BROADCASTING AMENDMENT ACT 1990 creates new provisions with respect to the amount of free broadcasting time political parties may receive.

Penal Reform

The CRIMES OF TORTURE ACT 1989 implements the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the United Nations in 1984. Torture is made an offence under the Act, whether it has been committed in or outside New Zealand, and is punishable by a maximum of 14 years imprisonment. Compensation may be awarded by the Crown to the victim of torture or her family.

The ABOLITION OF THE DEATH PENALTY ACT 1989 abolishes the death penalty as a punishment for treason under the CRIMES ACT 1961. The Act also confers a discretion on the Minister of Justice to refuse an extradition application where the person concerned faces the death penalty if returned to the state seeking to extradite him.

Finally, on 1 January 1990, the IMPRISONMENT FOR DEBT LIMITATION AMENDMENT ACT 1990 came into effect. It repeals the 1908 statute. No debtor need now face the theoretical possibility of imprisonment for making default in payment.