

terms and conditions of redundancy are now totally a matter for contract negotiation between employer and employee. The inequality of bargaining power between the parties however, may result in fewer individual employment contracts providing for redundancy compensation.

This case emphasises the contractarian approach to the interpretation of employment contracts and reinforces the primacy of the contract ahead of fairness, equity and good conscience.

Richard Francois

LEGISLATION NOTES

The Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998

On the same night that the Government announced a relaxation of parallel importation rules as part of the Budget package, the Copyright (Removal of Prohibition on Parallel Importing) Amendment Act 1998 ("the Act") was passed under urgency. It marks a significant change to New Zealand's intellectual property law and it also illustrates the current Government's commitment to principles of free trade and competition.¹ Under the Copyright Act 1994 ("the principal Act"), the definition of "infringing copy" included any product made legally in its country of manufacture, but imported into this country without the permission of the New Zealand copyright holder (usually the exclusive distributor or franchisee). Thus the practice of parallel importing copyright protected goods was effectively prohibited, unless the goods were for domestic or private use.² Although the removal of this limitation has met with virulent criticism from some sectors, it has been hailed by others as a triumph for both free trade and consumer choice.

Amendments to the Copyright Act 1994

While the effect of the Act is significant, it must not be overstated. The

1 Maurice Williamson MP, 568 NZPD 8626 (14 May 1998).

2 It is interesting to note that the Pharmaceutical Management Agency Ltd (Pharmac) has been statutorily entitled to engage in the parallel importation of pharmaceuticals since 1995 but has never availed itself of this opportunity.

amendments apply only to copyright,³ and they have no impact on limitations to parallel importing under trademark and patent law.

The Act does, however, remove one of the notable protections formerly afforded by New Zealand copyright law. The major provision of the Act is to amend the definition of “infringing copy” in s 12 of the principal Act. Counterfeit goods, that is goods made in breach of copyright laws in the country of origin, still fall within the meaning of infringing copy. The significant change relates to the importation of “genuine” goods. Under the old regime, the test was whether the item would have constituted a copyright infringement if it had been produced in New Zealand. This principle is now subject to two major exceptions. Parallel importation will be allowed where:⁴

- (i) The object was made with the permission of the copyright holder in the country of manufacture;⁵ or
- (ii) The object is not subject to copyright protection in the country of manufacture because the:
 - (a) copyright protection has expired;⁶
 - (b) person otherwise entitled to be the owner of the copyright has failed to take some step legally available to secure it;⁷
 - (c) object is a copy in three dimensions of an artistic work that has been industrially applied in that country;⁸ or
 - (d) object was made in that country by, or with the consent of, the owner of the New Zealand copyright holder.⁹

These four criteria ensure that controls can still be placed on goods that are “legal” in the country of manufacture only because that nation has few copyright protections. As noted above, the importation of pirated goods is still an offence. Indeed the Act increases the penalties for such activity quite significantly by an amendment to s 131(5) of the principal Act. While the prison terms remain unchanged, the fines associated with the importation of pirated goods have been doubled, even tripled.

3 The Act also alters the statutory scheme relating to the importation of pharmaceuticals under the Medicines Act 1981 by increasing the penalties applied for breaches of that Act. However, this note will focus on the changes to the Copyright Act as it is these changes which are of most significance.

4 Section 5 of the Act amends s 12 of the principal Act by inserting s 12(5A) which sets out these two major exceptions.

5 Copyright Act, s 12(5A)(a).

6 Ibid, s 12(5A)(b)(i).

7 Ibid, s 12(5A)(b)(ii).

8 Ibid, s 12(5A)(b)(iii).

9 Ibid, s 12(5A)(b)(iv).

Policy Behind the Changes

The Government promoted the changes as not only bolstering New Zealand's commitment to principles of competition and free trade, but also as representing a boon to New Zealand consumers. This position is supported by a report from the New Zealand Institute of Economic Research commissioned by the Ministry of Commerce.¹⁰ This report stated that, although there would be negative effects for manufacturers and exclusive distributors, increased competitiveness and benefits to consumers in the form of reduced prices and increased choice would produce an overall net benefit for the New Zealand economy. The report has been criticised by some, however, as being too narrow and ignoring the international impact of the changes.¹¹

From a legal point of view, the prohibition against parallel importing can be approached in two ways. On the one hand, it can be argued that the right to control import networks is not a core intellectual property right. The aim of copyright is to protect the intellectual property itself and not to provide a distribution monopoly.¹² On the other hand, control over distribution can be seen as central to control of intellectual property, providing fiscal incentives and rewards for innovators and preventing free-riding on investment into training, advertising and after-sales service.¹³

Reaction to the Amendments

The reforms have met with a mixed response. The Government's policy has been publicly supported by the head of the Importers' Institute, Daniel Silva, yet one of the most vocal and powerful opponents to the changes has been the United States. The American trade representative in New Zealand, Charlene Barshefsky, has been instructed to undertake an out-of-cycle review of New Zealand's intellectual property regime under s 301 of the Omnibus Trade and Competition Act.¹⁴ If the United States considers the results of this investigation to be unacceptable, potential consequences could be increased tariffs on New Zealand goods or even removal of Most Favoured Nation trading status.

American opposition would appear to be based on two major concerns.¹⁵ Firstly, the removal of parallel importation restrictions will increase the volume and reduce the control over copyrighted goods imported into New Zealand, and thereby make it more difficult to detect counterfeit goods. This is a concern shared by many manufacturers, particularly those in the computer and music

10 Supra at note 1.

11 Riordan, "Nasty sting to import move", *Sunday Star Times*, 24 May 1998, D1.

12 Van Melle, "Why parallel importing makes good sense despite US anger", *The National Business Review*, 22 May 1998, 20.

13 Josiah H Beeman, US Ambassador to New Zealand, quoted in McManus, "Parallel Importing - The battle has only begun", *The Independent*, 1 July 1998, 31.

14 McManus, *ibid*.

15 Editorial, "Gains all round", *The Press*, 28 May 1998, 4.

industries, areas long plagued by pirates.

A second concern is that the move by New Zealand could prompt other US trading partners to follow suit. While the impact of New Zealand's actions on American manufacturers and innovators is unlikely to be significant, large scale removal of parallel importation restrictions by many countries could harm the domestic US manufacturing sector. This is particularly the case with countries that generally have less stringent copyright protections and less inclination to enforce them.¹⁶

The Government's response to this censure has been to criticise the United States for apparent hypocrisy. While advocating the removal of trade restrictions in the international forum, the United States is unfairly chastising New Zealand for pursuing these policies further than US manufacturers would wish for. In addition, the type of protection afforded by parallel importing restrictions is not available in the United States where it would breach anti-trust laws. The Government, no doubt aware of such concerns, has also dramatically increased the penalties for piracy, and staunchly claims that New Zealand will not relax its stance on this issue. At the second reading of the Copyright (Removal of Prohibition on Parallel Importing) Amendment Bill, Maurice Williamson MP emphasised that the proposal did not breach any of New Zealand's international commitments.¹⁷ Indeed, Article 6 of the Agreement on Trade-related Aspects of Intellectual Property Rights including Counterfeit Goods, leaves nations free to decide policy on the parallel importation issue. Williamson also noted that other major trading partners like Japan and Singapore allow parallel importing. Within the European Union countries, parallel importing is freely allowed, and each member nation may adopt its own approach to imports from outside the Union.¹⁸

Criticism has been equally vociferous from some sectors within New Zealand. The change was long foreshadowed by debate prior to the passing of the Copyright Act 1994 and by the NZIER report.¹⁹ However, opponents of the change have criticised the Government for moving so rapidly in passing the Act, without broad consultation with those groups affected. The Labour Party has also been critical of the changes, with foreign affairs and trade spokesman Mike Moore lambasting the Government for taking "arrogant short-cuts".²⁰ Manufacturers claim that it will be impossible to compete with cheaper products imported from, for example, Southeast Asia, where labour costs are significantly less.²¹ By making it more attractive to import goods produced in developing countries, it only further reinforces the dynamic of the developing world as the producer for first world consumers, whose prosperity is based on information

16 Ibid.

17 Supra at note 1.

18 Ibid.

19 Dengate-Thrush, "Parallel Importation Rules Relaxed" [1998] NZLJ 194.

20 Trade interests at risk - Moore", *The Dominion*, 2 June 1998, 2.

21 Van den Bergh, "Manufacturers fear damage from parallel import move", *The Dominion*, 18 May 1998, 16.

management and the development of lucrative 21st century technology.

Another concern relates to the impact on after-sales service, with authorised dealers forced to honour manufacturers' warranties on products sold by parallel importers. This may lead to increased costs for parts and repairs by authorised dealers.²² With concern over dilution in brand investment, the nature of advertising will no doubt change, with more emphasis on outlets than brands, and on the benefits of dealing with an authorised trader. In addition, companies may be less likely to sponsor sporting or cultural events, as there is less incentive to invest in building general brand awareness to the benefit of "free-riding" parallel importers.

Alternative Protections

It is not the aim of this note to canvass thoroughly the potential alternatives to copyright protection. However, the focus of many affected by these changes has already been to consider other means of protecting their intellectual property rights.²³ As noted earlier, the changes do not affect New Zealand's patent or trademark laws, which still restrict parallel importation. These might therefore provide avenues of protection, either by preventing importation of goods or limiting the use of trademarks in advertising by non-authorised importers.

The Fair Trading Act 1986 and the Consumer Guarantees Act 1993 could also be used to regulate the advertising and distribution of parallel imports inside New Zealand. For example, a product produced for the Asian market could not be advertised as an authorised import designed for New Zealand conditions. The Consumer Guarantees Act could also provide protection for consumers with regard to after sales service and the availability of parts for goods bought from parallel importers. The tort of passing off may also be of use, particularly if the parallel imports are of an inferior quality to the "genuine" article.²⁴

These issues will become an important focus for intellectual property law in New Zealand. While copyright is only one area of intellectual property right protection, it is in reality the most widely used and most easily accessible.²⁵ Trade mark and patent law do not provide automatic protection like copyright, and are applicable to a more narrow range of goods. Furthermore, the protection of consumer legislation cannot prevent the importation of products but only applies once they are already in New Zealand. There is also room for further legislative change to remove perceived anomalies and to achieve an "across the board" removal of parallel importing restrictions.

22 Ibid.

23 "Stihl looks at counters to parallel importing", *The Dominion*, 24 June 1998, 17; Dick, "Car firms move to block parallel imports", *The Independent*, 1 July 1998, 34.

24 Supra at note 19, at 195.

25 Ibid, 195-196.

Conclusion

The passing of this legislation fuels concern over the use of urgency procedures to pass controversial legislation and avoid the Select Committee scrutiny and public submissions on proposed law changes.

However, the amendments have so far made little difference to the New Zealand market, although some retailers are advertising reduced cost goods imported since these amendments. The irony of these changes is that the much touted benefits to consumers will be severely limited by a weakened New Zealand dollar, the impact of which is currently being felt. Consumers, including large corporations, will have to balance the importance of ongoing after sales service and technical support against savings on cheaper parallel imports.²⁶ Indeed, consumers will have to be aware of potential differences between authorised products and other imports. These include after sales services, safety standards in the country of manufacture, appropriateness for New Zealand conditions and pirated goods masquerading as the genuine article. The emphasis on reduced prices belies the complexity of the retail market.

Victoria Pearson

²⁶ Pamatatau, "Parallel importing an avenue for big business", *New Zealand Infotech Weekly*, 2 June 1998, 6.

Electricity Industry Reform Act 1998

On 7 April 1998, the New Zealand Government announced far reaching reforms of the electricity industry.¹ The policy announcement included:

- (i) The split of the state owned enterprise generation company, the Electricity Corporation of New Zealand ("ECNZ"), into three competing state owned enterprises;
- (ii) A requirement that existing electricity companies who carry out both distribution and retail activities divest either their sale and generation business, or distribution business;
- (iii) An increased threat of price control on monopoly lines businesses through a regulation making power;
- (iv) Enhancement of existing information disclosure obligations on electricity companies to better detect anti-competitive behaviour, particularly cross subsidisation between competitive and monopoly activities;
- (v) Government funding for increased analysis of disclosed information; and
- (vi) A requirement that the industry develop a low cost switching mechanism to enable small consumers to change suppliers.

History

The announcement was a continuation of statutory reforms begun in 1992. The Energy Companies Act 1992 required local authorities to corporatise their energy businesses in accordance with establishment plans which provided for consultation. This has created a diverse range of ownership structures of energy companies, including community or consumer trusts, as well as council and private ownership. The Electricity Act 1992 removed statutory exclusive franchise areas, set up an information disclosure regime for energy companies, and contained some consumer protection measures to ensure no consumer would be refused a supply of electricity.²

Policy

Papers released under the Official Information Act 1982 indicate that in

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- 1 "A Better Deal for Electricity Consumers: An Outline of the New Zealand Government's Electricity Reform Package", Ministry Of Commerce, 7 April 1998.
 - 2 Fenwick, "A Competition Law Assessment of New Zealand's Electricity Reforms", presented at the Competition Law and Policy of New Zealand Ninth Annual Workshop, 31 July to 1 August 1998.

1997, the Minister of Energy expressed concerns with how the electricity industry was operating. The particular problems were:³

- (i) Although part of ECNZ's generation interests had been divested to a new competing state owned enterprise, Contact Energy Limited in 1996, ECNZ retained approximately 70 percent of the generation market. This led to wholesale prices on the spot, and the contract market not being fully competitive due to insufficient cost pressure and over-capacity in generation; and
- (ii) In the distribution and retail area, particular concern was expressed regarding monopoly costs and profits on lines businesses (given insufficient pressure under the then current regime), cross subsidies to uneconomic generation investments and retail businesses from monopoly lines businesses, as well as metering and access barriers to competition outside traditional franchise areas.

The Electricity Industry Reform Act 1998 (“the Act”)

The Electricity Industry Reform Bill was introduced to Parliament and referred to the Select Committee on 21 May 1998. It was introduced as part of the Budget and as a confidence matter. People interested in making submissions were advised that the substantive policy behind the Bill would not be debated in Committee hearings. The deadline for submissions was 5 June 1998, with the Committee scheduled to report back to the House on 29 June 1998.

While the Commerce Select Committee did hear a large number of submissions on substantive policy, particularly from energy companies, the scheme of the Bill was not changed. However, many technical amendments were made to the Bill before it received its final reading. The Act received the Royal Assent on 8 July 1998.

Scheme of the Act

The Act is complex and highly technical, with extensive interconnecting definitions and a broad scope. It was not drafted to fit the terminology used in existing electricity legislation.

Parts of the Act have retrospective operation. As of 21 May 1998, the following provisions were deemed to be in force:

- (i) A general obligation not to do anything to defeat the purposes of the Act;⁴

3 Officials' Committee on Energy Policy to Chair, Cabinet Committee on Industry and Environment, *Electricity Reforms: Paper 1: Overview*, 3, and 9.

4 Electricity Industry Reform Act 1998, s 68.

- (ii) No right to Crown compensation for any loss, damage or taxation liability;⁵
- (iii) The enforcement and penalty provisions set out in Part Three;
- (iv) A prohibition on electricity supply businesses transferring their assets or interests to discretionary trusts;⁶ and
- (v) Clauses relating to mirror trusts.⁷

Similarly, Part Two of the Act, which contains the ownership separation rules, is deemed to apply retrospectively from 23 June 1998.

Application

The primary objective of the Act is to achieve ownership separation of “electricity lines businesses”⁸ (monopoly electricity distribution activities) and “electricity supply businesses”⁹ (competitive retail and generation activities) to promote effective competition in generation and retail. For the avoidance of doubt, the Act specifically removes any possible right to Crown compensation for loss, damage or taxation liability arising from its operation or enactment.¹⁰ The Act is inclusive in scope. It uses extensive definitions in an attempt to prohibit any arrangement that could be used to escape the application of the ownership separation rules.

The key definition in the Act is “involved”. A person is “involved” in an electricity business if that person:

- (i) Carries on that business, either alone or with associates, and either on its own or on another person’s behalf;¹¹
- (ii) Has more than ten percent of the control rights, or equity return rights, of that business;¹² or
- (iii) Has material influence over the business.¹³

“Associate” and “material influence” are given expansive definitions designed to catch all possible situations of improper influence.¹⁴

“Control rights” means a voting right attaching to a voting security as

5 Section 69.

6 Section 46.

7 Sections 37-45, 71.

8 Section 4.

9 Section 5.

10 Section 69.

11 Sections 7(1)(a), 7(2), 12.

12 Sections 7(1)(b), 8-10.

13 Sections 7(1)(c), 11.

14 Sections 11-12.

defined in s 5 of the Securities Amendment Act 1988.¹⁵ Thus, it is not necessary that a person actually owns voting shares to be involved. A lesser interest in voting securities will suffice.

A person has an “equity return right” in relation to a business if they have a right or expectancy to directly or indirectly receive profits, distributions, or benefits from the business. These benefits are calculated by reference to a share in or proportion of the capital of the business, or its surplus or residual economic value, or its profitability or other indicator of success.¹⁶

Section 14 further provides that any issue under Parts One to Five of the Act is to be determined by the substance or economic effect of the interest or relationship, rather than its form. It extends the definitions of “involvement” and “associate”. Therefore, an interest in an electricity business will be an involvement not only if it meets the ten percent limit, but also the extended definitions of improper control.

Ownership Separation of Electricity Lines and Supply Businesses

The primary requirement of the Act is that persons involved in both an electricity lines business and an electricity supply business must divest one of those investments. The ownership separation rules therefore prohibit a person who is involved in an electricity supply business, from being involved in an electricity lines business.¹⁷

The Act also prohibits more than 20 percent of the control rights or equity return rights from being held in, or material influence exerted over, an electricity lines or supply business, by persons involved in the other type of electricity business.¹⁸ This is to prevent, for example, supply businesses circumventing the Act by sharing ownership and control of a lines business.

Section 20 governs trust-like entities. Unless the mirror trust option¹⁹ is complied with, a trust involved in one electricity business may not share more than 20 percent of common beneficiaries with a trust involved in the other type of electricity business. Given that it may be difficult to ascertain who the beneficiaries are, for example, in a community trust, section 21 prescribes how contraventions of the section are to be remedied.

Compliance

There is a two stage timetable for compliance with the ownership separation rules:²⁰

15 Section 9.

16 Section 10.

17 Section 17.

18 Section 18.

19 See *infra* at note 25, and accompanying text.

20 Sections 22 and 24.

- (i) Electricity companies must complete corporate separation by 1 April 1999. Electricity trusts who choose the mirror trust option must also comply with the mirror trust rules as at this date; and
- (ii) Electricity companies that have not opted for the mirror trust option must complete ownership separation by 1 January 2004.

As the ownership separation rules are in force as at 23 June 1998, the corporate separation timetable is expressed as a series of exemptions for “existing cross involvements” (involvements in both a supply and lines business as at the close of 23 June 1998).²¹

Therefore, every person that is exempted from the ownership separation rules except settling and mirror trusts must:

- (i) Separate their lines and supply assets into lines or supply businesses;
- (ii) Transfer one business into a new company, so that each business is in a separate company;²² and
- (iii) Comply with the “arms length rules”.²³

Expansion Limits

Part Two of the Act also contains limits on companies expanding cross involvements in electricity businesses. These are deemed to apply from 23 June 1998 until ownership separation is first completed, or 1 January 2004. Generally, no person with a cross involvement may acquire an involvement or increase the level of any of their involvements in an electricity business, except as provided in ss 31 to 35.

Section 31 provides that a person with no involvements may acquire another person's cross involvement, provided they comply with the corporate separation rules and ownership separation rules.

A person may expand a cross involvement in a single unseparated electricity business. This exemption applies if that person only has an interest in that unseparated electricity business and no other. However, the definition of “unseparated electricity business” is a lines business and supply business which are related companies within the meaning of s 2(3) of the Companies Act 1993. It is difficult to see how this exemption can have any impact until corporate separation has taken place.

If no other expansion option permits, a person may acquire or increase their involvements by giving notice to the Commerce Commission after acquiring or increasing the involvement. However, the deadline for ownership separation is then brought forward to 1 July 1999, unless the person reverts back to their level

²¹ Section 28 and also see s 3.

²² Section 24.

²³ Section 25. See also *infra* at note 27, and accompanying text.

of involvements as at 23 June 1998 before that date. The person must also notify the Commission whether it has complied with the ownership separation rules or reverted to their 23 June 1998 involvements.

These limits effectively inhibit expansion or acquisition of cross involvements for industry participants who are frequently involved in more than one electricity business. Given that one of the objects of the reforms is rationalisation of energy supply businesses, it is arguable that the limits may inhibit merger and joint venture activity in the industry.

Mirror Trusts

The mirror trust option allows a consumer or community trust with an existing cross involvement ("the settling trust") to establish a new trust to hold one of its involvements.²⁴

The mirror trust and settling trust are exempt from the ownership separation rules.²⁵ Section 40 requires that each trust must have the same beneficiaries or class of beneficiaries, and no others. The mirror trust must have entered into a binding contract to acquire the electricity business by 1 April 1999, as set out in s 39. If this requirement is met, mirror trusts are also exempt from the operation of s 46, which prohibits the transfer of interests in, or the assets of, supply businesses to trust-owned energy companies.

Mirror and settling trusts must be operated in accordance with the arms length rules which are set out in the First Schedule to the Act. However, if the arms length rules or other mirror trust rules are contravened, the exemption from the ownership rules and s 46 ceases to apply, even if the contravention is remedied. Thus, a contravention will irrevocably remove mirror trust status and the ownership separation rules must then be complied with. An exception applies if the Commission or Court is satisfied that:²⁶

- (i) The contravention is only a technical one and is immaterial for the purposes of the Act;
- (ii) The person who contravened did not know, and ought not reasonably to have known, of the contravention; and
- (iii) The contravention was remedied (if capable of remedy) as soon as practicable after the person became aware of the contravention.

24 Sections 37-45.

25 Section 43.

26 Section 45(3).

Arms Length Rules

The objective of the “arms length rules”²⁷ is to ensure that corporate separated lines and supply businesses, and mirror and settling trusts, operate at arms length. All transactions and relationships between supply and lines businesses are controlled by the application of the rules.

The rules place five legal duties on the parties:

- (i) A duty to ensure all reasonable steps are taken so that transactions between the businesses are not on terms which unrelated parties, each acting independently and in their own best interests, would not have agreed to;
- (ii) A manager of business A must not act in a manner which prefers the interests of business B;
- (iii) Business A must not discriminate in favour of business B, or business B's customers, suppliers or members when providing services or benefits;
- (iv) A manager of business A must act in the interests of the ultimate members of business A, and to the extent the ultimate members are also ultimate members of business B, not take account of their dual capacity; and
- (v) A manager of any person involved in business A must not prefer the interests of business B, or business B's customers, suppliers or members over the interests of business A or business A's customers, suppliers or members.

There are also restrictions on appointment of common managers, directors or trustees and on the flow of information between business A and business B. Integrated computer and billing systems must somehow be sufficiently separated so that business A does not have access to business B's restricted information.

Similarly, every person involved in business A must also ensure that practical arrangements such as office space, use of equipment and services does not contravene the “arms length rules”. Selection and appointment of advisers must not prejudice compliance with the management rules. A register must be also kept of every transaction between the two businesses.

Penalties

Part Three of the Act sets out the penalties for contravention. The potential application of the penalty regime is very wide. It is an offence to contravene a provision of the Act in any way, including to be, directly, indirectly or knowingly concerned in, or party to, the contravention by any other person of the

27 Contained in the First Schedule to the Act.

provision.²⁸

There is no exclusion for advisers, meaning that legal advisers may be a party to a contravention if they erroneously advise a client to commit a contravention of the Act. A defence is provided for inadvertent contraventions of Part Two, but is limited in its application, as it does not apply to certain breaches, for example, the “arms length rules”. It will only apply where the contravention arose other than by reason of that person’s action and the person did not know, and ought not reasonably to have known, of the contravention.²⁹ It will be a difficult test to meet, particularly since it expires three months after the person becomes aware of the contravention.

Section 68 also provides that no person may at any time do anything to defeat the purposes of Parts One to Five of the Act. Pecuniary penalties for breach of Part Two or s 68 include a fine of up to \$5 million for bodies corporate, and up to \$500,000 for individual directors,³⁰ and a penalty of up to three times the value of the commercial gain resulting from the contravention.³¹

Other remedies include:

- (i) Injunctions³²;
- (ii) Damages for any loss or damage caused by engaging in contravening conduct;³³ and
- (iii) Directions from the Court upon application, ordering a person in contravention to renegotiate any contravening agreement on such terms as the Court specifies.³⁴ If these directions are not fully complied with, the Court may reopen the agreement and make any “just and equitable order”. The Court may also give further directions concerning the business or property of the person, or the management and administration of the person’s business or property.³⁵

For any contravention of Part Two of the Act, the Court may order the divestiture of assets or voting securities, including the power to order that the assets or securities be disposed of within a specified time, regardless of the price obtainable at that time.³⁶

28 Section 47.

29 Section 48.

30 Section 51. See also the Commerce Act 1986, section 80.

31 Section 55(1). An order made pursuant to this section may be imposed in addition to any other penalty the Court may impose under the Act, s 55(2).

32 Section 52.

33 Section 53.

34 Section 56.

35 Section 56(2).

36 Section 54.

Impact of the Act

The Act has a worrying effect on other legislation and the rule of law. Section 76 states that no person will be liable under any Act or rule of law for any act or omission necessary to give effect to the ownership separation rules. This section specifically overrides the Companies Act 1993, noting in particular s 131 which sets out the duty of directors to act in good faith and in the best interests of the company. Thus, compliance with the Act is not subject to company law safeguards. Similarly, trustees will not be liable to beneficiaries under any rule of law or statute when complying with the Act.

Section 77 states that where the managers of a person must obtain the approval of the members or other owners to a transaction necessary to comply with the ownership separation rules, they must take all reasonable steps to provide an option most acceptable to a majority of the members. The transaction must also be approved by the majority of those members or other owners. However, if the members do not grant approval, the managers may still enter into the transaction to the extent necessary to ensure compliance with the Act. This section specifically overrides the requirement for a special resolution of shareholders to approve a major transaction in s 129 of the Companies Act. Section 129 provides important shareholder protection, including triggering minority buy out rights under ss 110-112. Power is therefore shifted from owners to management to control the way a company complies with the Act.

Similarly, the Act overrides the special consultative procedure required when an energy company ceases to be 51 percent or more owned by a local authority, that is, when it ceases to be in public ownership.³⁷ Section 78 provides that it will be sufficient if consultation is undertaken “to the extent that is possible” given the requirements of the Act. This removes the rights of the local community to be heard when compliance with the Act is at issue.

Conclusion

The Act represents a significant departure from New Zealand’s light handed regulatory regime under the Commerce Act 1986. Effectively, it creates a new, highly regulated competition regime specifically for the electricity industry. This raises concerns that other natural monopolies such as gas, water and telecommunications may also be similarly targeted. The Act has also created significant commercial uncertainty. The definitions, particularly those of “electricity lines and supply businesses” and “involvement”, are difficult to apply and interact in sometimes unexpected ways. Given the expansive scope of the penalty regime, it may well be that unintended liability will result for industry participants.

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³⁷ Energy Companies Act 1992, s 88.

Harassment and Criminal Associations Bill 1996¹

A “package” of legislation, passed through Parliament late in 1997, has produced a range of changes to existing law and new substantive provisions intended to “crack down on gangs”. The Harassment and Criminal Associations Bill 1996² had lain dormant in the House for some time since its introduction by Mike Moore, before it was rushed through after a pro-forma second reading and cursory consideration. It is a prime example of the sort of reactive legislation that qualifies New Zealand’s Parliament as the “fastest law-maker in the West”.³ There is a dearth of any sort of academic criticism or review of the Bill.⁴ This comment surveys the new provisions and expands on some of the more questionable results of this example of “quick draw” legislation.

The Background and Justification

The rationale for the package as described in the commentary to the Bill is to provide better protection from the threat of criminal gangs and from harassment.⁵ Two obvious questions to ask are: from what established threat is the Bill to provide protection from? and why is the present law inadequate to protect society?

Seemingly, there are no answers to either of these questions in the commentary or relevant parliamentary debates.⁶ The commentary to the Bill itself admits that there is no independent empirical data to establish a gang threat or a threat from stalkers in New Zealand society. The presence of the evil to which the Bill responds seems to have been established to the Legislature’s satisfaction by the anecdotes of Members of Parliament,⁷ and some sort of “general feeling”. The media coverage of gang intimidation in some towns and “public concern” seems also to have influenced the sudden passage of the Bill through the House.

The idea that this “threat” justified strengthening criminal law and police power seems to have been taken for granted. The assertion that more laws will give the police what they need to protect society from gangs was made with no consideration of whether there were already adequate powers to investigate, and offences with which to charge dangerous gang members. The Bill’s main foci

1 This comment is intended to complement “Broader Liability for Gang Accomplices: Participating in a Criminal Gang” by the same author in this issue of the Review.

2 Harassment and Criminal Associations Bill 1996 (No. 215—1).

3 A “Palmerism” used by Taggart in “Déjà vu all over again” [1998] NZLJ 234.

4 The original Bill’s provisions are described in Dawkins, “Criminal Law” [1997] NZ L Rev 20, 23. The provisions of two parts of the Bill passed: the Crimes Amendment Act (No. 2) and the Summary Offences Amendment Act 1997, are described in Cull, “Criminal Practice: Recent Legislation” [1998] NZLJ 66.

5 Supra at note 2, at Explanatory Note i.

6 565 NZPD 5532 (20 November 1997).

7 Ibid.

were to introduce:

- (i) New association oriented offences and sentencing to target gangs;
- (ii) Protection from harassment of all kinds;
- (iii) More extensive search and surveillance powers for police; and
- (iv) Streamlined procedures for Local Government removal of gang fortifications.

It appears that there has not been full consideration of how effective the existing law is in achieving these goals.

The New Acts

The Bill was passed as a series of Acts; Criminal Justice Amendment Act 1997; Crimes Amendment Act (No 2) 1997; Summary Offences Amendment Act 1997; Harassment Act 1997; Local Government Amendment Act (No 3) 1997; Misuse of Drugs Amendment Act (No 2) 1997; and Telecommunications Amendment Act 1997. A clause by clause account of each of these is unnecessary to see the overall effect of the new law. Several new offences and one new principal Act concerning harassment, have been created, and there have been amendments refining fortification removal, search powers and sentencing jurisdiction.

New offences

The creation of a new offence of “participation in a criminal gang” by section 2 of the Crimes Amendment Act (No 2) 1997⁸ was regarded as a great step forward in holding the members of a gang accountable for the conduct of other members. It makes it an offence to “further or promote” the commission of an offence by a member of the gang while participating in a “criminal gang” knowing it to be such. The offence would appear to be very similar to the traditional secondary liability of people who “aid and abet” crimes.⁹ The scope of this offence, and whether it creates some sort of vicarious liability of gang members for offences committed “by the gang”, is not clear. The fact that the criminal law of secondary liability has a very wide scope for punishing participants in crime, especially in the sort of concerted criminal enterprises undertaken by gangs, appears to have been ignored.

A major part of creating the new offence is in defining a “criminal gang”; the section has a very broad definition requiring three people, each with a particular

8 By inserting s 98A into the Crimes Act 1961. This amendment is critiqued by the author in detail in an article in this issue of the Review, see *supra* at note 1.

9 Crimes Act 1961, s 66(1)(b) and (c) respectively.

criminal history.¹⁰ To establish that someone knows he or she is associating with such a gang, which is an element of the offence, a police warning procedure acts as “deemed knowledge” of the criminal convictions of the gang members. This sort of “warning” by police to people who may be simply associating with others, rather than actually performing any socially dangerous conduct, should be viewed with suspicion.

A feature common amongst the statutes is the rather minimal requirement of only three people to constitute a “gang” or in some other amendments “organised criminal enterprise”.¹¹

The Summary Offences Amendment Act 1997 created two new offences relating more directly to association. It is unusual to prohibit mere “status” using the criminal law, which is doctrinally tied to proscribing harmful conduct. The offences are found in ss 6A and 6B,¹² which make it illegal to “habitually associate” with a “violent offender” or “serious drug offender” in circumstances that are likely to lead to violent offending, or serious drug offending, respectively. Section 6C provides a similar police warning scheme for proof of “habitual association”. After three warnings that a person is associating in contravention of ss 6, 6A, or 6B within twelve months will satisfy the prosecution’s burden. There is no direct description of what “habitual association” actually is. It would seem that the police could manufacture this association through the use of warnings.

The whole idea that people should be discouraged from associating with each other could lead to the abuse of the warning provisions by police. It is salient that the warning of association may not be necessarily directed to the apparent justification for the offence — which is that offending of the relevant type is likely to come about as a result of that association. The chilling effect on freedom of association is not addressed by any safeguards in these provisions, nor is it addressed by s 98A. Police may be encouraged to bully people with criminal histories into not associating with one another, for whatever purpose.

The Harassment Act 1997

The Harassment Act 1997 (“the Act”) is the only new principal enactment in the Bill. The objects of the Act are to protect victims of harassment by creating civil remedies and a criminal offence for the most serious types of harassment.¹³ The Act provides remedies not only for where a person is directly harassed, but also where conduct is directed at another person with whom an applicant has a family relationship.¹⁴

10 Ibid, s 98A.

11 Ibid, s 312A.

12 Section 6 is a previously existing “association” offence.

13 Harassment Act 1997, s 6.

14 Ibid, ss 4-5.

The offence of criminal harassment¹⁵ occurs where the harassment is intended, or is known to be likely to cause, another to fear for his or her safety. The civil jurisdiction provides a scheme for restraining orders to be made which prohibit the harasser from doing any “specified acts” that may constitute harassment, or to encourage another person to do such acts.¹⁶ The breach of such an order is also an offence.¹⁷ This scheme is very similar to the “protection order” jurisdiction found in the Domestic Violence Act 1995, and consequentially a person in a “domestic relationship” as defined by that Act cannot apply for a restraining order under the Harassment Act. In *C v S*,¹⁸ Judge Robinson observed, in refusing to grant a protection order, that the civil harassment remedies under the new Act could have been useful to address that situation. The order in that case could not be granted under the Domestic Violence Act 1995 because there was an insufficient relationship between the victim and the “harasser”.

The requirements for a civil order are that an applicant is being harassed; that the behaviour causes or threatens to cause her to suffer distress; and that the order is necessary to prevent further harassment.¹⁹

Clearly the most contentious feature of the Act is what will amount to “harassment”. The requirements for a victim to fear for their own or some related person’s safety place limits on the scope of conduct involved, which appears to be broad and subjective. The threshold for conduct is the commission of two specified acts within a twelve month period. The list of specified acts is strikingly broad and includes: watching, loitering, following, accosting, interfering with property and “making contact”.²⁰ In fact, “specified act” is something of a misnomer, as there is a non-specific residual class included in s 4(1)(f):

Acting in any other way—

(i) That causes a person (“person A”) to fear for his or her safety; and

(ii) That would cause a reasonable person in person A’s particular circumstances to fear for his or her safety.

The nature of what will be harassment will require some judicial clarification if there are to be practical limits on the scope of the Act. Harassment would appear to be very dependent on the circumstances, and not amenable to meaningful statutory definition beyond the touchstone of the “victim’s fear”.

15 Ibid, s 8.

16 Ibid, s 19.

17 Ibid, s 25.

18 (1998) 16 FRNZ 482; see also [1998] NZFLR 360.

19 Supra at note 13, s 16.

20 Ibid, s 4.

Another limiting factor in the Act is that a “specified act” cannot be relied upon for a civil harassment restraining order if the defence proves that it was done for a lawful purpose.²¹ This provision is clearly important to exclude people like debt collectors or even law enforcement agencies from having restraining orders issued against them. It is curious, however, that if an act is done for a lawful purpose it is completely immune from founding an order. Even if someone has a lawful purpose, in, for example demanding repayment of debt, it seems quite possible that a series of such demands could be made in a way that threatens the safety of an individual. There is no definition or limitation on “lawful purpose” in the Act, so the courts are faced with yet another clarification task in determining just how far a lawful purpose will protect otherwise “harassing” behaviour.

The civil provisions of the Act came into force as of 1 May 1998, and the criminal harassment offence came into force as of 1 January 1998. It appears that no proceedings have yet been brought under the civil jurisdiction, although a very recent newspaper report indicates that a 44 year old man has pleaded guilty to, among other charges, criminal harassment for obsessively visiting, telephoning and following a woman.²²

Removing Fortifications

The Local Government Amendment Act (No 3) 1997 inserted part 43C into the principal Act and supplanted the part of the Act which had previously provided for removal orders. The provisions govern how a local authority or the police may dismantle, or order to be dismantled, offensive structures on private property. This amendment is explicitly aimed at giving councils a more streamlined set of powers to prevent gangs from fortifying their premises. The existing removal powers introduced in 1987 were labelled “clumsy and difficult” by the Minister of Justice.²³

The general focus of the new provisions is expediency: applications may be made to the District Court without notice to any other party. Orders are available where the property is occupied by people who have been convicted of, or are committing, offences and there is a “fence, structure or vegetation” facilitating the commission of offences, obscuring the offending activity, or intended to injure. The Court can make an order for removal or alteration and any consequential order that it sees fit.²⁴ Although once granted, the order must be served on affected parties, who may then object, the District Court can summarily strike out objections which are vexatious or an abuse of process and

21 Ibid, s 17.

22 “New Digest: Stalker Sentenced”, *New Zealand Herald*, 22-23 August, A13. The man was sentenced to a \$1000 fine, six months’ periodic detention, and six months’ supervision for alcohol and psychiatric counselling.

23 Supra at note 6, at 5533.

24 Local Government Act 1974, s 692ZD.

appeals to the High Court are final.

Execution of orders is also streamlined; if the respondent does not comply with the order within the time specified and at its own cost, the applying authority may enter the property and execute the order with impunity.²⁵ The provisions are clear that there need not be a contravention of any rule in a plan, consent or other resource management instrument for an order to be granted.²⁶

Non-association Orders

The Criminal Justice Amendment Act (No 2) 1997 altered the existing non-association order provisions to target restrictions for 'gang-like' offences by gang associated offenders. There has been recent media coverage of the first use of the amended provisions to prohibit a small group of family members from associating.

Search and Seizure

The Crimes Amendment Act (No 2) 1997²⁷ additionally created several adjuncts to the powers of police to stop and search vehicles, and modified the provisions for the interception of private communications. The Misuse of Drugs Amendment Act (No 2) 1997 which came into force on 1 February 1998 made some modifications to the existing procedures in that Act for intercepting communications. The reduced threshold of three people to form an "organised criminal enterprise" is present in the interception warrant amendments. The Telecommunications Amendment Act 1997 introduced a new specific 'search warrant' for obtaining telephone call information. A "call data warrant" may be applied for by police where there is reason to believe offences punishable by imprisonment are being committed and evidence relevant to their investigation will be obtained from information regarding phone calls. A warrant authorises the use of telephone analysers and requires network operators like telephone companies to supply call information to the police.

The interception warrant procedures now have particular provision for use in relation to the perceived "gang" type offences and require fewer people to be involved. It is arguable whether these amendments will take the scope of police power very much further, especially considering the recent trend in judicial approval of illegal searches by findings of "reasonableness" in terms of the New Zealand Bill of Rights Act 1990.²⁸

25 Ibid, s 692ZK.

26 Ibid, s 692ZD(7).

27 See also New Offences, *supra* at note 8 and accompanying text.

28 See Schwartz, "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] NZ L Rev 259.

Conclusion

It is neither possible nor very useful to critique the individual details of the amendments and new legislation found in the Bill. What is significant is that a large variety of important police powers were altered, and some potentially very important new crimes and civil remedies were introduced with virtually no debate, on the justification of urgency. It seems anomalous that such “urgently” needed legislation is largely yet to be used. Some of the more important criminal provisions have been law for more than eight months and the author is unaware of any proceedings that have been brought under them.²⁹

Any legislation which substantially alters the scope of criminal sanctions and the powers of the state to restrict the freedom of the public should be scrutinised with the utmost care. Although some provisions appear to alter the existing law very little, the scope of participation in a criminal gang and the entirely new direction taken in the Harassment Act 1997 have the potential to be anything from oppressive to ineffectual. Very broad laws will not necessarily encourage police to prosecute gang members more rigorously. The “warning” procedures incorporated into the new offences where “association” is an element seem particularly open to abuse by police in intimidating people into not exercising their freedom of association.

It remains to be seen whether these enactments will change the complexion of gang activity in New Zealand. Given the fact that there was no hard evidence of a “gang problem” in the first place, this judgment may be impossible to make anyway.

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²⁹ Most significantly, s 98A of the Crimes Act 1961, “participation in criminal gang”; however it appears s 8 of the Harassment Act 1997, “criminal harassment” has been used; see *supra* at note 22 and accompanying text.