The Economic Stabilisation Act 1948 - a giant's power?

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Recent economic policies in New Zealand have been dominated by the "wages and prices freeze". The freeze was introduced by regulations made under the Economic Stabilisation Act 1948. There have been two legal challenges to the validity and effect of these regulations, one successful, the other unsuccessful. This article examines those cases, along with the government's response in inviting Parliament to alter the result of the successful one. The author argues that the extension and increasing use of the 1948 Act are transferring power to the executive at the expense of Parliament and undermining the relationship between the courts and the executive in the control of delegated legislation.

I. INTRODUCTION

The ambit of the regulation making power under the Economic Stabilisation Act 1948 has been of great significance in the general government control of the economy. Most commentators have recognised the width of the powers but at the same time have appreciated that there are limitations.[1] The Prime Minister was reported to have said of the power, "You can do anything provided you can hang your hat on economic stabilisation".[2] The Act provides the government, through the Executive Council, with the power to introduce and implement broad policy measures which promote the economic stability of New Zealand. Regulations have been made pursuant to section 11 of the Act to freeze wages and prices, to freeze rents and other incomes and to introduce a carless days scheme.

The great width and scope of the subjective empowering language means that, when attacking the validity of the regulations made under it, the attack would be better based on a specific limitation of regulation-making itself rather than on an argument that the regulations were not permitted by the Act. Indeed the history of the power shows that no regulation has been held to be unauthorised by the Act unless it has conflicted with a constitutional principle which fetters the power of regulation makers.

* Submitted as part of the LL.B. (Honours) programme at V.U.W.

1 See Caldwell "Economic Stability and Carless Days" [1981] N.Z.L.J. 542.

2 *The Times*, London, 14 April 1976, p. 18.

This note will focus mainly on the three most recent cases that have arisen in relation to the Act. In *Brader* v. *Ministry of Transport*[3] the Court of Appeal held that the Economic Stabilisation (Conservation of Petroleum) Regulations (No. 3) 1979[4] were authorised by the 1948 Act. The regulations set up a scheme whereby each car owner was required to nominate a "carless day" — one day in the week on which the car would not be driven. (An exemption was allowed for essential users.) A car salesman was being prosecuted by the Ministry of Transport for driving a car on its carless day. The case went to the Court of Appeal on a point of law and it was held unanimously that the regulations were valid.

A challenge was made to the validity of the latest set of Wage Freeze Regulations[5] made under the 1948 Act in *New Zealand Drivers' Association* v. *New Zealand Road Carriers*.[6] In that case the Drivers' Association had claimed, prior to the regulations coming into force, an increase in wages. Before the matter could be heard by a conciliation council, the regulations came into force.[7] The matter was then set down to go to the Arbitration Court but before it got there an Amendment to the regulations came into force which prevented the Arbitration Court from hearing disputes of interest. When the challenge was made to the validity of the regulations, the Arbitration Court referred the matter to the Court of Appeal. In a split decision,[8] the majority held that the Amendment to the regulations, the only part really at issue, was valid.

The latest case to come before the Court of Appeal was *Combined State Unions* v. *State Services Co-ordinating Committee*.[9] The C.S.U. had sought an increase in expense allowances and also in the trades classification of one group of their members (with the purpose of achieving a higher rate of wages). They were supposed to take up the matter under the State Services Conditions of Employment Act 1977 with the respondent. The respondent refused to proceed with the matter because it considered this impossible during the period of the wage freeze. The majority of the Court of Appeal held that the committee had decided not to exercise its normal statutory function because it was prevented by the regulations from so doing. The C.S.U. challenged the validity of the regulations in so far as they interfered with the operation of the 1977 Act. The majority upheld the challenge and the regulations were declared invalid in so far as they purported to interfere with the operation of the 1977 Act.

The regulation-making power prior to the Amendment Act of 1982 is best looked at as a combination of sections 3, 4, and 11. Section 3 states that the general purpose of the Act is to promote the economic stability of New Zealand.

3 [1981] 1 N.Z.L.R. 73.
4 SR 1979/153.
5 SR 1982/141 and the Amendment No. 2 SR 1982/194.
6 [1982] 1 N.Z.L.R. 374.
7 22nd June 1983.
8 Majority: Cooke, McMullin and Ongley JJ.
Minority: Woodhouse P. and Richardson J.
9 [1982] 1 N.Z.L.R. 742.

Section 4(1) charges the Minister with the general administration of the Act. Section 4(2) provides:[10]

> In addition, the Minister shall be charged with the general function of doing all things he deems necessary or expedient for the general purpose of this Act, and in particular for the stabilisation, control and adjustment of prices of goods and services, rents, other costs, and rates of wages, salaries and other incomes.

Section 11 provides:

> Stabilisation Regulations — (1) The Governor-General may from time to time, by Order in Council, make such regulations (in this Act referred to as stabilisation regulations) as appear to him to be necessary or expedient for the general purposes of this Act and for giving full effect to the provisions of this Act and for the due administration of this Act.

Section 11 continues, without limiting the general power, to provide some particular purposes for which regulations may be made.

After the decisions in the three cases already mentioned, Parliament passed the Economic Stabilisation Amendment Act 1982. This made some changes which will be discussed later. It is sufficient to say now that the powers have been extended[11] and a provision for disallowance has been enacted.[12] Further, the Finance Act 1983 makes an amendment to the 1948 Act.

A very close and detailed examination of the powers conferred by the 1948 Act and the regulations made under them up until 1978 was undertaken by D. Shelton. In discussing these powers, she concluded:[13]

> Although the precise limits of the power conferred in the Economic Stabilisation Act 1948 are not clearly defined, the Act, when compared with the Emergency Regulations Act 1939 or the Supply Regulations Act 1947, appears to confer not a wide emergency-type power but a narrower more restrained power. For instance there is no power conferred to amend, suspend or repeal statutes by regulations made under the Act. The Act does specifically grant certain unusual and potentially wide powers in the section authorising the making of regulations — a power to sub-delegate the delegated legislative power, a power to appoint officials and committees, and a certain power to legislate on matters of principle.

The recent cases that will be discussed show that, although there was no express power to interfere with statutes, there was authority to do so. The power to make regulations has been interpreted widely and liberally.

Part II of this note will discuss one approach used for testing the validity of the regulations. It will focus on the "reasonably capable" test for validity as discussed and applied in *Brader's* case[14] and the *Drivers'* case.[15] Part III will examine a second approach used to test the validity of regulations. It discusses the effect of the constitutional considerations the court takes into account: (1) the

10 Section 4 of the Economic Stabilisation Amendment Act 1982 substitutes "remuneration" (defined in s. 2 of that Act) for "wages, salaries".

11 Section 11A as inserted by s. 5 of the 1982 Amendment Act.

12 Section 13A as inserted by s. 6 of the 1982 Amendment Act.

13 D. Shelton *Government, the Economy and the Constitution* (unpublished LL.M. Thesis V.U.W., 1980) at 248-249.

14 Supra n. 3.

15 Supra n. 6.

interpretative presumption that the executive may not make regulations which interfere with or are repugnant to statutes, and (2) the presumption that regulations may not detract from the jurisdiction of the ordinary courts. Part IV will attempt to evaluate the present position of judicial review of delegated legislation as demonstrated by the recent cases. It will make some brief comments on the state of the constitution and separation of powers theory in the light of these decisions and the recent Amendment to the Economic Stabilisation Act.

II. THE "REASONABLY CAPABLE" TEST

A. The Test

Although the regulation-making power in section 11 of the Economic Stabilisation Act 1948 is worded subjectively, the courts have held that this does not confer an unbridled power. Richmond J. in *N.Z. Shop Employees Industrial Association of Workers* v. *Attorney-General*[16] quoted from *Attorney-General for Canada* v. *Hallet & Carey Ltd*[17] where Lord Radcliffe said of a similar subjective empowering provision:

> Parliament has chosen to say explicitly that he [the Governor-General] shall do whatever things he deems necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the act in this way.

This extract illustrates that where the opinion of the Governor-General is the criterion it does not mean that whatever he regulates will be valid. Nor does this passage mean that the court may merely substitute its opinion for that of the Governor-General. Rather it illustrates that the opinion the Governor-General must have held must be capable of being related to the purposes of the power. Thus the court's power of review lies somewhere in between the two "opinions". This point was made in a slightly different way by Turner P. in the *Shop Employees* case:[18]

> It [section 11] provides that the Governor-General may make such regulations as appear to him so to be necessary. Mr Arndt [counsel for the plaintiff arguing that the regulations were invalid] must accordingly take us to the point where we are able to say that the regulations could not reasonably be considered necessary or expedient for the economic stability of New Zealand . . .

This same approach was adopted in *Brader's* case. Cooke J. said:[19]

> By section 11 the opinion of the Governor-General in Council is the criterion, but that does not mean that the power of the Executive is practically unlimited. The Court has to ask, if the proceedings before it so require, whether the regulations are capable of being regarded as necessary or expedient for the general purpose of the Act. . . . A tenuous or remote connection with economic stability would not be enough; it would invite an inference that the regulations had not really been made for the purpose authorised by Parliament. The more indirect the connection, the more the Court would have to be ready to draw that inference.

The same test was adopted in the *Drivers'* case. The majority stated it as follows:[20]

16 [1976] 2 N.Z.L.R. 521, 535.
17 [1952] A.C. 427, 450.
18 Supra n. 16 at 529.
19 Supra n. 3 at 78.
20 Supra n. 6 at 388.

> The Court is concerned with whether, on the true interpretation of the parent Act, regulations are within the powers conferred by Parliament. They will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the act authorises regulations. If the only suggested connection with that purpose is remote or tenuous, the Court may infer that they cannot truly have been made for that purpose.

Before the discussion of this test is continued, it is worth noting some of the other points made in the judgments in these cases which relate to the test.

First, the regulation-making power is very wide. This is the result of enacting a general power which is restricted only by its reference to the stated purpose of the Act. As Turner P. put it in *Shop Employees*[21]

> . . . a statute which does no more than the Economic Stabilisation Act, if it includes a section giving a general power to make regulations to implement its expressed policy, calls for a liberal meaning to be accorded to such a section; for the legislature in enacting it must be taken to have intended to create a wide and general power against contingencies the exact nature of which it was unable at the moment of passing the Act to foresee.

He continued:[22]

> The ambit of the Act itself must by reason of the nature of its subject-matter be regarded as a wide one. Measures to secure the economic stability of New Zealand need not usually be considered unless that economic stability appears in some degree to be threatened . . .

Exactly what is meant by the economic stability of New Zealand remains vague and unclear. Cooke J. in *Brader* approved some comments of Smith J. in *Otago Harbour Board* v. *Mackintosh, Cayley Phoenix Ltd*:[23]

> Economic stability implies the stability of the economic system as it has been already established. It implies its firmness, steadiness, its ability to stand without being overthrown. This stability is not inconsistent with some change or movement, but it implies a freedom from essential change and a tendency to recover a state of balance.

A number of points can be made about these passages. First, the court is unable to test the validity of the regulations by reference to a series of specific guidelines. This is due to the nature of the empowering position, i.e. a general power for a general purpose.

Secondly, the general purpose is itself very wide. There are many factors which may be perceived as an apparent threat to economic stability. Thus there is a need to adopt a liberal interpretation of economic stability so as not to exclude matters that Parliament may have intended to be encompassed within it.

Thirdly, the test that has been developed is essentially one that endeavours to take an objective look at a subjective requirement. By this is meant that the court will determine whether, objectively, the opinion that the Governor-General must have held was one that was capable of being held. The test is subjective in that what is at issue is the opinion the Governor-General must have held. If not entirely accurate, it is useful to label section 11 of the Economic Stabilisation

21 Supra n. 16 at 529.
22 Idem.
23 [1944] N.Z.L.R. 24, 32.

Act 1948 as a subjective empowering provision. The test is objective in that the court's function is to determine whether the opinion that the regulations promoted economic stability was reasonably capable of being held. So while "objective" and "subjective" are perhaps not quite the right words, they do illustrate the two elements of the test. The court must determine whether the regulations were reasonably capable of being regarded as necessary or expedient for promoting the economic stability of New Zealand.

A useful illustration of how the test worked in practice can be seen in the *Drivers'* case. The decision is also interesting in that it was by a very narrow majority that the regulation 5A was held to satisfy the test. The minority judgment is the only occasion on which regulations have been held to fail the test. Furthermore, there are some interesting points that can be made from it.

The facts of the case have been mentioned. What was at issue was whether regulation 5A[24] was ultra vires the Act. Regulation 5A prevents the operation of a series of statutory bodies, including tribunals and courts, from exercising all or some of their jurisdiction especially in the wage fixing area. Regulation 5A(1)(b) is the one relevant to this case. It provides:

> No dispute of interest shall be determined by the Arbitration Court and no proceedings in relation to any such dispute which have been commenced but not completed before the commencement of this regulation shall be continued.

Counsel for the Drivers argued that this ban on proceeding with, and the determination of, disputes of interest was invalid as it was an absolute and unqualified prohibition. The eradication of the largest part of the jurisdiction of the Arbitration Court cannot be related as being reasonably necessary or expedient for the purposes of the policy of economic stabilisation enacted in the 1948 Act. Furthermore the Act should not be construed as authorising the removal of the rights of the subject to take a case to the established courts (such as the Arbitration Court).

The majority, in holding that the "reasonably capable" test was satisfied, made the point that although regulation 5 prevented increases in remuneration there were some other non-remunerative increases that could be made. These could have included matters concerned with worker safety or other working conditions. This could have resulted in increased costs to the employer. It was unfair that the employer would be unable to pass this on. They thought that virtually every claim made in a dispute of interest would have some bearing on the economic stability in that it would affect costs in some way. If these built up it could affect costs significantly. Of some importance to them was their conclusion that:[25]

> Even cent rises in prices to the public can matter. All inroads into a freeze could be dangerous in principle. The policy of as near as possible a total freeze is aimed at holding the overall position. In our opinion the Courts cannot say that this policy is not reasonably capable of being adopted for the purpose of economic stability.

Furthermore they thought that the fact that the original regulation 5 did not ban the hearing of disputes of interest, rather only the settling of them, meant

24 Supra n. 5. This regulation was inserted by the 1982 Amendment.
25 Supra n. 6 at 389.

that a base could be built from which a claim could be launched immediately after the end of the freeze. Thus the fixing of rates could be accelerated. They argued that any stability hard won by the freeze could be shattered. These considerations led to their conclusion that regulation 5A was reasonably capable of being regarded as "necessary or expedient to eliminate the risks and close the gaps left by reg. 5."[26]

The majority then went on to consider whether the regulations were invalid because they detracted from the jurisdiction of the ordinary courts. This part of the case will be discussed later.

It is interesting to note and compare the approach of the minority judgment. Although they used the same test and the same considerations they held that the regulation failed to satisfy the reasonably capable test. The minority did not accept the argument about the non-remunerative awards upsetting economic stability, nor did they accept the argument about the build-up of pressure during the freeze period which may be released in an explosive fashion just after the end of it. What was conclusive for them was that regulations 5 and 8 were together sufficient and totally effective in achieving a wage freeze during the period. Therefore they concluded that regulation 5A added nothing at all to the regulations as a whole and thus could not reasonably be thought to promote one of the purposes of the Act. This reasoning is based on the view that the purpose of the regulations was to impose a wage freeze for the prescribed period. The minority say as much:[27]

> As their name suggests, their purpose and indeed their undoubted effect, is to prevent (with certain very limited exceptions) any increase in wages or salaries until after 22 June 1983.

The reason the majority and the minority differed can be explained, in part, by the different approaches they took. The application of the reasonably capable test involves an examination of "the central and dominant purpose of the regulations".[28] As is discussed later in this part, the objects of an Act or regulations may be gathered only from the language used in them. It is submitted that there is a distinction between "purpose", "effect" and "means". It is also submitted that confusion of these three may, and in this case did, lead to different results.

The minority decision was based on a conclusion that the purpose of the regulations was to impose a wage freeze for the freeze period. This conclusion may have been reached because of the specific mention of wage control in section 4(2). The majority, however, thought differently. They argued that regulation 5(2) which banned the making of instruments which would come into effect just after the freeze period ended indicated that the makers of the regulations were concerned with what happened beyond the freeze. They also thought it an important consideration that the Wage Freeze Regulations were part of a package including the Price Freeze, the Rent Freeze, the Companies (Limitation of Distribution), the Professional Charges (Price Freeze), Financial Services and the Limitation

26 Ibid. 390.
27 Ibid. 375.
28 Supra n. 3 at 77.

of Directors' Fees Regulations. From this they concluded that the purpose of the regulations was to promote economic stability rather than merely to impose a wage freeze. This they considered to be the means chosen to promote the purpose. Support for this view can indirectly be found in the Explanatory Note at the end of the regulations.[29] It is stated that the note is not part of the regulations but is intended to indicate their general effect. It provides:

> These regulations, which come into force on 23rd day of June 1982, freeze rates of remuneration until the close of the 22nd day of June 1983.

It is possible to argue from this that the effect of the regulations is to impose a wage freeze whereas the purpose of them is to promote economic stability.

It is submitted that this distinction between the majority and minority is crucial to their decisions. The majority thought that the purpose of the regulations was to promote economic stability and that the means or effect was a wage freeze. The minority, however, appeared to think that the purpose of the regulations was to impose a wage freeze for the year. Thus when it came to testing the validity of regulation 5A the majority asked whether it could be reasonably capable of being regarded as necessary or expedient for the promotion of economic stability, while the minority questioned whether the purpose of regulation 5A achieved anything at all, given that a complete wage freeze was already imposed by regulation 5 combined with the support given by regulation 8. If the limited purpose approach of the minority is adopted their argument becomes virtually unanswerable.

The definition of remuneration in the regulations[30] relates to that in the Wage Adjustment Regulations 1974:[31]

> "Remuneration" means salary or wages and all other payments of any kind whatsoever payable to any worker.

No increases in remuneration are allowed.[32] It is submitted that in terms of a wage freeze regulation 5 is fully effective in securing a wage freeze within the freeze period. Two consequences flow from this. First the argument that the freeze period could be used to do all the groundwork in wage negotiations and then just after the end of the freeze there will be a rush of award increases becomes irrelevant because these will take place after the freeze period. Secondly, the argument that non-remunerative conditions of employment disputes of interest will be outside the ambit of the freeze also becomes irrelevant because the freeze is only intended to freeze wages. Every kind of possible allowance that would take the form of a payment cannot be increased — thus a total remuneration freeze is effected. This is the probable explanation why the minority did not attach as much weight or significance to these arguments as did the majority. While they may affect economic stability their effect on a wage freeze is, at the greatest, minimal.

29 Supra n. 5 at 7.
30 Ibid. reg. 4.
31 SR 1974/143.
32 Reg. 5 provides that no instrument which increases a rate of remuneration may be created. "Instrument" is defined in reg. 3 and is fairly exhaustive.

It is submitted that the more general purpose adopted by the majority is correct. The purpose of the Governor-General in Council in making regulations is to promote the economic stability of New Zealand. It is further submitted that a close inspection of the empowering provisions supports this view. Regulations may be made only if in terms of section 3 they are reasonably capable of being regarded as necessary or expedient for promoting the economic stability of New Zealand. In section 4(2) the Minister is charged with doing all that he deems necessary or expedient for the general purpose of the Act and includes a reference to the stabilisation or control of wages. If this approach is adopted the question then becomes whether regulation 5A is reasonably capable of being regarded as necessary or expedient to promote the economic stability. The point must be made that regulation 5A was an amendment to the original regulations. It was challenged in isolation. Thus it is to be judged in the light of the wage freeze already imposed by regulation 5. Regulation 5A could not be defended by arguing that it prevents various bodies giving wage increases because that is a job already done by regulations 5 and 8. It has to have some effect beyond this which can reasonably be regarded as capable of promoting economic stability.

B. *Evidence*

It is at this stage that a very important matter arises. In deciding the outcome of the test, what considerations should the court take into account? Furthermore, what sort of evidence is admissible in argument either for or against the validity of the regulations? The issue is further complicated by the fact that many of the considerations must, by nature of the topic, be conjectural.

The starting point for the courts will always be the words of the empowering statute and the regulations. This approach has been shown in the cases already discussed. The courts will, by reference to the express terms of the statute, decide what the purpose of the Act is. If the regulations are permitted to be made to promote the general purpose of the Act, then the courts will decide what the object of the regulations is.

The matter was discussed in *Brader's* case. The judgment of McMullin J. is particularly useful. He referred to a passage in *Carroll* v. *Attorney-General for New Zealand*:[33]

> The Courts have no concern with the reasonableness of the regulation; they have no concern with its policy or that of the Government responsible for its promulgation. They merely construe the Act under which the regulation purports to be made giving the statute . . . such fair, large, and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. . . . The objects and intention of the Act can, of course, be gathered only from the words used, and, in my opinion, the same rule applies to the construction of the regulations.

This is very much a question of law for the courts alone to decide. Extrinsic evidence will not be allowed if it is intended to show the purpose of the regulations. In *Brader's* and in *Carroll's* case affidavits were submitted by government officials.

33 [1933] N.Z.L.R. 1461, 1478 per Ostler J.

In the latter case the affidavit was excluded because the official expressed an opinion as to the purpose of the regulations. In *Brader's* case the affidavit evidence was admissible because it showed only the workings and the effects of the regulations. As McMullin J. said:[34]

> Whether regulations are or are not ultra vires a statute is a matter which ought usually to be decided on the face of the regulations without recourse to extrinsic evidence. But there may be cases in which regulations are so technical in content as to require some elucidation as to their practical working.

Again, then, there is this distinction between purpose and effect. In the *Drivers'* case, therefore, if the validity of the original regulations had been at issue, the minority would not have admitted evidence which would show the effect of the regulations because the effect of the regulations was what they considered to be the purpose. The majority would have admitted evidence to show the effect of the regulations, i.e. to show that the wage freeze would bring inflation down. This obviously could lead to some confusion.

The point was made by Caldwell that admission of evidence to show the effects of regulations is to let evidence which shows the "objects and purpose of the regulations through the back door."[35] He further points out that it is natural to assume that what the regulation achieved was what it was intended to achieve. Thus it is no real step from showing the effects of the regulations to showing the purpose of them.

If the effect of the regulations can be clearly established the court will be more likely to draw the inference as to the purpose of the regulations which flow from the effect. In terms of *Brader's* case, once it was firmly established that the effect of the regulations would be to conserve petroleum and that a failure to conserve could adversely affect the economy (all matters within the grasp of the average citizen) then the logical inference to draw from this is that the regulations could reasonably be regarded as necessary for the purpose of economic stability.

If the effect of the regulations is a question of fact, then as Turner J. said in *Reade* v. *Smith*[36] the question will be very difficult to resolve against the Crown. Furthermore if the effect is a matter of opinion or speculation as to future possibilities it must be almost impossible to resolve against the Crown. This process of admitting extrinsic evidence is thus heavily weighted in favour of the Crown. They will have the best, most acceptable, sources of information. If the Government can show that the regulations have some effects reasonably capable of being related to economic stability they will be virtually home and dry.

Furthermore if the party arguing that the regulations were invalid had conclusive evidence that the regulations were made for the purpose of, for example, curbing the trade unions, then it would be inadmissible even though it shows clearly that the regulations, while they may incidentally have an effect on economic stabilisation, have a central and dominant object designed to promote something

34 Supra n. 3, p. 83.
35 J. F. Caldwell "Economic Stabilisation and Carless Days" [1981] N.Z.L.J. 542, 543.
36 [1959] N.Z.L.R. 996, 1001.

entirely different. It is submitted that there is likely to be a presumption in favour of the evidence of the Crown. If they can show that the regulations would have, or had, some beneficial effect on the economic stability of New Zealand, or would have some effect that was capable of being regarded as necessary or expedient for the promotion of economic stability, then the regulations will prevail.

Evidence is of course only really relevant to questions of fact and in many cases the regulations can be judged on questions of law only. In *Reade* v. *Smith* for example the matter was decided on a question of law because the effect of the regulations was against one of the express purposes or policies of the Act, thus invalid. The question in *Brader's* case was much more a question of fact. The question of the validity of regulation 5A in the *Drivers'* case is much harder to categorise. Regulation 5A was not expressly authorised by the statute but at the same time was not contrary to its express policies. The majority looked at the effects regulation 5A might have and decided that these would have some effect on economic stability. The interesting point to note is that the court did this without, it appears, any actual hard fact evidence of the effects of the regulation. If the facts of the case were changed slightly and the amendment had been made six months after the original regulations and challenged six months later, the result may have been different. The Drivers may have been able to bring evidence to show that over that period regulation 5A had had no effect at all on the situation brought about by the original regulations.

Any challenge based on evidence must involve evidence to show that the state of knowledge at the time the regulations were made was such that it was known by the regulation makers, or obvious to them, that these regulations would have no effect at all reasonably capable of being regarded as necessary or expedient for promoting economic stability. However, it is clear that it would be very difficult to establish this.

The way the *Drivers'* case was settled was very much on the basis of opinion. In the opinion of the majority it was possible that regulation 5A may have had some effect on economic stability, the minority thought not. The decision could thus be classified as part-law and part-opinion based on general knowledge rather than admitted expert evidence.

It is submitted that it is this sort of complex question which the court will have enormous difficulty in deciding. The weight to be given to each consideration will be very hard to determine. Exactly what sort of evidential considerations are admissible remains unclear.

In conclusion to this part it is perhaps important to stress three things. Firstly, the empowering provision in section 11 of the 1948 Act is expressed in very wide terms and has been interpreted liberally. Secondly, this liberal interpretation makes it hard for litigants to satisfy the court that the regulations were not reasonably capable of being regarded as necessary or expedient to promote economic stability. Thirdly, the evidence admissible to prove an assertion that the regulations fail to satisfy the reasonably capable test is quite limited. As many

of the evidential considerations will by their nature be speculative the task is made even more difficult if a litigant is to successfully defeat the regulations.

III. CONSTITUTIONAL PRINCIPLES AND INTERPRETATIVE PRESUMPTIONS

Even though regulations may satisfy the reasonably capable test, they may still be held invalid if they offend a constitutional principle. There are certain constitutional principles which limit the scope and powers of the executive to legislate. From these principles the courts have developed a set of presumptions of interpretation. Based upon the principle that the Crown may not suspend the laws of Parliament,[37] there is the presumption that regulations will not derogate from statutes. They will look to see if the provisions of the regulations clash or are inconsistent with the provisions of any statutes. If they do the regulations will be presumed to be invalid unless there is clear antecedent authority from Parliament for the inconsistency. An example of express antecedent authority is the new section 11A[38] of the Economic Stabilisation Act which will be discussed in Part IV.

Also based on constitutional principle is what is known as the rule in *Chester* v. *Bateson.*[39] The courts have formed the presumption that regulations should not prevent a citizen going before the courts to seek determination of rights unless there is very clear parliamentary authorisation. The majority in the *Drivers'* case[40] even expressed doubt about the ability of Parliament itself to remove the jurisdiction of the courts. This principle and presumption will be discussed later.

The majority in the *C.S.U.* case[41] based their decision on the presumption that regulations may not derogate from statutes unless authorised. They said:[42]

> It is an important constitutional principle that subordinate legislation cannot repeal or interfere with the operation of a statute except with the antecedent authority of Parliament itself. It is a constitutional principle because it gives effect to the primacy of Parliament in the whole field of legislation. And as a corollary a rule of construction springs from it that the Courts will not accept that Parliament has intended its own enactments to be subject to suspension, amendment or repeal by any kind of subordinate regulation at the hand of the Executive unless direct and unambiguous authority has been spelled out to that effect, or is to be found as a matter of necessary intendment, in the parent statute.

It is submitted that the court appears to have confused the principle and the presumption. They have been confused because they have not really drawn a distinction between them. What they describe as the constitutional principle in the first sentence of the quote just given is in fact the interpretative presumption. The second sentence is the constitutional principle. The principle is that Parliament is supreme. The rule of construction is just an expansion of the presumption.

37 The Bill of Rights 1688 "(1) *Suspending Power* — That the pretended power of suspending of laws or the execution of law by regal authority without consent of Parliament is illegal."
38 Inserted by s. 5 of the Economic Stabilisation Amendment Act 1982.
39 [1920] 1 K.B. 829.
40 Supra n. 6 at 390.
41 Supra n. 9.
42 Ibid. 745.

The distinction becomes important and will be discussed later in relation to the difference in judicial approach in the *C.S.U.* case and the case of *Auckland City Corporation* v. *Taylor*.[43]

The *Shop Employees* case[44] dealt in part with the question of repugnancy. It was argued by the Shop Employees Union that the Stabilisation of Remuneration Regulations 1972[45] purported by regulation 16(5) and (6) to limit the powers of the Court of Arbitration which was set up by the provisions of the Industrial Conciliation and Arbitration Act 1954. One of the questions asked of the Court of Appeal was whether regulation 16(5) and (6) was ultra vires and void by reason of repugnancy to the Industrial Conciliation and Arbitration Act 1954 and in particular to sections 32, 36 and 47(1) thereof.

Shelton made an excellent summary of the Court's decision:[46]

> The Court found that although the Court of Arbitration had, under the Industrial Conciliation and Arbitration Act 1954, a wide jurisdiction in industrial matters, this jurisdiction was limited by the qualification in section 36, that orders of the Court could not be 'inconsistent with this or any other Act'. Section 4 of the Acts Interpretation Act 1924 provides that the word 'Act' when used in any statute includes not only an Act of Parliament but also rules and regulations made thereunder. The Court of Appeal held that the regulation was not repugnant to the Industrial Conciliation and Arbitration Act 1954 — the jurisdiction of the Court of Arbitration had never been absolute, section 36 restricted the Court to making orders not inconsistent with any other statutes or regulations.

This extract illustrates that although the regulations did interfere with the operation of the statute it was not invalid because of the limitation placed on the operation of the statute by the statute itself. In other words Parliament was held to have intended that the court's jurisdiction not be complete. This intention was sufficient antecedent authority for the interference. The court did not really have to discuss whether the Economic Stabilisation Act authorised inconsistency with statutes. However, there are implications throughout the judgments that the ambit of the Act is such that to fulfil its purposes it is inevitable that regulations made under it will trespass on other statutes, especially in the heavily statute-controlled area of wage fixing.

Richmond J. said:[47]

> . . . I have reached the conclusion that it must have been the intention of the legislature, when it enacted the Economic Stabilisation Act, to authorise the making of regulations which would, to such extent as the Governor-General in Council might consider necessary or expedient for the general purpose of the Act, derogate in some degree from the ordinary statutory procedures for fixing rates of wages in various sectors of the community.

This effectively amounts to a statement that Parliament must be taken to have implicitly authorised a certain amount of interference. However, as Turner P. said:[48]

43 [1977] 2 N.Z.L.R. 413.
44 Supra n. 16.
45 SR 1972/59.
46 Supra n. 13 at 154.
47 Supra n. 16 at 536.
48 Ibid. 530.

> Whether such regulations go so far as to transgress the proper ambit of the empowering section in any given case, may possibly become ultimately a question of degree.

This retains an element of flexibility for the courts and furthermore it is probable that no other approach would really work. It is interesting to note that the reasonably capable test is also based to some extent upon degree. In terms of the *Brader* discussion of the question by Cooke J. just when a connection is remote or tenuous is definitely a question of degree.[49]

Exactly the same issue arose on the facts of the *Drivers'* case but was not really addressed. The regulation clearly derogated and interfered with the workings of the Industrial Relations Act 1973 and many other Acts besides. Section 48(4) of the Industrial Relations Act is the equivalent of section 36 of the Industrial Conciliation and Arbitration Act. The court thought that regulation 5 was a valid limitation on the Arbitration Court and thus inferentially upon the statute that set it up.

The *C.S.U.* case is a good illustration of Turner P.'s comment that it is a question of degree. In that case the challenge to the regulations was based on an alleged inconsistency with the provisions of the State Services Conditions of Employment Act 1977. The challenge was in effect that the regulations should not apply where the provisions of the 1977 Act already applied. The majority of the Court of Appeal agreed.

As with much of New Zealand's wage and salary negotiations the procedures and guidelines for controlling conditions of employment in the State Services are provided by statute. The 1977 Act was an attempt to encapsulate in a statute a structured and co-ordinated means of administering employment conditions of the State Services. The Act sets up a number of tribunals and other methods for hearing applications and settling disputes. One such body was the State Services Co-ordinating Committee. The code provided by the Act was intended to be exclusive. Section 6(1) provides:

> Except as otherwise provided in this Act and *notwithstanding anything to the contrary in any other enactment,* as from the commencement of this Act, the conditions of employment of employees in the State services shall be prescribed by an employing authority by *determination under this Act and not otherwise* (emphasis added by the majority).

The majority thought that this was an important provision that contained "strong language".[50] They analysed the effect of the regulations upon the provisions of the Act and concluded:[51]

> So quite clearly there is an inconsistency between Act and regulations, in three important respects. First there is the direct conflict with s. 6(1). Second, the regulations attempt to impose an overriding qualification upon the statutory criteria. And third they would abrogate the review provisions of the Act.

Bearing in mind the constitutional principle and the presumption based on it the majority discussed whether the Economic Stabilisation Act gave the necessary

49 Supra n. 3 at 78 (and supra n. 19).
50 Supra n. 9 at 744 and 747.
51 Ibid. 745.

antecedent authority for regulations to override statutes. It pointed out that virtually all wage agreements in New Zealand were subject to some statutory control. It drew the distinction between the Arbitration Court legislation (The Industrial Relations Act 1973) and the State Services Conditions of Employment Act 1977 in that there is no equivalent to section 48(1) which prohibits the Arbitration Court making orders inconsistent with any other Act in the 1977 Act. The court referred to Turner P. in the *Shop Employees* case and concluded:[52]

> We think that in the light of its spirit and declared purposes the Act is wide enough to authorise regulations controlling wages payable directly or indirectly under statutory schemes. To treat a statute-controlled area as automatically outside the reach of the Act would be to emasculate or frustrate seriously the power that Parliament conferred in 1948.

The court clearly anticipated that there may be occasions where the regulations would be valid even though inconsistent with other statutes. However they continued:[53]

> Therefore the issue must involve a weighing of alternatives. Weighing them, we think that our constitutional duty is to resolve any conflict or doubt that arises in favour of the supremacy of Parliament. That is to say, special legislation as strongly worded as the 1977 Act is not to be overriden by mere regulations unless the authority to override it has been squarely and undoubtedly given by Parliament. Any other resolution would be too dangerous a constitutional precedent. In a case balanced as this one, it is vital that the Court should come down firmly on the side of that basic principle of democracy. We therefore hold unanimously that the Wage Freeze Regulations do not override the special code in the State Services Conditions of Employment Act.

To summarise the majority approach without, it is hoped, doing too much violence to their reasoning, constitutional principle demands that there is a general rule that delegated legislation which interferes with, or is repugnant to, the operation of a statute except with the antecedent authority of Parliament will be presumed to be invalid. Due to the special nature of the Economic Stabilisation Act, Parliament must be taken to have intended that there would be occasions, especially in the wages field, when statutory procedures would be interfered with by regulations. When a statute is of such a nature as the State Services Conditions of Employment Act, i.e. legislation specifically enacted to provide for a particular purpose after due consideration and which clearly purports to have exclusive jurisdiction, the court will take it that it was not intended to be overridden by mere regulation unless there was clear antecedent authority.

The approach of the courts in the *Shop Employees* and the *C.S.U.* cases is interesting to compare to that taken by Perry J. in *Auckland City Corporation* v. *Taylor*.[54] That case was very similar to the *C.S.U.* decision. The case considered the effect the Economic Stabilisation (Rent) Regulations 1976[55] had on the Rent Appeal Act. The regulations provided for an overriding and predominant consideration to be taken into account by every Rent Appeal Board, and were clearly in conflict with the provisions of section 8 of the Rent Appeal Act 1973.

52 Ibid. 746.
53 Ibid. 747.
54 [1977] 2 N.Z.L.R. 413.
55 SR 1976/122.

Perry J. said:[56]

> To hold that the government may by regulation alter a statute enacted for a specific purpose or to hold that when the legislature has carefully set out the way in which the board is to assess an equitable rent then that can be completely overridden by a regulation specifically incorporating 'an overriding and predominant consideration' is, in my view, a very sweeping claim. Here we have an Act of Parliament specifically enacted for the purpose of determining the equitable rents of dwelling houses — providing for the establishment of Rent Appeal Boards to make such determinations and setting out in careful detail the way in which such boards are to exercise their jurisdiction.

He continued:

> The question, then, is whether the Economic Stabilisation Act 1948 authorises the modification of such an Act. In the absence of a specific power I do not consider it does.

There are two important points to note from these passages. First, Perry J. placed much emphasis on the fact that it was a statute enacted for a specific purpose, very carefully considered, seemingly complete and exhaustive. Secondly that he required express, specific authorisation to override the statute before the regulations could be valid.

As in the *C.S.U.* case there was no provision in the Rent Appeal Act similar to section 48(1) of the Industrial Relations Act which limited the jurisdiction of the Act. The reliance on the texture of the Act interfered with was the same in both cases. The absence of any mention of *Taylor's* case in the *C.S.U.* decision may be explained by the fact that in the *Drivers'* case the Solicitor-General had sought to have it overruled by the Court of Appeal, because of its similarity to the *C.S.U.* case the court may not have wanted to mention it. This is purely conjecture.

It is submitted that there is a difference in approach between Perry J. in *Taylor* and the Court of Appeal in *Shop Employees* and the *C.S.U.* case. Perry J. gave the interpretative presumption the standing of a rule that could not be defeated except by express antecedent authorisation. The majority in the *C.S.U.* considered that the presumption did not require specific express antecedent authority but was a major consideration in a "weighing of alternatives".

It is submitted that the courts in these cases have been faced not merely with a clash between regulations and an Act but also between Acts. This is an issue that has been lying beneath the decisions in the cases. The decisions have tackled the clash between regulation and Act, but only in part the clash between the operation of the Acts. They have tackled the symptom but have not really addressed the cause. The wage, price and rent freeze measures taken under the Act have all been accepted as valid uses of the regulation making power. Turner P. in *Shop Employees* commented that a ceiling on salaries and wages was just the sort of thing likely to be imposed for the purposes of the Act.[57] It is a clash of textures and purposes. There is the wide general power given by the Economic Stabilisation Act and the specific provisions of an Act like the State Services

56 Supra n. 54 at 417-418.
57 Supra n. 16 at 529.

Conditions of Employment Act 1977. On the one hand there is a very detailed and comprehensive Act which provides for a complete statutory scheme intended to operate exclusively. On the other hand there is an Act which provides a very wide and general power to make regulations to promote economic stability. A perfectly ordinary use of this power such as the imposition of a wage freeze may interfere with the operation of the more detailed and specific Act. Thus there is a clash not only between the regulations under the 1948 Act and the 1977 Act, but also between the 1948 Act itself and the 1977 Act. In the *C.S.U.* case the great reliance placed on section 6(1) illustrated that the Act intended to provide an exclusive code. In the *Shop Employees* case section 36(1) of the Industrial Conciliation and Arbitration Act 1950 indicated that the court was not intended to be sacrosanct or exclusive. What the courts did not address was when the Economic Stabilisation Act was to take over from the ordinary statutes. They stopped short, saying only that it was a matter of degree.

McMullin J. in the minority in the *C.S.U.* case has specifically addressed this clash of textures. He saw the issue in the case as:[58]

> Whether or not this challenge can be sustained depends on the construction to be placed upon certain provisions of the State Services Conditions of Employment Act, s. 6(1) in particular, *and a consideration of the relationship between that Act and the Economic Stabilisation Act.* (Emphasis added.)

He went on to discuss the two Acts and concluded:[59]

> This compendious phrase [the opening words of s. 6(1)] does no more than emphasise that conditions of employment shall be determined under the State Services Conditions of Employment Act and no other Act. But it does not impinge upon the operation of the Economic Stabilisation Act. There is no reason why both enactments should not stand together. They are intended to apply to different circumstances and they are not mutually repugnant. The Executive is left free to invoke the Economic Stabilisation Act if it can reasonably form an opinion that a movement in wages likely to occur on the application of the formula provisions of the State Services Conditions of Employment Act requires freeze regulations in the interests of the stability of the economy.

The point that McMullin J. is making is a good one. There is a clash between the wide ranging ambit of the Economic Stabilisation Act and the more limited operation of the State Services Conditions of Employment Act. If the purpose of the Economic Stabilisation Act is to provide a power for the executive to act quickly in times of economic crisis by interfering in the economy in some way, then it is perfectly foreseeable that the operation of the Act will interfere with the operation of the Acts intended to deal with some area of the economy in more normal times. The purpose of the 1948 Act is not to allow the executive to suspend statutory procedures at will but rather to promote economic stability. It is conceivable that on occasions the fulfilment of this function will trespass upon the ordinary statutes. There is, on one way of looking at it, an almost inevitable clash of purpose. McMullin J. argues that when the occasion is appropriate it should be recognised that the purpose of the 1948 Act should be paramount. In the area of wage fixing there is almost bound to be a clash between

58 Supra n. 9 at 748.
59 Ibid. 749.

regulations imposing a wage freeze, pursuant to the purposes of the Economic Stabilisation Act, and other Acts which provide for normal procedures of wage fixing because those procedures will have become redundant as no change in wages can be fixed. When measures are introduced by regulation to freeze wages, which are just the sort of measures likely to be introduced under the 1948 Act, inevitably there will be interference with other wage negotiations statutes. It is a little strange that interference should be all right in the context of the Industrial Relations Act 1973 but not in the context of the State Services Conditions of Employment Act. It is strange when the only real difference between them is the contrast between section 48(1) of the 1973 Act and section 6(1) of the 1977 Act. It is this difference, however, that has led to the different decisions. Both Acts serve exactly the same type of function and were enacted to serve the same sorts of purpose — one for the public sector, one for the private sector.

The different decisions must be attributed to the differences perceived by the court in parliamentary intention in the two Acts. Section 48(1) of the 1973 Act (or section 36 of the old 1954 Act) is worded in such a way that Parliament did not intend that it be exclusive. Section 6(1) on the other hand is strong evidence that Parliament intended the 1977 Act to be exclusive.

It is submitted that the more global view of McMullin J. would avoid the apparent inconsistency between the decisions in the *Shop Employees* case and the *C.S.U.* case. The specific Acts provide the ordinary procedure to be followed in normal wage negotiations. In times of economic instability when the executive feels that far-reaching measures are needed it can invoke the Economic Stabilisation Act. The operation of the 1948 Act is not intended to wreck or abolish the ordinary procedure, merely to suspend its operation for the period of the freeze.

Richmond J. in *Shop Employees* said something similar to this which has already been quoted.[60] He made the point that Parliament must have intended that regulations made under the 1948 Act would interfere in some way with the ordinary statutory procedures for wage fixing provided that that interference was considered necessary or expedient for the purposes of the 1948 Act.

It is submitted that it is unnecessary, having attributed this clear intention to the legislature, to frustrate it by reference to the provisions of the Act which is interfered with. The provision of section 6(1) of the State Services Conditions of Employment Act should not be interpreted as extending to cover the provisions of the Economic Stabilisation Act. As the Solicitor-General was reported to have said in the *C.S.U.* case it would be unlikely that the stabilisation regulations would not apply to 187,000 members of the work force.[61] Furthermore, it could not have been the intention of the legislature when it enacted the State Services Conditions of Employment Act section 6(1) that it would operate to exclude the effects of the Economic Stabilisation Act.

There was a further issue in the *Drivers'* case that had to be discussed once

60 See n. 47.
61 Supra n. 9 at 745.

regulation 5A had been held to satisfy the reasonably capable test. The majority posed it as follows:[62]

> Is the result altered by the traditional reluctance, based on fundamental constitutional principles, to allow the jurisdiction of the ordinary Courts to be taken away? The reluctance is especially strong when the interference is by regulation as distinct from an Act of Parliament; it may be called the rule in *Chester* v. *Bateson,* from the Divisional Court decision reported in [1920] 1 K.B. 829.

Chester v. *Bateson* concerned regulations made pursuant to section 1(1) of the Defence of the Realm Consolidation Act 1914. That section provided that regulations may be made in general for securing the public safety and defence of the realm. Further there was a power to authorise the trial and punishment of persons committing offences against the regulations and in particular against regulations that were designed specifically in this case to prevent assistance being given to the enemy or the successful prosecution of the war being endangered. Regulation 2A(2) of the Defence of the Realm Regulations 1917 provided that munitions workers who lived in "special areas" may not have actions taken against them to obtain an order or decree for recovery of their houses or for the eviction of tenants from the houses they lived in. Darling J. said of the regulation:[63]

> It is to be observed that this regulation not only deprives the subject of his ordinary right to seek justice in the Courts of law, but provides that merely to resort there without the permission of the Minister of Munitions first had and obtained shall of itself be a summary offence, and so render the seeker after justice liable to imprisonment and fine.

The right to seek justice was held to be an elemental right that could not be taken away except by Parliament. The regulation making power did not authorise such a step as was taken in regulation 2A(2).

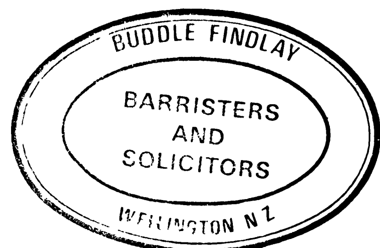
In the *Drivers'* case the majority drew the distinction between industrial arbitration and the determination of legal rights. Regulation 5A only suspended the use of the Arbitration Court for disputes of interest which is an arbitral function of the court, but one that involved the determination of legal rights. The rule in *Chester* v. *Bateson* did not apply because regulation 5A did not prevent the court from exercising its jurisdiction in solving issues of right.

What is interesting about the discussion in the majority judgment is this dictum:[64]

> At the beginning of our consideration of this question we wish to underline the importance of the rule in *Chester* v. *Bateson.* Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

It is clear that the majority considered that the rule enshrines a constitutional principle of some importance. What is more interesting is that the expression of doubt about the ability of Parliament itself to prevent access to the courts for the determination of rights.

62 Supra n. 6 at 390.
63 [1920] 1 K.B. 829, 834.
64 Supra n. 6 at 390.



Two points can be made about this. Firstly, it is clear that they would require at the very least a provision expressing specifically that regulations made pursuant to the Act may deprive a person of the right to seek justice before the courts of the land. Secondly it is more probable that they considered that regulations can never do this. It appears that they considered it not an interpretative presumption rather an irrebuttable principle. Their doubt as to the ability of Parliament to take away the right is contrary to the decision in *Chester* v. ***Bateson*** itself. Darling J. quoted a passage with apparent approval[65] from Scrutton J. in *In re Boaler*.[66] Scrutton J. held that Parliament could deprive the subject of having the right to have his or her rights determined by the courts. While the opinion of the majority stems, no doubt, from a desire to uphold the separation of powers theory, it may just impinge upon the sovereignty of Parliament.

IV. CONCLUSIONS AND AFTERTHOUGHTS

It might well be commented that the discussion in Part III of this note is of historical interest only when considered in the light of the Government's response to the decision in the *C.S.U.* case. When the decision was handed down the Government decided to validate the regulations and change the empowering Act rather than convert the wage/price freeze into the form of an Act. In a flurry of parliamentary activity the Government introduced and had passed the Economic Stabilisation Amendment Act 1982. Such was the speed with which it was rushed through the House that Mr Geoffrey Palmer M.P. was prompted to say:[67]

> The proceedings of the Select Committee were a study in the wondrous ways of making bad law. The Bill was introduced into the House yesterday. Yesterday we sat beyond 3 am. At 9 am the Select Committee began listening to evidence. It sat until a quarter to two. At 5.30 pm when the House rose, its members went back to deliberate. We finished at 6.30 pm and we are now engaged in a proceeding to pass the Bill through all its stages. . . .

Mr Palmer was highlighting the time, or rather lack of time, in which the Act was passed. In no uncertain terms he was arguing that there was iinsufficient time for full consideration and debate on the Bill. The Commerce and Energy Committee, to whom the Bill was referred, recommended the insertion of a provision for disallowance if within twenty eight days after having been tabled in Parliament a resolution is passed to disallow them.[68]

The Amendment Act overturned the effect of the decision in the *C.S.U.* case in section 9(1):

> The regulations specified in the Schedule to this Act are hereby validated and confirmed and are hereby declared to be, and to always have been, validly made under the principal Act.

The effect of this provision is twofold. First, the regulations specified in the Schedule to the Act are validated. Thus no question as to their validity can arise in the future except in so far as section 9(3) provides that section 9(1) does not

65 Supra n. 63 at 834.
66 [1915] 1 K.B. 21, 36.
67 N.Z. Parliamentary debates vol. 449, 1982: 5703.
68 Section 6 of the 1982 Amendment Act inserted the new s. 13A into the Act.

apply in cases of prosecutions for offences committed before the commencement of the Amendment Act. Secondly the regulations have been declared "to be and to have always been, validly made under the principal Act." This is a rather curious provision. If only the first limb of the provision had been enacted Parliament would in effect be saying that they accept the decision of the Court of Appeal and that this is legislation to change the effect of that decision and validate the regulations. The second limb goes further. In declaring the regulations to have always been validly made it appears to be saying that the reasoning in the decision is also overturned.

It could be argued that one of two things is being said in the second limb of section 9(1). First, it could mean that the Economic Stabilisation Act authorised such inconsistency with the State Services Conditions of Employment Act. Secondly, it could mean, more generally and more significantly, that regulations may override it or interfere with statutes. Against the second possibility it is arguable that if this is what Parliament intended the section to mean, then the new section 11A enacted by the Amendment Act would be unnecessary and too narrow. The new section 11A provides that regulations made under the Act shall prevail over certain specified Acts listed in section 11A(2) in so far as they relate to certain areas of the Acts to do with remuneration mentioned in (1)(a), (b) and (c). (It is to be noted that the Industrial Relations Act 1973 and the State Services Conditions of Employment Act 1977 both appear in section 11A(2).) It also provides in section 11A(3) that regulations shall prevail over any Act that provides for the control adjustment or fixing of rents where there is conflict between them.

It is submitted that the new sections 11A and 9(1) of the 1982 Amendment Act must have some meaning. Therefore the second possibility mentioned above cannot be what Parliament intended. Section 9(1) must therefore be interpreted more restrictively. The section will be read as referring only to the regulations in the Schedule and to have no further effect. Its effect is to deem them to have always been valid. Section 11A on the other hand is intended to have future operation. There is now clear and unequivocal authority to make regulations which affect or conflict with the Acts mentioned in section 11A(2). Section 11A can be seen to be in fact enhancing the decision of the court in the *C.S.U.* case. It illustrates that Parliament recognises the constitutional principle and the presumption and is ensuring that in future no question of lack of antecedent authority arises.

It is also submitted that section 11A(2) is further evidence that, as was discussed before, the conflict was not so much between the stabilisation regulations and other Acts rather than the Economic Stabilisation Act itself and other Acts. Parliament has recognised that in the operation of the Economic Stabilisation Act there will be occasions on which regulations made pursuant to it are bound to conflict with the operation of other Acts.

In December 1983 the legislature passed the Finance Act 1983. Section 2(1) deems part I of that Act to be part of the Economic Stabilisation Act 1948. Section 4(1) of the Finance Act provides that without limiting the generality

of section 11 of the principal Act (Economic Stabilisation Act 1948) stabilisation regulations may:

> regulate, control, or adjust, or provide for the regulation, control or adjustment of, (a) The rates of interest payable in respect of mortgage loans or any class or classes of mortgage loans; or (b) The finance rates of any mortgage loans or any class or classes of mortgage loans; or (c) Both.

Section 4(1) may only be used in the circumstances provided in section 4(3) and (4), that is where the mortgage loan is in existence and there is a variation of interest clause in the mortgage itself either by way of discretionary option on the part of the lender or the borrower or by way of review on a specified date or event. When the review is undertaken the provisions of the Finance Act apply. Section 4(5) provides for some exemptions from the application of the powers in section 11 of the 1948 Act and section 4(1) to (4) of the Finance Act. Section 4(7) provides that where the mortgage limits the extent of the review in terms of the change of interest rate that limit will take effect notwithstanding the stabilisation regulations.

The actual effect of the Finance Act 1983 on the Economic Stabilisation Act is difficult to determine. Although section 4(1) provides that the powers in that section do not limit the powers under section 11 of the 1948 Act, it is arguable that at least control of mortgage interest rates by stabilisation regulations is now covered entirely by the provisions of the Finance Act 1983. By the same token it is at least arguable that section 11(1) was seen by the government as not authorising across the board controls of mortgage interest rates. It is the writer's opinion that control of mortgage interest rates by regulation would have passed the "reasonably capable" test. It is a step at least as likely as the carless days regulations to promote economic stability.

There is no doubt that the Finance Act 1983 provides for a more limited and controlled power than section 11 of the 1948 Act. The question arises why did the Government choose to do what they did in this way, i.e. why did they not make regulations under section 11 of the 1948 Act to control mortgage interest rates? Any answer must be speculative and probably based on political considerations. Of some significance is section 4(8) of the 1983 Act which provides for the retroactive effect of the stabilisation regulations presumably to defeat any attempted avoidance of the threatened interest rates controls.

The discussion in Part III of this note is of more than historical interest. The cases are mainly recent decisions of the Court of Appeal. The same reasoning and judicial techniques may well be applied to regulations made under the Economic Stabilisation Act where what is at issue is something like the presumption that regulations may not prevent access to the courts for determination of rights. There are Acts not mentioned in section 11A(2) which may conceivably be interfered with. In the carless days and supply of petrol context, the Motor Spirits Distribution Act is an example. Furthermore there may be similar empowering provisions in other Acts.

The cases and the Amendment Act provide a background from which it is possible to make some comments of a more general nature on the way the New

Zealand constitution is working. The writer recognises that these comments are not in any way intended to be more than an identification of issues. Shelton in her thesis concluded:[69]

> The needs of the modern state have required the executive to acquire and exercise powers, including legislative powers, in and over the economy. If constitutional law is genuinely concerned with the control of the functions of government, and if the Constitution is to return to a degree of coherence, the existence and nature of these powers of the executive must be incorporated into the New Zealand Constitutional system, and, within the democratic process, ways of controlling them must be found.

It is submitted that since Shelton concluded this, the controls on the executive have certainly not been tightened and if anything have been relaxed even more.

The "reasonably capable" test which demands only a connection with the main purpose of the empowering Act that is more than tenuous or remote will in fact mean that virtually all regulations made pursuant to an empowering provision similar to that of the Economic Stabilisation Act will be held to be valid. This is evidenced by the decision of the majority in the *Drivers'* case which held that regulation 5A was valid.

The presumption that Parliament would not abandon the entire field of the economy to the executive is being gradually eroded by the increasing use of the powers of the 1948 Act. In times of world economic recession and hardship, when New Zealand's economy is forever threatened by inflation, large overseas debt and increasing balance of payment problems, most economic policies could be upheld in the name of economic stability. When the most significant government action in dealing with the economy in the last ten years was taken by Order in Council, one begins to wonder about the validity of the presumption.

Another area of worry was outlined by the Statutes Revision Committee in its report on the Remuneration (New Zealand Forest Products) Regulations 1980. The committee pointed out that because section 4 of the Acts Interpretation Act 1924 provides that "Act" includes regulations a statute which allows something to be done "by any other Act" means that Parliament has in effect waived its sovereignty. It stated:[70]

> This Committee is of the opinion that no amendment or alteration of an Act of Parliament should be effected by a simple act of the Executive unless Parliament has made a conscious decision that such a course is appropriate in all the circumstances.

It was this factor which lead to the decision in the *Shop Employees* case and was of some influence in the *Drivers'* case. These decisions mean that the Arbitration Court's jurisdiction can be interfered with by regulation, and that regulations may interfere with the operation of the Industrial Relations Act 1973. The new section 11A of the Economic Stabilisation Act is in part also contrary to the spirit of the committee's opinion. While Parliament has enacted an almost

69 Supra n. 13 at 405.
70 *Report of Statutes Revision Committee on Remuneration (New Zealand Forest Products) Regulations 1980* New Zealand Parliament House of Representatives, Appendix to the journals, vol. 5, 1980, IS: 9.

complete list of the Acts that may be interfcred with,[71] what it could not predict are the circumstances in which those Acts will be interfered with.

By overturning the decision in the *C.S.U.* case the Amendment Act spurned a decision that highlighted the traditional limits of executive power and at the same time slashed at the fetters which impose those limits. Its effect, as Mr Geoffrey Palmer M.P. pointed out, is slightly ironic:[72]

> The Court of Appeal said that Parliament is supreme; the Government is saying that Parliament should surrender that supremacy. . . . The Government's Bill clearly invites the House to make a conscious decision to transfer its powers to make law to the Executive branch of the Government

While the last sentence may reek of political exaggeration, there is no doubt that section 11A does give the executive wide powers. It illustrates the fuzzy nature of the modern separation of powers. First, not only does the executive have the power to make law which implements broad economic policy, but now they do it at the expense of Parliament. The executive can make law which overrules statutes. Secondly, the passing of such a piece of legislation begins to undermine the relationship between the courts and the executive in the control of delegated legislation. The Amendment Act removed one aspect of judicial control over regulations made pursuant to the 1948 Act. While the court might well have anticipated some parliamentary measures to validate the regulations, the Amendment Act went further than that.

Not all is bleak however. The willingness of the courts to uphold the *Chester* v. *Bateson*[73] rule in appropriate cases is encouraging, as was their willingness to uphold the presumption against repugnancy. If all else is lost the new section 13A with its provision for disallowance of the regulations by resolution of Parliament may be indicative of the move towards more parliamentary scrutiny and control of delegated legislation. This may act as a check on policy while the courts will remain a check on legality.

While on the face of it the regulation making power under the Economic Stabilisation Act 1948 may seem very wide, there are limitations to, and controls on it. Yet still there is a fear that the power, which may be considered necessary in these troubled economic times, may be abused. That has been a problem forever:[74]

> O, it is excellent
> To have a giant's strength, but it is tyrannous
> To use it like a giant.

71 The Acts which deal with rent in relation to s. 11A(3) are not listed.
72 Supra n. 67 at 5620.
73 [1920] 1 K.B. 829.
74 Shakespeare *Measure for Measure* Act II, Scene 2, Line 107.