SUBMISSION ON APPEALS TO THE PRIVY COUNCIL

1. Introduction

1.1 This submission is made by the New Zealand Business Roundtable (NZBR), an organisation comprising primarily chief executives of major New Zealand businesses. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.

1.2 The submission responds to the discussion document *Reshaping New Zealand's Appeal Structure* (December 2000), referred to below as 'the discussion document'. The document appears to take it as a forgone conclusion that appeals to the Privy Council will be abolished and implies that discussion is only required as to the new appeals system. For this reason, many businesses and business organisations have not troubled to respond to the discussion document. However, the NZBR considers the fundamental issues relating to any move to abolish appeals need to be addressed.

1.3 Major commercial enterprises constitute the most significant group of users of the Privy Council's services as the final appellate court for New Zealand. This submission is made from the standpoint of the commercial community. It is notable that of the nine cases decided by the Privy Council and reported in the [2000] *New Zealand Law Reports* (ie all substantive judgments of the Privy Council during the relevant period), six involved commercial enterprises (three being government-owned), one of the remaining three cases involved the right to earn a living, and major commercial interests were at stake in another. Contrary to claims that cases are increasingly being sent back to New Zealand, only one of these cases (not a commercial case) was remitted. There does not appear to be any fall-off in recourse to the Privy Council. By the end of April 2001, five further judgments had already been given and other cases were outstanding. These continue the dominant

pattern of appeals being commercial and private law matters, as shown in the Annex.

1.4 The conclusion of this submission is that, from a practical point of view, there are currently benefits from retaining appeals to the Privy Council. Other issues to do with the functioning of the courts and the appeal system should be addressed before this step is considered. The arguments for abolishing appeals appear to be promoted primarily by people and organisations that are unlikely to be involved in major litigation and appear to reflect concerns other than those felt by actual litigants.

2 Alternatives proposed in the discussion document

2.1 The NZBR believes any jurisdiction needs a final court of appeal that has the time to give careful consideration to a small number of cases of general public importance. This dictates the structure of the appeal system, since if the judges of that court are also judges of a busy appeal court that hears a large number of appeals from trials, that object is largely defeated. It follows that there must be a second appeal, and any court structure involving only one appeal – Option One in the discussion document – is not supported.

2.2 The other two options canvassed in the paper are essentially the same. The only difference between the proposed appeal tier of the High Court and a divisional court of the Court of Appeal is the presence of one Court of Appeal judge on the latter. Both these proposals essentially reflect the Court of Appeal's current practice of hearing a large number of cases before divisional courts composed of one Court of Appeal judge and two High Court judges. Experience with the divisional court system has not been uniformly happy. In both the criminal and commercial areas, cases have been mishandled by divisional courts and major confusion has resulted. *Carter Holt Harvey v McKernan* [1998] 3 NZLR 403 was particularly embarrassing and, but for a procedural stratagem, would have resulted in the inadequacies of a divisional court being exposed in the Privy Council. *R v Sew Hoy* provides an example of the divisional court system preventing the

court from clearing up confusion on an important matter, as to have done so would have involved overruling the decision of a 'proper' bench of the Court of Appeal. A litigant who appeals to the Court of Appeal expects to have the case dealt with by a court of three appeal judges. The divisional court system is not a good precedent for a first stage appeal and the current system of five-judge benches and divisional courts gives the worst of both worlds, wasting resources on some cases and providing inadequate service for others.

2.3 All three options assume that our Court of Appeal, constituted as at present, is suitable as a court of final appeal. Much of the debate has been conducted on the basis that it is now ready to assume this role. The NZBR does not wish to get into a debate about the quality of our current judges.[1] It seems inappropriate, however, to compare our Court of Appeal with the Privy Council which is the Judicial Committee of the House of Lords. The proper comparison for our Court of Appeal is with the English Court of Appeal. There is no reason to suppose that our Court of Appeal is of any lower quality than the English counterpart, even though New Zealand has proportionately more Court of Appeal judges than England and Wales. But nor is there any reason to suppose that it is markedly superior to the English equivalent and capable of replacing the highest level of appeal.

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[1] In a recent paper, James Farmer QC has written:

> I would suggest it is naïve to expect that a small country like New Zealand can *consistently* match the quality of Judges at the highest level in the United Kingdom, given the much greater size of the English bar from which Judges are drawn.

Farmer also makes the point that it cannot be assumed that the standard of the local judiciary will always match what it has been in the past given changing career patterns and opportunities.

James Farmer, 'The Judicial Process in New Zealand', Legal Research Education Foundation seminar, Auckland, 2 March 2001.

2.4 Two further options have been canvassed and warrant comment in case they are given serious consideration. These are:

- that there should be a single point of entry into the court system, with all cases starting in the District Court and with appeals to the High Court and thence to the Court of Appeal; and

- that a court of final appeal should include distinguished jurists from overseas.

2.5 The NZBR agrees with the discussion document that there should not be a single point of entry into the court system for commercial cases at District Court level. It is clear that few District Court judges are as experienced in commercial matters as High Court judges are, and many have no real commercial litigation experience at all. Indeed they are not expected to be experienced in dealing with commercial cases. Nor do District Court judges acquire, while sitting in that capacity, much experience that would equip them to deal with major commercial litigation. It seems unreasonable to expect the same judges to be able to deal both with a large number of summary criminal matters on the one hand and with indictable criminal cases and significant commercial cases. Nor does it seem a sensible use of resources. If a 'single point of entry' were to be adopted, therefore, it is likely that by some device – such as warrants to hear civil cases – two separate groups of judges would in fact be created, in which case the pretence that all cases were being heard by the same court might as well be abandoned.

2.6 The NZBR would not oppose in principle the proposal that there should be a court of final appeal which included distinguished jurists from overseas. But there is a flavour of 'window dressing' in the proposal. One overseas judge – or even two – involved on an occasional basis will not produce the unarguable independence that the Privy Council has from the conventional wisdom and perhaps prejudices of a New Zealand legal 'establishment'. Nor is it clear that the practicalities have been worked through. No research appears to have been conducted into whether senior judges from target countries like Britain, Canada and Australia would be willing to take part or

would be made available by their governments, and on what terms. Any requirement for full cost recovery would almost certainly be prohibitively expensive. Generally the use of retired judges would not be desirable. The practical problems involved in operating a final court of appeal on this basis have not been examined, but seem formidable at first glance. It seems likely that the cost to the New Zealand taxpayer would be much higher than the present arrangements and the resulting court of lower quality than the Privy Council. It is also not clear that even with, say, a doubling in final appeals there would be sufficient work fully to employ two or three New Zealand judges. If, on the other hand, the same judges were also rostered to deal with routine appeals in the Court of Appeal, the point of having a court of final appeal is largely defeated.

2.7 The desirable shape of the appeal system is therefore much as at present, namely two tiers of entry with major commercial cases going straight to the High Court, and two levels of appeal culminating in appeal to a court of final appeal which has time to devote serious consideration to a few cases of general public importance. Since no proposal has been made that would obviously be superior to the Privy Council in quality or efficiency, the question has to be asked whether there is any compelling reason to sever appeals to the Privy Council.

3 Arguments for abolishing appeals to Privy Council

3.1 Arguments used to justify severing appeals to the Privy Council need to be scrutinised to see whether they carry any real weight, or whether they raise issues that can be dealt with in other ways.

3.2 The first of these is 'sovereignty'. Maintaining appeals to the Privy Council is an exercise of sovereignty and may be all the more independent-minded for the fact that it arguably goes against a trend. In *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17, at p 20, the Privy Council took the trouble to point out:

> The Judicial Committee was created by an Act of the Imperial Parliament in 1833 … The 1833 Act … remains part of the statute law of New Zealand today by virtue of the Imperial Laws Application Act 1988 of New Zealand.

In other words, appeal to the Privy Council occurs by permission of the New Zealand parliament.

3.3 The national sovereignty argument is unconvincing for two further reasons:

- the United Kingdom has now subjected itself to being bound in international law by the decisions of the European Court of Human Rights and has allowed its domestic law to be bound by decisions of the European Court of Justice. These constitute far greater derogations of sovereignty than use of the Privy Council. The Privy Council is bound to apply New Zealand statute whereas the ECHR can require that the United Kingdom repeal or amend statutes and the ECJ can simply declare them ineffective; and

- New Zealand has allowed an individual right of complaint to a number of bodies such as the Human Rights Committee and committees set up under subsequent conventions. Again, these conventions are a more far-reaching derogation of sovereignty as United Nations committees can comment on New Zealand statutes and government policies and recommend changes.

3.4 The second argument is that the Privy Council is ineffective as a court of final appeal as it only hears 10 or so cases a year. This argument assumes that the law is constant need of explanation and guidance. This should not be so, particularly in the commercial arena. To the extent that it is, it indicates a deficiency in legislation rather than in the court system. It should also not be forgotten that New Zealand benefits from numerous decisions of the Privy Council from other jurisdictions in common law matters, and of the High Court of Australia in appropriate areas such as company law. New Zealand cases in the Privy Council have also made a contribution to the development

of the common law in important ways eg *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7.

3.5 A related matter is the question of cost. At first blush it appears that an appeal to the Privy Council would be expensive for the parties. The evidence is not clear-cut, however. Numerous parties involved in litigation have advised the NZBR that their appeals to the Privy Council were no more than might be expected for a further appeal (eg $150,000 on top of a bill that had already reached $650,000 in the High Court and Court of Appeal), or even that their costs in the Privy Council were lower than in the Court of Appeal. With the exception of the costs of Privy Council Agents in London, there seems little reason to suppose that costs would be much lower in appealing to a local court of final appeal. The figures given in the discussion document for the relative costs to Crown Law of appeals to the Court of Appeal and the Privy Council seem so out of kilter with private sector experience that it would be interesting to expose them to independent scrutiny.

3.6 A further argument is that large numbers of jurisdictions have severed appeals and New Zealand is now left with a collection of tiny Crown Colonies and a few very small independent states. In fact, appeals have been severed by two main groups of countries. On the one hand are Canada and Australia, both of which have populations and legal professions many times the size of our own. On the other hand are a large number of African and Asian states which have a poor reputation, to put it mildly, for maintaining the rule of law and protecting minority rights. The most recent jurisdiction to go was, of course, Hong Kong and it seems extraordinary that the government should use an example where the decision was taken clearly contrary to the wishes of the bulk of its population. Other countries including Trinidad and Tobago, which is a republic, have maintained appeals. Furthermore, several of those jurisdictions, including for example the British Virgin Islands, the Cayman Islands and the Turcs and Caicos Islands, being tax havens, generate major commercial litigation and appeal commercially significant cases to the Privy Council. The Privy Council has in the last six months decided cases from the British Virgin Islands and the

Cayman Islands which raise fundamental legal questions that will impact on New Zealand law.

3.7 What may, in reality, be the core argument appeals to judicial understanding of local 'social thinking', a somewhat ill-defined concept. This is an argument for local autonomy based on the proposition that there are particular conditions in New Zealand which dictate that the law develop in a unique way. But New Zealand commercial law is not different from that of other jurisdictions in any relevant sense. Indeed, the last few decades have been characterised by efforts to harmonise commercial law through adopting models from other countries and adopting harmonising conventions. It appears contradictory on the one hand to harmonise legislation and on the other to claim that New Zealand courts should follow a distinctive path in interpreting it. Furthermore, and particularly in a small country, detachment and objectivity can be valuable in upholding the rule of law and ensuring that local conditions and local knowledge do not distort principle and justice.

3.8 A related argument concerns the ability of the New Zealand courts to shape and direct the development of the law. The reasons why the abolition of appeals to London is opposed by many in the business community were neatly encapsulated by the commentary by Andrew Beck in the March 2001 issue of The *New Zealand Law Journal*. Writing in favour of severing appeals, Mr Beck noted that:

> … because the Court of Appeal has not been the final body responsible for the determination of all New Zealand's law, it has not had a free hand … this has made it quite impossible for the Court to pursue a uniform policy.

Mr Beck added:

> When it comes to substantive hearings, the Court would be able to play the true role of a final decision maker. With no one looking over its shoulder it would be able to pronounce with confidence on the law as it ought to be …

What is proposed here (by an expert in civil procedure) is a major change in the role of the Court of Appeal. A court is supposed to decide cases without favour, on the basis of principle and precedent and the argument presented by the parties. For courts to discuss policies to be adopted in relation to particular matters in advance would amount to a major failure of natural justice, as would the court seeking information that might affect its decisions in the absence of a party or its counsel.

3.9 Essentially, what is proposed is that the court of final appeal should become a policy-oriented body supplanting the proper role of the legislature. Although this argument is not explicit in the discussion document, it is clear that it is a widespread expectation both among supporters and opponents of abolition of appeals to London. Furthermore, once there are no appeals beyond the Court of Appeal, and if that court habitually sits as a single bench including all or nearly all the judges in one sitting, there will be no restraint to prevent the court from behaving in this way. The temptation to do so will present itself and the court has already shown that it can succumb to such temptation. Thus it seems that for some proponents of abolition the central objective is to promote a radical change in the role of the courts.

3.10 In order to see how the Court of Appeal would be likely to conduct itself once liberated from supervision by the Privy Council, one can look at areas of law where there is already no appeal or where appeal can only be mounted with difficulty. In *Brighouse v Bilderbeck* [1995] 1 NZLR 158, a controversially constituted Court of Appeal wrote new law in the area of redundancy compensation, and the members of the majority admitted that they were writing new law. Since the case concerned an appeal from the Employment Court there was no appeal to the Privy Council. Had such an appeal existed, it seems doubtful that the Court of Appeal would have made this decision. This case was effectively reversed by the current Court of Appeal in *Aoraki Corp v McGavin* [1998] 3 NZLR 276. For the business community major changes of direction by the court depending upon who is on the bench are costly, disruptive and unacceptable.

3.11 Likewise, in *Z v Z* [1997] 2 NZLR 258, dealing with an interlocutory issue that had arisen in a case before the High Court, the current Court of Appeal engaged in extraordinary procedures to enable it to decide issues the parties did not want argued but which the court wished to rule upon. The court then refused leave to appeal to the Privy Council, which it had the power to do because the matter was an interlocutory decision and not a final determination. This challenged the parties to mount an application for special leave to appeal on an interlocutory issue in a proceeding that still had not come to a substantive hearing in the High Court. The Court of Appeal appears to have banked on the parties not only not applying for special leave to appeal but also on them settling the case so that no substantive appeal occurred. That is what eventually happened.

3.12 These cases demonstrate that the central issue is not the quality of the judges but whether they apply the law without fear or favour, and only on the basis of the arguments of parties. Experience has shown that in high profile cases in a small country judges cannot always be relied on to uphold the rule of law, as opposed to being swayed by politically correct or even majority opinion. The value of the Privy Council has most recently been illustrated in two successful appeals in which our Chief Justice sat with the four Law Lords. In *Valentines Properties Ltd v Huntco Corporation Ltd*, a commercially realistic contractual interpretation was provided (reversing both the High Court and Court of Appeal). In *Harley v McDonald* an unfair imposition of costs on a barrister who had evidently irritated the High Court judge was set aside, again reversing the High Court and the Court of Appeal.

3.13 In short, the degree of influence that the Privy Council has had on the New Zealand legal system goes far beyond the number of cases it has heard from New Zealand. The mere existence of appeals to the Privy Council has an impact on the conduct of our courts. We believe that none of the reasons advanced for severing appeals carries weight with most of the parties who actually litigate in the Privy Council, and some of the arguments for severing appeals are considered alarming by large sections of the business community.

4 Consequences for business of severing appeals to the Privy Council

4.1 It is clear that there is a considerable element of sovereign risk in commercial dealings with entities in New Zealand. Its governments in the last 15 years have been prone to make rapid changes in policy, and to fail to address outstanding problems. One of the advantages of dealing with New Zealand is that it has, for its size, a relatively competent, reliable judiciary with a high level of integrity at the personal level. However, there are some key issues involving overseas business relations that are of concern.

4.2 The first of these is professional indemnity insurance. All professional indemnity insurance is laid off offshore, which means that premium rates are vulnerable to perceptions of risk in New Zealand. The courts in many jurisdictions have had an erratic record on professional liability, but the enthusiasm for finding insured professionals liable for a range of new losses has been dampened recently in overseas courts. New Zealand courts, deservedly or undeservedly, have a reputation for looking for deep pockets to compensate those who have suffered losses (*Hamlin v Invercargill City Council* comes into this category of case). If this perception is held by overseas reinsurers then professional indemnity insurance premium rates are bound to rise if appeals to the Privy Council are severed.

4.3 Similar issues arise with choice of law clauses. Anecdotal evidence suggests that the ability to take disputes as far as the Privy Council is an important factor, if not the most important factor, in obtaining consent to a New Zealand choice of law clause in overseas transactions. Many foreign business people do not have the time or inclination to make detailed enquiry about the New Zealand legal system. If an international benchmark in the form of appeals to London is removed, they may well refuse to deal with the New Zealand legal system at all. The loss of New Zealand choice of law clauses in international contracts will mean greater uncertainty and cost for New Zealand businesses and a loss of business to the New Zealand legal profession.

4.4 Two other matters in the discussion document raise concerns. One is the implication that the business community can always resort to arbitration, and so the quality and reliability of the court system on this presumption may matter less. Apart from the fact that this is an odd justification for the government to be offering, there are disadvantages to arbitration. Being confidential, it does not generate any public good in the form of refinement of the rules. A system depending entirely on arbitration would therefore be a highly uncertain system in which almost every dispute would have to go to arbitration instead of being settled on legal advice based on precedent. It is not therefore a substitute for a properly functioning court system.

4.5 The other matter is the statement that Maori concerns might be assuaged by consultation on judicial appointments. There seems no reason why consultation should be limited to matters Maori. It is already a concern that ministers responsible for portfolios such as Maori affairs and women's affairs and not representatives of the business community are consulted on judicial appointments. The ministries involved have a reputation for being anti-business and for having little understanding of the dynamic effects of their ideas. At the same time there are justified concerns that consultation could result in politicisation of judicial appointments.

4.6 In summary, the Privy Council has served New Zealand well. It significantly enhances the respectability of the judicial system of New Zealand, as a small remote country, in the eyes of the international commercial community. Because appointments to the Privy Council are not controlled by the New Zealand government, it reinforces the separation of powers between the judiciary and the other branches of government. The NZBR believes that a heavy onus is on those who propose abolition of appeals to the Privy Council to identify the gains that would justify discarding this valuable asset.

5 Conclusions

5.1 We consider that none of the options proposed in the discussion document can be accepted as an adequate substitute for appeals to the Privy Council. Further work on the court structure that might ultimately replace the Privy Council, including the feasibility of using overseas judges, needs to be undertaken.

5.2 For the immediate future there is no compelling argument for severing appeals to the Privy Council, at least for commercial cases. The 'sovereignty' argument for abolition is emotive and irrelevant.

5.3 There are, however, compelling reasons why abolishing appeals to the Privy Council in the absence of a court system that enjoys high levels of confidence in the local and international commercial community would be damaging to New Zealand business in general.

5.4 Currently the priority task should be to find ways of improving the performance of the New Zealand court system, which is not functioning well on a number of levels. In particular:

- efforts should be made to reduce the cost to the parties of appeals to the Privy Council. The main reducible cost is imposed by the restrictive practices of Privy Council Agents. The authorities in London should be requested to liberalise these rules, including by allowing firms in New Zealand to be appointed as Privy Council Agents;
- the Court of Appeal should drop its current division into two classes of cases and all commercial appeals should be heard by a bench of three Court of Appeal judges. The number of five-judge sittings should be severely reduced and reserved for cases in which the court is being asked to overrule one of its own decisions, as was the case in the past. Court of Appeal judges would then be available to sit on routine commercial appeals;

- efforts should be made to improve the commercial expertise of the High Court. In this respect, appointments in 2000 and 2001 have been encouraging;

- efforts should be made to improve the calibre and expertise of judges dealing with commercial cases in the District Courts. For the majority of New Zealand businesses, such cases can mean life or death. It is likely that any such effort will have to involve creating a new class of Stipendiary Magistrates to deal with summary criminal cases; and

- there is a strong case for investigating improvements to the nature of the Privy Council appeal right. Such an investigation could usefully explore such matters as access (including a leave requirement, and rolling back of statutory exclusions) and efficiency (including use of electronic media to expedite procedural matters).

5.5 These submissions are made from the point of view of the business community and it may be possible to deal with non-commercial cases in a different way. It must be pointed out, however, that in public law matters the Privy Council currently adopts an attitude of deference to the Court of Appeal and that very few criminal cases go to the Privy Council. Nevertheless, we have not examined issues relating to non-commercial cases in depth, and would not necessarily oppose the abolition of appeals in such cases. If the government wishes to take that step, however, we are strongly of the opinion that the views of the commercial community as the major user of the Privy Council's services should be respected and that appeals should be maintained for commercial cases.

5.6 The debate and decision making process should not be rushed. The government earlier indicated that no decision would be made in the current parliamentary term. There is no public clamour for abolition. As an important constitutional issue, there should be broad public and political support for any change. Consideration could be given to putting any

ultimate proposal to a binding public referendum to be decided on more than a simple majority vote.