APPEALS TO THE PRIVY COUNCIL

A SUBMISSION TO THE ATTORNEY-GENERAL ON THE SOLICITOR-GENERAL'S REPORT ON ISSUES OF TERMINATION AND COURT STRUCTURE IN RELATION TO APPEALS TO THE PRIVY COUNCIL

NEW ZEALAND BUSINESS ROUNDTABLE
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SUBMISSION ON APPEALS TO THE PRIVY COUNCIL

1 OVERVIEW

Introduction

1.1 This submission by the New Zealand Business Roundtable (NZBR) responds to the Attorney-General's invitation for comment on the report of the Solicitor-General, *Appeals to the Privy Council* (released on 5 May 1995), which is referred to below as the "Report". The Report is understood to have been sought by the government to assist it in making an 'in principle' decision on whether or not to retain the availability of appeals to the Privy Council. This submission is in five parts. Part 1 is a general overview. Part 2 analyses some recent leading cases. Part 3 offers some proposals for improving the quality of judicial decision making by the New Zealand resident courts. Part 4 addresses questions relating to the structure of the courts. Part 5 provides a concluding summary.

1.2 Major commercial enterprises form the main user group of the Privy Council's services as the ultimate appellate court for New Zealand. This submission reflects that user perspective. The conclusions from that perspective are that (1) the Privy Council serves a valuable role in our commercial law, and (2) in present circumstances the case for the abolition of appeals from New Zealand resident courts to the Privy Council has not been made out.

1.3 Discussion of the exemplary cases noted in Part 2 of this submission highlights the problems of the credibility and quality of decision making by the Court of Appeal. Too much depends upon the composition of the Court, and there has been a pattern of judicial 'activism' rather than 'restraint'. In this context, 'activism' means consciously seeking a law-making role, which can involve the disregard or undervaluing of established rules and precedents. It also implies the giving of low weight to stability and predictability, and excessive weight to idiosyncratic perceptions of 'justice' or 'fairness' in a short-term context of individual cases. The dangers of such an approach have been eloquently expressed by the Chief Justice of New South Wales in an article appropriately entitled "Individualised Justice - The Holy Grail" (1995), 69 Australian Law Journal 421. An extract from this article is attached as an Annex to this submission.

1.4 Our Westminister-style government, being premised on judicial restraint, contains few forms of judicial accountability and the judiciary is traditionally perceived as the 'least dangerous' branch of government. Indulgence in judicial activism raises the question of accountability: Who stops the judges from replacing the rule of law with the rule of judges?

1.5 Irrespective of the government's decision on appeals to the Privy Council, there is a

need and an opportunity to address some of those concerns by:

- reforms to the resident court structure which reinforce the virtues of consistency and predictability in commercial law matters;

- a legislative refocus away from giving broad discretions to courts in the hope that the judges 'get it right'; and

- simplifying the court structure by, *inter alia*, allowing full appeal rights against the decisions of specialist decision-making bodies.

1.6 If it is decided to abolish appeals to the Privy Council, there should be:

- a substantial 'phase in' period; and

- the availability of a second appeal in important cases, perhaps subject to the leave of the ultimate appellate court.

Commercial law

1.7 The Court of Appeal in New Zealand has, for perhaps a decade, been inconsistent in treating restraint and predictability as cardinal virtues of decision making in critical commercial law cases. This inconsistency has a real economic cost, adding legal risk to a range of business decisions and activities. Such costs are particularly significant where key transactions are perceived as potentially subject to litigation. The commercial community cannot, therefore, be expected to support the abolition of appeals to the Privy Council at least until the Court of Appeal, if that Court is be our final appellate court, has demonstrated consistency and predictability in decision making on commercial law topics over a significant period of time.

1.8 The recent high rate of successful appeals from the Court of Appeal to the Privy Council (over 50 percent in the 1990s) cannot be explained simply by the fact that good judges can disagree in hard cases. The Report is not correct in advancing this as the only or main explanation. Both the rate of reversals and the reasoning in particular cases show a *qualitative difference* (see, generally, Part 2 below) between decision making by the Privy Council and the Court of Appeal. This qualitative difference may in part be due to a greater commercial awareness by London resident judges and partly to the advantages of better argument and analysis on a further appeal. Because of the range and complexity of cases dealt with in London, the operation of the Privy Council encourages a high level of expertise on the part of the judges and those appearing before it. But whatever the explanation, there

is no reason to believe that implementation of the Report's recommendations would protect the quality of our commercial law.

Sovereignty

1.9 The proposition that perceptions of sovereignty require New Zealand to sever appeals to the Privy Council (based as it is in London) is misconceived, irrelevant and an unhelpful aspect of nationalistic sentiments. The fact that the United Kingdom itself has submitted to the final jurisdiction of the European Court of Justice underlines the invalidity of such an argument. New Zealand is in fact and in law a sovereign nation and the Privy Council applies New Zealand law. It is empowered to terminate appeals to Privy Council if it so chooses. Choosing not to do so is itself a sovereign act, and little more needs to be said. However, it may be noted that the sovereignty argument for abolition wrongly assumes (as do some judges) that judicial decision making is of great political and constitutional significance. In fact, judges are at most only interstitial law-makers, that is they fill in narrow spaces left in the laws enacted by parliament. To invoke a wider role on 'sovereignty' grounds is to endorse the concept of a law-making rather than a law-interpreting role for judges. Being un-elected, judges should not assume a law-making role, which is properly the province of parliament. With our sovereign legislature, it is always open to reverse judicial decisions by legislation if that is supported by a majority in parliament. The proper role of the courts should be seen within that context.

1.10 Any argument in favour of abolition of appeals to the Privy Council on the grounds of sovereignty applies much more clearly to New Zealand's adoption of a number of international treaties such as the First Optional Protocol to the International Covenant of Civil and Political Rights. The right of New Zealanders to take a complaint to the Human Rights Committee strikes far more obviously at national sovereignty since:

- a complaint can be made about the content of legislation, whereas the Privy Council cannot over-rule New Zealand legislation;

- complaints to the Human Rights Committee can involve matters of government policy which the Privy Council tries to avoid; and

- the New Zealand government is essentially bound to implement decisions of the Human Rights Committee whereas a decision of the Privy Council can be reversed by an Act of the New Zealand Parliament.

Links between the United Kingdom and New Zealand's legal system

1.11 It should also be recognised that New Zealand has a small population, is English speaking, has an economic interest in the internationalisation of commercial laws, and draws heavily on the judge-made law of England as well as having numerous statutes based on British models. In short, the United Kingdom and New Zealand legal institutions and political systems have many important features easily understood on each side. The common approach to legal matters explains the ease with which the Privy Council has been able to deal with the issues involved in the small but increasing number of significant New Zealand appeals it has dealt with. It is valuable to New Zealand businesses to be able to tell overseas counterparties that our final right of appeal is to the Privy Council in London. It provides a 'quality assurance' function for our judicial system and reduces the transaction costs of doing business in New Zealand. The fact that there are no direct costs to New Zealand taxpayers for the services of the Privy Council is a bonus.

1.12 In non-commercial fields, apart from some important 'public law' cases (see Part 2 below), the question of appeals to the Privy Council is not of great significance. In the important criminal and family law fields, the relevant New Zealand legislation often diverges from the UK equivalents, and the Privy Council has adopted a self-denying role in relation to 'social policy' legislation, preferring not to second-guess the resident courts on such matters. In other words, the Law Lords have regarded their own role as limited to applying their expertise in the major judge-made areas of law: contract, tort, equity and judicial review of administrative action. In addition, they have applied their expertise (no less than the resident courts) in reading and interpreting legislation drafted on assumptions associated with a Westminster-style legislature.

Conclusion

1.13 The abolition of appeals to the Privy Council would be a major constitutional step for which there appears to be neither public[1] nor cross-party political support.[2] The likely costs of abolishing support for the Privy Council include increases in liability insurance premiums[3] and in the direct expenses of additional judicial resources in New Zealand. The combination of these factors and the real economic costs for business in New Zealand of poor or unpredictable judicial decision making in the Court of Appeal argues forcefully against abolition in present circumstances. A case for abolition must bear the onus of proof of dispensing with an institution that continues to serve this country well, and no case has been presented. Logic suggests the priority task should be to remedy weaknesses in the

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1 "Drop plans to scrap Privy Council ...". National Business Review.

2 "Govt bungling Privy Council debate ...", The Press, 6 May 1995

3 "Abandon the Privy Council at our peril ...", The Indepedent, 21 October 1995.

management, performance and structure of the resident courts before considering the abolition of appeals to the Privy Council.

2 SIGNIFICANT RECENT CASES

2.1 The NZBR's concerns about the possible abolition of appeals to the Privy Council can be illustrated by reference to some of the leading decisions of 1993 and 1994. A similar pattern could be shown by reference to other decisions in those years (see e.g. *Deloitte Haskins and Sells v National Mutual Life Nominees* [1993] 3 NZLR 1) and to earlier cases (e.g. *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 and *Chase Securities Ltd v GSH Finance Pty Ltd* [1989] 1 NZLR 481), but analysis of such additional cases would merely lengthen this submission without altering its conclusions.

2.2 In the commercial context, the Privy Council has on several occasions provided valuable reminders of the importance of adhering to the primary rules, principally those of contract, and of upholding what the parties to a particular arrangement had agreed before any dispute arose. On such occasions it has reversed Court of Appeal decisions which, in the name of a particular view of 'fairness', show a preference for retrospectively engineering what the members of the Court regard as an equitable outcome, and for ignoring the effect that such rulings will have in the future. In legal terms, the Court of Appeal has in several cases sought to apply rules based on tort (duties of care) and/or equity (duties to avoid conflicts of interest) to produce results different from those yielded by a straightforward contractual analysis.

- The Mouat case

2.3 In October 1993 the Privy Council allowed an appeal in *Clark Boyce v Mouat* [1993] 3 NZLR 641. The case is of particular significance in New Zealand because it adversely affected the reputation of the Court of Appeal (and reinforced that of the Privy Council) within the New Zealand legal profession.

2.4 The case arose when a Mr Mouat wished to raise certain funds to pay for alterations to his house and other matters. He made arrangements with his mother, for her to provide a mortgage over her house to secure a loan for the sum he was borrowing. The borrower then asked a solicitor (not his usual solicitor) whether he would be prepared to act for both himself and his mother to complete the documentation of the transaction. The solicitor pointed out to the mother that her interests were significantly different from those of her son (who was merely guarantor), and suggested that she obtain independent legal advice. She declined, and signed a form prepared by the solicitor to this effect. The form concluded:

> "notwithstanding your advice I should obtain independent legal advice in relation to the matter, I record and hereby instruct you I do not wish so to do".

2.5 In the High Court, Justice Holland dismissed the mother's claim against the solicitor (which followed the son's default under the loan, and the lender's enforcement of its security over the mother's house). In the Court of Appeal, it was held (by 2:1) that the appeal should be allowed. Justice McGechan considered that the solicitor was in breach of a fiduciary duty to the mother. Sir Gordon Bisson held that there was both a breach of fiduciary duty and negligence (that is, a breach of a duty of care owed to the mother). Justice Gault dissented, seeing no reason to disagree with Justice Holland's decision in the court below.

2.6 The Privy Council allowed the solicitor's appeal in a judgment which strongly rebutted the reasoning of the Court of Appeal majority. Among the points made in that judgment were the following:

- "There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting."

- "Holland J had the advantage of seeing and hearing all the witnesses and of forming an impression therefrom as to their states of mind and what had occurred during the meeting in [the solicitor's] office. There are no exceptional circumstances which would justify differing from his conclusions on these matters."

- "Since [the mother] was already aware of the consequences if her son defaulted [the solicitor] did all that was reasonably required of him before accepting her instructions when he advised her to obtain and offered to arrange independent advice. ... he told her in no uncertain terms that she'll lose her house [if the son] defaulted. One might well ask what more he could reasonably have done."

- "When client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors."

- "A fiduciary duty concerns disclosure of material facts in a situation where the fiduciary has either a personal interest in the matter to which the facts are material or acts for another party who has such an interest. It cannot be prayed in aid to enlarge the scope of contractual duties."

2.7 The *Mouat* case illustrates well the concerns that the NZBR has in relation to the proposed abolition of appeals to the Privy Council. It was the Privy Council's decision which reintroduced commonsense and certainty into this area, and acted as a brake on the undisciplined application of concepts of duties of care and conflicts of interest. While the judges of the Court of Appeal in the majority were not permanent members of that Court, it does not seem likely (from a later episode in the same litigation which did come before permanent members of the Court) that those permanent judges would have put the matter so clearly or firmly as did the Privy Council. The case also serves to explain why overseas liability insurers have indicated that abolition of Privy Council appeals would lead to increased premiums.

2.8 Insofar as commercial law seeks predictability in legal rules, it is immensely troubling that the Court of Appeal could come to a decision of which the Privy Council could ask the unanswerable question: What more could the defendant have done?

- **The Goldcorp case**

2.9 In May 1994 the Privy Council allowed an appeal from the Court of Appeal, restoring the decision of Justice Thorp in the High Court, in *Re Goldcorp Exchange Limited (in receivership)* [1994] 3 NZLR 385. Again, the Privy Council charted a course of some simplicity in reversing the majority of the Court of Appeal which had wandered into unorthodoxy, apparently (again) in search of a 'fair' or sympathetic solution for the plaintiff.

2.10 The contest was essentially between Goldcorp customers, who had paid money to Goldcorp Exchange Limited to become owners of non-allocated bullion, and the Bank of New Zealand which had advanced money to the company out of a security of debenture containing a floating charge over all of the company's assets. In July 1988 the BNZ placed the company into receivership. To avoid the priority given to the BNZ's rights under its registered debenture, Goldcorp customers sought to argue in various ways that they had a 'proprietary' interest in the company's property which ranked ahead of the bank.

2.11 In essence, the Court of Appeal majority found in favour of the customers by holding that they had a proprietary right relating to the money paid to the company (although not to the bullion or other assets). The Privy Council's rejection of this point included the following:

> "Whilst it is convenient to speak of the customers 'getting their money back' this expression is misleading. Upon payment by the customer, the purchase money became, and rescission or no rescission remained, the unencumbered property of the Company. What the customers would recover on rescission would not be 'their' money, but an equivalent sum ... . [the] claimants would have to contend that in every case where a purchaser is misled into buying goods he is automatically entitled upon rescinding the contract to proprietary rights superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets. It is not surprising that no authority could be cited for such an extreme proposition."

2.12 Earlier in its judgments the Privy Council commented that "to describe someone as a fiduciary, without more, is meaningless". Further, the Privy Council decision served to reinforce Justice McKay's dissenting judgment in the Court of Appeal to the effect that the primary rules applicable to the case were those under the Sale of Goods Act 1908, which codify part of the law of contract.

2.13 The *Goldcorp* case is important. It was a significant case in a commercial context. The majority of the Court of Appeal's approach was to invoke equitable concepts in an unorthodox fashion to favour the (generally) individual customers who were the plaintiffs, against the bank which was the effective opponent. Put another way, the Court of Appeal's majority decision would have undermined secured lending arrangements, which are fundamental in the New Zealand commercial community, and without acknowledging (and perhaps not even realising) that that was the effect of the approach being taken.

- **Employment contracts: Brighouse**

2.14 In the view of the NZBR, the virtues of the Privy Council, and the problematic aspects of the Court of Appeal, were vividly illustrated by the Court of Appeal's October 1994 decision in *Brighouse Limited v Bilderbeck* [1995] 1 NZLR 158. The decision was under the Employment Contracts Act 1991, which prevents appeals to the Privy Council and limits appeals from the Employment Court to the Court of Appeal to questions of law only.

2.15 As is well known, the majority of the Court of Appeal held that redundancy payments could be ordered as a remedy for an employee's personal grievance claim notwithstanding that such payments had not been provided for in an employment contract. One of the majority judges admitted that the result represented a "radical departure" from the previously understood law. More importantly, one of the minority judges noted that the result required employers, although under no legal obligation to do so, to pay by way of compensation upon dismissal for genuine redundancy such an amount as the Employment Tribunal (or Court) subsequently determined to be 'fair'.

2.16 The majority decision has been well criticised by commentators since its release. In effect, it condoned an 'activist' approach by the Tribunal and the Employment Court in utilising the personal grievance procedure to assist employees with perceived inadequate bargaining power to obtain redundancy terms as part of their employment contract. It took no account of the wider employment context, including the disincentives to increased employment. The President of the Court of Appeal perceived the 1991 Act's emphasis on efficiency of market forces as balanced by a broadening of the scope of personal grievance remedies. At the heart of 'unjustifiable' dismissal were considerations of 'moral justice' which the President saw as applicable to redundancy as to other dismissals.

2.17 The most penetrating criticism of the majority's approach came from the minority judges, Justice Richardson and Justice Gault. Justice Richardson's starting point was that employee and employer "ought to be able to determine at the time what their respective rights and obligations are". He concluded that it was inconsistent with the intent of the 1991 Act to impose obligations on an employer to pay redundancy (as part of the implied requirement for mutual trust between the parties) where the parties had chosen not to provide for redundancy in their contracts. He stressed that questions of redundancy were matters of "commercial judgment" and not of "procedural fairness".

2.18 Also dissenting, Justice Gault regarded the approach of the majority as putting employers "in an impossible position". He trenchantly criticised the circular nature of the argument whereby a substantively justified dismissal (that is, on redundancy grounds) could be held to be unjustified because no redundancy payment had been offered, notwithstanding that there was no express obligation to do so.

- **'Public law' cases**

2.19 Outside the commercial context, the Privy Council has decided a number of important cases in the 'public law' field. By 'public law' is meant a governmental or public sector, rather than commercial, context.

2.20 Thus, for example, in June 1994 the Privy Council reversed another majority decision of the Court of Appeal on the central point in *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1. The Court of Appeal's decision would have permanently stayed Mr Prebble's defamation action and such an outcome was not sought in that form by TVNZ. The decision was widely criticised by commentators as well as by the Privileges Committee of the House of Representatives.

2.21 In *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, the Privy Council considered for the first time the 'principles' of the Treaty of Waitangi in the context of the State-Owned Enterprises Act 1986. While transparently sensitive to Maori concerns, but having the benefit of our Chief Justice sitting as one of its number, the Privy Council underlined the need for balancing of Maori and general interests. Such a balancing had not been conspicuous in the Court of Appeal's previous decisions in this area which had invented the novel (but nebulous) legal concept of a 'partnership' between a national government and one part of its people.

2.22 Conversely, in a case (surprisingly) not appealed to the Privy Council, *Simpson v Attorney-General* [1994] 3 NZLR 667, the Court of Appeal invented a new concept of 'public law compensation' (not damages) for breaches of the New Zealand Bill of Rights Act 1990. This extraordinary development has no obvious support in the relevant legislation nor in its legislative history, and merely reflects the Court's normative presumption that the Act 'implies' that effective remedies will be available if it is breached. The decision has been subjected to devastating criticism by Professor J A Smillie of Otago University in *The Allure of 'Rights Talk': Baigent's Case in the Court of Appeal* (1994) 8 Otago Law Review 187. Professor Smillie states at p. 193 that:

> In my view, the history, legal form, and overall structure of the New Zealand Bill of Rights Act 1990 demonstrate beyond doubt that Parliament did not intend the rights contained in the Bill to carry a higher "constitutional" status and, in particular, did not intend to confer power on the courts to enforce those rights through a new regime of public civil liability untouched by existing statutory immunities.

He adds at p. 196:

> Inexplicably, the Court overlooked the clearest expression of the government's intention regarding the availability of judicial remedies for violation of the rights contained in the Bill. Moving the second reading of the Bill, the Prime Minister responded to continuing Opposition and public concern by taking pains to "spell out what the Bill does not do". He then proceeded to emphasise:
>
> > [T]he Bill creates no new legal remedies for the courts to grant. The judges will continue to have the same legal remedies as they have now, irrespective of whether the Bill of Rights is an issue.
>
> Clearly the legislative history of the Bill of Rights Act does not support the view that Parliament intended to confer new enforcement powers on the courts. In fact the whole point of enacting the Bill as an ordinary statute was to confine the courts to their existing jurisdiction.

3 IMPROVING JUDICIAL DECISION MAKING

3.1 The review of cases in Part 2 of this submission illustrates the background to the concerns of commercial users of the Court of Appeal's services. It reveals error, inconsistency and a lack of awareness of the importance of certainty in commercial cases. This uncertainty is compounded by the fact that the outcome in a particular case may well depend on the composition of the panel of judges sitting on the Court of Appeal.

3.2 These difficulties appear to reflect the dominance of an 'activist' judicial philosophy within the New Zealand resident judiciary, most prominently in the Court of Appeal. Developing in New Zealand only in the last decade or so, this philosophy perceives the Court of Appeal's role to include shaping the law. The purpose of this shaping is not well articulated, although it appears to involve a subjective view of 'fairness', some untested assumptions about the legal and social culture of New Zealand, and the consciences of individual judges. In general, this approach is problematic. In the commercial law field, it is not acceptable.

3.3 It is relevant in the context of this submission to consider briefly the nature of the task of judging, particularly at the appellate level. Those appointed as judges are frequently successful barristers. The judicial task is inherently less stimulating and exciting than advocacy, and there is a risk that a judge's energy is diverted into the activism mentioned above. Putting the matter another way, a judicial appointment involves a degree of intellectual boredom, a fixed and secure income and a final career destination. But judges may remain inclined to manifest energy, express individualism and seek reputational rewards, just as they did as barristers. They may also be attracted to the idea of securing a place in legal history. These factors are more likely to result in judicial activism than in judicial restraint.

3.4 The conclusion is that, at least in relation to commercial law, the virtues of judicial restraint and orthodoxy require conscious reinforcement. In so doing, there is a need to seek a greater degree of judicial accountability without undermining the traditional and valuable independence of judges from political influences.

3.5 This last point - judicial independence - constrains the manner in which judges can be held accountable. There are, however, a collection of possible changes which cumulatively would reinforce accountability.

- **Drafting statutes**

3.6 Successive governments have encouraged an activist approach insofar as they have enacted legislation which, in effect, trusts the judges to exercise very wide discretions to fill in the gaps. Perhaps the worst example is section 9 of the State-Owned Enterprises Act which requires judicial invention of the 'principles' of the Treaty of Waitangi. It is also a criticism properly levelled at the 1993 company law reform legislation.

3.7 Acts of Parliament cannot deal with every contingency and should provide a sound structure rather than minute detail. But legislative conferral of broad judicial power to 'create' law is quite wrong. It raises a major problem of accountability within a political system premised on judicial independence and judicial restraint. In the commercial law field, a limited form of accountability has been provided by the Privy Council which is, of course, immune to perceiving itself as consciously shaping New Zealand law.

- **Appointment criteria**

3.8 The appointment of senior judges is presently the responsibility of the Attorney-General. There has been a longstanding debate on whether this power of appointment should be limited by, or even transferred to, an advisory committee or board. The NZBR considers this issue warrants fresh examination although the matter is not clear-cut. Possibly a more important step might be an explicit recognition that respect for certainty in commercial transactions is a matter relevant to the overall assessment of potential candidates.

3.9 In practical terms, the NZBR suggests that this recognition should be achieved informally. The Solicitor-General should be invited to develop a statement of record on the process and criteria for senior judicial appointments; such a statement should be tabled in the House by the Attorney-General. The statement should at a minimum:

- recognise an obligation to consult from time to time persons or organisations expert in, or who are particular users of, commercial law about relevant judicial appointments; and

- identify respect for certainty in commercial transactions as a positive quality in a candidate for appointment.

- **Judicial oath and charter**

3.10 It would also be possible to amend the current broad judicial oath, or to promulgate a new judicial charter, to highlight the importance of certainty in commercial transactions. A conscientious judge in a difficult case has, as the statutory touchstone, the judicial oath which refers to serving the Sovereign "according to law", and to doing "right to all manner of people after the laws of New Zealand without fear or favour, affection or ill will". In the context of particular disputes, this is readily (and understandably) taken as "justice in the present case". But commercial law requires a proper weighing of the consequences in the ordinary run of transactions (recall the *Mouat* and *Goldcorp* cases) and highlighting this in a judicial oath or charter would be beneficial.

3.11 At present, the "according to law" aspect of the oath, which includes the idea of following precedent (like cases should be decided alike), is at some risk of being overshadowed. As mentioned earlier, our tradition is of the rule of law - not the rule of judges. A conscious reinforcement is required, and a more specific oath or charter should be considered.

- **Supplementing the Bench**

3.12 In appropriate cases, for which the range could be enlarged from the present competition, patents and valuation legislation, the senior courts could sit with a lay adviser or member. These persons could be drawn from a panel of experienced business people, academics or others (not necessarily resident in New Zealand) appointed by a process analogous to that for judges, if sought by any or all parties to the litigation.

- **Educating / Informing the Bench**

3.13 There is a sound argument that a proper dialogue between judges and potential critics could assist in improving the quality of commercial law decisions, if only to allow inclusion of the importance of the wider or longer-term consequences of such decisions. Of recent times, some judges have involved themselves in exploring the economic analysis of legal problems. Likewise, the High Court judges have invited academic lawyers and economists to present papers to their annual conference. Sustained engagement with the material is required. This 'continuing education' process should be encouraged and expanded.

3.14 Similarly, there is scope for upgrading the information before the senior courts, especially the Court of Appeal, by encouraging counsel to provide appropriate background material (the 'Brandeis brief' as it is known in the United States). There may also be scope for an expanded *amicus curiae* role (counsel assisting the Court, not representing any party) in major appellate cases, not least to place long-term considerations before the Court. Under present arrangements, that role would sensibly fall to, or be overseen by, the Solicitor-General.

- **Annual reports and select committee oversight**

3.15 The topic of judicial accountability is controversial, with defensive refuge often being sought in the lofty rhetoric of separation of powers and judicial independence. There are some forms of intellectual accountability, notably appeal rights (very much an issue in the Privy Council appeal abolition debate) and published academic analysis (the suggestion that the last word comes from the Law Quarterly Review, not the Law Lords).

3.16 Nevertheless, judges perform public functions. Other public agencies go through the salutary process of preparing annual reports and being open to scrutiny by a parliamentary select committee. This is severable from the annual budgetary process from which the judiciary is expressly protected in the interests of its independence. Annual reports are issued by, for example, the High Court Commercial List and the New South Wales Court of Appeal.

3.17 The NZBR proposes that the head of each level of the judiciary (Chief Justice, President, Chief District Court Judge) be invited/required to produce an annual report on the operations of their courts. This would involve a degree of consultation with the other judges of the particular court, an exposition of the achievements and problems of the court, relevant statistical material, commentary on the impact of new legislation, and some reference to the court's performance in servicing user groups (including the commercial community) in both a short-term and a longer-term perspective.

3.18 The NZBR further proposes that such annual reports be tabled in the House of Representatives, and referred to a select committee for review. It would be appropriate for that review to be conducted in private (if only to avoid 'grandstanding' on 'law and order' issues). It would also be entirely appropriate for the committee to invite submissions from user groups including, of course, the commercial community.

4 THE STRUCTURE OF THE COURTS

4.1 The structure of our resident courts should be simplified, whether or not appeals to the Privy Council are abolished.

4.2 There is little sense in the law on, for example, the Employment Contracts Act and, in certain cases, the Commerce Act being finally determined by the Court of Appeal but in all other areas by the Privy Council. For the reasons highlighted in Parts I and 2, this arrangement is likely to disadvantage the interests of the commercial community in those statutory areas mentioned.

4.3 Similarly, the current limits on Privy Council appeals make little sense. Those involving sums of $5,000 or more can be appealed to the Privy Council as of right while others, which may involve important issues of a non-monetary nature, require leave from the Court of Appeal or the Privy Council itself.

4.4 The NZBR proposes that there be a streamlining of access to the Privy Council so that:

- all Court of Appeal decisions on final judgments of the High Court and Employment Court in their original jurisdiction are automatically subject to appeal to the Privy Council; and

- intending appellants from all other Court of Appeal decisions must seek and obtain leave to appeal (this would apply to appeals from tribunals to the High Court, to the Employment Court, and to interlocutory decisions of the Courts).

4.5 The objective of this proposal is to ensure that there are two rights of appeal in all cases, and that important legal issues are ultimately decided (or subject to review) by our final appellate court, the Privy Council. The NZBR believes that the value of a second appeal is well illustrated by the discussion of the cases in Part 2. While there must, of course, be a cut-off at some point, additional reflection and refinement of argument does produce better decision making, including appreciation of wider and longer-term consequences.

4.6 The criteria for leave to appeal would need to be set out in some detail or left for the courts to work out. The NZBR has no present view on this, although it would wish to avoid undue restrictions on the granting of leave. Further, it may be necessary to provide some guidance on cost issues to counter the concern expressed in the Report that the threat of the expense and delay of an appeal to London may induce otherwise unwarranted compromise by the party which is successful in the Court of Appeal. Obvious inequality of resources could be a ground for refusing leave to appeal. If complementary legislation were required to bind the Privy Council in this respect, it could be expected to be forthcoming. Also, if the substantive issues were sufficiently important, the government could always fund the party with inadequate resources or intervene itself.

- **The abolition scenario**

4.7 If the government decides in favour of abolition of appeals to the Privy Council, the NZBR would urge that:

- there should be a substantial transition period, if only to allow a new structure to be properly prepared;

- two rights of appeal should be retained for the reasons previously mentioned; and

- serious consideration should be given to establishing a panel of overseas judges who could supplement New Zealand's court of final appeal. Given the small pool of top judicial talent in New Zealand, there could be considerable advantages, particularly in the commercial field, in supplementing our final appellate court with visiting overseas judges in appropriate cases. A panel of judges could be established from the United Kingdom and other countries which share common legal traditions and institutions.

5 CONCLUSION

5.1 The NZBR believes that the proposal to abolish the right of appeal to the Privy Council should be strongly resisted pending changes to the management, performance and structure of the resident New Zealand courts. As an organisation representing major businesses, our perspectives are primarily those of commercial users of judicial services. That user perspective leads the NZBR to the following conclusions:

- the debate and decision making process should not be rushed. It is an important constitutional issue and any change should command broad public and political support;

- the 'sovereignty' argument for abolition is emotive and irrelevant;

- recent experience of the Court of Appeal's decision making in the commercial (including employment) law field is unsatisfactory. It indicates the need for greater judicial restraint if the significant costs arising from lack of predictability in judicial decision making are to be avoided;

- with no direct cost to New Zealand, the Privy Council continues to serve a valuable role including detachment, judicial quality and the benefits of reconsideration on a second appeal;

- accordingly, rights of appeal to the Privy Council should be retained in the present circumstances;

- retaining the Privy Council should not delay consideration of various options for improving the quality of decision making and the structure of our resident courts; and

- rights of appeal (including leave requirements) should be streamlined and made more coherent.

5.3 If the NZBR's analysis and recommendations for retention are not accepted and the right of appeal to the Privy Council is abolished, the NZBR would urge that:

- the final appellate court should be based around the current permanent Court of Appeal;

- two rights of appeal should be retained, involving intermediate appellate arrangements for original High Court matters;

- there should be a generous transition period; and

- the other proposals referred to in this submission should be advanced expeditiously.

Annex

Extract from *Individualised Justice - The Holy Grail,* The Hon A M Gleeson AC, Chief Justice, Supreme Court of New South Wales

The other matter to be observed is that there are important constraints of principle upon the law's capacity to provide a form of justice that responds to the peculiarities of every individual case. Some of these constraints are bound up with the concept of justice itself.

First, people look to a system of justice to function in an even-handed and consistent manner. To the extent to which the results of a case depend upon the personal and subjective evaluation of situations by individual judges, especially where discretionary remedies are available, this expectation is disappointed. To revert to a specific instance mentioned earlier, appellate courts, in prescribing that trial courts are to determine certain cases by reference to considerations of unconscionability, have been at pains to remind trial judges that this does not involve the application of personal and possibly idiosyncratic notions of fairness and justice. Many practising lawyers, however, are less than completely reassured by this. The greater the scope for the exercise of individual discretion and the application of subjective value judgments, the less will be the assurance, essential for public confidence, that the outcome of the case depends as little as humanly possible upon the identity of the judges who decide them. This is not to suggest that the law was ever capable of working in a fashion that is unaffected by the views and attitudes of individuals. But, other things being equal, the object ought to be to minimise the effect of this element of the system, not to maximise it.

Secondly, there is an abiding need for predictability and certainty in any system of law. The willingness of people to engage in commercial transactions, for example, depends upon confidence in their ability to know the way in which the law will assign rights and obligations to their conduct and their relationships. There are still many areas of law in which people accept, and clearly prefer, certainty in an assessment of individual merits. The value of reasonable certainty, and the demoralising consequences of unpredictability in the law, should not be underestimated.

Thirdly, as was noted earlier, the procedures by which justice is administered involve their own constraints upon the available degree of flexibility in the law. The consequences for the criminal law of the system of trial by jury exemplify this.

Fourthly, it is expected of judges that they will apply neutral and general principles to the resolution of individual disputes: they have no mandate to act as ad hoc legislators who, by decree, determine an appropriate outcome on a case-by-case basis. The legitimacy of judges depends upon the nature of the function that is assigned to them and upon the manner in which they perform that function. No judge has, and no wise judge aspires to, political legitimacy. Judges are un-elected and, from most points of view, relatively unaccountable. Their independence and unaccountability are appropriate to the judicial role, but they are inappropriate to a quasi-legislative role. The procedures by which judges are selected, their tenure of office, the fact that they may only be removed from office by an extraordinary and rarely invoked procedure, and the mechanisms that are established to ensure that they are free from political influence or pressure, all assume that their duty is to act as impartial adjudicators who administer general rules of law in a disinterested fashion. This is not to assert that there is no room for principled development of the law by appropriate judicial law-making. Of course there is. But, as a rule, acceptable judicial law-making is incremental, and involves development of established principle. There is a limit to the extent to which a democratic community will accept law-making by people who are not obliged to submit to the accountability of the political process.

Fifthly, it is wrong to assume that, running throughout the law, there is some general principle of fairness which will always yield an appropriate result if only the judge can manage to get close enough to the facts of the individual case. Much of the policy behind laws, statutory or judge-made, is based upon other considerations. Some legislation reflects the political influence of a particular interest group in the community which has used its power to obtain a redistribution of wealth at the expense of others who are, at least for the time being, less influential. A principle of law may be just, or wise, or convenient, even though it operates harshly in some cases. What is fair in the context of one set of facts may be unfair in the context of another. The law responds to many impulses in addition to the dictates of apparent fairness in individual cases, and these need to be given full weight in any rational development of the law.

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