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LEGAL FORUM

MMP: Aligning the Judicial and Parliamentary Functions

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Introduction

The advent of MMP may make a considerable difference to the way law is practised in New Zealand. It will change both the policy making environment and will ultimately change aspects of the legal environment.

In essence, MMP is going to alter the distribution of public power in New Zealand. The changes in the way our system of government operates will have significant implications for the legislative process, decision making within the executive government and it is suggested, the role of judiciary and the legal profession.

The focus of this paper is the possible impact of MMP on the alignment of our parliamentary and judicial functions. On the issue of policy making I will discuss the extent to which these roles may overlap and the desirability of such an occurrence. As a case study I will discuss the impact of judicial activism in the context of New Zealand's employment contracts legislation. Finally, I will examine the role of lawyers as advisors in the new regime.

The impact of MMP on the alignment of our parliamentary and judicial functions

As the implementation of MMP draws closer it is not easy to predict in precise terms how the new system will function. However it seems to be accepted that generating policy changes and legislative amendments will become more difficult to achieve. This is because of the greater number of parties with decision making power, resulting in the need for greater consensus in decision making. There will be a shift in the balance of power from cabinet to parliament rendering it better able to bring the executive to account. The passage of legislation is likely to be more fraught and less predictable.

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As Sir Geoffrey Palmer has noted a likely result of these changes is more pressure on the courts to extend their scope of review as a result of policy paralysis within the executive branch and parliament.[1]

The courts, being aware that legislative change will be difficult through parliament may feel greater pressure to make certain findings. The judiciary is likely, as a consequence of MMP, to become more involved in determining policy issues. I suggest that the implications of such a development are significant.

The doctrine of parliamentary supremacy and the principal of the independence of the judiciary are two of the cornerstones of our constitution. It is undeniably important that public confidence in the impartiality of the judiciary be maintained. Judicial independence is maintained by a number of well known factors:

- the convention of non-political appointments to the bench,
- immunities from judicial proceedings,
- the practice of judicial restraint rather than activism.

The mixing of personnel and functions between the different institutions of government is such that the doctrine of the separation of powers and the theory of checks and balances have most application to the judicial branch of the New Zealand Government. The personnel of the judiciary do not hold office in the legislative or executive branches of government. Similarly the judiciary does not perform executive or legislative functions. In short, it is not part of the judicial function for the courts to take issue with policy decisions implemented in statutory form. The consequences of such actions offend against both the separation of powers principle and the doctrine of parliamentary supremacy.

I suggest that the extent to which an MMP system of government may blur the judicial and parliamentary functions is a matter for some concern.

Earlier this year, His Honour, Justice Michael Kirby of the High Court of Australia created a storm of debate by using his swearing in speech to outline what has been interpreted as a manifesto of judicial activism and reform. His honour noted that there is now a greater public understanding of the limited but very real scope for judicial creativity and legal development.[2] One academic commentator observed that "such an approach may be seen as extreme and virulent. It amounts to judicial progressionism by which judges see themselves entitled to update the Constitution as the people are too stupid to change it at the referendums".[3] The extreme sentiment of this reply would possibly find favour with certain business groups in New Zealand who have expressed concern at examples of judicial activism

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1 Palmer et al., "Practical Issues for Lawyers Arising from MMP", NZLS seminar, August 1995, 13.

2 The Independent, "New judge would usurp parliament's powers", 16 February 1996.

3 Supra at note 2.

affecting commercial interests.[4] Restraint and predicability are cardinal virtues for the business community and perceived inconsistency in the interpretation of the law has a real economic cost.

In a recent publication prepared by the New Zealand Employers Federation and the New Zealand Business Roundtable the argument was made that the judiciary does not have authority to interpret legislation to make it accord more readily with its own policy conceptions than those of parliament.

And therein lies the difficulty. It is undoubtedly the case that the role of the judiciary in our Westminster system of government is to interpret legislation in accordance with Parliament's intent.

Perceived inconsistencies in that process undermine confidence in our system of government. The degree to which this may continue or even be highlighted under the regime of MMP is problematic and a source of concern.

Employment Contracts Act 1991

To exemplify some of these issues I would now like to examine the impact of judicial activism in the context of New Zealand's employment contracts legislation and the consequences this has had, and continues to have, on New Zealand's industrial relations.

The arrival of the Employment Contracts Act in 1991 ("ECA") capped a seven year programme of comprehensive economic liberalisation. The purpose of the Act was to move away from the traditional system of collective bargaining, centralised wage fixing and the control of working life by bureaucracy and pressure groups.[5] A controversial piece of legislation at its inception, that controversy has turned to the judiciary which has become increasingly activist in determining labour relations issues.

The significant changes wrought by the ECA can be most clearly demonstrated by a comparison of the stated objectives of the new legislation to those of its predecessor. The purposes of the Labour Relations Act 1987 ("LRA") were:

- To facilitate the formation of effective and accountable unions and effective and accountable employer organisations;

- To provide procedures for the orderly conduct of relations between workers and employers;

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4 See, for example, "Employer wants Court abolished", The Dominion, 10 August 1992; Roger Kerr, "Employment Contracts Act undermined by judicial activism", The Independent, 14 May 1993; and "Employment Courts future under review", Evening Post, 17 September 1993.

5 Kasper, "Free to work - The liberalisation of New Zealand's labour markets", The Centre for Independent Studies, 1996.

- To provide a framework to enable agreements to be reached between workers and employers.

By contrast, the purposes of the ECA are:

- To promote an efficient labour market and in particular;
- To provide for freedom of association; and
- To allow employees to determine who should represent their interests in relation to employment issues.

The substantive provisions of the ECA are consistent with such objects as outlined in its preamble. They are the result of a policy judgment that would promote an efficient labour market. A notable feature of the ECA, evident in both its objects and the substantive provisions which put them into effect is the emphasis they place on the start of the employment relationship, that is the making of the contract. It is a fundamental aim of the Act that the explicit terms of the contract should regulate the employment relationship. The extent to which the courts have wholeheartedly given effect to that intention has been the subject of speculation.

Recent authority reveals the courts' inclination to decide unjustifiable dismissal cases on the simple basis of "fairness"[6]. To date, the perceived dictates of fairness have resulted in the employment institutions expanding the rights and expectations of employees, and in particular redundant employees. By way of illustration the recent decision of *Brighouse v Bilderbeck* is instructive.[7]

In this case a three to two majority in the Court of Appeal upheld the decision of the Employment Court to award redundancy compensation pursuant to contracts which made no provision for it. The facts concerned four managerial employees who were dismissed for redundancy. It was not disputed that the employees were genuinely redundant. That is, their positions no longer existed within the company.

Their contracts made no reference to redundancy and there was no contractual right for compensation for dismissal on that ground. Nevertheless the employees claimed compensation under the ECA (s.40) framing the claim as a personal grievance by way of unjustifiable dismissal.

If the fact that the employees were generally redundant is combined with the fact that their employment contracts did not extend to redundancy, there is obvious difficulty in regarding the dismissals as unjustifiable.

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6 For a useful discussion of the burgeoning role of fairness see Harbridge and Kiely, "Activism and Passivism: The Role of the Judiciary in the New Zealand Employment Contracts Act", Canadian Labour and Employment Law Journal, **3**, nos. 4/5 1995.

7 [1994] 2 ERNZ 243.

The only way in which the claim could succeed was for the court to modify the definition of "employment contract" in a manner which turned a lawful dismissal into one which was so unlawful as to bring the remedies of the Act into place.

Clearly to do such a thing would be plain a instance of judicial legislation to reach a conclusion obviously contrary to the statutory intention, the agreement between the parties and the general law relating to implied terms.

The leading majority judgment was delivered by the President, Cooke P. His Honour invoked the doctrine of the implied term, stating, "there is implied in a contract of employment a term that the employers will not without reasonable and probable cause conduct themselves in a manner calculated to destroy or seriously damage the relationship of trust and confidence between employer and employee".[8]

It is accepted law that an implied term does not need to be implied to make the contract effective or elucidate any of its other terms. It exists to give business efficacy and must not contradict any other expressed term of the contract.[9]

To call a judicially imposed duty a "term of the contract" has the unfortunate consequence that in the guise of enforcing the contract the court may be in fact contradicting the contract in the pursuit of a different, unacknowledged object. More seriously, if an Act of Parliament is involved the court may be contradicting a statutory directive also.

The majority held that redundancy compensation was payable to the dismissed employees.

Arguably there was a degree of injustice exhibited towards the employer in the *Brighouse* decision. That a sanction was imposed on the employer for doing something he was entitled to do and a need for which was not his fault would appear illogical.

As one of the dissenting judgments, Richardson J. noted that, "it is not open to the Courts to construct an extra statutory concept of social justice applicable in redundancy decisions."[10]

It has been argued that by introducing a false implied term into the employment contract the majority in *Brighouse* succeeded in contradicting the Act a well as the contract. In doing so the Court of Appeal exceeded the judicial function and placed itself above parliament in the formulation of social policy.[11]

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8 Supra at note 7 at 252.

9 *BP Refinery (Western Port) Pty Limited v Hastings Shire Council* (1977) 16 ALR 363; *Devonport Borough Council v Robbins* (1979) 1 NZLR 1; *Attorney General v New Zealand Post Primary Teachers Association* (1992) 1 ERNZ 11636.

10 Supra at note 7 at 258.

11 Howard, "Interpretation of the Employment Contracts Act 1991", New Zealand Business Roundtable and New Zealand Employers Federation, December 1995 at 12.

The interpretation of fixed term contracts under the ECA has also been the subject of some discussion. In the 1995 decision of *Smith v Radio i*[12] the employee, Smith, was employed pursuant to a fixed term contract as a radio broadcaster for a term of one year.

Negotiations for a new contract were unsuccessful and the term of the contract expired. The employee then brought an action for personal grievance and breach of contract. In fact, the action failed on the facts but the decision is important for its analysis of the fixed term contract. The Employment Court noted that:

> "It will be a question in each case of determining whether such a contract is indeed for a fixed term at the conclusion of which either party may elect not to continue with or renew the contract without repercussions and if so, whether that amounts to a personal grievance for actual breach of contract".[13]

Clearly this is troublesome logic. The expiration of the term of a fixed term contract cannot logically be a breach of that contract. Nor can it be a dismissal, let alone an unjustifiable one.

The decision in the *Kerry Smith* and *Brighouse* cases stand well together as illustrative of the manner in which a judiciary, possibly out of step or sympathy with the policy of a statute, can blunt its effect and frustrate at least some of its purposes.

Disconcertion at the trend of interpretation of the ECA in the Employment Court and the Court of Appeal prompted a joint report by the New Zealand Business Roundtable and the New Zealand Employers Federation in 1992.[14] It undertook a detailed survey of the course of decisions up to that date in the Labour Court, the Employment Court and the Court of Appeal. From the survey emerged a picture showing continuity of approach by the courts in the application of the previous law in spite of the sharp change in statutory policy. The report drew several conclusions and its recommendations were as follows:

- The need for the Employment Court as a separate jurisdiction should be reviewed;
- The ECA should be amended to give proper weight to contractual provisions in unjustifiable dismissal/personal grievance cases;
- Compensation for procedural irregularity and otherwise justifiable dismissals should be limited;
- Non-contractual redundancy compensation should be abolished;
- The ECA should be amended to confirm the validity of fixed term contracts;

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12 [1995] 1 ERNZ 281.

13 Supra at note 12 at 308.

14 Supra at note 11.

- The ECA should be amended to validate dismissal on contractual notice.

What I have discussed here is an area of the law in a state of flux. The ECA is still very much in its early stages. As I have outlined, the development of the law in the area of employment contracts has and is being subjected to an active judiciary and serious political lobbying by concerned groups. I say it provides a microcosm of what is to come as we approach the implementation of MMP.

Foreign affairs and relations

By way of contrast at a recent address the Minister for Foreign Affairs and Trade, Don McKinnon expressed his view that New Zealand's foreign policy will remain much as it is today under MMP.[15] He noted that what will change will be the influences and sources of foreign policy input. As a result, the challenge will be in maintaining our foreign policy integrity.

The Minister noted that an instance of a legislature overturning a decision of the Executive might normally pass without a domestic ripple. But the loss of a government's credibility internationally may be real if it appears to be "marching to someone else's drum beat". Such a switch may throw foreign policy actors off balance and highlight not only how precariously balanced some foreign policy planks are but how dependant practitioners are on predicability and no surprises.

In New Zealand foreign policy has by and large always been the preserve of the government and while parliament and public opinion can influence the process, only rarely has parliament made changes to our foreign policy's discretion or impact. Under MMP there will undoubtedly be more debate on policy issues and their presentation. The extent to which the judiciary may be brought into the picture is unclear but nevertheless worthy of consideration.

The judiciary and foreign policy

Attempts to use the courts to circumvent legislative intent on foreign policy are not new. In 1971 the decision of *Parsons v Burk*[16] concerned an application under the ancient writ of ne exeat regno[17] to prevent officials and members of the All Blacks from travelling to South Africa on the grounds that the proposed tour would be prejudicial to the interests of New Zealand.

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15 Speech to the Upper Hutt Chamber of Commerce, the Right Honourable Don McKinnon, 4 April 1996.

16 [1971] NZLR 244.

17 "That he not leave the Kingdom", Hinde & Hinde New Zealand Law Dictionary, Butterworths 1986.

His Honour Hardie Boys J. refused to grant the order observing that on matters of state the court would be usurping the function of the Queen's Ministers in New Zealand if on an application of a private citizen the Court in the name of the Queen in a matter of this kind permitted the issue of the writ.[18]

The final holding notwithstanding, the decision is important because it shows how the judiciary can be used to question and enquire into matters of foreign policy.

As is widely known, history repeated itself some 10 years later in 1985 with *Finnigan v New Zealand Rugby Football Union*.[19] The Court of Appeal was required to determine a challenge to the Council of the NZRFU concerning an invitation to tour South Africa. The appellants maintained the decision to tour failed to comply with the Council's stated object of promoting and fostering the game of rugby union throughout New Zealand.

Justice Casey in his decision made the important reference to the foreign policy implications of the case in allowing the restraining injunction. He observed that there was a clear direction from the government and a unanimous resolution of parliament that the tour should not proceed because it would do serious harm to New Zealand's interests at home and abroad.[20]

Therefore the attempts to influence foreign policy through the courts has precedent history. This may increase under MMP. However the extent to which the courts have hitherto been able to act neutrally and give effect to the intentions of parliament may set them in good stead for, as the Minister noted, (mentioned earlier) maintaining our foreign policy integrity.

I suggest that by way of contrast with the Employment Contracts Act, the judicial neutrality of the Courts is possibly another reason why the Minister sees the impact of MMP on foreign policy as potentially minimal. As a final point to this discussion of foreign policy, there is under MMP likely to be more discussion on the adoption of treaties and foreign conventions.

International treaties

I suggest that as a forerunner to MMP recognition of international or extraneous policies is already occurring.

For instance, the Employment Court and Court of Appeal have made numerous references in determining issues under the Employment Contracts Act to the conventions of the International Labour Organisation (ILO).[21]

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18 Supra at note 16 at 248.

19 [1985] 2 NZLR 181.

20 Supra at note 19 at 186.

21 See, for example, *Capital Coast Health v New Zealand Medical Lab Workers* (1994) 2 ERNZ 93; *Ivamy v New Zealand Fire Service Commission* (1995) 1 ERNZ 724.

In the final analysis it is pertinent to ask what are the implications of all of this to be for the legal profession?

Implications for the legal profession

Lawyers are in the business of generating outcomes for clients. This includes changing the application of specific law or policy to a client in a certain case or changing the law and policy in a general area. As the examples to which I have referred show, under MMP "black letter law advice" without more is unlikely to be successful in generating positive outcomes for clients.

The policy or political realities of a given situation will become integral to the giving of advice. MMP will require black letter law to be considered in the context of the policy and political environment concerning that piece of law. In some circumstances that may result in advice contrary to the strict letter of the law. The law may allow it, but the political reality may mean it is not wise to do it.

Lawyers can only hope to give such strategic advice if they see themselves as participants in the constitutional system and understand what is happening in that system. Successfully influencing policy and legislation-making to achieve desired policy outcomes will require lawyers to understand not only the law but also the processes in the practice of how the constitutional system in New Zealand really operates. Furthermore, it will require understanding of how public power is really distributed through that system.

It has been stated that it is vital that lawyers have some input into policy making and learn non-judicial ways of getting results.[22] More finely honed dispute resolution techniques, a better understanding of how to draft private members bills and learning how to use the select committee system effectively, are among the skills successful lawyers will need in the new MMP environment. At the heart of this argument is the proposition that MMP will mean more opportunity to change legislation as it passes through the House. Primarily this is because it will be given more detailed scrutiny by select committees on which a coalition government is unlikely to command a majority.

Lobbying skills for lawyers will become important. Lawyers seeking to change legislation on behalf of the clients at the select committee stage will need to learn how to make effective written and oral submissions. Alternatively, lawyers acting for government departments or SOEs which can be subject to scrutiny or enquiry must establish good channels of communication with committee members and make sure they are well-briefed on matters which may give rise to an investigation.

At the recent Dunedin Law Conference, National Party MP and lawyer, Alec Neill observed that lawyers need to practice their "lobbying skills". "I'm sorry", he told his audience, "but lawyers are not good lobbyists. They're a little verbose, they're a little arrogant, they're

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22 The Independent, "Under MMP lawyers will become pre-emptive lobbyists", August 1995.

definitely pompous and from time to time I catch them consorting with the Opposition but they come and see me."

Finally, it is noteworthy that MMP should consolidate the current trend of increasing public consultation. Without it policies and laws are unlikely to be successful or acceptable to the electorate.

The greater imperative to consult is likely to develop a culture of public consultation for policy and law making. This may impact, for example, on the concept of legitimate exceptions in the realm of administrative law. Applicants may argue that they had a reasonable basis for expecting that they would be consulted due to a past practice. Public consultation is likely to be required in a wider range of areas than has previously been the case. Recent analyses of the policy manifestos of current political parties and those that are likely to be formed prior to the first MMP election, shows that all key areas of policy are likely to be affected.[23] These including policy affecting:

- The Employment Contracts Acts;
- The Reserve Bank Act;
- Tax legislation;
- Fiscal, social and foreign policy.

Consultation is likely to be extended to all of these key policy areas under MMP.

Conclusion

The advent of MMP will bring large changes to our system of government. There will be less emphasis on how our constitutional system operates in theory and more on how our system of government operates in practice. The passage of legislation will be more fraught and less predictable.

Any reliance on the judicial arm of government to determine policy issues may result in an unsatisfactory situation as is illustrated by the developing body of case law under the ECA.

In order to generate successful outcomes for clients in the new environment, lawyers will need to familiarise themselves with the creative range of tools available in the developing public laws sphere. I suggest a positive and proactive approach to the new challenges before us will increase the chances of creating solutions to client problems in a cost and time efficient manner.

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23 Supra at note 1.