

ROBERT FOITZIK

THE NEW ZEALAND LEGAL SYSTEM
FROM A GERMAN LAW PERSPECTIVE

LLM MASTER PAPER
LAWS 582

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2003

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INTRODUCTION

ABSTRACT

Germany and New Zealand are not only geographically on opposite sides of the world, but also have different legal systems. Germany and New Zealand are representatives of two different legal systems, the civil law and the common law system. This paper compares selected areas of the New Zealand Legal System with the corresponding German Legal System and concentrates on legal areas which occur in the daily practise of a New Zealand Community Law Centre. After a brief introduction in the legal basis of each country, which gives the reader essential background information on both countries, the paper compares the two court systems and outlines the differences. In the following administrative law, contract and consumer law, family and employment law are compared and analysed. Examples from the daily practise in a Community Law Centre are used in each chapter to highlight and explain the differences. The paper finally concludes that despite a very different approach to the legal solution of a case the outcome is almost always similar under each system. The differences are in the end more to be found in question of form and procedure as in the substance of the law.

The first chapter "The Legal Basis" provides basic background information about New Zealand's History and constitutional development. The second chapter ("The Courts") describes and compares the New Zealand Court system with the German Court system. This paper contains approximately 13500 words, excluding table of contents, footnotes, bibliography and appendices.

The third chapter ("The Law") analyses and compares selected areas of New Zealand Law with the corresponding German Law. The chapter starts with a brief explanation of the general differences between the Common and the Civil Law. The paper then analyses and compares New Zealand Administrative Law, Contract and Consumer Law, Family Law and Employment Law with the German Law. Case examples which occurred or are common in the daily practise are used to highlight and explain the differences.

¹ The author has been working with the Whistlers Community Law Center in Porirua from June 2002 till March 2007 and the paper therefore focuses on the areas of law the center is mainly dealing with.

I INTRODUCTION

Germany and New Zealand are not only geographically on opposite sides of the world, there are also legally 'opponents' as typical representatives of different legal systems, the common law system as represented in New Zealand, and the Civil Law System as represented by Germany. Both systems have proved to provide a stable judicial framework with broad support from the population in the countries in which they have been established, obviously transporting the perception that the system is fair and just. Each system has, however, its own specific advantages and disadvantages and limitations. Instead of focussing on the general differences between the common and civil law system, this paper puts special emphasis on the practical application of the law. It concentrates on legal problems, which typically occur on a day-to-day basis in a New Zealand Community Law Centre,¹ and addresses the legally trained reader to give him or her an overview of selected areas of New Zealand Law.

The paper is constructed in the following way: the first chapter "The Legal Basis" provides basic background information about New Zealand's History and constitutional development. The second chapter ("The Courts") describes and compares the New Zealand Court system with the German Court System. In this chapter examples² explain the procedure and the requirements of the Dispute Tribunal and the difference to the requirements of the District Court. The third chapter ("The Law") analyses and compares selected areas of New Zealand Law with the corresponding German Law. The chapter starts with a brief explanation of the general differences between the Common and the Civil Law. The paper then analyses and compares New Zealand Administrative Law, Contract and Consumer Law, Family Law and Employment Law with the German Law. Case examples which occurred or are common in the daily practise are used to highlight and explain the

¹ The author has been working with the Whitireia Community Law Center in Porirua from June 2002 till March 2003 and the paper therefore focuses on the areas of law the center is mainly dealing with.

differences. The last chapter ("Miscellaneous") describes the differences in regards to private tenancies, infringement offences and torts.

Each chapter begins with a brief introduction which summarizes and comments the following to draw the readers attention to the major points. After this brief introduction a brief explanation ("Practical remark") follows about the standard problems one encounters in the daily practise and how clients can be helped.

The final conclusion summarises the findings and concludes that although both systems are quite different, in the daily practise of a Communal Law Centre they both reach almost always the same legal consequence when applied to the same case. A German lawyer still has to adapt to the New Zealand Law System by learning in which Act (or common law principle) the corresponding rule to the German Law can be found, but besides that the differences are more found in procedure and form as in the substantive law. However, the lack of a written constitution with an entrenched part of basic rights has an effect on the approach to justice in New Zealand as people seem in general more reluctant to pursue their rights against the state, government or public entities.

II THE LEGAL BASIS – THE CONSTITUTION

In New Zealand, the understanding of what comprises a constitution refers to 'the rules by which government is conducted',³ whereas it is understood in Germany as 'a framework for the permanent organization of a particular nation state'.⁴ Striking is the lack of one unitary constitutional document and that the individual liberties are found in a normal not even entrenched piece

² The examples given are 'real' cases the author has dealt with during his time at the Law Center, but for privacy reasons the names of the clients and the parties involved have been changed.

³ Morag McDowell and Duncan Webb *The New Zealand Legal System* (Butterworths, Wellington 1995), 90.

⁴ Donald P. Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, Durham and London 1989), 35.

of legislation, the Bill of Rights 1990. The task to examine breaches of individual liberties through public entities is assigned to the ordinary courts.⁵

Practical remark:

Claims with a constitutional problem or significance only arise with Maori clients who inherited or want to buy or sell a piece of land. The legal position of the Maori people is founded in the Treaty of Waitangi and the Maori Land Court deals with problems in this area of law.⁶ Besides that constitutional problems don't arise in the daily practice of the Law Center

A *The New Zealand Constitution*

Although New Zealand does not have a written constitution, it possesses an effective and clearly discernible set of laws which taken collectively can be described as the constitution.⁷ Among a range of legal and extra legal sources⁸ only six can be considered as a constitutional framework:⁹ the rule of law, legislation (both of New Zealand and United Kingdom Origin), constitutional conventions, common law, letters patent, and the Treaty of Waitangi.¹⁰

1 *The Treaty of Waitangi*

Captain James Cook discovered New Zealand in 1769 and although it was

⁵ In comparison, the German Federal German Constitution Court ("Bundesverfassungsgericht") can ask the legislature to amend, adopt or cancel pieces of legislation that it considers non-constitutional. In recent years, the Court has used this power more and more and has developed into an institution of major policy making importance (in the eyes of some critics to the extent of a 'second legislator'). For an overview about the Constitution Court, its development and most significant cases Kommers, above.

⁶ These claims are dealt with at the Maori Land Court. For details about Maori Land Claims and the procedure Whitireia Community Law Centre Trust Inc *Maori Land A Guide to Succession* (Whitireia Community Law Centre, Porirua 2001).

⁷ R D Mulholland *Introduction to the New Zealand Legal System* (8th ed, Butterwoths, Wellington 1995), 17.

⁸ According to Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001), 1, these include the statutes of the British and New Zealand Parliaments, the common law, constitutional convention, the law and custom of Parliament, the great legal commentaries, customary international law, the principles of the Treaty of Waitangi, and a host of Westminster traditions embedded in British constitutional history.

⁹ McDowell/Webb, above, 90.

¹⁰ McDowell/Webb, above, 117,118.

subsequent declared a British possession by virtue of that discovery, Britain repeatedly disclaimed any interest in New Zealand.¹¹ It was not until 1839 that a letters patent¹² was issued which demonstrated a first British interest to establish New Zealand as a British possession.¹³ It was followed then by the most influential event in New Zealand's history the signing of the Treaty of Waitangi on 6 February 1840. Although there is till today a significant controversy about the Treaty and its interpretation,¹⁴ it is unanimously accepted that by the ratification of the Treaty British sovereignty was established, which led in due course to the implementing of the (British) system of law and government.¹⁵

2 Constitution Acts

The New Zealand Constitution Act 1852 can be described as New Zealand's first constitution.¹⁶ It established the implementation of suitable central and provincial governmental institutions and was also regarded as above 'normal law' as it was not open to amendment by ordinary legislative process.¹⁷ It was replaced by the Constitution Act 1986, but like its predecessor the act is not a basic constitutional document and not a written constitution in itself, as it does not establish or define any of the constitutional institutions which it

¹¹ McDowell/ Webb, above, 93.

¹² A letters patent is a set of instructions issued to the Governor General by the monarch. For more details Mulholland, above, 23, 35.

¹³ McDowell/Webb, above, 94.

¹⁴ For the two texts of the treaty and their textual differences see Joseph, above, 45 – 48. The controversy concentrates on two points: first, whether sovereignty was in fact ceded, as there are some difficulties in the interpretation of the Maori text, and second, whether the Maori as a body were capable of ceding sovereignty. McDowell/ Webb, above, 93. For an extensive analysis about the meaning of the treaty and the judicial ruling upon it Joseph, above, 42 – 95.

¹⁵ McDowell/Webb, above, 95. The Treaty of Waitangi is incorporated into the legal system by the Treaty of Waitangi Act 1975, which established the Waitangi Tribunal whose task is to examine Acts of parliament and regulations to determine whether or not they affect the rights of the Maori people. Mulholland, above, 23. For more details about the Waitangi Tribunal Joseph, above, 77 – 79

¹⁶ Joseph, above, 112, 113.

¹⁷ Joseph, above, 99 and 113.

recognises.¹⁸ It further lacks the character of superior law, as none of the Act's provisions is entrenched.¹⁹

3 *The Bill of Rights*

In contrast to the Bill of Rights 1688, which is acknowledged as a source of New Zealand's institution (but is of no great significance today),²⁰ the Bill of Rights Act 1990, which declares a series of individual liberties becomes more and more important but is not considered a constitutional source.²¹ The very idea behind the Bill of Rights 1990 was to introduce a piece of legislation with supreme law status ("entrenched") to protect basic rights and to prevent abuses of executive government.²² However, following the recommendations of the Justice and Law Reform Committee a significantly watered down version of the White Papers Bill was passed as the Bill of Rights Act on 28 August 1990. Despite the quite diminished legal status the interpretation by the Courts indicates that they consider the Act of far greater constitutional significance than perhaps first expected.²³ In the daily practise,

¹⁸ For example, the continued existence of the House of Representatives, which was established by the New Zealand Constitution Act 1852, is recognized by S10 of the Constitution Act 1986. Mulholland, above, 29, 30, 31.

¹⁹ Joseph, above, 116.

²⁰ It goes further into identifying the relationship of the crown to parliament and also partially identifies the doctrine of parliamentary supremacy. For more details McDowell/Webb, above, 127.

²¹ The Bill of Rights Act 1990 contains a menu of what might be regarded as fundamental individual rights, such as the right to freedom of religion, speech, assembly, life, to vote at elections, to a speedy trial etc. Mulholland, above, 19. Although the Act affirms and promotes basic rights and freedoms, it does not control the legislative powers of Parliament. Also, inconsistent statutes may be neither invalidated nor rendered inoperative under it. Joseph, above, 171 and 785.

²² Introduced in 1985 by Sir Geoffrey Palmer and embodied in a 'White Paper', it sparked a fierce discussion about its main proposals. The major concern was to the extent of the power to be accorded to the judiciary and it was feared that this would entail a fundamental shift in the balance of power from the elected body of Parliament to the judiciary. These and other arguments lead to the final recommendation of the Justice and Law Reform Select Committee that the Bill should be introduced as ordinary statute, and not as entrenched law. They concluded that "New Zealand is not ready, if it ever will be, for a fully fledged Bill of Rights along the lines of the White Paper draft". For a detailed analysis about the discussion Geoffrey Palmer and Matthew Palmer *Bridled Power - New Zealand Government under MMP* (3rd ed, Oxford University Press, Auckland, 1997), 265-271.

²³ The Bill of Rights is not only important in the courts. One of the most fundamental of its effects is upon government itself, as, before legislation is introduced, it has to be ensured that it does not breach any of the principles enacted in the Bill of Rights Act. Palmer, above, 272.

it is striking how often apparently the police commit breaches of the BORA (as it is commonly abbreviated).

Example:

Keith claims that he has been beaten up by police officers: he spent the evening with his partner, their children and some friends, watching TV, when his partner went into the bathroom. When he went to look for her, he found her trying to open her arteries. They called an ambulance and shortly after their arrival, four policemen also arrived, obviously informed by the ambulance people. They interviewed him in the kitchen, out of sight of his partner, and when he tried to go to her, they put him down on the floor, kicked him in the ribs, handcuffed him and sprayed pepper spray into his eyes. He was then taken to the police station and got arrested.

One has no problem to establish some serious violations of the Bill of Rights²⁴ through the police and even assuming that his story was only partly correct it is hardly conceivable that four policemen need such excessive force to put one man down.²⁵ Like with other cases also this one did not make it to court. The general perception among clients at the Law Centre is that they don't have real means to go against the police.²⁶ Although they could apply for legal aid, clients normally file a complaint to the Police Complaints Authority, which investigates the case and has the power to impose sanctions if misconduct can be proved.²⁷ In contrast, complaints about misconduct of public bodies or departments quite often find their way to court in the German Legal System: the police is part of the executive branch of the state and subjected to the jurisdiction of the administrative courts. Access to the first instance, the district administrative courts ("Verwaltungsgerichte"), is possible without assigning a lawyer, legal aid is

²⁴ S9 ("Right not to be subjected to torture or cruel treatment") and S21 ("Unreasonable search and seizure") of the Bill of Rights Act 1990 are clearly violated. The Bill of Rights Act 1990 is available at www.brookes.com (last accessed 20 February 2003). See also Appendix I.

²⁵ Although the first part of the story sounded quite incredulous (did his partner really go to the bathroom and tried to kill or hurt herself with children and friends present?) and it was more likely that this was simply another case of domestic violence in disguise, the second part, the beating by the police, sounded plausible.

²⁶ Although the 'Baigent-Case' (Simpson v Attorney-General (Baigent's case) [1994] 3 NZLR 667 (CA)) recognized a general claim against the police, the court denied the application of the BORA. Applications for judicial review are generally made under the Judicature Amendment Act 1972. Mary Scholtens *Judicial Review – An introduction to administrative law* (New Zealand Law Society Workshop, April 1999), 23.

²⁷ People are in general more reluctant to bring actions against public entities. The state, the government and its entities are regarded as representatives of the law and therefore not subjected to it – the given legal provisions are not recognized as such by people who are unfairly treated through public bodies and their representatives.

available and court costs are low. In the aforementioned case the regional acts about the conduct of the police ("Landespolizeigesetze") would be applied. That the state is responsible and liable is a general understanding in the German society; the state designs the rules, but is also bound to stay in its limits.²⁸

B The German Constitution

1 History

The German Basic Law had mainly two predecessors: the constitution of the German "Reich" under Bismarck of 1871 and the "Weimarer Verfassung" (Constitution of Weimar) of 1919. The constitution of the German "Reich" regulated only the organization of the state, whereas the Constitution of Weimar also included a list of basic rights, which were, however, rather general political statements than enforceable rights.²⁹ After Germany's capitulation on 8 May 1945 the Western powers wanted a German State as a stronghold against the Soviet Union and called for the German "Laender" (Countries) to convene a parliamentary council for the drafting of a constitution.³⁰ The submitted draft of the constitution was labeled 'Basic Law' to underline the provincial character of the constitution and not to enhance the partition of Germany, and came finally into force on 24 May 1949.³¹ With the reunification of East- and West Germany after the collapse of the East- German regime in autumn 1989 the majority of the member of the House of Representatives ("Bundestag") voted for the continuing

²⁸ This is also expressed in §839 Civil Code (introduced with the Civil Code in 1900), which states that should a public body or its representative carelessly damages the property of a citizen, the state is bound to compensate that harm. In addition to that, the suits provided by the relevant administrative laws are numerous and even the highest German court, the Federal Constitutional Court, is accessible for ordinary people with low income and little education. Verdicts from the Federal Constitutional Court against unfair legislation and the subsequent change of the laws by the government have also supported the general perception that the state is and can be held liable for his deeds. §839 Civil Code available at <http://dejure.org/gesetze/BGB> (last accessed 20 February 2003).

²⁹ Sabine Michalowski/ Lorna Woods *German Constitutional Law – The protection of civil liberties* (Ashgate, Aldershot, 1999), 3.

³⁰ Michalowski/ Woods, above, 4.

³¹ Michalowski/ Woods, above, 5.

existence of the Basic Law and the Basic law became the permanent constitution of (reunited) Germany.³²

2 Structure

The Basic Law contains provisions providing a framework for the political order in Germany, including the most important state organs, their functions and the main principles by which the state operates.³³ The first chapter deals with the Basic rights³⁴ and is comparable to the Bill of Rights 1990. It also stipulates various fundamental principles including the establishment of separate courts for administrative, criminal and civil law and the rule of law,³⁵ declares the separation of powers and stipulates the unalterable principle that Germany is a social state.³⁶ The Basic Law sees for a 'free democratic basic order' based on individual liberties and equality, majority rule, responsible party government, separation of powers, the rule of law, and the observance by citizens of certain principles of political obligation.³⁷ Above all, the Federal Constitutional Court watches as a guardian of the constitutional order, as a specialized tribunal, empowered to decide only constitutional questions and a limited set of public law controversies.³⁸

III THE COURTS ("*Instanzenzuege*")

There are no major surprises in the New Zealand Court system: due to its

³² Michalowski/ Woods, above, 5, 6.

³³ Michalowski/ Woods, above, 7.

³⁴ Article 1 appropriately declares the cornerstone of the Basic Law that 'the dignity of man is inviolable'. Kommers, above, 37. The Basic Rights or individual liberties in the Basic Law include beside others, the right to self-determination, the right to personal freedom, the freedom of religion and conscience, the freedom of expression and the freedom of assembly. For a detailed description of the basic rights of the Basic Law, Michalowski/ Woods, above, 97-349.

³⁵ Dicey's concept of the rule of law had a decisive restrictive effect on the growth and modeling of administrative law in the common law countries. McDowell/ Webb, above, 119-124 and A V Dicey *Introduction to the study of the law of the constitution* (10th ed, London, Macmillan, 1965). The German terminology, however, is used in reference to a state that keeps the jurisdictions separate with equal independence to their judges and is therefore based on the rule of law ("*Rechtsstaat*"). Mahendra P. Singh *German Administrative Law in Common Law Perspective* (Springer- Verlag, Heidelberg, 1985), 6.

³⁶ For the text of Article 20 I, Basic Law, Appendix II.

³⁷ Kommers, above, 2.

³⁸ Kommers, above, 3.

hierarchical structure it resembles very much the German system, although the jurisdiction of each instance is much wider than the comparable German one. Striking is the lack of administrative courts: all disputes arising in the public and administrative law field are also dealt with in the normal courts³⁹ and court costs are high⁴⁰ and lawyer fees are even higher,⁴¹ as there is no statute regulating their fees.⁴² Legal Aid is available for all major forms of disputes, although it is not the judge who deals with the case who decides instead solely the Legal Service Agency. Like in Germany, the courts with a special jurisdiction are assigned to the normal courts (like the Family Court to the District Courts). The standing of a judge is different than in Germany: judges are considered to be persons of respect and honor, superior to the lawyers, and judgments are quoted with the name of the judge, not with the neutral expression 'the court'.⁴³

Practical remark:

In the daily practice of the Law Center cases usually go to the Disputes Tribunal or to the District Courts, but not above the High Court level. The decisions of the Court of Appeal or the Privy Council are of academic interest and can be used as arguments in the disputes fought over in the lower instances. Clients who go to court need to be advised on the relevant costs and the procedure; it is in general also often necessary to draft the statement of claim for them. Although the legal

³⁹ In some areas tribunals deal with disputes in the first instance (for example, the Benefit Review Committee in Welfare Law Disputes). See further IVC2.

⁴⁰ The costs for the District Court are regulated in the District Court Rules 1992. S45 (1) District Court Rules says "all matters relating to the costs of or incidental to any proceeding or any step therein shall be in the discretion of the Court". The same regulation is found in S46 High Court Rules. The District and High Court Rules are available at www.brookers.com (last accessed 21 February 2003).

⁴¹ Like in Germany, lawyer are not allowed to take contingency fees. However, even people with little or no legal education can represent other people in court or give legal advice in New Zealand. This is prohibited in Germany by the Federal Statute on Legal Advice ("Rechtsberatungsgesetz", available at www.uni-oldenburg.de/~markobr/RBerG.html, last accessed 25 February 2003).

⁴² In Germany, a special federal statute the Statute on Attorneys' Fees ("Bundesrechts-anwaltsgebuehrenordnung - BRAGO") lists in 133 paragraphs all details what a lawyer can charge for what kind of work he is doing for the client. As a general rule in civil and administrative law cases, the higher the amount or the value of the assets the parties are in dispute about (value of the subject matter - "Gegenstands - oder Streitwert"), the higher the remuneration. However, there is no obligation for the lawyer to charge his client according to the "BRAGO". Individual fee agreements, normally based on hourly rates, are also possible and common in middle size and big law firms. For a detailed description about the legal personnel in Germany Anke Freckmann and Thomas Wegerich *The German Legal System* (Sweet & Maxwell, London, 1999), 111- 122.

⁴³ By contrast, the typical German judge enters the judiciary at the conclusion of his legal training, and his success is marked by promotion within the ranks of the judicial bureaucracy. German judges have been characterized as persons seeking to clothe themselves in anonymity and to insist that it is the court and not the judge that proclaims the verdict. Kommers, above, 4 and Freckmann/ Wegerich, above, 111.

problems of the clients are most of the time quite simple, one should not forget that important (High) Court decisions almost always come from apparently minor disputes or arguments about the interpretation of an Act.⁴⁴ The clients should be advised on the availability of Legal Aid, which is granted like in Germany should the plaintiff lack the financial means to afford a lawyer.⁴⁵

A *The New Zealand Court System*

1 *Jurisdiction and procedure*

In the hierarchical New Zealand system, four levels of instances can be distinguished: on the bottom are the District Courts, followed by the High Court, the Court of Appeal and the Judicial Committee of the Privy Council.⁴⁶ In addition to these courts of general jurisdiction, there are also specialized courts that administer law in a particular area, for example, the Family Court⁴⁷ and the Maori Land Court.⁴⁸ There are also a number of tribunals which exercise a quasi-judicial function and which are closely connected with the courts of general jurisdiction, like the Disputes Tribunal and the Tenancy Tribunal.⁴⁹ As the district courts hear appeals from these Tribunals they also have in difference to the German District Courts

⁴⁴ One good example in this respect is the Scoble- case (Chief Executive of WINZ v Scoble [2001] 8 NZAR 1011 (HC) per Doogue J). See further IVC2.

⁴⁵ The Legal Aid Scheme is set out in the Legal Services Act 2000. Civil Legal Aid is available for Family Court matters, all sort of civil law matters and for matters dealt with by tribunals like the tenancy tribunal. However, Legal Aid is not available for dissolution of marriage, for simple consultancy talks with a lawyer and for going to the Disputes Tribunal. The prospective lawyer who shall take over the case usually files the application; a \$50 fee applies. The Legal Service Agency, which makes the decision, might also establish a contribution to be paid by the applicant and also determines if the legal aid has to be paid back in full or only partly. Criminal Legal Aid is also available and is usually applied for by the duty solicitor. The Legal Services Act 2000 is available at www.brookers.com (last accessed 20 February 2003).

⁴⁶ McDowell/ Webb, above, 225, 226.

⁴⁷ The Family Courts were established as divisions of the District Courts by the Family Courts Act 1980. The Family Courts Act 1980 is available at www.brookers.com (last accessed 20 February 2003).

⁴⁸ Other special courts include for example the Youth Court, established under the Children, Young Persons and their Families Act 1989. The youth court has jurisdiction when a young person is charged with a purely indictable offence unless the charges are murder or manslaughter. A child is according to S2 of the Act a boy or girl under the age of 14 and a young person is an unmarried boy or girl of or over the age of 14 years but under 17 years. No proceedings shall commence (other than for murder or manslaughter) against a child of or over the age of ten years (S272). The Children, Young Persons and their Families Act 1980 is available at www.brookers.com (last accessed 20 February 2003).

⁴⁹ McDowell/ Webb, above, 226.

("Amtsgerichte") appellate jurisdiction.⁵⁰ In District Courts the hearing procedure is similar to the very formal and traditional one in High Court.⁵¹ Proceedings follow the adversary system,⁵² in which the Court plays a neutral role in the proceedings whereas the parties fight out the conflict.⁵³

1 Disputes Tribunal

In civil matters coming to the Law Centre the most important tribunal is the Disputes Tribunal, which combines elements of judicial power with powers of mediation and negotiation.⁵⁴ The Dispute Tribunal has jurisdiction over claims up to \$7500 or \$12000 if both parties agree. The costs to bring a claim to the Tribunal are very low⁵⁵ and the parties have to represent themselves, lawyers or other representatives are not allowed.⁵⁶ Although the Tribunal can deal with a variety of disputes one important limitation is that there has to be a dispute; the Tribunal cannot be used as a debt collector.⁵⁷

⁵⁰ McDowell/ Webb, above, 230.

⁵¹ McDowell/ Webb, above, 244. The Court of Appeal and the High Court also claim an inherent jurisdiction to hear or determine a matter and it is largely up to the court's discretion to determine when it should be exercised. One example is the power of the court to close its proceedings from the public where such circumstances are not prescribed by statute. McDowell/ Webb, above, 229. This inherent jurisdiction can be best compared with the duties and powers of the court regulated in the German Judicature Act ("Gerichtsverfassungsgesetz"), which outlines the constitution, organization and jurisdiction of the ordinary – civil and criminal – courts. Freckmann/ Wegerich, above, 138, 181.

⁵² Mulholland, above, 105, 106. In Germany this system is applied only in civil cases.

⁵³ This equals the German principle of party presentation, which requires and demands that the participating parties have provided all facts of the case on which the court may base the judgment beforehand. The court cannot introduce facts in trial and adduce evidence. This principle is further supported by the principle of party disposition ("Dispositionsmaxime"), which says that the parties are the masters of civil procedure. Only the parties determine the subject matter of proceedings of which they can choose freely. Moreover, the parties determine the extent both of judicial review and the judgment through their pleadings and the court cannot award more or differently than has been applied for (but of course less than demanded if the action is partly unfounded). Freckmann/ Wegerich, above, 141, 142.

⁵⁴ Disputes Tribunal Act 1988, SS10 and 18- 19. They are attached to all District Courts and their objectives are to provide access to quick, inexpensive, informal and fair resolution of small disputes for ordinary New Zealanders, including consumers. Ministry of Consumer Affairs *Review of the Operation of Dispute Tribunal From A Consumers Perspective* (Wellington, 1994), 11. The Disputes Tribunal Act 1988 is available at www.brookers.com (last accessed 20 February 2003).

⁵⁵ The fees are: \$30 for claims under \$1000, \$50 for claims between \$1000 and \$5000, and \$100 for claims over \$5000.

⁵⁶ Exceptions are listed in S38 Disputes Tribunal Act 1988.

⁵⁷ Whitireia Community Law Center *An easy guide to the Disputes Tribunal* (Truprint, Porirua, 1998), 6.

Example:

Liam is running his own company and has been doing sub-contractor work (plastering) for another company. The agreed price was \$8000, but he was only paid \$4000. He is been told that the company is waiting for incoming money and that they can't pay him at the moment.

The parties are not arguing about any contractual obligations (no dispute), so Liam can't get relief through the Disputes Tribunal. He can file a claim to the District Court, get a judgment and have it enforced.⁵⁸ However, it is possible to apply to the Disputes Tribunal to enforce other contractual obligations, which are not in dispute between the parties (for example, when the respondent is obliged to hand back borrowed property to the applicant). Although referees are not bound by legal rules,⁵⁹ but should in obvious situations decide according to the relevant statutes a case decided against legal rules would certainly give grounds for an appeal.

Example:

During his time overseas, Mike had lent his car to a friend, who himself lent it further to another friend, who sold the car. On his return, the police advised Mike to go to court and apply to have the transfer of ownership returned.

The buyer of the car does not get a good title as the seller was not entitled by the respective owner (S14 and S23 (1) Sale of Goods Act 1908). When a person is not the owner, then he or she cannot pass on the ownership, i.e. the buyer in the transaction does not get ownership and cannot pass it on in any subsequent sales. Mike can claim the car back from the buyer and can enforce the tribunal order in the District Court.⁶⁰ By contrast, according to the German Civil Code the buyer got good title and became the owner of the car.⁶¹ Mike would not be able to claim it back from the buyer, instead would have to sue for damages against his friend.

⁵⁸ See further IIIA2.

⁵⁹ S18 (6) Disputes Tribunal Act 1988 states that 'The Tribunal shall [...] regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities'. The Disputes Tribunal Act 1988 is available at www.brookers.com (last accessed 25 February 2003).

⁶⁰ See further IIIA3.

⁶¹ This due to the fact that Mike voluntarily handed over the car to his friend and the buyer was in 'good faith' that the car belonged to the seller. SS433, 929, 935 Civil Code, available at <http://dejure.org/gesetze/BGB> (last accessed 20 February 2003). However, a buyer in Germany never acts in good faith if he purchases a car without the relevant registration (ownership) papers (so called 'Fahrzeugbrief') and can never get good title when the goods were stolen.

2 District Court

The District Courts are at the base of the hierarchy and their jurisdiction is quite extensive.⁶² The Governor-General⁶³ appoints the Judges on recommendation from the Minister of Justice, who must be barristers or solicitors of at least seven years standing.⁶⁴ When the case is simple and there is no dispute between the parties' clients can be encouraged to file their own Statement of Claim to the District Court.

Example:

Sela's niece is the main tenant of a flat. She has rented out one room to a friend of hers. This friend, however, has not paid any rent since and signed an agreement acknowledging the debt. Although it was agreed that she is paying off the money owed in one lump sum and the rest in installments, she is not paying it back. What can she do?

This is a standard case for the District Court as the parties don't argue about any legal position, instead one party (Sela's niece) simply needs the help from the court to enforce a debt. The niece can therefore file a statement of claim to the District Court herself.⁶⁵ However, as the procedure in the Dispute Tribunal is quicker and cheaper she should try to involve an element of dispute into her claim (for example by claiming for some additional damages due to the delay in the payments) to open the jurisdiction of the Disputes Tribunal. Enforcement of District Court judgments (and Dispute Tribunal decisions) resemble in principle practice under the German system: the creditor can to establish the financial situation of the debtor apply for an

⁶² According to SS29, 30 and 34 District Court Act 1947 the District Court has jurisdiction over actions founded in contract, tort or statute up to \$200,000; recovery of land, where yearly rent does not exceed \$62,500, or if no rent is involved, land up to the value of \$500,000; actions seeking remedy in equity (such as an action calling for specific performance of a contract) – up to \$200,000. There are a number of other acts, for example the Minors' Contract Act 1969, the Hire Purchase Act 1971, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979, which give specific jurisdiction to the District Court. The District Court Act 1947 is available at www.brookers.com (last accessed 20 February 2003).

⁶³ The Governor-General is recognized as the Sovereigns representative in New Zealand by the Constitution Act 1986. The Constitution Act 1986 is available at www.brookers.com (last accessed 20 February 2003).

⁶⁴ Mulholland, above 42 and McDowell/ Webb, above 241.

⁶⁵ The client should be aware that the filing costs to the District Court are currently around \$60 and that the Statement of Claim plus the Notice of Proceedings has to be delivered personally to the defendant. The plaintiff also has to sign an affidavit of service and forward it to the court. S43 (1) District Court Rules 1992. The District Court Rules 1992 are available at www.brookers.com (last accessed 20 February 2003).

order for examination,⁶⁶ or apply for a distress warrant by which the court bailiff can take goods or property of the debtor to the value of the debt (\$500 worth of tools and \$2000 worth of household furniture and clothes are the only goods which can't be taken).⁶⁷

A unique feature in the New Zealand Legal System is the New Zealand Accident – Compensation Scheme which provides free health care and protection for the loss of earnings and salaries for every person, who is injured in an accident irrelevant of its nature.⁶⁸ The scheme pays for all the necessary treatment costs and the injured is also entitled to weekly compensation for employment incapacity⁶⁹ till he is able to resume his employment. The victim is, however, not entitled to file any claims against the person(s) responsible for the accident.

Example:

Angela calls on behalf of her husband. He has had a car accident, underwent surgery and is currently covered by ACC. The accident was the sole fault of the other driver. Angela would like to sue the other driver for the following damages: additional food costs for being in the hospital to look after her husband; costs for a babysitter during that time; costs for the cab to the hospital, and a compensation for emotional stress.

⁶⁶ If the financial position seems suitable, the Registrar can order payments in instalments. Easy Guide, above, 29. In the German system the debtor can declare in an affidavit his financial situation ("Eidesstattliche Versicherung"). S807 Civil Procedure Code, available at <http://dejure.org/gesetze/ZPO/807.html> (last accessed 20 February 2003)..

⁶⁷ In the German system, execution proceedings are laid down in the eighth book of the Code of Civil Procedure. After the creditor has filed a demand for execution the official organ for enforcement by execution ("Vollstreckungsorgan") fixes the enforcement measures in accordance with the claim. A monetary claim is enforced by either seizing the movable property of the debtor, conducted by the bailiff (SS808-827), or by issuing an attachment order. There is further the possibility to register a mortgage in the name of the creditor ("Zwangshypothek" – mortgage registered to enforce judgment debt). Other claims, for example for the delivery or recovery of goods, are enforced by either taken possession of the goods and deliver it to the creditor, or by issuing an attachment order. For more details about the execution of claims. Freckmann/ Wegerich, above, 171-176.

⁶⁸ Since 1974, a statutory no-fault accident compensation system has provided compensation for virtually all accidents involving personal injury, including fatal accidents in New Zealand. The Accident Compensation Scheme bars all actions for compensatory damages that arise directly or indirectly from personal injury covered by the Act. If the injury is work related, the employer will be liable to pay the first weeks compensation. The Accident Insurance Act 1998 has now been replaced by the Injury Prevention and Rehabilitation Act 2001. For a detailed overview about the accident scheme Legal Information Service Inc. *Legal Resource Manual* (Legal Information Service, Auckland, 2002), chapter 4.

⁶⁹ The Accident Insurance Corporation pays out 80% of the salary of the injured person.

The very idea behind the scheme is to avoid enormous litigation processes like those which occur in the US and Australia.⁷⁰ Compensation claims are excluded and therefore Angela's husband can't sue against the other driver. She has to be content with the amount paid out by ACC.⁷¹

3 High Court

The High Court has an almost unlimited jurisdiction⁷² and may even intrude on matters which usually originate in the District Court.⁷³ It also hears appeals from the Family Court Division and the Youth Court. In both criminal and civil jurisdiction, where a question of law is required to be determined, there is an appeal from the District Court to the High Court, or to the Court of Appeal if the matter is one of significant difficulty.⁷⁴

4 Court of Appeal

The Court of Appeal⁷⁵ is based in Wellington and consists of seven judges, although only a minimum of three judges is required to sit on any case.⁷⁶ As an appellate court, it has both civil and criminal appellate jurisdiction and

⁷⁰ The Act abolishes the right of the injured person (or the dependants of a deceased person) to bring an action for damages. Note that also the Corporation can't file a claim against the person responsible for the accident. For more details about the Accident Compensation see Stephen M. D. Todd (ed), John F. Burrows, Robert S. Chambers, Margaret A. Mulgan and Margaret A. McGregor Vennell *The Law of Torts in New Zealand* (The Law Book Company Limited, Sydney, 1991).

⁷¹ She can, however try to claim these payments from ACC. For details about the review and appeal process in ACC- matters New Zealand Council of Trade Unions *ACC Review and Appeals* (Wellington, March 1997).

⁷² This is expressed in S16 Judicature Act 1908 that "[the High Court has] "all judicial jurisdiction which may be necessary to administer the laws of New Zealand." The Judicature Act 1908 is available at www.brookers.com (last accessed 20 February 2003).

⁷³ In principle, all civil matters, which fall outside the jurisdiction of the District Court, can be heard by the High Court. If the amount claimed exceeds \$50,000 the parties may apply to have the matter removed to the High Court. The Judicature Act 1908 sees also for a "Commercial List" to provide a service for the commercial community to enable commercial disputes to be decided as quickly and cheaply as possible. McDowell/ Webb, above 239. This is comparable to the chambers of commerce ("Handelskammern") at the German Regional Courts, which are competent to hear commercial cases only. Freckmann/ Wegerich, above, 138.

⁷⁴ McDowell/ Webb, above 240.

⁷⁵ The position, power and duties of the Court of Appeal are regulated in Judicature Amendment Act 1957. The Judicature Amendment Act 1957 is available at www.brookers.com (last accessed 20 February 2003).

⁷⁶ McDowell/ Webb, above 237.

hears appeals from the High Court, but can also be addressed directly on questions of law which are considerably difficult or of great importance.⁷⁷

5 *Judicial Committee of the Privy Council*

The Judicial Committee of the Privy Council is the highest court in New Zealand's hierarchy. It is technically not a court at all, but instead acts as an advisory body to the Queen. The Privy Council sits in London and comprises English and Scottish Law Lords, who are the highest judges in the UK. The minimum number of judges required to sit on a case is three, although, on more important cases, five may sit.⁷⁸ As the highest court in New Zealand's hierarchy, it has appellate jurisdiction only.⁷⁹ The procedure adopted in the Privy Council is usually that it considers evidence previously heard in the lower courts, in written form, and hears submissions on the points of appeal by legal counsel. After consideration of the matter, it forwards an opinion to the Queen, who, by convention, gives effect to the opinion.⁸⁰

B *The German Court System*

The principle rules of the administration of justice are laid down in Article 20 III and 92 Basic Law.⁸¹ The adjudication is assigned to "five jurisdictions"⁸² and each of them is headed by a federal court as the highest

⁷⁷ McDowell/ Webb, above 237. The procedure adopted in Court is relatively informal, with both counsel and Judges freely discussing and questioning the facts and law pertaining to a case. Although the hearing should be conducted as a rehearing, normally cases are heard by presentation of the record of the trial of the court below. McDowell/ Webb, above, 238. This is very different to the formal civil court procedure in the German Regional Appeal Courts ("Oberlandesgerichte"). For a detailed description Freckmann/ Wegerich, above, 145, 146.

⁷⁸ McDowell/ Webb, above, 235.

⁷⁹ For civil matters, where the final judgement of the Court of Appeal is \$5000 or more, there is an appeal as of right to the Privy Council, i.e. no permission is necessary. In respect of other judgments, permission ("leave") needs to be sought and obtained from the Court of Appeal before the matter can proceed. The Court of Appeal has the discretion to refuse such leave and may only grant it where the matter concerns a question of great general or public importance. McDowell/ Webb, above, 236.

⁸⁰ McDowell/ Webb, above 236.

⁸¹ For the text of Article 20 and 92 see Appendix II. Further details can be found in the Judicature Act ("Gerichtsverfassungsgesetz") and in various codes of procedure, such as the Code of Civil Procedure ("Zivilprozessordnung"), the Code of Criminal Procedure ("Strafprozessordnung") and the Rules of the Administrative Courts ("Verwaltungsgerichtsordnung"), the Rules of Procedure of the Tax Court ("Finanzgerichtsordnung"), and the Law

court of the federation and as the court of last resort. Their main duties are to act as final appeal courts for the courts of the "Laender" (countries) and to ensure a uniform interpretation and development of the law.⁸³ This vertical separation is completed by a horizontal hierarchical court structure: the pyramid of these courts start with District Courts ("Amtsgerichte") at the bottom, which are followed by the Regional Courts ("Landgerichte") and then by the Regional Appeal Courts ("Oberlandesgerichte"); the court of the last resort is the Federal Supreme Court of Justice ("Bundesgerichtshof").⁸⁴ In addition to that there is the highly specialised constitutional jurisdiction ("Verfassungsgerichtsbarkeit"), which is headed by the Federal Constitution Court and the different constitution courts of the "Laender" (countries).⁸⁵

IV THE LAW ("*Materielles Recht*")

The common law requires some adaptation for the civil law lawyer. The numerous statutes often only deal with one particular case scenario,⁸⁶ many case constellations are not covered, instead the solution has either to be found in case law or old common law principles. There are no statutes dealing with basic contractual obligations in general. Even more disturbing is the almost complete absence of any form of commentary:⁸⁷ the meaning of

concerning Social Courts and its Procedure ("Sozialgerichtsgesetz"). Freckmann/ Wegerich, above, 124.

⁸² They can be put in order with the legal fields enumerated in Article 95 I Basic Law as follows: ordinary jurisdiction ("ordentliche Gerichtsbarkeit"), jurisdiction in labour matters ("Arbeitsgerichtsbarkeit"), administrative jurisdiction ("Verwaltungsgerichtsbarkeit"), jurisdiction of the social courts ("Sozialgerichtsbarkeit") and the jurisdiction of the tax courts ("Finanzgerichtsbarkeit"). Freckmann/ Wegerich, above, 129, 130.

⁸³ Besides these jurisdictions, other Federal Courts with special jurisdiction exists in accordance with Article 96 Basic Law. Freckmann/ Wegerich, above, 129, 130.

⁸⁴ Jurisdiction in civil matter is regulated by the Civil Code of Procedure; in criminal matters by the Criminal Code of Procedure. Freckmann/ Wegerich, above, 131.

⁸⁵ Freckmann/ Wegerich, above, 129, 130. Specialisation is a characteristic feature of the court system in Germany and has the advantage, that the judges have specialist knowledge and experience and therefore should be able to produce a better quality of judicial application for the individual.

⁸⁶ For example the Credit Repossession Act 1997 or the Fencing Act 1978 (available at www.brookers.com, last accessed 28 February 2003).

⁸⁷ In the civil law system, codes are generally published with a commentary written by a scholar or group of scholars, sometimes also experienced judges or lawyers in the particular legal field. The opinion of these scholars on the status of the law is based on their own and other scholars theories and on decisions of the higher courts. Although court decisions are important, scholarly opinion certainly receives a great deal of respect as providing a theoretical basis for solving legal issues. Often the courts will adopt these theories

certain acts and their interpretation has to be unveiled by studying the relevant case law.⁸⁸

Practical remark:

In the day-to day practise in the Law Centre the most important task is to establish the facts. Clients tend to jump directly to the problem and tell you what they expect the Law Centre to do for them, or they start an extensive story telling which is also most of the time of no help for the legal solution. The discovered legal problem is then in general quite simple and straightforward. The following search for the solution should start with the relevant Acts which in 95% of all cases provide the answer to the problem. To find relevant case law, however, might be difficult: there is no structural approach to this source and a search can therefore be quite time-consuming.

A *The Common Law v The Civil Law*

1 *Origin*

The expression 'common law' can be used to describe the entire body of case law, law built up by the courts, as opposed to statute law. It can also be taken as that body of case law evolved by the courts of common law in contrast to another complementary system of law originally developed by a separate set of courts, the Court of Chancery⁸⁹ (known as equity).⁹⁰ Although today common law and equity are now administered in the same courts, the principles have remained separate.⁹¹ In a common law system, the primary source of law is the judicial opinion of judges as developed over the

themselves as the basis for their opinions. B. Sharon Byrd *Introduction to Anglo- American Law & Language* (Beck- Verlag, Muenchen, 1997), 3, 4. For example, the commentary 'Palandt' (Palandt Buergerliches Gesetzbuch (62ed Beck Verlag, Muenchen 2003) has become a household name in legal circles. It provides a commentary of the relevant codes with regard to civil law, concentrating on the norms of the civil code. Freckmann/ Wegerich, above, 51.

⁸⁸ Although some acts like the Company Act 1993 have explanatory notes and are sometimes even accompanied by Select Committees Reports, these explanatory materials are not comparable to commentaries available to German codes which analyze and summarize not only the 'motives' of parliament but also give an overview over the relevant case law. The Companies Act 1993 is available at www.brookers.com (last accessed 26 February 2003).

⁸⁹ Mulholland, above, 104, 105. The Court of Chancery evolved in the 14th century and developed his own set of equity rules alongside the common law. This dual system persisted in England until the later years of the nineteenth century.

⁹⁰ Due to the more and more specific 'writ' system, the King's chancellor, usually a bishop, began considering petitions asking for relief from injustice that would ensue from the common law. If the chancellor was convinced he would interfere and order the person responsible for the injustice to do or refrain from doing some act that could cause this injustice. As a consequence, a separate body of legal principles developed, which are referred to as principles of 'equity' (= "Billigkeit"). Byrd, above, 31.

centuries. These opinions contain legal principles that can be applied to solve future cases.

Example:

Judy parked her car in Wellington downtown at an unmarked car parking lot. On her return two hours later she noticed that the car was not there anymore and asked in a nearby PhotoShop if they knew about it whereabouts. She was told that she parked on a parking lot of the PhotoShop and that they assigned a towing company to take the car away. Judy wonders if she has to pay the towing costs.

There is no Act that can be applied to this case and the principles to solve it have to be found in the common law, i.e. in the Law of Torts as the towing of Judy's car obviously breaches her proprietary rights. In the Law of Torts one finds the self- help remedy "distress damage feasant" principle which applies in cases where A has without justification caused a thing to enter on B's land and where damage has thereby been caused. In these circumstances the victim of the trespass is entitled to impound the thing until such time as the wrongdoer has tendered adequate compensation for the trespass.⁹² This old principle was in former times applied to cases in which farm animals from farm A grazed on the meadow of farm B. The principle stated that farmer B was entitled to keep the animals till their owner had paid for the grass eaten by the animals. Nowadays, the principle is applied to Judy's case and establishes that the Photoshop as the owner of the parking lot was indeed entitled to tow her car away. However, as Judy said that it was not obvious that the lot belonged to the Photoshop she was advised to take the Photoshop to the Disputes Tribunal and claim the towing costs back.⁹³

This case gives a good example about the different possibilities to find a legal solution in the common and the civil law system: for lay people in a common law system, the solution which is based in common law principles is impossible to find. The access to the knowledge in the common case law is neither structured nor categorised so that only legally trained people are

⁹¹ Mulholland, above, 104, 105.

⁹² Todd a.o., above, 377 under reference to *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144 (HC) by Quilliam J.

⁹³ However, the crucial question in this dispute was if it was indeed not obvious obvious that the parking lot belonged to the shop. Common sense already says that there are no free

able to find it. In contrast, in the German system Judy could claim the money back from the Photoshop under S823 Civil Code, the cornerstone of the German Law of Torts.⁹⁴ The Civil Code, which title ("Buergerliches Gesetzbuch") literally means "Code Book For the People", provides even for the legally not educated a quick overview about rights and obligations in all legal civil areas.⁹⁵ The application of S823 Civil Code would lead to the same result.⁹⁶

In the German civil law system, the primary source of law is a code, such as the Civil Code ("Buergerliches Gesetzbuch"). Whereas in the common law system, a code is merely a collection of statutes, which have been enacted or adopted by legislature, a code in the German law system is an organised treatment of an entire body of law. It contains normally a general part, which deals with issues common to the entire body of legal problems the code is designed to govern, and also a more specific part, containing provisions relating to particular legal questions.⁹⁷

2 Doctrine of stare decisis

One of the most important principles of the common law system is the 'doctrine of stare decisis', which basically means, that judges are bound by their previous decisions and by the decisions reached by higher courts.⁹⁸ A case decided in the past establishes a principle of law, which is referred to as

parking spots in a city center – every place belongs either to the community or private companies.

⁹⁴ For the details about the requirements of S823 Horn, Koetz and Leser, above, 146-155.

⁹⁵ However, the Civil Code is not a simple attachment of sections, instead a closed system amendment by numerous case decisions.

⁹⁶ The fact that the lot was unmarked would be considered as 'contributory negligence' of the Photoshop. This 'contributory negligence' ('Mitverschulden') is regulated in S254 Civil Code and basically states that if the plaintiff was also responsible for the loss, injury or damage, the defendants liability will be reduced to the extent that the plaintiff's fault contributed to the harm. This rule in the General Part of the Civil Code applies to claims in damages and torts as well. S254 Civil Code is available at Code is available at <http://dejure.org/gesetze/BGB> (last accessed 20 February 2003).

⁹⁷ The German Civil Code, for example, consists of five books, the first of which is the general part for the following four on the law of obligations (contract law and tort law), property law, family law and inheritance law. Byrd, above, 3.

⁹⁸ For the further conditions on the binding precedent Byrd, above, 9 and McDowell/ Webb, above, 329.

'binding precedent'.⁹⁹ This doctrine also applies in the German system, but a German court is, in principle, never bound by the decision of a court higher in the hierarchy and it has therefore been said that it cannot be predicted what the outcome of a case may be.¹⁰⁰ However, dissenting judgements from decisions from higher courts are rare, and if they occur, can always be overruled by way of appeal. In fact, the courts take the decisions of the higher courts always as a guideline for their own decisions and try to comply with them.¹⁰¹

3 *Ratio decidendi*¹⁰²

Since the main source of law in a common law system lays in judicial decisions,¹⁰³ which are binding precedents, a common law lawyer or judge must be able to find those precedents within the somewhat lengthy case published. The part of the judicial decision, which contains the 'ratio decidendi', is found in the holding: the precedent in a case is the principle of law necessary to reach the holding in a case.¹⁰⁴ The ratio decidendi has to be strictly separated from statements made 'obiter dicta' by the court, which are opinions raised and discussed by the court which are not necessary for resolving the issue.¹⁰⁵ In general, it is more difficult for a common law lawyer or a common law judge to distinguish between the ratio decidendi or

⁹⁹ For a detailed analysis Byrd, above, 8, 9.

¹⁰⁰ So the argument of McDowell/ Webb, above, 329.

¹⁰¹ One distinguishes between appeals ("Berufung") and appeals on points of law ("Revision"). In the latter, the court of last resort can not only squash the judgment, but also can send the matter back to the court of lower instance in order to render a new decision after considering the findings of the court of last resort. This is of course particularly embarrassing for the lower court. For a detailed description of the requirements of appeals Freckmann/ Wegerich, above, 211-214.

¹⁰² The ratio decidendi is defined as: "The reason for a decision. The principle of law on which a court bases its decision." Peter Spiller *New Zealand Law Dictionary* (4th ed, Butterworths, Wellington, 1995), 245.

¹⁰³ There are, however, exceptions: for example, the New Zealand company law has its main source in the Companies Act 1993.

¹⁰⁴ The construction of a judicial decision comprises the same elements as in the German system: the facts of a case and the legal history of the case ("Tatbestand"), the issue or issues raised on appeal ("Vortraege der Parteien"), and the holding ("Rubrum" mit den Leitsaetzen). For a detailed description Byrd, above 15, 16.

¹⁰⁵ Byrd, above, 16. In Germany, these 'obiter dictum' statements are declared to be not legally binding ("erwachsen nicht in Rechtskraft"), but are thoroughly discussed and interpreted amongst scholars as to whether these statements give hints how the court will decide on future cases (especially with decisions of the Federal Constitution Court).

the obiter dicta: in a civil law system, one could say that the sections of the various codes represent what in a common law system are the 'rationes decidendi' of one or many cases.¹⁰⁶ Whereas a judge or a lawyer in a civil law system has the problem of applying the general principles of law in the codes to the various and complex problems that arise in individual cases, the common law judge or lawyer has the problem of sorting out the general principle of law from the specific case.¹⁰⁷

In Judy's case (above) the common law lawyer needs to know the tort principles and has to find the right tort, i.e. the proper remedy. The civil law lawyer looks up the relevant section in the Civil Code (S823), checks if the requirements are fulfilled and is able to tell if Judy's claim might have success or not.

4 *Forms of action*

The common law forms of action have their sources in the medieval 'writ'. A writ was a formal written order from the Kings Court, which could be purchased by a person seeking justice. In the beginning individually designed and addressed, the writs developed over time to standardised case categories, called form of action, which included factual, procedural and remedial elements.¹⁰⁸ Each of the common law forms of action had names, for example account, covenant and trespass. They are today only referred to as 'civil actions.'¹⁰⁹

¹⁰⁶ There are of course exceptions in cases when the courts invented legal constructions to fill gaps in the Civil Code. For example, the courts developed the 'culpa in contrahendo', a legal principle which applied in all cases in which no contractual obligations between the parties were established, but the relationship between the parties was already so close that the denying of the benefits of a closed contract (f.ex. stronger responsibilities to due duty and care) seem to be unfair. Since the reform of the Civil Code in the beginning of 2001 the 'culpa in contrahendo' is incorporated in the Code. For details about the *cic horn*, Koetz and Leser, above 94.

¹⁰⁷ Byrd, above, 16.

¹⁰⁸ The factual element described the type of injury for which a plaintiff could sue a defendant. The procedural elements specified the formal steps the plaintiff had to take to go forward with the lawsuit. The remedial elements provided what remedy or relief the King's judges granted for the plaintiff's type of injury. A remedy or relief is what the court could then order the defendant to do in order to compensate the plaintiff for his injuries. Byrd, above, 26.

¹⁰⁹ Byrd, above 26. Most of these civil actions have an equivalent in the German Civil Code. For example, the action of account was appropriate against someone who had agreed to keep or manage the plaintiffs money and give him a periodic account of that money, but who had failed to do so (= BGB SS666, 675); the action of debt was appropriate to recover money loaned to the defendant (= BGB S607); the actions trespass on the case and trespass are no contractual actions to recover damages to compensate for injury the defendant caused the

For example, Judy's case above could also be researched under the law of conversion, an old common law form of action. Conversion is a wrong to a possessory right in goods and can apply in cases, when a person acquired the possession of the goods rightfully, but retained them wrongfully.¹¹⁰ However, as explained above, the retaining of Judy's car is rightfully exercised should she carelessly parked on the lot, i.e. carelessly not realised that the lot belonged to the PhotoShop.

B The German Law

The German jurist or judge approaches a legal problem quite differently from his common law counterpart, as he always starts out from the legal rule or norm. A legal rule consists always of two parts, the legal command, that is the legal outcome, and the state of facts ("Tatbestand"), i.e. the facts or other circumstances in which it is to apply.¹¹¹ Constitutional law always takes precedence over a simple statute, while statutes take precedence over ordinances and other forms of delegated legislation. Customary law also exists and is an independent source of its own.¹¹² In contrast to the common-law lawyer, who can turn to the common law, the civil law lawyer does not recognize such alternative sources of law to turn to, but accept that the decisions of the courts amend and change the substance of the codes and statutes.¹¹³ The German Civil Code is the most comprehensive of the German Codes, and although its not the oldest of the codes,¹¹⁴ it is the probably the most important code for comparative lawyers.¹¹⁵

C Public and Administrative Law

Administrative law has a different standing in New Zealand as in Germany. There are no specific administrative law statutes, which explain administrative law principles or give guidelines on how a public body should

plaintiff through the defendants wrongful act (=BGB S823). For a more detailed overview of the various forms of actions Byrd, above, 26-30. See also IVG3.

¹¹⁰ For details Todd a.o., above, 489.

¹¹¹ Norbert Horn, Hein Koetz and Hans G. Leser *German Private and Commercial Law: An Introduction* (Clarendon Press, Oxford, 1982), 51, 58, with a very simple example of the application of S823 Civil Code, the corner stone norm of the German Law of Torts.

¹¹² Horn, Koetz and Leser, above, 59.

¹¹³ Horn, Koetz and Leser, above, 60.

¹¹⁴ It came into force on 1 January 1900, whereas, for example the Criminal Code and the Code of Criminal Procedure were already established with the foundation of the German Empire in 1871.

operate.¹¹⁶ Disputes are assigned to administrative tribunals in the first instance, from which appeals the ordinary courts are possible.¹¹⁷ These tribunals are supposed to have more expertise as the courts, but their independence is questionable as they are often closely linked to the department which decisions they are supposed to review.¹¹⁸ Another interesting feature: although acknowledged by the courts the 'proportionality principle' is not applied.¹¹⁹

Practical remark:

Most of the time clients come to the Law Center to give an affidavit or declare a statutory declaration. These are needed for various reasons (for example to declare that the client is the sole caregiver of a child to support an application for a child support benefit) and have to be signed in front of a solicitor or a Justice of

¹¹⁵ Horn, Koetz and Leser, above, 64.

¹¹⁶ There are some acts which contain administrative provisions, such as the Securities Act 1978, the Tax Administration Act 1994 or the Commerce Act 1986, but there is no Act which lays out general principles applying to all administrative procedures or gives rules how administrative bodies reach their decisions, for example in discretionary matters. In Germany, the Law of Administrative Procedure of 1976 outlines in all details what kind of procedures apply and how the review and appeal process works in every administration. The core concept outlined in this act is the 'administrative act' ("Verwaltungsakt"), which covers most of the action of the administrative authorities through which they affect the legal interests of an individual. For the various characteristics on Section 35 above Singh, 32 – 36 and 164 – 183. See also Appendix III.

¹¹⁷ The courts in New Zealand had historically had jurisdiction to review the decisions of public bodies under an ancient form of common law remedy known as the 'prerogative writs'. In 1972 parliament enacted the 'Judicature Amendment Act 1972', which was intended to regulate a simplified procedure for reviewing the powers derived from statute and also broadened the High Courts jurisdiction. It also allowed the applicant not to specify the precise remedy, instead merely to state the nature of relief sought. The exercise of non-statutory power is reviewable under Part VII of the High Court rules. Mary Scholtens *Judicial Review – An introduction to administrative law* (New Zealand Law Society Workshop, April 1999), 1 and Joseph, above, 750 and 983. The Judicature Amendment Act 1972 is available at www.brookers.com (last accessed 22 February 2003). See also Appendix XIV. Claims against the Department of Social Welfare ('WINZ') can for example be filed under S4 Judicature Amendment Act 1972.

¹¹⁸ For example, the Benefit Review Committee, established under the Social Security Act 1964, is made up of a community representative (appointed by the Minister of Social Services), and two Department officers who were not involved in making the original decision about the case (but who can for example be working in the same branch). Legal Resource Manual, above, 77. Administrative tribunals in general are still considered part of the executive branch of the Government, whereas the administrative courts in Germany are strictly an integral part of the judiciary and share the judicial power of the state with the other courts. They are as independent from the executive as are the ordinary courts. Singh, above, 64.

¹¹⁹ The 'proportional principle' ("Verhältnismaessigkeitsgrundsatz") is one of the cornerstones of administrative and constitutional law in Germany. The principle holds that excessive means must not be employed to achieve given ends – the burden a decision imposes (the means) must not be a disproportionate method of achieving the desired purposes (the end). English and New Zealand courts have been circumspect in applying this principle, partly in recognition that reviewing on this ground would trespass on the merits of decision-making. However, the courts have accepted the principle as an aspect of unreasonableness. Joseph, above, 740 and 841- 842.

the Peace. Disputes arise fairly often with the Department for Work and Income ("WINZ") about the correct calculation of the benefits and especially about the granting of benefits in retrospect. Despite some important High Court decisions, this is still a contentious issues and very likely to go to the courts again in the near future.

1 *Administrative Law in New Zealand*

It is a feature of administrative law in common law countries that the ordinary courts also review the exercise of administrative power,¹²⁰ but their scope of judicial control is limited to the excess of jurisdiction or the ultra vires exercise of the powers.¹²¹ Administrative actions are basically reviewed according to two principles: the rule of law together with the doctrine of ultra vires (both uncodified law).¹²² The rule of law comprises three meanings: first, the exclusion of arbitrariness, meaning, that a public authority must, if challenged supply the rule of law authorizing the action. Second, equality before the law, meaning that no person is above the law. And third that civil liberties are secured by ordinary public or private law remedies developed and administered in the ordinary course of litigation.¹²³ In general, the courts usually intervene where the authority concerned has acted without legal power, and that may include situations where the authority acts in bad faith or for a wrong purpose.¹²⁴

2 *Welfare Law and review of WINZ- decisions*

The Social Security Act 1964 is the legislative cornerstone of the New Zealand Welfare Law and has a major importance in the daily practice of the average community law center. Disputes arise especially around the requirements for the application of a benefit and the correct calculation of the amount of the benefit payments.

¹²⁰ Joseph, above, 727.

¹²¹ C.T. Emery and B. Smythe *Judicial Review: Legal Limits of official power* (Sweet & Maxwell, London, 1986), 39, 40. The courts therefore examine only if the decision in question was in the authority of the Department to decide. Although this principle seem to be quite precise, in practice distinctions between errors going to jurisdiction and those not so going can be impossible to draw.

¹²² Singh, above, 65.

¹²³ For a detailed analysis of the three meanings, Joseph, above, 206- 235.

Example:

Paul calls and explains that he has been on a benefit two years ago. He started full – and part time employment at the same time in September 2000. Shortly after commencing his two employments he called WINZ on its 0800 – Number to stop the benefit. However, he did not check his bank account till one year later and realized, that he was still receiving the benefit – now amounting to \$8000. He has now received a summons to appear in court and is afraid that he will go to prison.

According to WINZ Paul has committed an offence under S127 SSA:¹²⁵ he received a benefit and did not inform WINZ that he was not entitled to it. In fact, Paul informed WINZ about his situation, but he can't prove it.¹²⁶ However, Paul can be assured that he won't go to prison as the total amount he received is too little.¹²⁷

When it comes to a dispute with WINZ, the review and appeal process starts at the bottom with an application to the District Review Committee (DRC),¹²⁸ followed by the Social Security Appeal Authority (SSAA). From the SSAA, an appeal to the High Court and further to the Court of Appeal¹²⁹ is allowed.¹³⁰ A common problem is the correct calculation of benefits: when WINZ establishes that a beneficiary is entitled to a higher benefit as previously granted, the question arises if WINZ has then grant the benefit in retrospect.

Example:

Loretta explains that she is on a DPB (=Domestic Purpose Benefit) for 6 years

¹²⁴ This is affirmed in S27(1) of the Bill of Rights Act and means, that the court will ensure that administrators act fairly and reasonably. Above Palmer, 259.

¹²⁵ The Social Security Act 1964 is available at www.brookers.com (last accessed 20 February 2003). See also Appendix XIII.

¹²⁶ To prove that he informed WINZ about his employment he was advised to request the records of the phone calls made under the 0800- number, but it turned out that WINZ did not have any records. However, in another case the court believed the defendant who swore that he had contacted WINZ and convicted the defendant only to repay the received benefit payments, but did not impose a fine on him.

¹²⁷ From previous cases it can be said that the amount has to be considerable higher than \$8000 before the court sends a recipient to prison.

¹²⁸ Legal Information Service Inc., above, 66.

¹²⁹ For an overview see the diagram in Wellington People Resource Center *Benefit Fact File* (Wellington, April 2001), 32.

¹³⁰ The DRC is sometimes also labeled BRC (Benefit Review Committee). Both the DRC and the SSAA are administrative tribunals, specialized to deal with all arising disputes. The DRC has the power to confirm, vary or revoke the decision of the Chief Executive and, should the decision in question have been a purely discretionary one, can also decide on the matter upon its own discretion (S10A(8)). The same applies for the appeal authority (SS12M(7) and 12M(8)).

now. In September 2000 she applied for a Special Benefit on the grounds that her income was not sufficient to support herself and her three children. Although it was rejected at that time, she applied again in April 2001, October 2001 and April 2002, when it was finally granted. Since April 2002 she now receives an additional amount of \$62.5 per week. Loretta is of the opinion that, as her personal situation has not changed since September 2000 she should be granted the Special Benefit in retrospect, i.e. since September 2000 on.

There are two important High Court decisions which can be applied to Loretta's case: in *Moody*¹³¹ the court decided that a retrospective grant of benefits is not allowed by the Act¹³² even if the only reason for the miscalculation is on behalf of the department.¹³³ However, in *Scoble*¹³⁴ the court decided that when applying for a benefit it is the department's obligation to determine the correct benefit for the applicant and that it is not the duty of the beneficiary to specify the benefit sought.¹³⁵ The Court decided further that the plaintiff (Mrs. Scoble) was entitled for an additional benefit from the time on she actually applied for it. For the very reason that these two High Court decisions contradict each other in the question of granting benefits in retrospect, clients like Loretta are advised to have their case reviewed and that they should claim for a retrospective payment of their benefits. There are strong arguments that the Act allows the retrospective granting and Loretta has a fair chance to convince WINZ about her entitlement.¹³⁶

Another important High Court decision, which illustrates the difference between the New Zealand and the German administrative law is the

¹³¹ *Moody v Department of Work and Income* [2001] NZAR 608 (HC) per Young J.

¹³² The court referred to S81 (3) Social Security Act. One interesting aspect of this case is that the Social Security Appeal Authority (in difference to the court) decided to grant the benefit in retrospect.

¹³³ However, according to these court decisions it is always possible for WINZ to recover overpayments; there is no statute of limitations prohibiting that and its up to the discretion of the department to demand repayment or not. In contrast, according to Section 50 of the 10th Book of Statutes of German Social Law the Social Authority Department cannot demand a repayment if the beneficiary had reason to rely on his or her entitlement to receive the benefits. The recovery of overpayments is then prohibited should the beneficiary spend all the money received. For the text of S50 <http://www.sozialgesetzbuch.de/gesetze/sgbx/index.html> (last accessed 30 January 2003).

¹³⁴ *Chief Executive of WINZ v Scoble* [2001] 8 NZAR 1011 (HC) per Doogue J.

¹³⁵ Apparently, the court also declared – obiter dicta – that the beneficiary was entitled for the correct benefit from the beginning and contradicted the statement in *Moody*.

¹³⁶ Clients have to be advised however that legal aid is not available for applications to the DRC (but for the appeal to the SSAA and the High Court). Legal Resource Manual Inc., above, chapter 1, 78.

Wharerimu – case.¹³⁷ The court decided in Wharerimu that only ‘decisions’, which had an economic effect on the beneficiary, could be reviewable under the Act. The decision in question referred to the search of the house of the beneficiary (Mrs Wharerimu), which was conducted in a humiliating manner but led to no financial consequences. The problem the court faced here (the meaning of “decision v determination”) can’t arise in a German administrative court: the Law on Administrative Courts 1960 sees in Section 43 for a special (declaratory) suit (“Feststellungsklage”) to demand the court to declare the existence or non-existence of a legal relationship. The suit covers decisions and determinations from public entities regardless of their economic effect.¹³⁸

3 Administrative Law in Germany

As a “Rechtsstaat” Germany is a state based on the rule of law,¹³⁹ which demands that all state activities are based on laws warranted under the constitution. In case of unlawful exercise of power by the state the individual has legal remedy in an independent court¹⁴⁰ and these disputes are assigned to the jurisdiction of a separate system of courts to settle administrative disputes (S40 (1) Law on Administrative Courts¹⁴¹).¹⁴² Their power depends only on the legislation that regulates their jurisdiction;¹⁴³ a traditional common law power to give remedy against any illegal action is unknown to

¹³⁷ Wharerimu v Chief Executive of Department of Work and Income [2000] NZAR 467 (HC) per Baragwanath J.

¹³⁸ For the text of Section 43 of the Law on Administrative Courts 1960 Appendix IV.

¹³⁹ As expressed in Article 1 and 19(2) of the German Basic Law. Appendix I.

¹⁴⁰ Singh, above, 5, 6. The right to approach the courts in case of infringement of any right by any public authority is one of the basic rights enumerated in the Basic Law.

¹⁴¹ For the text of S40 see Appendix IV.

¹⁴² Three levels of administrative courts in Germany have been instituted (S2 of the Law on Administrative Courts 1960) and process before these courts is regulated by the Law on Administrative Courts 1960 (“Verwaltungsgerichtsordnung”). At the bottom are the Lower Administrative Courts (“Verwaltungsgerichte”), in the middle the Higher Administrative Courts (“Oberverwaltungsgerichte”) and at the top is the Federal Administrative Court (“Bundesverwaltungsgericht”). Singh, above, 3 and 181 – 183. For an overview about the Administrative Courts System in Germany Singh, above, 102 – 115.

¹⁴³ Singh, above, 64, 66: In Germany, enforcement of the basic rights against the executive has been expressed in the Basic Law itself that the basic rights bind the executive in the same measure as the legislative and the judiciary and are directly enforceable law: Article 1(3) Basic Law. Article 19 (1) Basic Law also recognizes a fundamental right of recourse to the courts in case any public authority breaches basic rights. For the text of Article 1(3) and 19(1) Appendix I.

the German system.¹⁴⁴ The scope of review of the German administrative courts is like the common law courts confined to the legality of the action and does not extend to the examining of its expediency (“Zweckmässigkeit”). This is determined by the doctrine of separation of powers: the courts shall not be allowed to question the reasoning of an Departmental decision as long as it stays within the legal limits.¹⁴⁵

For example, a German court could in ‘Wharerimu’ decide if the (discretionary) decision to search Mrs. Wharerimu’s house was legal or illegal. But the court can’t decide for the department which decision it should make when two or more options to solve a dispute are available, all of which are legal and in the department’s discretionary power to decide.

The courts must interpret the laws in its light and, if necessary, order the administration to advise the citizen on the legal position and material facts.¹⁴⁶ This task is facilitated by the inquisitorial principle in the German courts: they are not dependent on the evidence presented to them, instead can demand and collect evidence considered necessary for the dispute in question.¹⁴⁷

D Contract and Consumer Law

The New Zealand Contract Law feels quite familiar for the German lawyer, as the basic principles are very much alike. However, there is no Act which regulates the basic principles¹⁴⁸ and each case has to be summarized under

¹⁴⁴ This power is inherent in the common law system and does not depend on any legislative grant whereas the German courts don’t have any such inherent power. A good example is the case of Keith, above, page 12. He can file a claim against the police to the High Court and the High Court can grant any remedy it considers suitable. In Germany, the claim would have to be filed under S839 Civil Code, which not only states the requirements but also the possible remedies. Without these provisions in the Civil Code and the Basic Law Keith could not file a suit in German. The courts could, however, establish their jurisdiction as.

¹⁴⁵ Singh, above, 71. This principle is stressed in the administrative objections proceedings (“Widerspruchsverfahren”, S68 Law on Administrative Courts 1960, Appendix IV) where the authority is empowered to go also into questions of legality and expediency.

¹⁴⁶ Singh, above, 8.

¹⁴⁷ Singh, above, 71.

¹⁴⁸ Book one of the German Civil Code is the General Part and deals with all rules, which are not specific to a particular institution, for example the contract of sale or the contract of service. These rules are ‘factored out’ and put at the beginning so as to render them of general application. The General Part begins with a treatment of the subjects of law, natural and legal persons. Its general provisions about capacity to act, legal transactions etc. apply

the specific Act. Interesting differences include the requirements as to form¹⁴⁹ and to content (the requirement of consideration, for example, has in principle no equivalent in the German law).¹⁵⁰ The New Zealand consumer law consists of various acts designed to protect the average consumer, which come quite close to the German regulations. However, contracts with very intrusive clauses and enormous interest rates¹⁵¹ are common in New Zealand and clients have to challenge these contracts on a case to case basis: what is missing is an Act which declares certain clauses void to prevent companies to issue the standard contracts again and again.¹⁵²

Practical remark:

Very often clients ask for legal advice after they signed up a contract and either want to know what they actually signed up for or how to cancel the contract. When companies or dealers are involved a letter from the Law Centre has more impact than a letter from the client, but in general clients should be encouraged to pursue their rights on their own. Assistance is often given with the filing of the Statement of Claim to the Disputes Tribunal or the District Court.

1 Contract Law

New Zealand contract law has, as a result of the enactment of a series of Acts of Parliament particularly during the 1970s become distinctive from other jurisdictions. These Acts include beside others the Minors Contract Act

not only through the five books but outside it as well. For a detailed description of the structure of the 'BGB' Horn, Koetz and Leser, above, 66-68.

¹⁴⁹ The German Civil Code requires the signing of contracts about the sale of land by and in front of a notary public to be valid (SS313 and 929 Civil Code), whereas the Contracts Enforcement Act 1956 basically requires them to be in writing to be enforceable. The Civil Code is available at <http://dejure.org/gesetze/BGB> (last accessed 20 February 2003).

¹⁵⁰ Consideration is defined as "A compensation, matter of inducement, or quid pro quo, for something promised or done.[...] It need not be adequate but must be of some value in the eye of the law and must be legal; [...]." Law Dictionary, above, 62. Consideration has nothing to do with the basic principle 'do ut des' of the Roman law or the 'Zug-um-Zug-Leistung' (S320 German Civil Code). The latter is instead found in the common law doctrine of part performance, which allows a court to order specific performance of the contract if the plaintiff had at least partially performed the obligations he or she had assumed under it in the belief that it was valid and enforceable. Maree Chetwin and Stephen Graw *An Introduction to the Law of Contract in New Zealand* (2nd ed, Brookers, Wellington, 1998), 7. However, in practice the requirement for consideration can also be fulfilled by the simple exchange of offer and acceptance (the one given as the consideration for the other).

¹⁵¹ Typical examples include loan contracts from finance agencies, often signed to finance the purchase of expensive cars. Another example are contracts about in-house alarm systems. Common clauses here include the possibility for the company to enter the premise of the customer and remove the alarm system (even when the customer is not at home) should he fail to pay the agreed installments.

¹⁵² See further IVD(d).

1969,¹⁵³ the Contractual Mistakes Act 1977¹⁵⁴ or the Contractual Remedies Act 1979 to name a few. The essential elements of a contract are almost the same as in the German system¹⁵⁵ and a simple contract requires little in the way of formality, but some contracts have to be at least evidenced in writing to be enforceable or to be valid.¹⁵⁶ In the daily practise loan and finance contracts as well as contracts about the purchase of cars prevail.

Example:

Maria got a courtesy car for the time her car was being repaired at the garage. She got involved in an accident in which course the courtesy car was destroyed. The garage refused to hand back her car until she pays the repair costs plus the additional \$1000 insurance excess for the courtesy car. Maria is prepared to pay the repair costs but not the \$1000. She intends to recover the money first from the other driver who caused the accident.

The garage has the right to retain Maria's car till she paid for the repair according to the common law principle of a 'repairer's lien'.¹⁵⁷ However, the repair contract was not signed together or linked to the loan contract for the courtesy car and therefore the garage can't demand the payment of the excess. Maria was advised to go the Disputes Tribunal to claim for the

¹⁵³ There are three categories of people who don't have the capacity to contract: minors, person of unsound mind and drunken persons. Chetwin/Graw, above, 123. According to the Minors Contract Act 1969, married minors (S4) have full contractual capacity; minors aged 18 or over in relation to life insurance contracts and contracts of service have in principle also full capacity (details SS5 and 8). Contracts entered by minors aged under 18 are unenforceable against the minor, but the minor can enforce against the adult (S6). The legal age in Germany is 18 (S2 Civil Code); if authorized by his parents, a minor can in principle also enter into contracts, as long as they are of no (legal) disadvantage for him (S107 Civil Code).

¹⁵⁴ Different to the German law, which distinguishes between three exactly defined mistakes (errors), the Act basically establishes that a court may grant relief where a mistake is known to the opposing party or is common or mutual. The Contractual Mistakes Act 1977 is available at www.brookers.com (last accessed 22 February 2003). See also Appendix VIII. For an overview about the mistake regulations in the Civil Code www.jura.uni-tuebingen.de/reichhold/download/download/ss02/bgbat/13irrtum2.pdf (last accessed 20 February 2003).

¹⁵⁵ Even the Roman law 'invitatio ad offerendum' exists: advertisements of a general nature are usually regarded as invitations to treat and not an offer themselves. The same applies for a display of goods in shops. Chetwin/ Graw, above, 18, 19.

¹⁵⁶ For example, matrimonial property agreements have to be in writing to be valid. Contracts, which have to be in writing to be enforceable, include contracts under the Door to Door Sales Act 1976 and Credit Contracts Act 1981. Chetwin/Graw, above, 12.

¹⁵⁷ Repairers may retain goods (such as motor vehicles) on which they have performed repairs until the repair account for the particular work has been paid. Roger Tennant Fenton *Law of Personal Property in New Zealand* (6th ed, Wellington, Butterworths 1998), 509.

release of her car plus additional damages (for example costs for a rental car or public transport).¹⁵⁸

The requirements and conditions for contracts of sale are found in the Sale of Goods Act 1907, which also provides sections equal to the German principles of impossibility of performance.¹⁵⁹

Example:

Claudia from Wellington purchased a video camera via an internet auction and agreed with the seller, who lives in Christchurch, that the camera should be handed over on Tuesday 25.10.02 in Christchurch to her uncle. The money is to be transferred into the sellers account till Monday. Before the transfer is carried through she received an E-Mail from the seller on Sunday evening, saying, that he sold the camera to someone else because he needed the money.

This case was at a first glance quite simple as it was obvious that the seller had breached the contract of sale (S3 Sale of Goods Act 1908). As the buyer became the owner of the camera (S27 Sale of Goods Act 1908) Claudia was therefore (only) entitled for damages. But what kind of damages could she claim for? She could in principle claim the difference between the agreed price and the price she has now to pay to get the same camera again. However, the camera was a last year model and not sold as new in the shops anymore. To find someone who was selling the same camera second hand proved to be impossible. Claudia's only damage, as she had not transferred the money, was therefore the miss of an opportunity.¹⁶⁰

Although the solution to Claudia's case would be the same according to the German Civil Code, the approach is quite different. The Civil Code has no comprehensive notion like the 'breach of contract' and does not deal with

¹⁵⁸ Maria has the same rights according to the German Civil Code: the repairers lien equals the regulation in S647 German Civil Code ("Werkunternehmerpfandrecht"), but as the garage has no right to retain Maria's car in respect of the excess she can file a claim at the District Court ("Amtsgericht") for the release of her car. The continued possession of the car also amounts to a tort under German law (S823 Civil Code: breach of the right of undisturbed use of ones property), which in common law equals the tort of conversion. For the definition of conversion above IVA1.

¹⁵⁹ For a detailed explanation about these parts of the Civil Code Horn, Koetz and Leser, above, chapter 6 and 7.

¹⁶⁰ The Sale of Goods Act 1907 is available at www.brookers.com (last accessed 22 January 2003). Note that in these cases where the parties live far away from each other the Disputes Tribunal will arrange a telephone conference – it is not necessary for the respondent to travel to the applicants place. Easy Guide, above, 8.

irregularities in a unitary manner.¹⁶¹ If performance cannot be rendered at all, whether because for example the sale – object has been destroyed or is for some other reason not available anymore, the performance has become ‘impossible’ and may render the other party liable for damages.¹⁶² As the seller in Claudia’s case had already handed over the camera (and the buyer thereby achieved the legal ownership), the seller can’t hand over the camera a second time – this is impossible, the contract therefore void. However, as the impossibility is solely the seller’s fault, he is liable for damages and has to put the other party in the position he/she would have been in if the contract had been duly performed. Again, Claudia’s position can’t be established anymore and also according to German law she only missed an opportunity and can’t claim for damages.

2 Consumer Law

The most important consumer law acts include the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Credit Repossession Act 1997, the Hire Purchase Act 1986 and the Credit Contract Act 1981.

(a) Consumer Guarantees Act 1993

The Act replaced the terms implied by the Sale of Goods Act 1908 and the Hire Purchase Act 1971, with statutory guarantees over goods and services bought for ‘ordinary personal, domestic or household use’ or consumption.¹⁶³ For goods, these include guarantees of acceptable quality and are fit for any particular purpose made known to the supplier and correspond with any description, sample or demonstration model. For services, these include guarantees that services will be carried out with “reasonable care and skill”, will be “fit for any particular purpose made known to the trader” and will be completed within a “reasonable time” and for a “reasonable price” where no time/ price is agreed.

¹⁶¹ Horn, Koetz, and Leser, above, 93.

¹⁶² Horn, Koetz and Leser, above, 94.

¹⁶³ SS48 and 49 Consumer Guarantees Act 1993. The Consumer Guarantees Act 1993 is available at www.brookers.com (last accessed 22 January 2003). See also Appendix VII.

(b) *The Fair Trading Act 1976*

Example:

Ken wants to buy a car for his family. He contacts the finance company Shark & Company and consultant Henry suggests to go to an auto auction, organised by NeverTrust- Auctions. They agree on a car of around \$2000 and the next day go with Henry to the auction. There, Henry demonstrates himself as an experienced car buyer and makes it obvious that Shark & Company and NeverTrust are working quite closely together. He advises them to buy a 1993 Nissan Maxima, which Henry then purchases on the behalf of Ken for \$1600. As soon as on the way home the automatic gear box crashes and the car only shifts up to the second gear. Henry denies any responsibility and advises Ken to return the car to NeverTrust. NeverTrust, however, says that the Consumer Guarantees Act does not apply as the car was purchased in an auction. Ken wonders what he can do get another car.

This case was one of the rare complicated ones of the Law Centre as it involved a thorough analysis of the Fair Trading Act 1986 and the Consumer Guarantees Act 1993. The fact that Henry convinced Ken that he was experienced in cars might establish a misleading conduct (misrepresentation) under the Fair Trading Act¹⁶⁴ and entitle Ken for damages,¹⁶⁵ but this was hard to prove. Easier was the application of the Consumer Guarantees Act: Shark & Company was a supplier according to S2(d) Consumer Guarantees Act¹⁶⁶ and therefore Ken did not buy the car from NeverTrust, instead directly from Shark & Company.¹⁶⁷ Ken was therefore advised to go the Disputes Tribunal and claim for a cancellation of the contract or that Shark & Company shall pay for the repair of the car.¹⁶⁸

(c) *Credit Repayment Act 1981*

¹⁶⁴ S9 Fair Trading Act 1976. The Fair Trading Act 1976 is available at www.brookers.com (last accessed 22 January 2003)

¹⁶⁵ This would be the approach according to the German Civil Code: Henry is liable as a representative who created the impression that he has special knowledge. Developed by the German Courts, this principle is now regulated in the new S311III Civil Code. For details <http://www.uni-potsdam.de/~u/lsassmann/AGSchR/webs02/faelle/fall2.pdf> (last accessed 23 February 2003).

¹⁶⁶ S2(d): [A supplier is] "A financier within the meaning of the Credit Contracts Act 1981 who has lent money on the security of goods supplied to a consumer, if the whole or part of the price of the goods is to be paid out of the proceeds of the loan and if the loan was arranged by a person who in trade supplied the goods:". See also Appendix VII.

¹⁶⁷ That also meant that S41 (3a) Consumer Guarantees Act 1993, which says that the Act does not apply when goods are sold in an auction, did not apply in this case.

¹⁶⁸ Unfortunately, this never happened. This was one of the many cases where the clients had quite a strong case and a fair chance to get out of a very disadvantageous finance contract. However, the clients never returned after the first two consultations and also did not answer the calls urging them to come back. As a lawyer one also has to accept the fact that the last step has always to be taken by the client –the lawyer can't do more than advising; its up to the client to decide what to do or not to do.

(b) *The Fair Trading Act 1986*

The Fair Trading Act prohibits misleading and deceptive conduct in trade and the making of false and misleading representations. The Act also prohibits certain unfair practices (for example pyramid selling schemes). Section 9 is the main provision dealing with misrepresentation and covers a wide variety of conduct. It provides that "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to be misled or deceive."¹⁶⁹

Example:

Sonja assigned a professional photographer to take pictures at her daughters wedding. The photographer asked for an advance of \$500 to travel from Auckland to Wellington. After the wedding Sonja paid another \$500 and the photographer told her that he would send the pictures to her in three weeks time. They did not arrive and Sonja heard that others also did not receive their pictures either. She only has the cell- phone number of the photographer and left messages a couple of times, but he did not call her back.

The photographer either did not intend to supply the goods (the pictures) or did know that he could not supply them in the specified time. This establishes an unfair trading practise¹⁷⁰ and Sonja was advised to take the photographer to the Disputes Tribunal.¹⁷¹

(c) *Credit Repossession Act 1997*

The intention of the Act is to govern the taking of possession of goods by a creditor and has the most practical relevance in connection with the repossession of goods purchased under the Hire Purchase Act 1971.¹⁷² If a

¹⁶⁹ The Fair Trading Act 1976 is available at www.brookers.com (last accessed 22 January 2003). See also Appendix VI. Remember that the Act does not apply for private sales. Chetwin/Graw, above, 335.

¹⁷⁰ SS17 - 26 Fair Trading Act 1976.

¹⁷¹ However, for that she needed to know the whereabouts of the photographer. As she only had a cell- phone number she had to consider to ask a private investigator in Auckland to find the address. She can then claim the costs for the PI back in the Disputes Tribunal as additional damages.

¹⁷² The Hire Purchase Act 1971 regulates 'conditional sale agreements'. The sale is conditional on the person making payments in accordance with the terms and conditions of the contract. The customer has the right to possess and use the goods from the time the contract is made, but the finance company keeps the ownership until all payments are completed. This form of purchase is regulated in the Law of Property together with the Law of the purchase of goods in the German Civil Code (SS433 -447 and SS929 - 992 - "Verkauf

debtor is in default under the credit agreement or in the event that the creditor has reason to believe that the goods are at risk,¹⁷³ the creditor is entitled to repossess the goods. The Act establishes a detailed process to be followed by the creditor. However, even if the goods are repossessed in breach of the process, the debtor does not necessarily get his goods back.

Example:

Umuru bought a 1998 Subaru WRX for \$17000 from SuperDealCars in Lower Hutt financed through Ripoff-Finance Ltd in September 2002. He agreed to pay fortnightly instalments of \$340 over a period of three years. He lost his job a month ago and did not pay the instalments since. This morning a guy from Ripoff-Finance showed up at his place and took the car with him. Umuru claims that Ripoff never contacted him, nor did he receive any letters informing him about the repossession. He asks if the finance company has a right to repossess the car and what he can do to get it back.

According to the Act, the creditor has first to serve a pre- possession notice, allowing a certain period of time for the debtor to pay the outstanding instalments. After the expiration of that period, he can then take possession of the goods and has to serve a post- possession notice to the debtor. According to Umuru, he neither received the pre – or post possession notice. Both failures to comply with this process are quite common, but don't result in an obligation for the finance company to return the car.¹⁷⁴ If Umuru wants the car back he can reinstate the agreement by paying the amount owed and remedying any default (s28); the finance company must then forthwith return

unter Eigentumsvorbehalt"). The Hire Purchase Act 1971 is available at www.brookers.com (last accessed 22 January 2003).

¹⁷³ According to S7 (2) the goods are " 'at risk' if the creditor has reasonable grounds to believe that the goods have been or will be destroyed, damaged, endangered, disassembled, removed or concealed contrary to the provisions of the agreement [...]". The onus of proving the existence of those grounds is on the creditor. The creditor is even entitled by the act to enter the premises of the debtor to recollect the goods (even at times when the debtor is not present, SS14 – 19). The German system does not allow a creditor to enter private premises on the basis of contractual agreements only. The creditor must apply at the District Court ("Amtsgerichte") for an execution order, which is then carried out by the bailiff. For a detailed description about the procedure of execution enforcement Freckmann/Wegerich, above, 171-176. The Credit Repossession Act 1997 is available at www.brookers.com (last accessed 22 January 2003). See also Appendix IX.

¹⁷⁴ A failure to serve the pre- possession notice may only result in a fine up to \$3000 (S11), but an application to the District Court is required (SS12 and 13). If the creditor fails to serve the post- possession notice, he only loses the right to claim for the cost for the repossession of the goods (S21). If the goods are sold earlier than the required 15 days after serving the post-possession notice, the debtor is only liable for the outstanding amount and the creditor has to repay any money already paid for other purposes than the outstanding amount (S24).

the car (s29).¹⁷⁵ However, as Umuru is unemployed and can't afford the car anyway, it is more likely that the finance company is going to sell the car. Due to the high interest rates he agreed to pay the proceeds won't cover the outstanding amount, so Umuru will still have to pay for the car without having the benefit of using it (not to mention that, after paying it finally off, he won't have one).¹⁷⁶

(d) Credit Contracts Act 1981

The Credit Contracts Act 1981 was established to "prevent oppressive contracts and conduct" and to "ensure that all the terms of contracts are disclosed to debtors before they become irrevocably committed to them".¹⁷⁷ The Credit Contracts Act requires the disclosure of all details of the contract by the creditor. However, it is not sufficient that the creditor or dealer explains the contract to the customer; the conditions of the contract have to comply with the definitions of the act.

Example:

In Umuru's case above the interest rate in the loan contract is around 40%. To comply with the requirements of the Credit Contracts Act, the finance company must have disclosed the 'total cost of credit' and the exact 'finance rate'¹⁷⁸ to Umuru, otherwise a full disclosure has not been made in accordance with the act. Should it turn out that the finance company failed to disclose they can't enforce the contract and are also liable for a penalty.¹⁷⁹

Contracts which have been disclosed in accordance with the act, but provide for clauses such as exclusively high interest rates can be re-opened by the court.¹⁸⁰

¹⁷⁵ Umuru could also require the finance company to sell the goods to any person introduced by him (S30). He has further the right to settle the agreement (S31) or to force the sale if the goods have not been sold within 3 months (S32).

¹⁷⁶ The situation for Umuru is however different if he can find a disclosure error and invoke SS24 and 25 Credit Contracts Act 1981. See further IVD(d).

¹⁷⁷ The Credit Contracts Act 1981 is available at www.brookers.com (last accessed 02 March 2003).

¹⁷⁸ See the definitions in SS5 and 6 Credit Contracts Act 1981, Appendix XIV. The principal method of disclosure is described in S20.

¹⁷⁹ SS24 and 25 Credit Contracts Act. According to S30 the debtor has then a right of recourse against the creditor and can recover the amount he has paid due to the failure of disclosure (details S30).

¹⁸⁰ S9 and 10 Credit Contracts Act.

Example:

Susanne brought her stereo to a 'Cashconverter' to get some money to pay off some debts. She got \$200 for it and it was agreed that she would get her stereo back if she pays \$300 within the next four weeks. After three and half weeks Susanne has not more than \$250 in savings. She wonders if she can still claim her stereo back.

The agreed interest rate is extremely high and Susanne can challenge the agreement as 'unconscionable or in contravention of reasonable standards of commercial practice' and ask the court to re-open the contract.¹⁸¹

Although the Credit Contracts Act therefore provides some very effective protection against oppressive contracts and functions like the German Federal Act about General Conditions of Business 1977 ("AGB- Gesetz"), its application in the daily practise is quite limited.¹⁸² The language of the Act is very complicated and even for legally trained people hard to understand. Consumers in general don't understand it at all and might rather comply with the signed contract then challenge it. The Ministry of Consumer Affairs is aware of this problem and new credit legislation has been introduced to parliament.¹⁸³

¹⁸¹ SS9 and 10 Credit Contracts Act.

¹⁸² The Federal Act about General Conditions of Business 1977("AGB- Gesetz – Gesetz ueber Allgemeine Geschaeftsbedingungen") was developed from the experience that general conditions have been increasingly used in order to deviate from the rules implied by law. They produced a form of contract that cast all the risks and disadvantages on the other party, the Act is designed to protect the weaker party and to ensure contractual justice in the context of freedom of contract. It invalidates a large number of clauses in general conditions of business that deviate from the balanced model of dispositive law; when such clauses are invalidated, the terms implied by law take effect. For a more detailed description Horn, Koetz and Leser, above, 87-89. Consumers achieve further protection through S138 German Civil Code ("Wucher"), which states that every contract that opposes good standards (= the moral standard of every reasonable and just person) is void. The judicature has applied this section in numerous decisions to cancel loan contracts with high interest rates. As a rule of thumb interest rates which are 100% over the average are considered void. For an overview about the different features of S138 Civil Code <http://bgb.jura.uni-hamburg.de/einwand/138.htm> (last accessed 20 February 2003).

¹⁸³ According to a media statement from 18 September 2002 the new legislation will replace the Credit Contracts Act 1981 and the Hire Purchase Act 1971, "which are outdated, complex, difficult to understand, and give consumers little redress for unfair behaviors by lenders." For more information www.consumer-ministry.govt.nz (last accessed 03 March 2003).

E Family Law in New Zealand

Family Law in New Zealand is, in essence, not that much different from Family Law in Germany. The most important and relevant acts include the Family Proceedings Act 1980, the Guardianship Act 1968, the Children, Young Persons and Their Families Act 1989,¹⁸⁴ the Property Relationships Act 1976 and the Domestic Violence Act 1995. In the case of a separation and the arising question of custody and access, the courts do primarily, like in Germany, consider first what the best welfare for the children might be. Differences are to be found more in details of procedure and formality than in the substantive law. However, the principles outlined in the Property Relationships Act 1976 are quite far reaching and of considerable impact for both married couples and those who chose to live together outside the status of a marriage.

Practical remark:

The majority of cases at the Law Centre deal with domestic violence. In these cases the clients are assisted in drafting affidavits and completing the necessary steps to apply for a protection order. Common questions also include the requirements for a separation order and how to reach a legally binding agreement about custody and access to the children. Very often Statutory Declarations have to be drafted, for example when single mothers can't give the name of the father to WINZ when they apply for a benefit.¹⁸⁵ The stories told are very intimate and often disturbing, but the help the Law Centre provides is only general advice and goes neither into representation nor into drafting of agreements: clients who ask for these services are sent to the local family lawyers.¹⁸⁶

¹⁸⁴ The overriding object of the Act is to advance and promote the well being of children, young persons and their families and family groups (S4). It was mainly established to deal with the problems of child abuse, neglect, delinquency and young crime. In care and protection proceedings, the welfare and interests of the child or young person are the first and paramount consideration and can, in last consequence lead to the actual removal of the child (S39). In practice, an application for removal is submitted by the relevant social worker to the District Court. The Director General (of the Department of Social Welfare) may then place the child with any person he deems capable as a caregiver. Butterworths *Family Law in New Zealand* (9th ed, Butterworths, Wellington, 1999), 1016, 1018.

¹⁸⁵ As a consequence the benefit is then cut down at around \$22 per week (because WINZ then has no possibility to recover the respective amount from the father who is primarily responsible for the maintenance of the child). S70A Social Security Act 1964. With the Statutory Declaration the beneficiaries explain why they can't name the father (usually because the conception took place during a one-night stand) and the benefit is then reinstated.

1 Family Law in New Zealand

The Family Court has jurisdiction over all traditional family matters such as, custody, dissolution, matrimonial property and adoption.¹⁸⁷ The emphasis in every family dispute is to resolve the dispute by promoting counselling and conciliation; defended hearings are usually seen as a last resort.¹⁸⁸

(a) Guardianship

The child's natural guardians are most commonly the mother and the father. Natural guardianship is linked with parenthood and begins automatically when the child is born.¹⁸⁹ The mother is the sole guardian however if she is not married to the father and either never has been, or ceased to be married before the child's conception or she and the father were not living together as husband and wife at the time the child was born.¹⁹⁰ Guardianship ends automatically on the child's 20th birthday or when the child marries.¹⁹¹

Example:

Maree wants her grandmother to take care of her 1½ year old daughter during the time she is working up in Auckland. The grandmother shall especially be able to take her daughter to the doctor when needed and see for the relevant treatment. Maree does not want the father, who has not been living together with her at the time of the birth of her daughter, to be the caregiver. Maree wants to know what she has to do that her grandmother is 'legally protected' so that the father cannot demand the child from her.

¹⁸⁶ This goes back to an agreement between the Law Center Trust and the local lawyers in the area.

¹⁸⁷ Christchurch Community Law Center *The Family Law Journal* (Christchurch Community Law Center Christchurch 2000), 13.

¹⁸⁸ Christchurch Community Law Center, above, 14. The Family Courts in Germany, which are also in the first instance divisions of the local district courts take the same approach.

¹⁸⁹ Guardianship is defined as the custody of a child and the right of control over the upbringing of the child (S3 Guardianship Act 1968). The Family Court will appoint a person as the guardian of a child on application (S8) for example if a child's parents have died, the custodial parent remarries or if a step parent has become an important part of a child's life. Christchurch Community Law Center, above, 33.

¹⁹⁰ S6(2) Guardianship Act 1965. The effect of this is that the subsequent marriage to the father, where he would not otherwise have been a natural guardian of his child, automatically makes him one. P R H Webb, J G Adams, W R Atkin, I D Johnston, R M Henaghan and J L Caldwell *Family Law in New Zealand* (6th ed, Butterworths, Wellington, 1993), 448. However, the Act does not define 'living together as husband and wife', which leaves it for the court to decide if the requirement is fulfilled.

¹⁹¹ Christchurch Community Law Center, above, 34. Young people under 20 need the consent of their custodial parent to marry. People under the age of 16 years cannot marry. S17(1) Marriage Act 1955. The Marriage Act 1955 is available at www.brookers.com (last accessed 20 February 2003).

As the father was not living together with Maree at the time her daughter was born, he is not a guardian and has to apply to the Family Court to be appointed as the child's guardian.¹⁹² The grandmother can also apply to the Family court to be appointed an additional guardian, which would give her the legal status Maree is looking for. In the meantime Maree should give a written authorization to her grandmother that she can act on her behalf. However, in case of important decisions for the child (for example an operation) she has to give her consent again for the specific decision in question as the authorities won't accept a general authorization.

(b) Custody and Access

Custody is 'the right to possession and care of a child'; a person who has custody of a child is responsible for the day-to-day care of the child and the everyday decisions about the child's welfare and upbringing.¹⁹³ Custody is linked to guardianship and does not change if a child's parents separate, but the separating parents may either agree about joint or single custody or apply to the Family Court for a custody order.¹⁹⁴ If the parents can't come to an agreement a defended custody hearing (closed hearing) will take place.¹⁹⁵ Parents can make their own agreement about custody and access and are

¹⁹² The non-custodial parent does not have an automatic right to access, but normally the Family Court will make orders for custody and access at the same time. A child's parents, step-parent or guardian have an automatic right to apply to the Family Court for custody of that child. Fathers who have never been married to their child's mother and who were not living with mother when their child was born also need to establish guardianship before they can apply for custody or access. S11 Guardianship Act 1968 and Christchurch Community Law Center, above, 38. The procedure to make an application for a custody order is regulated in SS8-13 Family Proceedings Act 1980. The Guardianship Act 1968 and the Family Proceedings Act 1980 are available at www.brookers.com (last accessed 20 February 2003).

¹⁹³ S3 Guardianship Act 1968.

¹⁹⁴ Christchurch Community Law Center, above, 37.

¹⁹⁵ S23 Guardianship Act 1968. The court's most important and overall consideration is the welfare and interests of the child, but will also consider the relationship between the child and each parent, the parental capacity, the family support systems, material factors and the child's feelings and wishes. The court cannot make a custody order for a child over 16 years unless there are special circumstances.

generally encouraged to do so. However, these agreements are not enforceable unless made into a consent order.¹⁹⁶

Example:

Angela wants some legal advice about drafting a separation agreement. She has been married for 25 years and been separated now for 5 years. She has a casual agreement about the access to the two children in place with her husband, but would like to have something 'official' and legally and wonders what she can do.

She can draft an agreement about the access to the children together with her husband. The Law Centre can give her an exemplary form about a separation agreement. The agreement she works out with her husband has to be put into a 'memorandum of consent' and has to be filed to the Family Court, together with an application for a 'separation order'. As the separation order does not affect the equal responsibilities of the couple as parents¹⁹⁷ and does also not end the marriage its most important effect is usually that it provides evidence that the parties have lived apart for two years.¹⁹⁸

(c) *Dissolution of marriage*

After being separated for two years, husband and wife can apply together to the Family Court for a dissolution order (joint application), or either spouse can apply on its own (single application).¹⁹⁹ The only ground for dissolution

¹⁹⁶ Christchurch Community Law Center, 18, 39. A consent order can be made at a mediation conference or in the Family Court. The enforcement takes place by the court issuing a warrant authorizing the police, social worker or other named person to take the child and deliver it to the custodial parent, but will issue the warrant only in extreme situations as the child's welfare has to be considered and the potential harm of such procedure has to be taken into account. When the non-custodial parent takes the child to another country (commonly to Australia), the Convention on the Civil Aspects of International Child Abduction applies (available at www.hcch.net/e/conventions/text28e.html last accessed 24 February 2003). If a parent believes that the child is to be removed from New Zealand, he or she can make an urgent application to the High Court or District Court for a warrant to prevent the removal. These applications can be made 'ex parte', i.e. without notice being given to the other party. S20 Guardianship Act 1968 and Christchurch Community Law Center, above, 51.

¹⁹⁷ A separation agreement does also not affect the rules of intestate succession. However, if a separation order is in place the property of the deceased will not pass to the surviving spouse, instead will pass as if the surviving spouse was already dead. S26 Family Proceedings Act 1980.

¹⁹⁸ Christchurch Community Law Center, above, 66.

¹⁹⁹ S37(1) Family Proceedings Act 1980. A joint application is preferable: it takes only 5-6 weeks in comparison to 9-10 weeks of the single application and can be usually dealt with by the Family Court Registrar (equals the German "Rechtspfleger") without a hearing before a judge. However, a dissolution order made by a judge becomes final immediately, whereas

in New Zealand is that the marriage has broken down irreconcilably, i.e. the couple are living apart and have disagreements that cannot be resolved.²⁰⁰ Most disputes arise over how to divide the common property. This is regulated in the Property Relationships Act 1976.²⁰¹

Example:

Anita has been living together with her partner for four years now. They are not married and have no children. Anita moved out of the house they have been living in during their relationship and is now staying with her parents. She knows that her ex-partner has not paid the instalments for the mortgage of the house, which is registered in his name, for the last three months. The bank has now announced that they are going to sell the house. What is her legal situation?

Anita is not married to her partner, but lived in a de facto relationship with him for over three years. According to the Relationship Property Act the relationship property is then equally shared when the couple separates. In general, all property acquired by either partner during the relationship is relationship property; the other property is separate property and usually stays with the person who owns it. The family home is by definition relationship property, regardless in which name it is registered, so Anita can claim half of the family home from her partner.²⁰²

(d) Domestic violence

Clients who need advice or help because they are confronted with domestic violence are quite common visitors in the Law Centre and their situation is very much alike: they are either still in a relationship, or have recently separated and experience serious abuse and physical violence from their

a dissolution order made by a registrar will not become final until one month after the order is made. As the parties don't need legal representation the only costs involved are the filing fees (currently \$175). Christchurch Community Law Centre, above, 79, 81.

²⁰⁰ S39 (1) Family Proceedings Act 1980.

²⁰¹ The Act sets out property sharing rules that apply when a married or de facto couple separate or one of them dies. The Act applies to married couples, regardless of how long they have been married; and de-facto (including same-sex) couples if their relationship has lasted at least three years and has not ended by 01 February 2002. The former Matrimonial Property Act 1952 was repealed and replaced by the Property Relationships Act 1976. The Matrimonial Property Act 1952 and the Property Relationships Act 1976 are available at www.brookers.com (last accessed 20 February 2003). See also Appendix X.

²⁰² Anita shall also see a lawyer to have her interest in the house registered (the details are regulated in the Personal Property Securities Act 1999 (available at www.brookers.com last accessed 03 March 2003). After the bank has sold the house and the mortgage is paid, she is therefore entitled for half of the remaining amount.

partners or ex-partners. To protect them and their children they can apply for a protection order at the Family Court.²⁰³ The application for a protection order should be filed with an affidavit outlining the reasons why the order is needed, an application for a custody order (if children under 16 years of age are affected), and an information sheet about the other partner.²⁰⁴ Once the application is filed, the court will either set a hearing date or in urgent cases grant the order without any further hearing. The other partner has the possibility to defend himself against the protection order. Breaches of the protection order will lead to an arrest by the police and serious or continuous breaches will lead to imprisonment.

2 Family Law in Germany

The Family Law in Germany²⁰⁵ underwent a substantial change after the second world war due to the term in the Basic Law that laid down that 'men and women have equal rights.'²⁰⁶ The evolving principles laid later down in the 'Law on the Equal Rights of Man and Woman' included also the equal rights for the wife in relation to household management and outside employment.²⁰⁷ Initially empowering the father only, the law for the exercise of parental power was later changed by the Federal Constitution Court. It is now that the parental power to act as the child's legal representative belongs to the spouses jointly. Can the parents not reach an agreement the decision will be made by the court.²⁰⁸ In the question of relationship property, the basic rule is that the property of both spouses remains separate until a separation or the death of either party occurs. In the event of a divorce, the other spouse is entitled to half of the property difference.²⁰⁹ One important

²⁰³ The protection order is regulated in the Domestic Violence Act 1995. The Domestic Violence Act 1995 is available at www.brookers.com (last accessed 22 February 2003).

²⁰⁴ For a detailed description about the application process Whitireia Community Law Centre Trust Inc *A Guide to applying for a Protection Order* (Whitireia Community Law Center, Porirua 2001).

²⁰⁵ The family law is regulated in the fourth book of the Civil Code in SS1356 -1900. The fifth and last book, SS1934 - 2375, deals with the inheritance law.

²⁰⁶ Article 3 (2) Basic Law, Appendix I.

²⁰⁷ Horn, Koetz and Leser, above, 190.

²⁰⁸ Horn, Koetz and Leser, above, 190.

²⁰⁹ S1357 Civil Code. If one spouse has not worked during the duration of the marriage, also half of the entitlement shares for the superannuation scheme, which are accumulated only by the working spouse have to be divided ("Versorgungsausgleich"). The other spouse then

feature of the German Family Law is that illegitimate children have the same legal status as legitimate children and have therefore the same claim in regards of maintenance and even succession.²¹⁰ Like New Zealand, Germany also has adopted the principle of 'breakdown of marriage' for its divorce law (S1565 Civil Code) and a divorce can now be carried through if the couple has been living apart for one year (S1566(2) Civil Code).²¹¹

F Employment Law

Employment law in New Zealand has a lot of aspects in common with the German Employment law. In both systems the employment law is not codified in one code, instead divided in several acts and amended through extensive case law. The main act is the Employment Relations Act 2000, and other relevant acts include the Holidays Act 1981²¹² and the Minimum Wages Act 1983.²¹³ Whereas in Germany every aspect of the employment relationship is somewhere regulated in an act or statute,²¹⁴ New Zealand

gets an independent right against the social insurer for herself by diminishing the other spouse's right to that extent. Horn, Koetz and Leser, above, 195. If the marriage ends by death, a quarter of the late partner's assets is added to the statutory portion of the surviving spouse (S1371 Civil Code).

²¹⁰ Horn, Koetz and Leser, above, 192. However, although the illegitimate child has the same statutory right of succession he has in the event of a surviving spouse and legitimate children only a monetary claim to the value of his portion of succession (S1934a Civil Code).

²¹¹ A divorce is always heard in front of a judge. Both parties have to have legal representation and, once a marriage has broken down, the Court has to grant the divorce, unless exceptional circumstances apply (f.ex. if the divorce would be a severe hardship for one spouse, S1568 Civil Code).

²¹² The Holidays Act applies to all employees whether full time, part time, temporary or casual. Employees are in principle entitled for three weeks paid annual holiday. Holiday not taken at the end of the employment has to be reimbursed with at 6% of gross earnings holiday pay, S123 Holidays Act. After working continuously for six months for the same employer, employees are entitled to 5 days special leave per annum, which may be used for when the employee is sick or for bereavement, S30 Employment Relations Act 2000. The Employment Relations Act 2000 and the Holidays Act 1981 are available at www.brookers.com (last accessed 22 February 2003). German Employment Law guarantees the employee 6 weeks sickness payment by the employer. After the sixth week, the payment is taken over by the relevant health insurance of the employee. For a detailed overview about the requirements for sickness payment www.heymanns.com/html/recht/ratgeber_recht/arbeitnehmer/A217.htm (last accessed 20 February 2003).

²¹³ The wages and salaries are regulated in the Minimum Wages Act 1983 and the Wages Protection Act 1983. At the time of publishing, the minimum wage for those aged 20 and over was \$9 per hour. The Minimum Wages Act 1983 and the Wages Protection Act 1983 are available at www.brookers.com (last accessed 22 February 2003).

²¹⁴ German Employment Law has an Act for everything, including for example the Holiday Act, the Termination- Protection Act, the Work- Time- Act, Motherhood- Act, Short- term work Act, Equal- treatment of women Act. For an overview of all Employment acts and

relies on extensive case law to fill in the gaps left by the acts. The protection of employees against termination of their employment is far less regulated than in Germany, although the focus on dispute resolution outside the courts is quite progressive and in accordance with international trends.

Practical remark:

Clients usually come to the Law Centre after they have been dismissed and ask for legal advice if they can challenge the dismissal. The Law Centre won't help if the client asks for the legal analysis of an individual employment contract, i.e. if they shall sign it or not. In these cases clients are advised to see a lawyer and pay for the check of the contract. Special attention has to be paid to the three-months period in which the personal grievance has to be raised. The establishing of what has really happened is in Employment law cases even more important than in other legal areas, otherwise revelations at the meetings with the other party can be quite embarrassing.²¹⁵

1 Employment Law in New Zealand

The Employment Relations Act 2000 as the cornerstone of the Employment Law puts its main emphasis on the requirement of 'good faith' dealing on the part of employees and employers. It basically means that the parties to an employment agreement, including their representatives, must act honestly and openly, without misrepresentation or deceitful conduct.²¹⁶ The Act established three institutions with an emphasis on more accessible less legalistic processes of which the first one is mediation, with the Employment Relations Authority (ERA) as the next option. The Employment Court is basically a Court of Appeal and retained for more complex cases.²¹⁷ The mediation service provides mediation for any 'employment relationship problem' and is only available on request to the Department of Labour.²¹⁸

other sources of employment law in Germany www.uni-kiel.de/fak/rechtsw/ful/institute/reuter/arbeitsr.htmlwww.arbeitsrecht.de. (last accessed 20 February 2003).

²¹⁵ In one case the client admitted to have threatened his boss verbally. At the mediation conference, however, the employer explained that the client also had hold his fist up to his face and threw chairs around in the office. Two witnesses apparently also overheard the whole argument. These allegations were never raised before and also the fact, that witnesses could be provided, was never mentioned in the written correspondence. Without knowledge if these witnesses really existed or not and the quite weak case the client had in the very beginning, the paid compensation of the employer of \$500 was still a satisfactory result

²¹⁶ S4 Employment Relations Act 2000.

²¹⁷ Legal Information Service Inc., above, Chapter 5, 5.1/3.

²¹⁸ SS123 and 146 Employment Relations Act 2000. The grievance can be raised orally or in writing, but the latter should be preferred for evidentiary reasons.

Example:

After an initial interview and the passing of a couple of tests John signs an employment contract as a call- centre adviser with the ABC- Bank. He is told that a three weeks training course has to be completed first to get familiar with the position. On the first day all participants of this course are handed a form ("attachment") to sign, which states that the successful passing of the training course is required, otherwise their employment may be terminated. John has some initial problems with the tasks he encounters, but is told in the third week by one of his trainers that his performance has greatly improved. The whole group is told by one of the trainers that everyone will pass. However, the next day John is informed that he is dismissed due to his lack of performance a couple of days before the end of the third week. John comes to the Law Centre to get a legal opinion about his situation.

There are a three major legal issues in John's case which gave reason to submit a letter of personal grievance to the employer:²¹⁹ first, the attachment was handed out after the contract was signed and introduced a new term to the contract which was not discussed before; second, he did not have the opportunity to get legal advise before he signed the attachment;²²⁰ and third he was not allowed to finish the training course and he was told he would pass anyway.

Although the process at mediation is quite informal and not primarily focussed on the legal issue, the client should be aware that every settlement at mediation is legally binding and cannot subsequently challenged at the ERA or in Court.²²¹ In John's case, the mediation failed and an application to the ERA was filed.²²²

The authority asked for witnesses to back up John's version that the attachment was handed out in the beginning of the training course, and that he was not

²¹⁹ The letter has to be sent within 90 days after the occurrence of the grievance (usually the dismissal). S114(4) Employment Relations Act 2000.

²²⁰ The employer is also required to advise employees that they are entitled to seek independent advise about the intended agreement and they must give employees a reasonable opportunity to do so. S64 Employment Relations Act 2000.

²²¹ SS 149- 150 Employment Relations Act 2000. Although the mediator is legally trained, he won't give a detailed legal analysis, instead will only explain to each party his view on the situation ("risk analysis"). As it is every mediator's goal to settle a dispute the analysis will always tend to be more pessimistic.

²²² The parties can apply to the ERA without being to mediation first, but usually the ERA will then refer the matter back to mediation, unless the parties can give compulsive reasons whether mediation has no prospect of success (for example, if it has become obvious from previous correspondence that one party won't agree to settle at all or already expressed that they won't attend mediation). This is to ensure that the parties try to reach settlement before judicial intervention is required. Legal Information Service Inc., above, chapter 5, 5.1/4. The ERA charges a filing fee of \$70 for every application.

advised that he could ask for legal advice before signing it.²²³ The statements of the witnesses had to be provided in writing prior to the hearing. In the hearing the ABC- Bank focussed on the fact, that John did not meet their expectations. However, the Authority followed the (legal) argumentation of John and explained that the employment contract was valid and binding before the 'attachment' was handed out. Without legal advice, the attachment was invalid and even though, John had no chance to sit for the final test at the end of the third week. The matter was settled for a payment of around \$6000.

Where a party is dissatisfied with a determination of the Authority, he or she may elect to have the matter reheard in full or in part by the Court with a new hearing of any relevant evidence.²²⁴

The peculiarities in the substantive law include that Employment agreements are usually not fixed in writing.²²⁵ Fixed term employments are in general allowed,²²⁶ and trial periods must be specified in writing, otherwise they are invalid.²²⁷ The termination of an employment agreement follows the procedure outlined in the individual agreement and there are no regulations in the Act limiting the rights of the employer to terminate an agreement, as long as the dismissal is justified (f.ex. breach of the contract by the employee) and the process prior to termination is carried out fairly.²²⁸

²²³ The ERA has broad investigative powers in order to establish the facts and a wide discretion as to the procedure to be followed. They may direct the production of any information, summon witnesses and examine witnesses who were present at the mediation meeting. S160 - 161 Employment Relations Act 2000.

²²⁴ The application to the court has to be filed within 28 days of the Authority's decision. S183 Employment Relations Act 2000.

²²⁵ An employee might, however, already be covered by a collective employment contract negotiated by the relevant union. However, even if the employee is not a union member, the collective agreement will apply in the first 30 days of the commencement of the employment. During that time, the employee has the possibility to join the union. Should he decide not to join the union, the employer is then entitled to negotiate the contract again and provide the employee with a new individual employment contract (SS61-65 Employment Relations Act 2000).

²²⁶ S66 Employment Relations Act 2000 states that a fixed term employment is possible, as long as the employer has genuine reasons and advises the employee accordingly. In contrast, the German Employment Courts have put strict limits to the consecutive hiring of employees under fixed term contracts. For an overview about the requirements for fixed term contracts www.hagerbraune.com/service/arbeitsrecht.htm (last accessed 20 February 2003).

²²⁷ S67 Employment Relations Act 2000.

²²⁸ Legal Information Service Inc., above, chapter 5, 5.107. In contrast, the German Civil Code states in S622 exactly, which notice period applies for which time of service of the employee. These notice periods are binding and the employer can't contract out of these regulations. A New Zealand Employment Court might also consider the length of the prior employment, but it is basically up to the courts discretion how much emphasis they put on this factor.

However, in the event of a dismissal due to redundancy, a strict process has to be followed, otherwise the employee is entitled for compensation.²²⁹

2 *Employment Law in Germany*

Very unusual and even for the German judicial profession hard to understand, German Employment law is not regulated in one, comprehensive act, instead scattered in various acts and extremely influenced by court decisions, especially from the Federal Employment Court ("Bundesarbeitsgericht"). The primary source, however, is again the Civil Code, which regulates in §§611- 630 the basic requirements of every employment contract (closing, termination, main duties of both parties). The judicial process follows the normal structure with the District Employment Court as first instance, followed by the Regional and then the Federal Employment Court as Court of Appeals; there are no tribunals or mediation services available. However, the first hearing in the District Employment Court resembles very much a mediation hearing with the judge usually urging the parties to settle the dispute (unless the case is obvious and can be decided without further presenting of evidence).²³⁰

G *Miscellaneous*

1 *Tenancy Agreements*

Private Tenancies are regulated in the Residential Tenancies Act 1986²³¹ and disputes are first met at a mediation hearing, followed by the Tenancy

²²⁹ Legal Information Service Inc., above, chapter 5, 5.107. However, the contract can see for a clause that the employee is not entitled for any redundancy payment.

²³⁰ The reasoning, however, is different to the mediation in New Zealand: a settlement is recorded in court and the judge simply takes down the conditions the parties agree upon. The agreement is then typed and mailed to the parties - the case is finished. Without a settlement, the judge is forced to decide on the legal issues, i.e. request evidence from the parties or write a judgment. This means a considerable more amount of work plus the possibility that one or both parties may appeal against his decision - it is uncertain when the case is finally be finished. As every judge tends to have a case closed as soon as possible, one can say that the first hearing will always have the tendency to settle the dispute.

²³¹ Tenancies about commercial premises are explicitly excluded: S5 Residential Tenancies Act 1986. In the case of mixed- use premises, the Act applies to the residential part only as it relates to 'premises' and not to the agreement. Andrew Alston *Residential Tenancies* (3rd

Tribunal.²³² From the Tribunal, there is an appeal to the District Court,²³³ from where a further appeal to the High Court and the Court of Appeal (on questions of law only) is possible.²³⁴ The obligations of a tenant²³⁵ are set out in S40 Residential Tenancies Act, which state that in general the tenant is not liable for damage caused by 'fair wear and tear'.²³⁶ The premise has to be left in a fair and tidy condition, which often gives some reason for disputes.

Example:

After terminating the tenancy in October, Angelica has agreed with her landlord to move out on the 11 November 2002. Angelica's mother, who has signed as a guarantor for the rent, writes a long letter in response to the landlord, who demands an extensive cleaning of the house, in which she also states that her daughter moves out on the 09 November. Angelica gets to know about this letter end of October 2002. She pays the rent till the 11 November and discovers, when she returns to the house on the 10 November to clean it, that the locks have been changed and she can't enter it. She calls the landlord, who explains to her that according to the letter the tenancy has ended yesterday and that she has no right to enter the premise anymore. He refuses to pay back her bond²³⁷ and claims an additional amount of 115 dollars on top of it for cleaning (15 hours at 10 dollars per hour for his own work plus 238 dollar for a professional carpet cleaning). The mediation is unsuccessful and no settlement can be reached. The landlord now files a claim for the Tenancy Tribunal.

ed., Butterworths, Wellington 1998), at 2.3. Note that beneficiaries often have 'Housing New Zealand' as their landlord, a limited company (Ltd) established under the Housing Restructuring Act 1992 as a wholly Crown owned company. The Residential Tenancies Act 1986 and the Housing Restructuring Act 1992 are available at www.brookers.com (last accessed 22 February 2003).

²³² For an overview about the process Tenants Protection Association (Inc.) *Tenancy Advocacy Manual* (Auckland), 44. Tenants are in principle not allowed to be represented, but there are exceptions (f.ex. if the amount in dispute exceeds \$3000). S93(7) Residential Tenancies Act 1986.

²³³ SS117, 118 Residential Tenancies Act 1986. The Court has the power to review the Tribunal's decision on matters of fact and of law.

²³⁴ SS 119 and 120 Residential Tenancies Act 1986.

²³⁵ A tenancy agreement does not have to be in writing, but lack of it results in the legal assumption that the tenancy will be for an indefinite period and will last until it is terminated by either the landlord or the tenant. Alston, above, at 3.5. The same applies if there is a written agreement, which does not say when the tenancy ends. S13A Residential Tenancies Act 1986.

²³⁶ Alston, above, at 6.8. The landlord, on the other hand, has to ensure that the house or flat remains in a good state of repair (S45), but it is not regulated if the landlord is then also responsible for the costs involved and how quickly repairs have to be done. Tenants Protection Association, above, 28. However, failure by a tenant to notify the landlord of a damage to the premise or the need for repair under s40(1)(d) could be costly for the tenant if consequential damage results. Alston, above, at 6.7.

²³⁷ Bonds can be asked for up to an equivalent of four weeks rent and have to be placed with the Bond Centre, a department of the Tenancy Service. SS18 and 19 Residential Tenancies Act 1986. The German landlord can ask for a bond in the equivalent of up to 3 months rent and is required to pay the bond into a special account at the bank of his choice. The bond is paid back after the expiration of the tenancy agreement, including the accumulated interest (S552 III3 Civil Code). For a detailed overview about the requirements www.haus-und-

Although Angelica knew about her mother telling the landlord that she would move out on the 09.11. (and might had an obligation to inform the landlord that this was not correct), she actually paid the rent for the full week and was therefore entitled to enter the premise on the 10.11.. She is in principle also not liable for the cleaning costs, as she was not allowed to clean the house herself.²³⁸

Terminating a tenancy is usually done by given 90 days notice (in case the landlord wishes to terminate), or by 42 days notice (in case the tenant wishes to terminate) to the other side.²³⁹ One notable different feature is also that the tenancy also ends when the landlord sells the house.²⁴⁰ No notice period applies when the landlord shares the premise with the tenant.

Example:

Susie and her partner Fred have rented one room of her house in Titahi Bay to their friend Klara in the beginning of January 2003. Except for the first week, Klara has not paid any rent at all. Although pets are not allowed, she brought her dog into the house and smashed deliberately one of the windows of the veranda last week. Susie and Fred want to get rid of her a.s.a.p. They are, however, afraid that Klara might leave the house without paying the outstanding rent and ask, if they can withhold some of her property till she has paid off all her debts.

As Susie and Fred are sharing the house with Klara, the Tenancy Act does not apply,²⁴¹ which allows them to ask Klara to leave immediately. They

grund-sh.de/Haus_und_Grund/Dienstleistungen/infoblaetter_mietkaution.htm (last accessed 20 February 2003).

²³⁸ In general, landlords are not bound to give tenants an opportunity to carry out cleaning or damages after the tenancy has terminated. However, the other party must take reasonable steps to minimize any loss arising from a breach of provisions (S49), but which steps have to be taken is a question of fact dependent upon the particular circumstances of each case. Alsdon, above, at 6.7 and 6.20.

²³⁹ The ways of terminating a tenancy are comprehensively listed in S50. This is a significant difference to the German Tenancy Law: a landlord can according to S564b Civil Code terminate a tenancy only on the grounds that he has a 'reasonable interest to terminate'. The Act states as examples serious, intentional breaches of contract through the tenant, a serious interest of the landlord to use the rented premise for himself (for example if he intends to let it to his children - "Eigenbedarf"), and otherwise the impossibility to use the premise in an economical, reasonable way. The details about the termination of a tenancy through a landlord are available at www.koelner-hausundgrund.de/biblio/rechtsdatenbank/kuendigung/0001.htm (last accessed 20 February 2003).

²⁴⁰ S5 (c) Residential Tenancies Act 1986. The principle in the German Tenancy Law is exactly opposite: according to S566 Civil Code a tenancy does not end in the event of the sale of the premise (and the selling landlord is liable for damages should the buyer breaches his obligations as the new landlord). The text of S566 Civil Code is available at <http://dejure.org/gesetze/BGB/566.html> (last accessed 20 February 2003).

²⁴¹ S5(n) Residential Tenancy Act.

can't, however, take possession of Klaras goods,²⁴² instead have to take her to the disputes tribunal for the outstanding rent and the damages.

2 *Infringement Offences*

Minor offences like driving without license, illegal parking or failure to have a current registration or a current warrant of fitness (WOF) are called infringement offences. Typically problems occur when clients don't receive any infringement notices and get to know about the accumulated fines on the day when the Department of Courts seizes the car.²⁴³

Example:

Bernadette comes in for some legal advice and presents a fines summary from the Department of Courts, totalling an amount of \$660 for no warrant of fitness and failure of displaying a current registration. The offences are dated from April last year. Bernadette explains, that she sold her car without a WOF and registration in March last year to a friend. He promised to change the ownership and would not use the car and park it on his premise. Before she received the fines summary, she never got any letter from the police. And this morning her car was seized by putting a metal clamp around the front wheels. Bernadette needs her car urgently to drive her four kids to and back from school.

On request the department of courts explained that according to their documents the two infringement notices were sent out to Bernadette plus the reminder notice.²⁴⁴ The copy of the reminder notice bore Bernadette's correct address and the service details showed that the notices were sent out by normal post.²⁴⁵ When the department for courts did not receive any

²⁴² There is no 'lien' for this case and although the categories of a lien are not closed, the courts are quite restrictive with the establishing of 'general liens' outside the already established categories. For a detailed overview Fenton, above, chapter 9. Note, that also in a normal tenancy agreement, in which the Residential Tenancy Act applies, the landlord is not entitled to seize the tenants goods as payment for rent owing: S33(1) Residential Tenancy Act. Moreover, its an unlawful act for which a landlord may be ordered to pay exemplary damages not exceeding \$1500. SS33(2) and 109 (4)(b).

²⁴³ The infringement authority (normally the police or the infringement bureau) sent out a first infringement notice, which sets out the offence and the amount of the fine (S80 and 84 Summary Proceedings Act 1957). After 28 days a reminder notice ("further notice of fine") is sent out which gives the person another 28 days to pay the fine (S85). The Summary Proceedings Act 1957 is available at www.brookers.com (last accessed 22 February 2003). See also Appendix XI.

²⁴⁴ After receiving the reminder notice, the person has another 28 days to pay the fine or to make arrangements to pay it off (S86).

²⁴⁵ Whereas in Germany the burden of proof lies with the department (and for that reason important court letters are sent out by registered mail or a delivered by the bailiff), it is assumed that the letter is delivered in time when mailed by normal post.

response after sending out the final notice it took enforcement action.²⁴⁶ Bernadette was advised to pay the fine to release her car and to apply for a review of the registrar's decision by a judge.²⁴⁷ In case that the judge reversed or modified the registrar's decision, another (second) infringement notice is sent out which gives the applicant a new period of 28 days to pay the fine or make arrangements.²⁴⁸

3 Torts

A tort is defined as an injury inflicted intentionally or accidentally upon someone, for which that person can sue for compensation, pain or suffering.²⁴⁹ The law of torts is the body of rules which determines whether or in what circumstances the actor is liable for compensation to the injured party.²⁵⁰ It comprises various different categories and includes besides others the ACC-scheme,²⁵¹ trespass to the person and trespassing on land and the duty of care (negligence).²⁵² Negligence is, like in the German system, defined as lack of proper care and attention (or carelessness).²⁵³ Torts play a role in the daily practise of the Law Centre in the application of consumer rights²⁵⁴ and in trespass cases. An action of trespass²⁵⁵ is used to recover damages to compensate for injury caused by the defendant's unlawful

²⁴⁶ For example, the Department of Courts can issue an attachment order to have the fine taken from a persons salary or their benefit, can issue a deductions notice to have it taken from their banc account or can issue a warrant for the persons property to be seized. In the case of a car, they can also immobilize it by issuing a warrant for seizure (S87).

²⁴⁷ A judge can always review a registrar's decision (S78B). The application has to be accompanied by a Statutory Declaration explaining the reasons for the application.

²⁴⁸ This, of course, won't help Bernadette as by then she would have already paid the fine. As the whole situation was solely the fault of the friend, who bought her car, she was therefore advised to take him to the Disputes Tribunal and claim for a compensation for damages.

²⁴⁹ Byrd, above, 277. This equals the regulations in S823 Civil Code, which says that "The person who carelessly damages the property of another is bound to compensate that harm." Horn, Koetz, and Leser, above 51, 58, with a very simple example of the application of S823.

²⁵⁰ Todd a.o., above, 2.

²⁵¹ See above III3.

²⁵² For an overview about the Law of Torts Todd a.o., above.

²⁵³ Todd a.o., above, 115.

²⁵⁴ The Fair Trading Act 1986 for example has changed the requirements for negligent misstatements. A defendant may be liable even though he or she acted innocently. For a detailed analysis of the Fair Trading Act 1986 in regards to negligence Todd a.o., above, 162-166.

²⁵⁵ For the explanation about the common law actions see above IVA4.

interference with the plaintiff's person, property or rights.²⁵⁶ Usually, clients are not looking for a compensation for damages, instead need protection against the trespasser.

Example:

Andrea has separated from her partner and moved to another flat. Her ex-partner is now constantly harassing her, abuses her over the phone and is waiting in front of her house till she returns back from work. More than once he has threatened to kill her should she not return to him.

Andrea is advised to file an application for a protection order and additionally to serve a trespass notice to her ex-partner to get immediate protection.²⁵⁷ When served a trespass notice her ex-partner is not allowed to enter her premise any more. Andrea gives a copy of the trespass notice to the police, which will in case of a breach of the trespass notice arrest the trespasser.

V CONCLUSION

The comparison of the two systems leads to a quite astonishing result: although the approach to the law (and justice) is quite different the solution to a case is almost always similar and the prevailing perception is that of two systems with more differences in details as to the general conception. However, some aspects of the New Zealand legal systems remain questionable: there is first the general uneasiness about common law principles. Common law is basically case law and with no apparent structure or guideline, the principle to be applied on a case can only be found by extensive research or experience – lay people have no access to this knowledge and no chance to solve a case themselves. This is especially disadvantageous in consumer law cases which involve the Credit Contracts Act. In contrast, the civil law system, which is based on codes, allows even ordinary people to look up the legal remedy and make an evaluation of their own legal situation.

²⁵⁶ Byrd, above, 278.

Second, although it has been shown that it is basically a question of definition whether a country can claim to have a constitution or not, the lack of a written constitution with an embodied and entrenched piece of basic civil rights has a disadvantageous effect throughout the different legal areas. This is not to say that people have more rights in Germany; it is more a developed and experienced general understanding in Germany that everyone's rights are protected and can be enforced even against the state. History has also proved that the Federal Constitution Court is a very capable watchdog against the government and is doing a fine job in controlling the government. This has even lead to the phenomenon that it is more often than not enough for the opposition to threat the government to take disputed legislation to the Federal Constitution Court to force the government to re- consider. A further impact is noted on the side of the executive: as every administrative action can be taken to a judicial review (till up to the Constitution Court), the administration is in general keen to comply with the established rules and procedures.²⁵⁸

However, it is apparent that both systems begin to adopt features of the other for further development: nowadays even common law lawyers are forced to systemize, abstract and digest the bulk of decisional law. On the other hand, the importance of decisional law is increasing more and more in Germany (especially in the Constitutional and Employment Law). One might therefore say that neither system is yet fully developed – the new international courts with their far reaching jurisdiction will finally show which elements of which system are universal and which are not.

²⁵⁷ The trespass notice is regulated in the Trespass Act 1980. The Trespass Act 1980 is available at www.brookers.com (last accessed 22 February 2003).

²⁵⁸ The downside being that Germany's administration has reached an enormous size and created regulations for everything despite all promises from the government to reduce bureaucracy.

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Appendix I
The Bill of Rights Act 1990

Section 3

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law

PART 2 - CIVIL AND POLITICAL RIGHTS

Life and security of the person

8. Right not to be deprived of life—

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment—

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation—

Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment—

Everyone has the right to refuse to undergo any medical treatment.
Democratic and civil rights

12. Electoral rights—

Every New Zealand citizen who is of or over the age of 18 years—

- (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
- (b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion—

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. Freedom of expression—

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15. Manifestation of religion and belief—

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly—

Everyone has the right to freedom of peaceful assembly.

17. Freedom of association—

Everyone has the right to freedom of association.

18. Freedom of movement—

- (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
- (2) Every New Zealand citizen has the right to enter New Zealand.
- (3) Everyone has the right to leave New Zealand.
- (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-discrimination and minority rights

19. Freedom from discrimination—

- (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
- (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

20. Rights of minorities—

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, arrest, and detention

21. Unreasonable search and seizure—

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person—

Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained—

(1) Everyone who is arrested or who is detained under any enactment—

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. Rights of persons charged—

Everyone who is charged with an offence—

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

- (f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
- (g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure—

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court:
- (b) The right to be tried without undue delay:
- (c) The right to be presumed innocent until proved guilty according to law:
- (d) The right not to be compelled to be a witness or to confess guilt:
- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. Retroactive penalties and double jeopardy—

- (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
- (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice—

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Appendix II
The German Basic Law ("Grundgesetz")

Article 1 (Protection of human dignity)

- (1) The dignity of man shall be inviolable. To respect and protect it shall be duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

Article 3 (Equality before the law)

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights.
- (3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.

Article 6 (Marriage, Family, Illegitimate children)

- (1) Marriage and family shall enjoy the special protection of the state.

Article 19 (Restriction of basic rights)

- (1) In so far as a basic right may, under this Basic Law, be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, such law must name the basic right, indicating the Article concerned.
- (2) In no case may the essential content of a basic right be encroached upon.
- (3) ...
- (4) Should any person's right be violated by public authority, recourse to the court shall be open to him. If jurisdiction is not specified, recourse shall be to the ordinary courts...

Article 20 (Basic principles of the constitution – Right to resist)

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) ...
- (3) Legislation shall be subject to constitutional order; the executive and the judiciary shall be bound by law and justice.
- (4) ...

Article 92 (court organization)

Judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Laender.

Article 95 (Highest Courts of Justice of the Federation – Joint Panel)

- (1) For the purpose of ordinary, administrative, fiscal, labour, and social jurisdiction, the Federation shall establish as highest courts of justice the Federal Court of Justice, the Federal Administrative Court, the Federal Fiscal Court, the Federal Labour Court, and the Federal Social Court.

Appendix III
Law of Administrative Procedure

Section 35

Administrative act is every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequences. A general order is an administrative act which addresses a category of persons who are determined or are determinable by common characteristics or which concerns public law quality of a thing or its use by the general public.

Section 40 – Discretion

If an administrative authority is authorized to act in its discretion, it has to exercise its discretion in consonance with the purpose of the authorization, and has to observe the legal limits of the discretion.

Section 44- Nullity of an administrative Act

(1) An administrative act is null and void to the extent it suffers from a specially grave defect and such defect is evident on the appreciation of all the surrounding circumstances.

Appendix IV
Law on Administrative Courts

Section 40

(1) Access to administrative courts is accorded in all public law disputes other than constitutional law disputes to the extent such disputes are expressly assigned to some other court by a Federal law. Public law disputes within the sphere of Land may be assigned to other courts by Land laws.

(2)...

Section 43

(1) Declaration of the existence or non-existence of a legal relationship, or the nullity of an administrative act may be demanded through a suit, if the plaintiff has a legal interest in a prompt declaration (declaratory suit).

Section 68

(1) Before filing a suit for invalidity the legality and expediency of an administrative act have to be examined in administrative objection proceedings before an authority.
[...]

(2) Clause (1) applies correspondingly to a suit for mandatory injunction if the application for taking an administrative act has been rejected.

Section 113

(1) To the extent an administrative act is unlawful and through it the rights of the plaintiff have been infringed, the court quashes the administrative act as well as the interim ruling on an objection [in administrative proceedings]. If the administrative act has already been executed, then on application the court may also pronounce that, and how, the administrative authority has to reverse the execution... If through withdrawal or otherwise the administrative act has already ceased to exist, then on application the court through judgment pronounces that the administrative act was unlawful, if the plaintiff has a legitimate interest in such a declaration.

Section 114

To the extent the administrative authority is authorized to act in its discretion, the court also examines whether the administrative act or its refusal or omission is unlawful for the reason that the statutory limits of the discretion have been exceeded or the discretion has not been exercised for the purpose of authorization.

Appendix V
Sale of Goods Act 1908

PART 1 - FORMATION OF THE CONTRACT

Contract of sale

3. Sale and agreement to sell—

- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the price".
- (2) There may be a contract of sale between one part owner and another.
- (3) A contract of sale may be absolute or conditional.
- (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called "a sale"; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell".
- (5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

4. Capacity to buy and sell—

- (1) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property:
Provided that where necessaries are sold and delivered to . . . a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.
- (2) "Necessaries" in this section means goods suitable to the condition in life of [the] person, and to his actual requirements at the time of the sale and delivery.

16. Implied conditions as to quality or fitness—

Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

- (a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:
- (b) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(d) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

27. Seller or buyer in possession after sale—

(1) Where a person, having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(1A) Subsection (1) does not apply to a delivery or transfer of goods or documents of title to the goods by a person who is, with the consent of the holder of a security interest that has been perfected under the Personal Property Securities Act 1999, in possession of the goods or documents of title to the goods.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner:

(2A) Subsection (2) does not apply to a delivery or transfer of goods or documents of title to the goods by a person who is, with the consent of the holder of a security interest that has been perfected under the Personal Property Securities Act 1999, in possession of the goods or documents of title to the goods.

(3) In this section,—

“mercantile agent” has the same meaning as in Part 1 of the Mercantile Law Act 1908

“security interest” has the same meaning as in section 17 of the Personal Property Securities Act 1999.

Appendix VI
Fair Trading Act 1986

Misleading and deceptive conduct

9. Misleading and deceptive conduct generally—

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

10. Misleading conduct in relation to goods—

No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

False representations

13. False [or misleading] representations—

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation] that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation] that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill; or
- (c) make a false or misleading representation] that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation] that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation] that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation] that a person has any sponsorship, approval, endorsement, or affiliation; or
- (g) make a false or misleading representation with respect to the price of any goods or services; or
- (h) make a false or misleading representation concerning the need for any goods or services; or
- (i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy; or
- (j) make a false or misleading representation concerning the place of origin of goods.

Appendix VII
Consumer Guarantees Act 1993

2. Interpretation—

“Consumer” means a person who—

- (a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
- (b) Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—
 - (i) Resupplying them in trade; or
 - (ii) Consuming them in the course of a process of production or manufacture; or
 - (iii) In the case of goods, repairing or treating in trade other goods or fixtures on land:

“Manufacturer” means a person that carries on the business of assembling, producing, or processing goods, and includes—

- (a) Any person that holds itself out to the public as the manufacturer of the goods;
- (b) Any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods;
- (c) Where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods:

“Ordinary place of business in New Zealand”, in relation to a manufacturer, does not include a New Zealand subsidiary of a foreign manufacturer:

“Supplier” means a person who in trade—

- (a) Supplies goods to a consumer by—
 - (i) Transferring the ownership or the possession of the goods pursuant to a contract of sale, exchange, lease, hire, or hire purchase to which that person is a party; or
 - (ii) Transferring the ownership of the goods pursuant to a gift from that person; or
 - (b) Supplies services to a consumer,—
- and for the purposes of this Act, includes—

- (c) Where the rights of the supplier have been transferred by assignment or by operation of law, the person for the time being entitled to those rights;
- (d) A financier within the meaning of the Credit Contracts Act 1981 who has lent money on the security of goods supplied to a consumer, if the whole or part of the price of the goods is to be paid out of the proceeds of the loan and if the loan was arranged by a person who in trade supplied the goods;
- (e) A person who, in trade, assigns or procures the assignment of goods to a financier within the meaning of the Credit Contracts Act 1981 to enable the financier to supply those goods, or goods of that kind, to the consumer;
- (f) A person who, in trade, is acting as agent for another where that other is not supplying in trade:

“Supply”,—

- (a) In relation to goods, means supply (or resupply) by way of gift, sale, exchange, lease, hire, or hire purchase; and
- (b) In relation to services, means provide, grant, or confer:

“Trade” means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services.

7. Meaning of “acceptable quality”—

(1) For the purposes of section 6 of this Act, goods are of acceptable quality if they are as—

- (a) Fit for all the purposes for which goods of the type in question are commonly supplied; and
- (b) Acceptable in appearance and finish; and
- (c) Free from minor defects; and
- (d) Safe; and
- (e) Durable,—

as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable, having regard to—

- (f) The nature of the goods;
- (g) The price (where relevant);
- (h) Any statements made about the goods on any packaging or label on the goods;
- (i) Any representation made about the goods by the supplier or the manufacturer;
- (j) All other relevant circumstances of the supply of the goods.

(2) Where any defects in goods have been specifically drawn to the consumer's attention before he or she agreed to the supply, then notwithstanding that a reasonable consumer may not have regarded the goods as acceptable with those defects, the goods will not fail to comply with the guarantee as to acceptable quality by reason only of those defects.

(3) Where goods are displayed for sale or hire, the defects that are to be treated as having been specifically drawn to the consumer's attention for the purposes of subsection (2) of this section are those disclosed on a written notice displayed with the goods.

(4) Goods will not fail to comply with the guarantee of acceptable quality if—

- (a) The goods have been used in a manner, or to an extent which is inconsistent with the manner or extent of use that a reasonable consumer would expect to obtain from the goods; and
- (b) The goods would have complied with the guarantee of acceptable quality if they had not been used in that manner or to that extent.

(5) A reference in subsections (2) and (3) of this section to a defect means any failure of the goods to comply with the guarantee of acceptable quality.

8. Guarantees as to fitness for particular purpose—

(1) Subject to section 41 of this Act, the following guarantees apply where goods are supplied to a consumer:

- (a) That the goods are reasonably fit for any particular purpose that the consumer makes known, expressly or by implication, to the supplier as the purpose for which the goods are being acquired by the consumer; and
- (b) That the goods are reasonably fit for any particular purpose for which the supplier represents that they are or will be fit.
- (2) Those guarantees do not apply where the circumstances show that—
 - (a) The consumer does not rely on the supplier's skill or judgment; or
 - (b) It is unreasonable for the consumer to rely on the supplier's skill or judgment.
- (3) This section applies whether or not the purpose is a purpose for which the goods are commonly supplied.
- (4) Part II of this Act gives the consumer a right of redress against the supplier where the goods fail to comply with any guarantee in this section.

9. Guarantee that goods comply with description—

- (1) Subject to section 41 of this Act, where goods are supplied by description to a consumer, there is a guarantee that the goods correspond with the description.
- (2) A supply of goods is not prevented from being a supply by description by reason only that, being exposed for sale or hire, they are selected by a consumer.
- (3) If the goods are supplied by reference to a sample or demonstration model as well as by description, the guarantees in this section and in section 10 of this Act will both apply.
- (4) Where the goods fail to comply with the guarantee in this section,—
 - (a) Part II of this Act gives the consumer a right of redress against the supplier; and
 - (b) Part III of this Act may give the consumer a right of redress against the manufacturer.

41. Exceptions—

- (1) Nothing in this Act shall apply in any case where goods or services are supplied otherwise than in trade.
- (2) Nothing in this Act shall give any person a right of redress against a charitable organisation in any case where goods or services are supplied by the charitable organisation for the principal purpose of benefiting the person to whom the supply is made.
- (3) Nothing in this Act shall apply in cases where goods are supplied—
 - (a) By auction; or
 - (b) By competitive tender.

Appendix VIII
Contractual Mistakes Act 1977

6. Relief may be granted where mistake by one party is known to opposing party or is common or mutual—

- (1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract—
- (a) If in entering into that contract—
- (i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or
- (ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
- (iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
- (b) The mistake or mistakes, as the case may be, resulted at the time of the contract—
- (i) In a substantially unequal exchange of values; or
- (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and
- (c) Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.
- (2) For the purposes of an application for relief under section 7 of this Act in respect of any contract,—
- (a) A mistake, in relation to that contract, does not include a mistake in its interpretation:
- (b) The decision of a party to that contract to enter into it is not made under the influence of a mistake if, before he enters into it and at a time when he can elect not to enter into it, he becomes aware of the mistake but elects to enter into the contract notwithstanding the mistake.

Appendix IX
Credit Repossession Act 1997

7. Circumstances in which creditor can take possession—

- (1) A creditor must not take possession of [consumer] goods unless—
 - (a) The debtor is in default under the [security agreement]; or
 - (b) The [consumer] goods are at risk.
- (2) In this section and section 8, goods are "at risk" if the creditor has reasonable grounds to believe that the [consumer] goods have been or will be destroyed, damaged, endangered, disassembled, removed, or concealed contrary to the provisions of the agreement; but the onus of proving the existence of those grounds is on the creditor.

8. Notice to be given to debtor and guarantor before taking possession of [consumer] goods—

- (1) A creditor must serve a pre-possession notice on the debtor, and on every guarantor of the debtor, before taking possession of [consumer] goods.
- (2) This section does not apply if the [consumer] goods are at risk within the meaning of section 7(2).

9. Form of pre-possession notice—

Every pre-possession notice must be in writing in the form set out in Schedule 1,—

- (a) Specifying the nature of the default; and
- (b) Requiring the debtor to remedy the default (if it is capable of being remedied) within the period specified in the notice (being a period of not less than 15 days after service of the notice on the debtor).

10. Creditor must allow time to remedy default—

A creditor must not take possession of [consumer] goods in respect of which a pre-possession notice has been given unless—

- (a) The period for remedying the default specified in the notice has expired; and
- (b) The debtor has failed, within that period, to remedy the default complained of in so far as it is capable of being remedied.

11. Offences against this Part—

Every person who contravenes any of sections 7 to 10 commits an offence and is liable on conviction to a fine not exceeding \$3,000.

12. Debtor may apply to Court for relief—

A debtor may apply to a Court for relief if—

- (a) A creditor serves a pre-possession notice on the debtor; or
- (b) A creditor has taken possession of the [consumer] goods,—
in contravention of this Act.

20. Notice to be given to debtor and guarantor after taking possession of [consumer] goods—

A creditor must serve a post-possession notice on the debtor, and on every guarantor of the debtor, within 21 days of taking possession of [consumer] goods.

21. Form of post-possession notice—

Every post-possession notice must be in writing in the form set out in Schedule 2.

21A. Notice of sale of consumer goods to other creditors—

- (1) A creditor who intends to sell consumer goods must, in addition to any other notices that the creditor must give under this Act, give notice to the following persons, within 21 days of taking possession of consumer goods:
 - (a) Any person who has registered a financing statement in respect of the consumer goods that is effective at the time the creditor took possession of the consumer goods;
 - (b) Any other person that has given the creditor notice that that person claims an interest in the consumer goods.
- (2) Subsection (1) does not apply if—
 - (a) The consumer goods may perish within 21 days of the creditor taking possession; or
 - (b) The creditor believes on reasonable grounds that the consumer goods will decline substantially in value if they are not disposed of immediately after default; or
 - (c) The cost of care and storage of the consumer goods is disproportionately large in relation to their value; or
 - (d) For any other reason, a court on an ex parte application is satisfied that a notice is not required.

22. Consequences of not giving post-possession notice—

If a post-possession notice is not served as required by this Act,—

- (a) The costs of taking possession of the [consumer] goods must be borne by the creditor; and
- (b) The creditor is not entitled to recover those costs from the debtor or the guarantor.

23. Creditor must not sell [consumer] goods until 15 days after post-possession notice—

- (1) Where a creditor has taken possession of any [consumer] goods, the creditor must not, without the consent in writing of the debtor obtained after possession of the

[consumer] goods has been taken, sell or dispose of the [consumer] goods or part with possession of the goods (except for the purposes of storage or repair) until after the expiry of 15 days from the date of service of the post-possession notice on the debtor.

(2) This section applies except as provided in an order under section 13(3) (vexatious applications).

24. Consequences of selling within 15 days of post-possession notice—

If the creditor contravenes section 23,—

- (a) The liability of the debtor for anything other than—
 - (i) The amount of credit under the [security agreement]; or
 - (ii) Where the agreement secures the performance of some obligation other than the payment of money, the performance of that obligation,— is extinguished; and
- (b) The creditor must repay any money already paid to the creditor by any person on account of, or in satisfaction of, any amount in respect of which liability is extinguished by paragraph (a).

25. Creditor must sell [consumer] goods 15 days after post-possession notice—

- (1) The creditor must offer the [consumer] goods for sale after the expiration of 15 days from the date of service of the post-possession notice on the debtor.
- (2) This section does not apply if—
 - (a) The debtor reinstates the agreement under section 28; or
 - (b) The debtor introduces a buyer under section 30 and the buyer completes the purchase of the [consumer] goods; or
 - (c) The debtor settles the agreement under section 31; or
 - (d) The Court determines otherwise in an order under section 13(3) (vexatious applications).

Appendix X
Property Relationship Act 1976

1N. Principles—

The following principles are to guide the achievement of the purpose of this Act:

- (a) the principle that men and women have equal status, and their equality should be maintained and enhanced;
- (b) the principle that all forms of contribution to the marriage partnership, or the de facto relationship partnership, are treated as equal;
- (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or de facto partners arising from their marriage or de facto relationship or from the ending of their marriage or de facto relationship;
- (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.]

4. Act a code—

(1) This Act applies instead of the rules and presumptions of the common law and of equity to the extent that they apply—

- (a) to transactions between spouses or de facto partners in respect of property; and
- (b) in cases for which this Act provides, to transactions—
 - (i) between both spouses or de facto partners and third persons; and
 - (ii) between either spouse or de facto partner and third persons.

(...)

(5) This section does not apply if the de facto partners have lived in a de facto relationship for less than 3 years.

(6) However, if the Court makes an order under section 25(1)(a) in respect of any relationship property of de facto partners to whom subsection (5) applies, and any question relating to relationship property arises between those de facto partners in any subsequent proceedings that are not proceedings under this Act, then—

- (a) subsection (5) does not apply; and
- (b) the question must be decided as if it had been raised in proceedings under this Act.

8. [Relationship] property defined—

[(1)] [Relationship] property shall consist of—

- (a) The [family] home whenever acquired; and
- (b) The family chattels whenever acquired; and
- (c) All property owned jointly or in common in equal shares by the husband and the wife [or by the de facto partners]; and

- (d) all property owned by either spouse or de facto partner immediately before their marriage or de facto relationship began, if—
- (i) the property was acquired in contemplation of the marriage or de facto relationship; and
 - (ii) the property was intended for the common use or common benefit of both spouses or de facto partners; and]
- (...)

9. Separate property defined—

- (1) All property of either spouse or de facto partner that is not relationship property is separate property.
- (2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.
- (3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.
- (4) The following property is separate property, unless the Court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:
 - (a) all property acquired by either spouse or de facto partner while they are not living together as husband and wife or as de facto partners;
 - (b) all property acquired, after the death of 1 spouse or de facto partner, by the surviving spouse or de facto partner, as provided in section 84.
- (5) Subject to subsection (6), all property acquired by either spouse or de facto partner after an order of the Court (other than an order made under section 25(3)) has been made defining the respective interests of the spouses or de facto partners in the relationship property, or dividing or providing for the division of that property, is separate property.
- (6) However, where relationship property has been divided on the bankruptcy of a spouse or de facto partner,—
 - (a) the family home and any family chattels acquired after that division may be relationship property; and
 - (b) any other property acquired by either spouse or de facto partner after the discharge of that spouse or de facto partner from bankruptcy may be relationship property.]

11. Division of relationship property—

- (1) On the division of relationship property under this Act, each of the spouses or de facto partners is entitled to share equally in—
 - (a) the family home; and
 - (b) the family chattels; and
 - (c) any other relationship property.
- (2) This section is subject to the other provisions of this Part.

Appendix XI
Summary Proceedings Act 1957

78B. Power to correct irregularities in proceedings for infringement offences—

- (1) This section shall apply to a defendant who,—
- (a) On the filing of a copy of a reminder notice pursuant to section 21 of this Act, is deemed to have been ordered to pay a fine and costs; or
- (b) On the hearing conducted following the filing of a notice of hearing pursuant to section 21 of this Act, is ordered to pay a fine or costs, or both.
- (2) Where a District Court Judge [[or Registrar]], on the application of a defendant to whom this section applies, is satisfied, whether on the basis of a statutory declaration or evidence given before the Judge, that—
- (a) The defendant did not in fact receive the reminder notice, or a copy of the notice of hearing, required to have been served on the defendant pursuant to section 21 of this Act; or
- (b) Some other irregularity occurred in the procedures leading up to the order for the fine or costs, or both,—
- the Judge [[or, subject to subsection (3) of this section, the Registrar,]] may do one or more of the following:
- (c) Set aside or modify the order:
- (d) Grant a hearing or rehearing of the matter and proceed with the hearing or rehearing immediately or set it down for a later date:
- (e) Authorise or require another copy of the reminder notice or notice of hearing to be served on the defendant, and for that purpose require the defendant to specify an address at which personal service, service by post, or service by either method may be effected:
- (f) Make any other order as to costs or otherwise that the Judge [[or Registrar]] considers appropriate in the circumstances.
- [[3) Where a Registrar exercises power under subsection (2) of this section, the Registrar shall not have authority to set aside or modify the order under subsection (2)(c) of this section.
- [[4) Where a Registrar exercises a power under paragraph (d) or paragraph (e) of subsection (2) of this section, the order made or deemed to have been made against the defendant shall cease to have effect.]]
- (5) Where a defendant granted a rehearing pursuant to this section does not appear at the rehearing, the Court may, if it thinks fit, without rehearing the matter, direct that the original order be restored.]

80. Fines generally payable within 28 days—

Except as otherwise provided in this Act, every fine shall be paid within 28 days after the day on which it is imposed.

84. Notice of fine—

- (1) Where, on the determination of an information or complaint, the defendant is ordered to pay or becomes liable to pay a fine and no order is made under section 83(1) of this Act for immediate payment, the Registrar shall, as soon as practicable,

deliver to the defendant or send to the defendant by ordinary post addressed to the defendant's last known place of residence or business, a notice of the fine.

- (2) Every notice given under subsection (1) of this section shall set out—
 - (a) The amount of the fine;
 - (b) The date on or before which payment of the fine is to be made;
 - (c) The times and places at which payment of the fine may be made;
 - (d) The defendant's rights of appeal;
 - [[e) That a Registrar or bailiff may enter into an arrangement with the defendant for an extension of time to pay, whether by instalments or otherwise:]]
 - (f) A general description of the action that may be taken if the fine is not paid.
- (3) Failure to comply with this section shall not of itself invalidate any subsequent proceeding.
- (4) Notwithstanding the requirements of this section, it shall be the responsibility of the defendant to take all necessary steps to find out the decision of the Court, the defendant's obligations under that decision, and the defendant's rights in relation to that decision.
- (5) It shall not be necessary to comply with the requirements of this section in any case where a fine is paid in full before the notice is delivered or sent.

85. Further notice of fine—

- (1) Where—
 - (a) A defendant is liable to pay a fine; and
 - (b) No order has been made under section 81 or section 83 . . . of this Act; and
 - [[c) No arrangement has been entered into under section 86 or section 86A; and]]
 - (d) The fine remains unpaid on the expiry of a period of 21 days beginning with the day on which it was imposed—the Registrar shall deliver to the defendant or send to the defendant by ordinary post addressed to the defendant's last known place of residence or business, a further notice of the fine.
- (2) The notice given under subsection (1) of this section shall—
 - (a) Set out the matters specified in section 84(2) of this Act;
 - [[b) Notify the defendant that if the fine is not paid within 28 days after the day on which it was imposed, and no arrangement has been entered into under section 86 or section 86A, enforcement action may then be commenced by—
 - (i) An order to seize property; or
 - (ii) An attachment order; or
 - (iii) A deduction notice,—and must set out in general terms the meaning and effects of those orders and that notice:]]
 - (c) Notify the defendant that, instead of commencing enforcement action as described in paragraph (b) of this subsection, the Registrar may issue a warrant to arrest the defendant and have the defendant brought before a District Court Judge with a view to having a substitute sentence imposed.
- (3) Failure to comply with this section shall not of itself invalidate any subsequent proceeding.

86. Extension of time to pay—

- (1) If a fine is payable and is not subject to an order for immediate payment, the Registrar may enter into an arrangement with a defendant providing for either or both of the following:
 - (a) Allowing a greater time for payment;
 - (b) Allowing payment to be made by instalments.
- (2) If the Registrar enters into an arrangement under subsection (1), the period for which the fine remains unpaid must not exceed [[5 years]] after the date on which the arrangement is entered into.
- (3) Before the Registrar enters into an arrangement under subsection (1), the Registrar may consider any information received from any source about the defendant's financial position.
- (4) If a fine may be paid by instalments and default is made in the payment of any instalment, proceedings may be taken as if default had been made in the payment of all instalments then remaining unpaid.]

87. Action where fine not paid—

- (1) Where there is default in the payment of any fine, the Registrar may—
 - (a) Issue a warrant to seize property; or
 - (b) Make an attachment order attaching any salary or wages payable or to become payable to the defendant[[]; or]]
 - [[c) Issue a deduction notice requiring a bank to deduct the amount due from a sum payable or to become payable to the defendant.]]
- (2) Enforcement procedures commenced under this section shall cease on payment of the unpaid amount of the fine.
- (3) The powers conferred by this section may not be exercised by a Registrar who is a constable.

Appendix XII
Fencing Act 1978

9. Adjoining occupiers to share cost of fencing—

Subject to the provisions of this Act, and to any order of the Court made under this Act, the occupiers of adjoining lands not divided by an adequate fence are liable to contribute in equal proportions to work on a fence.

10. Notice to do work to be given—

- (1) Any occupier who desires to compel any other occupier under this Act to contribute to the cost of work on a fence shall serve on him a notice in the form numbered 1 in Schedule 1 to this Act or to the like effect.
- (2) The notice shall—
 - (a) Specify the boundary or line of fence, or the parts of the boundary or the line of fence, along which the work is to be done; and
 - (b) Specify (whether by reference to a fence described in Schedule 2 to this Act or otherwise) the work proposed to be carried out with sufficient particularity to enable the occupier on whom the notice is served to—
 - (i) Comprehend the nature of the work proposed and the materials to be used; and
 - (ii) Estimate the cost of the work; and
 - (c) Specify the consequences of failure to comply therewith.

(...)

11. Objections to proposed fence—

- (1) If the occupier receiving a notice objects to any of the proposals set out therein, he may, within 21 days after the date of the service of the notice, serve on the occupier who gave the notice a cross-notice signifying his objection, and he may make counter-proposals in that cross-notice.
- (2) A cross-notice shall be in the form numbered 2 of Schedule 1 to this Act or to the like effect, and any work proposed in a cross-notice to be carried out shall be specified with the same particularity as is required in the case of a notice by subsection (2) of section 10 of this Act.
- (3) If the occupier receiving a notice fails to serve a cross-notice within the said period of 21 days, he shall be deemed to have agreed to the proposals set out in the notice served on him.

Appendix XIII
Social Security Act 1964

Section 10A Review of decisions

- (1) This section applies to—
- (a) an applicant or beneficiary affected by a decision made by any person in the exercise of any power, function, or discretion conferred on the person by delegation under this Act, against which the applicant or beneficiary has a right of appeal under section 12J; or
 - (b) an applicant, beneficiary, or other person in respect of whom a person makes any decision in the exercise of a power under section 19D(1)(a) of the Social Welfare (Transitional Provisions) Act 1990 conferred on the decision-making person by delegation under that Act, against which the applicant or beneficiary or other person has a right of appeal under section 12J.
- (1A) A person to whom this section applies may apply in writing for a review of the decision to the appropriate district review committee established under this section.
- (1B) The application must be made—
- (a) within 3 months after receiving notification of the decision; or
 - (b) if the committee considers there is good reason for the delay, within such further period as the committee may allow on application made either before or after the expiration of that period of 3 months.
- (2) The Minister shall establish at least 1 benefits review committee for every office of the Department where decisions or recommendations in relation to the matter or matters to which the Act applies are being made or was taken or made
- (3) Every benefits review committee shall consist of—
- (a) A person resident in sic: the area of or closely connected with the office of the Department where decisions or recommendations in relation to the matter or matters to which the Act applies are being made or was taken or made appointed by the Minister to represent the interests of the community on the committee;
 - (b) Repealed.
 - (c) Two officers of the Department appointed by the chief executive—
 - (i) From time to time; or
 - (ii) In respect of the particular review.
- (...)
- (7) No officer of the Department shall act as a member of the review committee if that officer was involved in the decision being reviewed.
- (8) As soon as practicable after receiving an application for review the review committee shall review the decision and may, in accordance with this Act, confirm, vary, or revoke the decision.
- (9) On reaching a decision on any review, the review committee shall give written notification of its decision to the applicant for review and shall include in the notification—
- (a) The reasons for the review committee's decision; and
 - (b) Advice that the applicant has a right of appeal against the decision to the Social Security Appeal Authority.

Section 12M Hearing and determination of appeal

(1) (...)

(2) Notwithstanding anything in subsection (1) of this section, on any appeal against a decision or determination of the chief executive, the Authority may rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if the Authority has reason to believe that any note of the evidence of that witness made by the chief executive is or may be incomplete in any material particular.

(3) The Authority shall have full discretionary power to hear and receive evidence or further evidence on questions of fact, either by oral evidence or by affidavit.

(4) The Authority shall also have regard to any report lodged by the chief executive under section 12K of this Act and to any matters referred to therein and to any evidence tendered thereon, whether or not such matters would be otherwise admissible in evidence.

(5) In the exercise of its powers under this section the Authority may receive as evidence any statement, document, information, or matter which in the opinion of the Authority may assist it to deal with the matters before it, whether or not the same would be admissible in a Court of Law.

(6) The Authority shall, within the scope of its jurisdiction, be deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908, and subject to the provisions of this Act, all the provisions of the Act, except sections 2, 10, 11, and 12, shall apply accordingly.

(...)

S127 Offences

Every person who makes any statement knowing it to be false in any material particular, or who willfully does or says anything or omits to do or say anything for the purpose of misleading or attempting to mislead any officer concerned in the administration of this Act or any other person whomsoever, for the purpose of [[receiving or continuing to receive]] (for himself or for any other person), or which results in himself or any other person [[receiving or continuing to receive]]—

(a) Any benefit under this Act or the Social Welfare Transitional Provisions Act 1990 or the New Zealand Superannuation Act 2001; or

(b) Any exemption from any obligation under this Act; or

(c) Any payment from the Crown Bank Account in accordance with this Act; or

(d) Any entitlement card issued under regulations made pursuant to section 132A of this Act; or (e) A more favorable means assessment than he or she would otherwise have been entitled to under section 69F or section 69FA of this Act, commits an offence and shall be liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding [[\\$5,000]], or to both imprisonment and fine.

Appendix XIV
Credit Contracts Act 1981

An Act to reform the law relating to the provision of credit under contracts of various kinds in order to—

- (a) Prevent oppressive contracts and conduct;
- (b) Ensure that all the terms of contracts are disclosed to debtors before they become irrevocably committed to them;
- (c) Ensure that the cost of credit is disclosed on a uniform basis in order to prevent deception and encourage competition; and
- (d) Prevent misleading credit advertisements; and to repeal the Moneylenders Act 1908

5. Definition of "total cost of credit"—

(1) In this Act, the terms "total cost of credit" and "cost of credit", in relation to a credit contract, mean the total of all money and money's worth that the debtor has paid or provided or is or may become liable to pay or provide either by virtue of the contract, or to or for the benefit of the creditor in respect of the contract, less the following amounts:

- (a) The amount of credit provided pursuant to the contract:
 - [(aa) Any amounts referred to in subparagraphs (i) and (ii) of paragraph (c) of the definition of the term "credit" in section 2(1) of this Act:]
- (b) The amounts specified in section 3(3)(b) of this Act [to the extent that they are not included within the amount of credit provided pursuant to the contract] (and for the purposes of this paragraph that provision shall be read as if the reference to the promisor were a reference to the debtor);
- (c) Any amount of a kind specified in regulations made under section 47(1)(b) of this Act.

(2) For the purposes of calculating the total cost of credit of a credit contract, and without limiting regulations made under section 47(1)(e) of this Act,—

- (a) Where the amount of credit is not known at the time the calculation is made and—
 - (i) The credit is not to exceed a known maximum amount, the amount of credit shall be deemed to be that maximum amount; or
 - (ii) There is no such maximum amount, the amount of credit shall be deemed to be the amount that, in the opinion of the creditor, is likely to be the amount of credit:
- (b) Where the period for which credit is provided is not known at the time the calculation is made and—
 - (i) The period is not to be less than a stated minimum period, the period shall be deemed to be that minimum period; or
 - (ii) There is no such minimum period, the period shall be deemed to be 12 months:
- (c) Where an interest rate, or the amount or rate of any other component of the total cost of credit,—
 - (i) Is known as at the time the calculation is made but may vary during the period of the contract, the rate or amount shall be deemed to be the rate or amount as at the time the calculation is made; or

(ii) Is not known as at the time the calculation is made, the rate or amount shall be deemed to be the rate or amount that, in the opinion of the creditor, is likely to be the rate or amount:

(d) Where the contract does not specify the day when credit will be provided, or an amount will be paid by the debtor, under the contract, and this day is not known at the time the calculation is made, the day shall be deemed to be the day that, in the opinion of the creditor, is likely to be the day of such provision or payment.

6. Definition of "finance rate"—

(1) In this Act, the term "finance rate", in relation to a credit contract, means the rate that expresses the total cost of credit as a percentage per annum of the amount of credit and that is—

(a) The annual finance rate, as defined in Schedule 1 to this Act, for that contract (which may be rounded to the nearest quarter of one percent); or

(b) A rate that is correctly derived or calculated from tables, or in accordance with a formula, prepared and published by the Government Actuary for the purposes of giving the annual finance rate (as so defined) for that kind of contract.

[(1A) Without limiting subsection (2) of this section, it is hereby declared that where the creditor under a credit contract stands ready to provide the whole or part of the credit to the debtor, subject only to the debtor first satisfying all security and other requirements of the credit contract, the finance rate may be calculated, in relation to the credit that the creditor stands ready to provide,—

(a) As if that credit had been provided to the debtor on the date on which the creditor, with the agreement of the debtor or at the request of the debtor, so stands ready; and

(b) Where, after the time when the creditor so stands ready, that credit earns interest or any other benefit for the debtor, without crediting that interest or benefit against the total cost of credit.]

(2) Paragraphs (a) to (d) of section 5(2) of this Act, and any regulations made under section 47(1)(e) of this Act, shall apply for the purposes of calculating the finance rate of a credit contract.

9. Meaning of "oppressive"—

In this Act, the term "oppressive" means oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice.

10. Re-opening of credit contracts—

(1) Where, in any proceedings (whether or not instituted pursuant to this Act), the Court considers that—

(a) A credit contract, or any term thereof, is oppressive; or

(b) A party under a credit contract has exercised, or intends to exercise, a right or power conferred by the contract in an oppressive manner; or

(c) A party under a credit contract has induced another party to enter into the contract by oppressive means—

the Court may re-open the contract.

(2) Where a party under a credit contract refuses to agree to the early termination of the contract, or to vary or waive any term of the contract, or imposes conditions on such agreement he shall, for the purposes of this Act, be deemed to be exercising a right or power under the contract.

(3) Where, with the knowledge of the creditor under a re-opened credit contract,—

(a) The credit provided pursuant to the contract was used (whether in whole or in part) to pay amounts owing under another credit contract or other credit contracts; or

(b) Amounts owing under the contract were paid from credit provided pursuant to another credit contract or other credit contracts—

and the creditors under the contracts are either the same person or related bodies corporate, the Court may re-open all or any of those other contracts (whether or not it considers that any of paragraphs (a) to (c) of subsection (1) of this section apply in respect thereof).

20. Method of disclosure—

(1) Subject to subsections (2) and (3) of this section, initial disclosure, [guarantee disclosure,] modification disclosure, continuing disclosure, and request disclosure shall each be made by giving, or sending by post to the last place of residence or business known to the creditor or to an address specified by the person for this purpose, to each person to whom disclosure is to be made, disclosure documents that comply with section 21 of this Act:

Provided that where that place of residence or business or address is the same for 2 or more [debtors], disclosure documents given or sent to any of those [debtors] shall be deemed to have been given or sent to all those [debtors].

(2) For the purposes of sections 22, [24, and 24A,] when disclosure is made by sending disclosure documents to a person by post, the disclosure shall be deemed to be made to the person on the 4th working day after the day on which the documents are posted.

(3) For the purposes of sections 25 to 28 of this Act, when disclosure is made by sending disclosure documents to a person by post, the disclosure shall be deemed to be made to the person on the day on which the documents are posted.

(4) Where disclosure that is required to be made to more than one person is made to those persons on different days, it shall for the purposes of this Act be deemed to be made to all those persons on the last such day.

Penalties for failure to disclose

24. Enforcement of contract before disclosure prohibited—

Where initial disclosure, continuing disclosure, or request disclosure of, or modification disclosure relating to, a controlled credit contract is required by this Act to be made,

subject to sections 31 to 33 of this Act, no person (other than a debtor under the contract) may,—

- (a) Enforce the contract; or
- (b) Enforce any right to recover property to which the contract relates; or
- (c) Enforce any security given pursuant to the contract—

before the disclosure is made:

Provided that nothing in this section shall limit any rights that a person has in respect of a bill of exchange.

25. Penalty for failure to make initial disclosure—

(1) If initial disclosure of a controlled credit contract is not made in accordance with section 16(1) of this Act (whether or not the disclosure is subsequently made), then, subject to sections 31 to 33 of this Act,—

(a) The liability of every debtor and guarantor under the contract to pay an amount equal to the specified amount shall be extinguished and every provision of the contract to the contrary shall be of no effect; and

(b) Subject to paragraph (a) of this subsection, the contract shall have the same force and effect as if this subsection did not apply thereto.

(2) In this section, the term "specified amount" means the smaller of the following amounts:

(a) An amount equal to three times the part of the total cost of credit that relates to the period from the day the contract is made until the earlier of the following days:

- (i) The day on which initial disclosure is made;
- (ii) The day that is 8 months after the day the contract is made;
- (b) The total cost of credit payable under the contract.

30. Debtor's rights of recourse against creditor—

Where—

(a) The liability of a debtor or guarantor to pay an amount under a credit contract has been extinguished pursuant to any of sections 25 to 28 of this Act; but

(b) The debtor or guarantor remains liable to pay the amount, or part thereof, under a bill of exchange drawn as part of, or pursuant to, the credit contract—

the debtor or guarantor may recover from any creditor under the credit contract (other than the holder of the bill), any such amount paid by him under the bill as if that amount were a debt due to him by the creditor.

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