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1 SEPTEMBER 1977

GLENESE J. ADAMS

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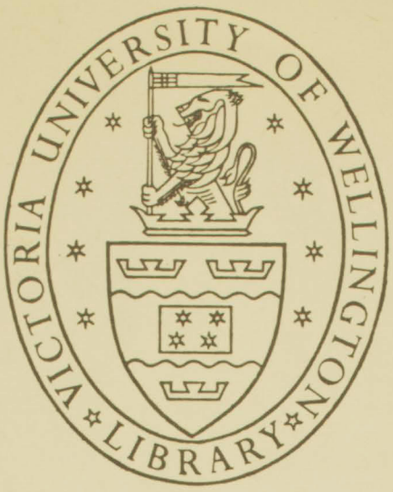

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LL.B.(HONS) LEGAL WRITING REQUIREMENT

1 SEPTEMBER 1977

GLENESE J. ADAMS

"THE NELSON COTTON MILL AGREEMENT -

A Lesson from 1960 for 1977".

INTRODUCTION

One principle of our legal system holds that Parliament "for the time being" has sovereign power - one Parliament cannot bind its successor at least in a matter of substance. A further principle of law holds that, with certain exceptions, in matters of contract the Crown is subject to the same rules, privileges and sanctions as private citizens. The potential conflict between these two principles gives rise to several areas of uncertainty. It is clear that a contract which has been ratified by an Act of Parliament and so become law is binding until its abrogation and repeal by a succeeding statute. Can a contract formed by the Crown and not ratified by Parliament bind the Crown and its successors unless and until Parliament exercises its sovereign right to override it by statute? Is this right to abrogate a contract by statute, which would appear to set limits to the liability of the Crown in contract, one which is often used? Are any other solutions available if a succeeding government does not wish to be bound by a contract formed by its predecessor? These questions illustrate a conflict at the heart of our legal system. The need to strike a balance between certainty and flexibility, between continuity and change, a balance which Fuller[1] considers "the ultimate problem of the law", has its parallel in the political and economic spheres, where a balance must be struck between the need for stability and certainty of arrangements and the need and desire for adaptation and development. An interesting situation arose in New Zealand in 1961, when a National Government inherited from the preceding Labour Government a contractual obligation to facilitate the establishment of a cotton mill at Nelson. The history of the two agreements involved, the first

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providing for the establishment of the mill, and the second providing for the rescission of the first, is of more than academic interest in 1977, for it demonstrates a pattern of inadequacy and inconsistency which must not be permitted to recur. It is necessary to study the general political and historical background to the two agreements in order to assess the particular events and problems in the light of the context in which they occurred.

BACKGROUND TO THE ORIGINAL AGREEMENT

For many years prior to 1960 a conflict had existed both between the National Party and the Labour Party, and within the ranks of the Labour Party itself, concerning the development of the manufacturing industry in New Zealand. From the time of New Zealand's earliest colonisation primary produce had been the mainstay of the economy. Industry was concerned in the main with the processing of primary produce, and with the establishment of related service industries such as brewing, tanning, baking, clothing manufacture and joinery. The fortunes of more widely based manufacturing industries suffered during the depression years of the eighteen seventies, and from the ensuing collapse of the Australian Stock Market, but began to revive in the late eighteen nineties. Fluctuations in economic conditions in this century, however, made demand unpredictable and investment uncertain. The depression of nineteen thirty made it clear that the economy must be diversified, and manufacturing industries encouraged. In 1931 the Labour Party Conference endorsed Mr H.E. Holland's policy of encouraging industry by import control, state control of credit and the establishment of an industrial development board. This policy,

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however, was rejected by the Party Conferences in 1934 and 1935 which supported the encouragement of "economic industries", and in 1936 the Prime Minister, Mr Savage, said:[2] "We have no desire to set up uneconomic industries behind a high tariff wall. Rather we would attempt to organize industry on a rationalized plan." His Government passed in that year the Industrial Efficiency Act 1936.

A crisis in the balance of payments arose in 1937. The Government was unable to raise an overseas loan and in 1938 import controls were instituted and industrial development was urged. Import and Export Control Regulations were promulgated under the authority of the Customs Act 1913 and the Reserve Bank of New Zealand Amendment Act 1936.

The Second World War intensified the need for industrial self-sufficiency and the value of manufacturing output rose dramatically. The National Party, however, which took office in 1949, was dedicated to the development of "worthwhile and efficient industry directed by private enterprise as free as possible from dictation by the State".[3] Control would be by tariff rather than by import restriction, thus depriving industry of a degree of the protection which it had enjoyed. In the latter half of the nineteen fifties a developing crisis in the economy and a decline in terms of trade again became apparent. Many industries were in decline, from electrical appliances, tanning and woollen goods to jam and glove making. Unemployment rose. In 1957 prices for wool, dairy products and meat all slumped. At the same time the demand for imports had soared.

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In its election programme in 1957 the Labour Party stood by its policy of protection through import control, and the National Party by its policy of protection through tariff control.

The new Labour Government introduced wide ranging import controls. The Minister of Industries and Commerce, Mr Holloway, said: "All industries in New Zealand can look to the Government and my Department for help."[4]

The Minister of Finance, Mr Nordmeyer, declared: "The stern realities of the position demanded that immediate action should be taken."[5]

These two men, key members of the Cabinet Economic Committee, and Dr W.B. Sutch, a key figure in the officials' committee which advised the Economic Committee and Secretary of the Department of Industries and Commerce, were the architects of the new policy of "industralisation in depth", Mr Nordmeyer because of necessity, Mr Holloway and Dr Sutch because they believed in the policy for its own sake. Dr Sutch said: "New Zealand faces the alternatives of rapid substantial industrial development or slowly falling living standards."[6]

In 1958 the renegotiation of the Ottawa Agreement reduced the quantity of goods imported from the United Kingdom on favoured terms, and a trade agreement with Japan gave that country most-favoured-nation status but allowed easy access only for goods which offered no threat or serious damage to New Zealand industries. In that year the Cabinet Economic Committee instructed the Department to formulate a philosophy for future industrial development. In the pre-election campaign of 1960

/"industralisation

"industrialisation in depth" was one of the Labour Party's major planks. "The contribution of primary producers will no longer be sufficient".[7]

In June 1960 the Government organised an Industrial Development Conference. The Government's attitude was clear. "It is the Government's aim to encourage the development of industries which can process New Zealand or imported raw materials in their crudest form through to their most finished stage."[8]

Despite opposition from academics such as Professor B.P. Philpott, Professor J.B. Condliffe, Professor H.R. Rodwill, and from Mr A.P. O'Shea, President of Federated Farmers, the Conference endorsed the Government's policy. A cotton manufacturing industry seemed made-to-measure. We already possessed expertise in the manufacture of woollen products, and the importation of cotton goods was a heavy drain on our overseas funds. Although a previous attempt to establish a cotton weaving industry in Wellington in 1942 had been abandoned, cotton had been produced in Christchurch and the Hutt Valley on a small scale during the war years. British manufacturers, suffering from the increasing production of cotton goods in Japan, Hong Kong, India and Pakistan were eager to establish plants in countries where costs were lower and protection could be obtained. The Chairman of the Board of Directors of one large British company, Smith and Nephew Associated Companies, Mr J.E. Leavey, was investigating the possibilities of such a move, and in 1959 visited New Zealand during the course of a world tour.

/HISTORY OF FIRST AGREEMENT

HISTORY OF FIRST AGREEMENT

At this time Smith and Nephew supplied a large part of the New Zealand market for cotton goods. Mr Leavey became interested in the establishment of a cotton mill here but for limited lines only. The Government's plans were more ambitious, and they invited other overseas companies to submit proposals. Smith and Nephew joined forces with an American Company, Joanna Mills, North Carolina, in January 1960, and a plan for a more complex plant was discussed. The following month, Mr Walter Regnery, Vice President of Joanna Mills, and Mr J.A. Whittaker, Deputy Chairman of Smith and Nephew, arrived in New Zealand for discussions with the Labour Government. Aware of the ensuing General Election, they approached Mr A. McKenzie, President of the National Party, and were assured that if an agreement were made by the Labour Government it would be honoured by a National Government should it take office later in the year. Both men held formal talks with Mr Holloway, the Minister of Industries and Commerce, and informal talks with Mr J.T. Watts, the shadow Minister of Finance, with whom they discussed the proposal in a general way. Discussions also began with the Department of Industries and Commerce, represented by Mr J. Lewin, Assistant Secretary of the Department. The Department favoured the establishment of a mill in the Nelson region, for it viewed that region as one which was lagging behind the general manufacturing development.[9]

In March the Prime Minister, Mr Walter Nash, at a ceremony marking the beginning of construction work on a Nelson/Blenheim extension of the South Island Main Trunk Railway, announced the establishment of a £4,000,000 cotton spinning, weaving and

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processing mill at Nelson, which was expected to be in production in 1961. The Railway would facilitate the transport of the factory's products. Mr Nash did not acknowledge that the mill was not yet at the planning stage and that no firm commitment had been made. This ill-timed and impolitic announcement, which was the decision of Mr Nash alone, allowed the agreement to be viewed later as the result of short-term political pressure rather than as an implementation of long-term policy. Its impropriety was evident a month later, when Smith and Nephew advised the Government that the American Company had withdrawn from its proposed scheme and that they also would withdraw. A cable from the Minister of Industries and Commerce was sent to Smith and Nephew regretting their decision and requesting reconsideration. The Company cabled back that they were not prepared to reconsider the matter.

The following month Mr Nash, in London for the Commonwealth Prime Ministers Conference from 4 May - 12 May, visited the Directors of the Company, and endeavoured to persuade them to continue alone with the proposal. His personal advocacy appears to have been effective, for Mr Whittaker visited Mr Nash at the New Zealand High Commission and indicated that the Directors might change their minds and submit new plans. A further cable from New Zealand at the end of May urged an early decision.

In June Smith and Nephew submitted a new scheme for a cotton spinning and weaving industry at Nelson. It was quite clear to the Company that the New Zealand Government was eager to establish the Mill which Mr Nash had already promised would mean for Nelson an era of economic growth, a large capital investment, and employment for many people; and would mean for New Zealand a major

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saving in overseas exchange and a major reduction in the price of cotton goods.[10]

Early in August 1960 Directors of the Company, satisfied that the/ were in a strong bargaining position, arrived in New Zealand. Negotiations were conducted by Mr Whittaker and the Company's New Zealand representative, Mr A.H. Giles, on the one hand, and officers of the Department led by Mr Lewin, with Mr Boord, the Minister of Customs, on the other. Agreement was finally reached after seven days. In a letter to Mr Whittaker dated 12 August, Mr Holloway set down his understanding of the position reached and declared himself satisfied. This constituted the offer to contract. A brief letter dated 11 August (a curious carelessness in such an important context) from Mr Whittaker said: "We have for acknowledgment the memorandum dated 12 August 1960, in regard to the proposed terms covering the establishment of a cotton industry in New Zealand. We have carefully studied this and agree with the terms as set out therein." This was the acceptance.[11] A further letter from Mr Holloway dated 15 August acknowledged the acceptance and allowed for the agreement to be assigned to any Company formed to carry out the establishment of the industry. New Zealand after all was to have its own Cotton Mill. The Commonwealth Fabric Corporation was born.

Before considering details of the contract itself it would be appropriate to consider the development of events leading to its rescission, but we must pause for a moment here and look briefly at certain aspects of it. The agreement as we have seen took the form of an exchange of letters and bore little overt resemblance to the usual form for a binding legal contract.

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This in itself was no bar to its validity and no innovation,[12] but it is significant in the light of later developments that the agreement was not submitted to the Crown's legal experts at the Crown Law Office. Negotiations were conducted in secret and neither the full Cabinet nor the Prime Minister himself, as was later evident, were aware of the exact details or their implications. This again was not unusual. The agreement was clearly in line with the industrial development policy of the Department and the declared policy of the Government, which saw a combination of tariff and import protection as the optimum means of facilitating industrial development, a policy implemented in several other secret industrial agreements made by the Government from 1957 to 1960.[13] The cotton mill agreement has been chosen from this group for study both because it was a relatively uncomplicated agreement with a clear pattern showing its development, its decline and its final fall, and because, as will later become evident, it differed in an important respect from the other major agreements of the time.[14]

HISTORY OF THE SECOND AGREEMENT

Let us now trace this "decline and fall". Representatives of the Company called on Mr Holyoake, the Leader of the Opposition, on the day of the acceptance but no details were discussed. The following week, on 17 August, Mr Holloway, in answer to a question in the House, said: "The completion of negotiations having been announced a week ago by the Directors of the Company, a £5,000,000 plant is to be established at Nelson and is expected to begin production in 1961."[15] He gave no details to the House of the terms of the agreement.

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The General Election in 1960 resulted in a change of Government. Soon after it assumed office the National Government ordered an immediate review of the cotton mill agreement. It was investigated by the Economic Sub-Committee of Cabinet and by an officials' committee which acted in an advisory capacity. It was discovered that the agreement was loosely structured and ambiguously phrased but the Sub-Committee, on advice from the Department of Industries and Commerce, and after inspection of the relevant documents, declared that ambiguous clauses were clearly to be interpreted in the Government's favour. On 14 December the Company was assured of the Governmental support which it needed if it was to proceed with the project. In a letter dated 16 December the Company set out the progress made and commitments undertaken, and sought an assurance of cooperation and goodwill. Later remarks in the House showed that at that time members of the Government felt that "it was a binding agreement and should be honoured in the letter and spirit"[16] and "the contract, having been made by a New Zealand Government, had to be kept".[17] Mr Holyoake in London for the Prime Ministers' Conference from 8 March - 17 March, reaffirmed the Government's support for the proposal.

Already, however, public demand was growing for the release of the terms of the agreement. In July, after consultation between Mr Marshall and Mr Giles, the New Zealand Director of the Commonwealth Fabric Corporation, a joint statement was issued stating briefly the major points of the agreement. Mr Marshall said: "Work is progressing in the establishment of a cotton mill and production is to commence in 1962."[18] Ten days later he declared (ironically in the light of future events): "I think I

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may claim that New Zealand is a country in which an overseas concern may invest with full confidence in an expanding market, an intelligent labour force, strict financial probity and a high measure of official assistance."[19] Public pressure, however, continued to build up for the release of the terms of the agreement. Concern was expressed about the few facts which were known. Differences of opinion emerged in Cabinet, particularly between the Minister of Industries and Commerce and Mr Shand, the Minister of Labour, over the degree of protection which should be afforded to industries.[20]

Mr Marshall advised Smith and Nephew of his intention of releasing the full text to interested parties, and indeed began to carry out this intention. The text was released to the Textile and Garment Manufacturers Association on 13 August, and to the Textile and Garment Council and to the Wholesale Softgoods Council on 14 September. The parties concerned were pledged to secrecy. On 4 September the Company, aware that it needed the goodwill of its potential buyers if such a venture were to succeed, became concerned about the intensity of public feeling in New Zealand against the agreement. The Chairman wrote to the Prime Minister: "I am sure my Company would be willing even at this stage to withdraw from this scheme entirely and negotiate with the Government for reasonable compensation. I am afraid the latter would be of considerable size ... we are not asking for any compensation for breaking of contract or actual monies lost."[21] This appears to have been the first time that any suggestion had been made that the venture might not proceed. It is interesting to see a party which hints that it might itself withdraw magnanimously allowing that it would seek no damages for breach

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of contract from the other party. This suggestion, clearly nothing more than an attempt by the Company to apply a little gentle pressure, was later skilfully taken up by Mr Holyoake. It is interesting also, in the light of this earlier letter, that on 22 September Mr Marshall received a letter from Smith and Nephew declaring that their Chairman and Board would not agree to the release of the agreement, which they considered to be a confidential agreement between the Company and the Government.

During October consultations between the Minister and the Company had established that there were significant differences in the interpretation placed on key clauses by the Company on the one hand and the Government and their advisers in the Department of Industries and Commerce on the other. A debate in the House on 4 October had shown that caucus, in particular some new and outspoken back-benchers such as R.D. Muldoon, was far from happy. On 27 October, by agreement between the Company and the Minister, the full text of the agreement was finally published. There was an immediate and hostile reaction from many groups within the community.[23] On 30 October Mr Marshall organised a round-table conference with trade groups. The following day, in reply to a question in the House, the Minister agreed that the contract, which was a binding legal one entered into by the properly constituted Government of New Zealand, could be terminated unilaterally but that that would involve a breach of contract for which damages would be payable. It could also be terminated by agreement with the other party, in which case compensation would be payable. He understood that the amount to which the company was already committed exceeded £1,000,000, and that was a measure of damages or of compensation. He did not intend to

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use one million pounds of the taxpayers' money to terminate the agreement.[24] This was a strange statement. It is not clear whether the Company or the Department misled Mr Marshall, but it should have been known that the Company was not yet committed to that extent. The following day, however, concern was expressed by Mr R. Kobayashi, Chairman of a visiting Japanese Trade Mission. A cable from Japan, following the release of the full text, declared the agreement to be contrary to the spirit of GATT Treaty negotiations.

Three caucus meetings took place that week, the last of them on the morning of 9 November, and it is significant that on the following day an invitation was extended to the Directors of the Company to visit New Zealand (at their own expense) to discuss the agreement with the Government. During November and December, in the course of numerous meetings between the Government, the Department and the Company, a significant lack of agreement on interpretation became clear. The Government believed that to allow the interpretation put on certain key clauses by the Company would not be in New Zealand's interests. The Company, on the other hand, stated that the mill could be economically operative only if its own interpretations were accepted. Neither party wished for the delay and expense of a Court action, which could go to the Privy Council, to determine which interpretation should apply. The Company was emphatic that "if we are to go on with the mill, we must have the guarantees, the monopolies and the various terms set out in the agreement."[25].

On 29 November a Cabinet Committee, headed by Mr Shand in Mr Marshall's absence, was formed to attempt to find a common

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ground for agreement and renegotiation.[26] A specially constituted officials' committee[27] was set up to advise the Cabinet, chaired by Mr Foss Shanahan, known to be opposed to the agreement. Other members of his committee were known to favour it, in particular Mr Lewin. The Solicitor-General reported to Mr Shand that the Company's interpretation of the crucial price clause was a reasonable one and Cabinet discovered that figures thought to have been prepared by the Department were found to have been provided by the Company. The Company remained obdurate. Mr Shand believed that the future of democracy depended on the Government's being prepared to carry out agreements properly made, and believed also in the need to extend our industrial base. By the end of December, however, he was forced to report that no successful formula for renegotiation could be found.[28] He felt that the Department had acted irresponsibly in not investigating all elements sufficiently when the contract was formed. "In fact no proper research had been done at all."[29] Discussions nevertheless continued after the Christmas break. Finally, on 13 January the Prime Minister called Mr Leavey and Mr Whittaker to his office and said: "The Government is of a mind to accept the invitation of the Company to withdraw from the agreement." The Company accepted. A second agreement was made (this time assessed by the Crown Law Office before it was signed) providing that the Government would compensate the Company for its expenditure by the acquisition of shares in the Commonwealth Fabric Corporation. The Government would pay compensation to all who had suffered damage by the rescission of the contract and would acquire the assets of the Corporation.[30] On 30 August this agreement was ratified by the Commonwealth Fabric Corporation Act.

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We shall return later to this second agreement, which raises the question of the necessity for Parliamentary authorisation of contracts involving the expenditure of public funds. At this point we shall discuss in more detail the reasons which led finally to the rescission of the contract.

REASONS FOR THE DECISION

This paper does not provide the forum for a detailed discussion of the terms of the initial agreement, of its economic or political merits, or of the policy of "industrialisation in depth". To assess the legal validity of the contract, however, and the necessity for rescission and the payment of compensation, we must look at the agreement itself and the factors which influenced the National Government. The principal reasons for the decision were published by Mr Holyoake in February 1962[31] and repeated by Mr Marshall[32] in the House in June. Although he personally held firmly to the maxim of International Law, pacta sunt servanda,[33] he declared that it was "not in the public interest" for the venture to proceed for the following reasons:-

(a) The Company's production would be of a limited range of quality, construction and patterns, which would restrict public choice.

(b) In those lines the Company was going to need 80% of the market.

(c) The Company intended to produce one width only in certain types of materials which would involve considerable reorganisation of clothes manufacturing equipment in New Zealand.

(d) Workers were likely to be displaced from the manufacture

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of certain types of cotton goods.

(e) There would be a considerable rise in the price of cotton goods, particularly at the lower end of the market.

(f) The quality and price of cotton goods coming from South East Asia and India were meeting the requirements of New Zealand to an increasing degree, in competition with products from the rest of the world. English cotton manufacturers were already in serious difficulties in the face of that competition.

(g) The Company could be competitive only with a very high degree of protection by both tariff and import restriction. This protection was promised in perpetuity and would prevent NewZealanders from enjoying the benefit of lower prices from Asian countries. It would also interfere with reciprocity of trading relations with those countries. There was a conflict between such monopolistic restrictions and our international treaty obligations.

(h) The industry was to use no New Zealand raw materials.

(i) The proposed plan to export to Australia was jeopardised by the Company's expressed intention of establishing a similar mill there.

(j) It had proved impossible for agreement to be reached on the interpretation and application of certain important clauses.

All of these complaints should have been obvious very much earlier. A Cabinet Committee and an officials' committee had after all examined the agreement in December 1960, and, as a Minister later declared in the House, the Department of Industries and Commerce had "checked with the greatest care on the price structure."[34]

UNCERTAIN AND UNSATISFACTORY TERMS

UNCERTAIN AND UNSATISFACTORY TERMS

Prices

The Company will endeavour to sell all its products disposed of in New Zealand at prices not higher than the prices of like imported products. To this end, the price (of all substantial distribution centres) of each and every product produced by the Company for sale in New Zealand will not exceed the prevailing fair average price in such centres for similar products at the time of the Company's firm commitment (as specified by specific financial commitments and the setting of a date of manufacture) to manufacture such products, increased or reduced thereafter by variations in direct costs of production and variations in taxation fairly apportionable ...

This paragraph alone contained several areas of disagreement.

1. The Company was not obliged to sell its products at a fixed price but only to endeavour to do so.
2. Increased costs and taxation could be passed on in price increases. The Company, protected by tariff and import restrictions, was not obliged to be too concerned about cost efficiency.
3. The Company believed that "similar products" was never intended to refer to similar products from all sources, including Asian, but only to similar products at that time imported from the United Kingdom.
4. The Company held that the significant time at which prices were to be fixed was 12 August, 1960. "This has always meant, and could only mean, that the price ... will be based on the fair average price or prices which prevailed when the agreement was signed in August last."[35] This clause was the most important point of disagreement, and the vagueness of the language singled this contract out from the ten other similar agreements made during this period. The prices for cotton goods (except for meat wraps) were not specifically tied to any source or to any /date.[36]

date.[36] It was unclear whether the price should include duty. The Department claimed that it would not but the Company believed that the wording allowed duty to be included both in the final price and in the determination of the prevailing average price. The most serious problem, however, was that the Government and the Department had always believed that the price would be fixed at the date when manufacture commenced. This was a matter of some importance, for the pattern of world trade in cotton goods changed dramatically after August 1960. Prices had fallen considerably. If the Company's interpretation prevailed, the public would have been denied the benefit, and the Company forever protected from the effects, of the intense world competition which had forced prices down. If, however, in the interim world prices had increased the Company would have been obliged only to endeavour to sell at the earlier lower prices.

Assurance of the market

Throughout the first stage of the Company's operations, that is until 1964, the Company will, by import licensing practice ... be enabled to dispose of all of its production disposable of in New Zealand up to a maximum in the case of any one product other than meat wraps, of 80% of the New Zealand market for that product.

...

Thereafter for a further period of at least five years, the Company will be assured by the same means of a market for all extensions of its production (manufactured pursuant to agreement with the New Zealand Government) disposable in New Zealand.

...

As soon as the Company is manufacturing and supplying a reasonable share of the New Zealand market therein an appropriate tariff will by the relevant procedure be established, notwithstanding that assurance of the

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market by way of import licensing is at the time being provided.

...

Commencing in 1969 and continuing indefinitely the Company will ... by import licensing or protective tariff or both continue to be provided with a reasonable assurance of the New Zealand market.

The interpretation of that 80% led to much disagreement. The Labour Government and the Department of Industries and Commerce had apparently held it to mean 80% of what Smith and Nephew was then providing from its British factories. According to Mr Nash that meant 80% of 7½% of the total market.[37] Mr Skinner produced from somewhere the figure of 22%. According to the Company, however, it meant just what it said - 80% of the total market in New Zealand for such products - a wide measure of disagreement indeed.

Our crop of secret industrial agreements shows that this was not itself an unusual promise. Austral Standard Cables were guaranteed 90% of the market and the Wire Rope Company was guaranteed 75%, but the Government could alter the former agreement after eight years if it gave two years' notice, and the protection in the latter agreement was to last only until 1965. The cotton mill agreement on the other hand appeared (and the Company held firmly to this interpretation) to set no time limits, to provide no way in which the Government could withdraw this extensive protection. It cannot be denied that an industrial venture of this type must have initial protection by way of import licensing restrictions or tariff controls until it becomes established, and the provision of such protection is within the discretionary power of the Minister of Customs. But this was not a "completed exercise of that discretion". It was a

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fettering of the power of the Minister of Customs in perpetuity by the Minister of Industries and Commerce. Other clauses of the agreement reiterated those promises of perpetual protection.

Other features of the agreement were regarded as unsatisfactory. For example, the agreement that the Company be provided with protection for up to 33-1/3% of the market for meat wraps could have operated to prevent the importation of meat wraps from substitute materials such as plastics, which might compete with the Company's share of the total market.

We find also that if further development of the industry was proposed by the Government, or by a third party, the Government would allow the Company the first opportunity to make and carry out proposals of its own. Requisite plant and raw materials import licenses would be available exclusively to the Company.[38]

These then were the reasons given by the National Government, after a delay of 13 months, for the decision to abandon the agreement. It was clearly an unsatisfactory situation for all concerned. The Company could not force the Government to carry out its part of the bargain, for a decree of specific performance does not lie against the Crown in New Zealand,[39] and of course the Crown has always the power to introduce legislation to abrogate a contract by Statute. The Company believed that without complete fulfilment of the terms as they interpreted them the project could not prosper and they had no wish to market products which could meet with determined sales resistance. It would be wise for them to be done with the affair, but they were already financially committed to a major degree. They had no wish to abrogate the agreement unilaterally. The Government also had

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no wish to breach the agreement unilaterally. An agreement for mutual rescission, with compensation paid to the Company for its losses, while its assets passed to the Government, seemed the only solution to the problem. But was it in fact the only solution open to the Government? The Government clearly did not wish to promote legislation to put an end to the contract. Were they obliged then to "buy their way out"?

It is significant that at no time was the legality or the binding nature of the contract officially questioned. "The agreement was a binding legal one entered into by the properly constituted Government of New Zealand".[40] A contrary view however was expressed by Dr O.C. Mazengarb, Q.C.[41]

> Both political parties have committed themselves to the view that any Minister of the Crown might, at any time, by letter written in secret, tie the hands of all his successors and the people of New Zealand for all time. But it is against constitutional law for a Minister or any Crown official to grant a monopoly to any person or firm as part of a contract for the establishment of an industry. No Parliament can bind successive Parliaments. Is a Crown official superior to Parliament? ... It is clearly laid down in English law that a Government must always retain to itself perfect freedom of action in matters affecting the State's welfare and must not fetter its actions or seek to fetter the actions of its successors. There was, therefore, no need for the Government to buy its way out of an improvident and illegal arrangement. The contract was void, ab initio. TheCompany should have ensured that the Minister of Industries and Commerce had power to conclude such a contract before they entered into it.

Before dealing with the points raised by Dr Mazengarb let us first deal with the question "Is a Crown official superior to Parliament?" As a matter of law a Crown official cannot be held to be superior to Parliament. Parliament for the time being has, as already discussed, unrestricted power to pass legislation repealing expressly or impliedly any previous legislation and abrogating any contract. It may be bound only

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by a preceding Parliament and then only in a matter of form, not of substance; but if Parliament is reluctant to exercise this right in relation to contracts formed by the Crown, or if the Crown is reluctant to promote such legislation in Parliament, it may well be that in practice a Crown official does bind the Crown and the State by contracts entered into on behalf of the Crown.

Let us consider now the several points raised by Dr Mazengarb. Must a contract in fact be binding unless cancelled by a statute? First this was indeed a contract. It was clearly an agreement intended by both parties to be binding, each party making a promise as the price for something to be done in return. It differs in this respect from those cases where it has been held that a governmental promise was a statement of policy, an expression of intention not meant to be binding.[42]

But has the Crown power to enter into contracts? That such a power existed at common law has been acknowledged in a long line of cases.[43] This common law right has long been recognized by Statute, and is presently evidenced in the Crown Proceedings Act 1950.[44] In contrast with section 6 which creates liability in tort of the Crown, section 3 proceeds on the basis that the Crown is contractually liable, merely giving the court the jurisdiction to determine that liability and to establish a contractual breach.

What then is the position of a contract concluded by a Minister who purports to bind the Crown? In general there would appear to be no reason for denying to the Crown the usual rules of agency, the ability to delegate its powers to its Ministers

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as agents of the Crown, in the absence of statutory restriction. The Courts have many times recognized this right, and the ordinary business of Government could not otherwise be carried on.[45]

Dr Mazengarb may be complaining not so much that a Minister cannot bind the Crown by contract, as that he may not bind it by a contract of this nature. A conflict which has not yet been clearly resolved has long existed in this area of the law, arising from the fact that the Crown's power to contract may originate from statute, from prerogative or from the common law. There would appear to be three prevailing views as to the existence of restrictions on the absolute freedom of the Crown in contract.

One view (of which Dr Mazengarb is clearly a devotee) holds that the Crown may contract only within expressed or implied statutory provisions or strictly within areas traditionally covered by the prerogative (Foreign Affairs, Defence, Honours, Justice) or recognised statutory or common law extensions of it.[46] There is much to favour this view. It is in accord with Dicey's doctrine of the sovereignty of Parliament, and would be an effective limit to the creeping power of the Executive which is feared and criticised in some quarters. It would appear to be the accepted Audit Office understanding of the law,[47] and the Legislature has many times expressly authorised the Government to enter into particular contracts or categories of contract. Much of the legislation[48] however is explicable on the ground that it makes a necessary appropriation. It is suggested that the authorisation of the agreements themselves may be a legislative "catch-all", certain and convenient but unnecessary.

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A second, perhaps related, view has been expressed by the judiciary in a line of cases which would allow to the Crown the capacity to contract only in the pursuit of recognised governmental activities.[49]

The difficulty with this view however lies in deciding what is "a recognised function of government" if we move away from the areas covered by Statute or the prerogative. The judgment in Bardolph's case complicates the matter further by allowing that an undertaking of doubtful validity at its inception may, if long practiced by the Executive Government, recognised in appropriations, and referred to in legislation, become recognised as one of the normal functions of government. This view, post Bardolph, has met with severe criticism.[50] The Court in Bardolph would appear to have followed the lead of the Court in the Wooltops case,[51] in which the High Court of Australia held that the Commonwealth Government could not, without Statutory authority, enter into contracts concerning the sale of wooltops. In that case, however, the Australian constitution conveyed a limited power to the Commonwealth Executive and the agreement did not fall within the scope of the relevant provisions.

Another Australian case which is often used[52] to justify the restriction on Crown contractual power is the Australian Alliance Insurance Co. case,[53] but that was complicated by the fact that the carrying on of insurance business necessarily involves the expenditure of public moneys, forbidden by the Constitution Act. The existence of such a restriction also explains the recent Australian case of Cudgen-Rutile (No. 2) Ltd. v. Chalk.[54] No such constitutional restrictions limit the power of the Executive in New Zealand, and this contract did not involve the expenditure of public funds.

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It is suggested that we should prefer the third of the three current views, supported by a long line of authority,[55] and strengthened by the existence of multifarious activities established and conducted by the Crown without statutory authority. This would allow to the Crown as a "legal person" at common law all those contractual rights which are not expressly forbidden to it by Statute (in contrast with the restricted rights expressly or impliedly conferred on "legal persons" which are the creatures of statute) despite the fact that this must enhance Executive power and correspondingly diminish the role of Parliament. The long-standing requirement of Parliamentary approval for the expenditure of public funds and the necessity for Ministers to reply to questions in the House may be considered in general to be sufficient control on the power of the Executive.

So far it would seem that we must disagree with Dr Mazengarb's view of the invalidity of the agreement. What other considerations could have moved him? Certainly it was not the "improvident" nature of the contract which was at fault, for that was early held to be no ground for questioning contractual validity or the power of a Crown agent to enter into such a contract.[56]

The other grounds on which he challenges the validity of the agreement would appear to be that it offends against both the doctrine of executive necessity and the related rule that "a person to whom a discretion has been entrusted cannot bind himself by contract as to the manner of exercising that discretion in the future".[57]

The doctrine of "executive necessity" was first expounded

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in England in 1921.[58] We see conflict yet again, this time between Dicey's principle that the Crown should be subject to the law (which is emphasised in the Crown Proceedings Act), and the necessity for the Crown to have freedom to override the law (especially the law of contract) where the public interest is concerned. During the First World War the British Government assured the owners of a Swedish ship that all ships carrying 60% of "approved goods" would be given the clearance required by all foreign ships before they could leave the country. The assurance was safely acted upon, but the next time the ship reached Britain, in reliance on a second assurance, it was refused clearance. The owners petitioned the Crown for damages for breach of contract. Rowlatt J. dismissed the petition on the grounds that there could be no valid contract of that sort between the Crown and the shipowners. "It is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract fetter its freedom of action on matters which concern the welfare of the State."[59]

This suggests that the Crown is not competent to enter such a contract. The purported contract would be void, what was meant to be a binding promise becoming merely an expression of intention. This interpretation explains the injustice of the fact that no damages were paid to the shipowners. There can be no breach of a non-existent contract.

This much-questioned doctrine is exceedingly vague and far-reaching, for any contract entered into by the Crown, even those commercial contracts which Rowlatt J. himself excluded from its bounds, will to some extent fetter its future executive actions.

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The cotton mill agreement was less a simple commercial contract than an expression of the Crown's industrial policy. Certainly no Government could rely upon this rule to evade its contractual liabilities without very soon destroying its credibility as a just and reliable contracting partner. Even if legally possible, it would have been politically unwise for the National Government in 1961 to invoke the Amphitrite principle unless under conditions of grave emergency. A note of warning wasssounded in "The Guardian", London, 12 December 1961: "This wider issue of the conditions British capital may expect to meet in New Zealand may help to persuade the Dominion Government to stand by the agreement of its predecessor."

The related principle to which Dr Mazengarb clearly refers is regarded by Hogg[60] as "analogous to if not identical to the rule of the Amphitrite". The essential core of the two rules is that "a power or duty with which a governmental agency is invested by law in the public interest cannot be frustrated by a contract".[61] Most of the case law in this area concerns public authorities other than the Crown which had purported to enter into contracts whose fulfilment would have necessitated a failure to exercise duly their statutory powers.[62] That the principle relates also to the Crown was made clear by Lord Devlin in 1960. Both William Cory and Page dealt with contracts containing a claimed implied term that the discretionary powers would not be exercised to defeat the purpose of the contract, and it was held that no such term could be validly implied. Lord Devlin declared (obiter) that even an expressed term may not be valid.[63] A similar but more definite view has been expressed in the Supreme Court of Canada[64] where Newcombe J. declared:

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> A Minister cannot by agreement deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly convenant to refrain from the use of that power ...

Lamont J. held:

> ... The Postmaster-General would have no authority by means of a contract, to restrict or limit the exercise of his discretion, or that of his successor in office, ... unless authority to make such a contract had been vested in him, either expressly or by necessary implication. Without such authority the contact would not be binding upon His Majesty.

That the cotton mill agreement did by express terms restrict the exercise of the discretionary powers of the Minister of Customs was recognised by Mr Riddiford. "The discretionary powers of the Crown were pledged in advance so that they ceased to have any meaning."[65] This point was raised also by C.N. Irvine.[66] He relied basically on the Amphitrite decision, but used, as further authority for the proposition that this contract was void, an earlier judgment of the High Court of Australia, which unanimously held such a contract to be void.[67] The Minister of Customs in 1960 had a complete discretion as to the grant or refusal of import licenses under the Import Control Regulations 1938 (S.R. 1938/161), particularly Regulation 10. The agreement was a clear fetter on the future exercise of this discretion, and it would appear that this contract could indeed have been declared void on that ground. Dr Mazengarb's view would appear to be justified.

That at no time was this officially proposed had perhaps more to do with politics than with the law.[68] It would have been politically unwise, nationally and internationally, and unjust to an old-established English company with a fine reputation; a Company which was a substantial importer of

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cotton goods into New Zealand; a Company which had acted (and suffered financially in so acting) on a promise which was intended to be binding, and on which it was intended to act.[69]

Despite the fact that in this instance the Crown could not itself claim that the contract was ultra vires of the Minister, for fear of damaging the country's reputation and credibility and perhaps for fear of the security of other similar contracts made at that time, and despite the fact that it would not have been appropriate for the Company to claim invalidity because of the very contractual terms which most favoured it, if in fact such aontracts are void it could in the future be open to either party to repudiate them at will. They would also be an unwarrantable curtailment of the rights of those who might otherwise have benefited from the exercise of the unfettered discretion imposed upon the Minister by statutory regulation. It is true that such curtailment from time to time is within the Minister's power, but here he had said: "You will never be considered in respect of the degree of the market assured to this Company". It is unfortunately doubtful that such a third party could successfully pursue a claim in such circumstances. He would have two barriers to overcome. Before he could attack the legality of the Minister's action in court, he would have to show that he had standing to bring such an action. An example of a successful third party challenge may be found in the Ski Enterprises case,[70] but that may be distinguished on the ground that the granting of the licence concerned, which was of long but limited duration, was held to be in direct conflict with the statutory duties imposed upon the Tongariro National Park Board, and their overall purpose. In the Regulations with which we

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are concerned, however, the Minister was given an absolute discretion as to the granting or refusal of a licence and was required to give no reasons for refusal, subject only to the requirement that such action must in the view of the Minister be "necessary in the public interest and to that end that the economic and social welfare may be promoted and maintained". Such a third party must further show that the refusal of the Minister to exercise his discretionary powers in his favour, a refusal which caused him damage beyond that suffered by the world at large, was due to the existence of the agreement. A difficult situation for an aggrieved cotton importer seeking justice.

THE SECOND AGREEMENT

This then was the background to the second agreement, the agreement for mutual rescission and for compensation to the Company. This second Agreement is an illustration of the principle that the expenditure of public funds requires Parliamentary approval, allowing Parliament to control to some degree, or at least to oversee, executive action. For some years it was held,[71] apparently on the flimsy authority of obiter dicta by Shee J. in the Churchward case,[72] that Parliament must not only sanction the expenditure but must also sanction a contract requiring such expenditure. In the leading cases holding this view, however, legislative approval was required by statute or by constitutional practice based on statute, as in the McKay case and the Commercial Cable Co. case. In the Auckland Harbour Board case statutory restrictions on the authority of the agent were not observed, and the appellant did not fulfil statutory requirements. In Rayner v. R,[73] and N.S.W. v. Bardolph[74] a

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contrary view was expressed. The Court in Bardolph declared not only that such a contract was valid without statutory authority, but also that it was valid without statutory appropriation, although unenforceable against the Crown.

This view concurs with that of Lord Haldane in Commonwealth of Australia v. Kidman,[75] where he explains his judgment in Commercial Cable Co.: "But he (the Governor-General) was presumed only to bind the funds which might or might not be appropriated by Parliament to answer the contract, and if they were not, that did not make the contract null and ultra vires; it made it not enforceable because there was no res against which to enforce it."

The second agreement,[76] which involved public expenditure, was clearly then valid, even if in fact Parliament had not later ratified it. Any payment, however, would have been invalid and recoverable. In this event it would have been open to the Company to bring an action against the Crown for breach of contract, and if judgment were given against the Crown, Section 24, Crown Proceedings Act 1950, would empower the Governor-General without further authority to pay the amount of such a judgment. This problem did not arise. The appropriation was later made by Parliament retroactively, and the Public Revenues Act 1953 allows quite wide powers of spending without, prior to, or in excess of appropriation.

The agreement concluded by the National Government with the Company involved not only an agreement without Parliamentary authority to disburse public funds, but also an actual disbursal of £447,956 of such funds. The details of this transaction are to be found in the report of the Controller and Auditor-General

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for the year ending March 1962.[77] The acquisition of 500,000 £1 shares in the Commonwealth Fabric Corporation Limited is shown in the list of Corporate Investments held as at 31 March, 1962.[78] These were two sides of the same transaction. This payment was in accordance with Section 51 of the Public Revenues Act 1953, which allows unauthorised expenditure to be charged to the Unauthorised Expenditure Account, with approval of the Minister of Finance or the Treasury under delegated powers. Section 51 limited expenditure to one and a half percent of the total sums authorised by the Appropriation Act of the particular year. In 1961-62 there was ample margin. It would appear, however, that the Auditor-General required as a precondition for such approval that legislation validating the expenditure (but not, as we have seen, the agreement itself) be introduced. The Commonwealth Fabric Corporation Act, deemed to have come into effect on 13 January, was passed on 30 August, 1962, ringing down the curtain on a protracted drama which at times showed the elements of farce.

CONCLUSION

What lessons remain for us in 1977? We began by asking what happens when an incoming Government wishes to retreat from a contractual obligation incurred by a preceding one. It must now be clear that the premature termination of agreements entered into by Governments, either with other Governments or with private interests, can never be a cause for satisfaction. Our reputation as a country with which overseas firms might safely negotiate suffered severely, even in the eyes of countries such as Japan, India and Hong Kong, whose own particular interests at that time were best served by the rescission of the cotton mill /agreement.

agreement. It was also clear that a contract entered into with the State, where political factors may intrude, is less secure than a contract entered into between private concerns. This was the price paid for the committal of the State to a complex, monopolistic and perpetual agreement, without an exhaustive study of its validity and its wide ranging effects - a price potentially more heavy than the sterling funds paid as compensation.

There is no doubt that the business of government would grind to a halt if all of the thousands of contracts entered into by the State annually were to require such an exhaustive study. There is also no doubt that there are many agreements which require delicate and private negotiation, at least in their initial stages. But some dividing line must be drawn, as the French have distinguished between "contrats publiques" and "contrats administratifs", between limited commercial contracts such as those for procurement, and contracts, although perhaps basically commercial, which are of wider effect. It is not suggested that we should follow the French and apply different rules to the interpretation and resolution of different classes of contract. It is suggested, however, that we must ensure that contracts which appear to conflict with existing international or contractual obligations, or which give exclusive privileges in perpetuity, or which fetter Ministerial discretion, are assessed by the Crown Law Office and by a Commission, such as the Industrial Development Commission, independent of the contracting Department.

The rules, it is true, were changed after the rescission of the Cotton Mill Agreement. The Government of the day promised

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to consult trade organisations which were affected by industrial development policy, and constituted theTariff and Development Board. The Cabinet rules were amended,[79] requiring that certain contracts be referred in draft form to the Solicitor-General before they were signed. It would perhaps be preferable if these procedural rules were given the force of statute. Parliament may bind the Government as to the manner in which it exercises its contracting power, particularly if such procedural requirements are entrenched. The benefits of certainty at this stage of contractual negotiation would appear to outweigh the benefits of flexibility.

At a time when clamorous calls for more open government are continually heard; a timewhen the balance of power appears to be shifting from Parliament to Cabinet and thence through the Ministers to the Departments, and through caucus to organised pressure groups within the community; a time when powerful multinational organisations are demanding ever more monopolistic protection before entering into activities regarded as essential to New Zealand's present and future welfare, it is important not only that contracts of this kind should be minutely studied and legally certain but also that they should be seen to be so.

Lawyers are not and should not be makers or movers of policy,[80] but despite Dr Sutch's expressed views,[81] they have an important role to play in ensuring not only that such contracts are in satisfactory and certain form, that the terms incorporate a true understanding between the parties, and that provision is made for adjustment or renegotiation if the "stern realities" of political necessity require this, but also that they do not offend against the law. Fitzgerald v. Muldoon[82] is authority for the proposition

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that the Executive is not above the law. If a contract required to implement necessary policy is potentially in breach of the law, the law must be changed to accommodate it. This could readily have been achieved in 1960 by ratifying the agreement by Statute, or by amending the regulations to allow such a fettering of Ministerial discretionary powers.

Mistakes were made by both political parties in 1960, 1961 and 1962. The Labour Government erred in its haste and, after Mr Nash's premature announcement, was open to the charge of using an important industrial agreement for reasons more of short-term political expedience than of public interest or long-term policy. The National Government erred in its procrastination and so was open to the charge that it was moved more by pressure from its less than disinterested adherents than by public interest or long-term policy.

The problems of 1960 may seem remote from us, but many of our present Cabinet Ministers were Members of Parliament during those years. Santayana believed that those who do not remember their history are doomed to repeat it. Let us hope that the "Great Cotton Mill Disaster" and the lessons to be learnt from it are fresh in their minds as a permanent example of the misuse of powers allowed to the Crown in the interests of just and efficient government.

NOTES.

1. L. Fuller, Legal Fictions (1967) Stanford University Press, p. 137.
2. Daily Telegraph, 15 July 1936.
3. The Press, 28 October 1949, p. 8 cols 1-2.
4. Evening Post, 6 January 1958, p.4 col. 4.
5. N.Z.P.D., Vol. 315, 64.
6. Report of the Department of Industries and Commerce, 1959.
7. The Press, 8 November 1960, p.18 col. 3.
8. Mr Nash, Press, 14 June 1960, p.16 col. 2.
9. "Economic Survey of the Nelson Region", Department of Industries and Commerce, June 1962.
10. Evening Post, 1 March 1960, p. 28 cols 1-2.
11. Commonwealth Fabric Corporation Act 1962, 1st Schedule.
12. The Rongotai Airport Agreement also took the form of an exchange of letters.
13. Agreements, details of which were released in February 1962, were made with:-
    (i) Consolidated Zinc Pty. Ltd., to establish a plant to smelt imported Aluminium;
    (ii) Alcan Industries Ltd., to establish a plant to produce aluminium flat sheet;
    (iii) Pacific Steel Ltd., to establish a steel-rolling mill;
    (iv) Ajax Ltd., to establish a plant to manufacture steel and brass screws;
    (v) G.K.N. Ltd., to establish a plant to manufacture wire;
    (vi) Cookes N.Z. Wire Rope Co., to establish a plant to produce wire rope;

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(vii) Austral Standard Cables, to establish a plant to produce telephone cable;

(viii) N.Z. Refinery Co., to establish a plant for the distillation of refined products;

(ix) N.Z. Distillery, to establish a factory for the production of gin;

(x) McKendrick Glass, to establish a plant to produce glass.

14. "There is no other agreement known to exist in this country whereby a commercial concern is given a protected monopoly forever for its shareholders":- Mr Hanan, N.Z.P.D. Vol. 330, 753.

15. N.Z.P.D. Vol. 323, 1555.

16. Mr J.R. Marshall, Minister of Industries and Commerce, N.Z.P.D. Vol. 329, 3542.

17. Mr R.D. Muldoon, N.Z.P.D. Vol. 328, 2748.

18. Evening Post, 14 July 1961, p.13 cols 1-2.

19. Article in N.Z. Supplement to the London Financial Times, 24 July 1961.

20. N.Z.P.D. Vol. 329, 1524, 1560

21. Quoted by Mr K.J. Holyoake during the second reading debate on the Commonwealth Fabric Corporation Bill, N.Z.P.D. Vol. 330, 763

22. N.Z.P.D. Vol. 331, 1617.

23. The Textile Manufacturers Association, the Softgoods Wholesalers and Importers Association, Federated Farmers, the Plunket Society, the Associated Chambers of Commerce, the Constitutional Society et al.

24. N.Z.P.D. Vol. 329, 3982.

25. N.Z.P.D. Vol. 330, 1618.

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26. This specially constituted committee was composed of the Minister of Labour, Mr Shand; the Prime Minister, Mr Holyoake; the Minister of Finance, Mr Lake; the Minister of Justice, Mr Hanan; and the Under-Secretary of Industries and Commerce, Mr Talboys.

27. This Committee was composed of Mr Shanahan; Mr J.F. Cummings, Controller of Customs; Mr J.P. Johnson, Chairman of the Board of Trade; Mr J.P. Lewin, Assistant Secretary of the Department of Industries and Commerce; Mr H.J. Lang, a senior Treasury official; and Mr H.R.C. Wild, Q.C., the Solicitor-General.

28. N.Z.P.D. Vol. 331, 1453, 1454.

29. Otago Daily Times, 7 March 1962, p.1 col.7

30. Commonwealth Fabric Corporation Act 1962, 2nd Schedule.

31. Evening Post, 1 February 1962, p.16, cols 1-3.

32. N.Z.P.D. Vol. 330, 385.

33. Interview with Sir John Marshall, 1 August 1977.

34. Mr D.J. Eyre, N.Z.P.D. Vol. 330, 797, 10 June 1962.

35. Mr Leavey, Evening Post, 1 December 1961, p.8, cols 1-2

36. The prices of gin, wire rope and steel were all to be lower than the prices of imported products at the date of the approval of the agreement.

37. N.Z.P.D. Vol. 329, 3509.

38. The N.Z. Refining Co. was given the same assurance, while Comalco had the right to import materials free of duty.

39. Crown Proceedings Act 1950, 17 (a). Declaratory relief is however available.

40. Mr J.R. Marshall, N.Z.P.D. Vol. 329, 3542, 3982.

41. Address to the Constitutional Society, Dunedin, 16 April 1962.

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42. Cf for example:-

(1) Australian Woollen Mills Pty. Ltd. v. Commonwealth (1955) 93 C.L.R. 546 (P.C.)

(2) Logan Downs Pty. Ltd. v. Commissioner for Railways [1960] Qd.R.191.

43. Thomas v. R. (1874) L.R. 10, Q.B. 31, 33 per Blackburn J:- "Contracts can be made on behalf of Her Majesty with subjects."

44. Crown Proceedings Act 1950, s.3 (2).

45. (1) Thomas v. R. (1874) L.R. 10, Q.B. 31.

(2) Rederiaktebolaget Amphitrite v. R. [1921] 3 K.B. 500, 503.

(3) J.E. Verreault et Fils Ltee v. Attorney-General for Quebec (1975) 57 D.L.R. 3rd 403.

46. (1) The Case of Saltpetre (1606) 77 E.R. 1294 cited in

(2) Attorney-General v. de Keyser's Royal Hotel [1920] A.C. 508, 565.

47. The Annual Report of the Controller and Auditor General for the year ending March 1975 states that statutory authority was necessary to enable the Secretary for Transport, acting for the Ministry on behalf of the Crown, to enter into a contract for the charter of the Rangatira. Such authority was given to the Minister of Industries and Commerce in 1947 (now incorporated in Trade and Industry Act 1956, s.9) after the Audit Office had declared that it was not satisfied that the State had the authority of law to embark on shipping ventures.

Appendix to the House of Representatives, Vol. 1, 1975, BI Pt.II, 65; Vol. 2, 1947, BI Pt.II, 22, 23.

The Commonwealth Fabric Corporation Act itself contains provision for the making of further agreements if it should become necessary.

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48. The Iron and Steel Industry Act 1959, and the 1965 Amendment e.g.

49. N.S.W. v. Bardolph (1933-4) 52 C.L.R. 455.

50. Enid Campbell "Commonwealth Contracts" (1970) 44 A.L.J. 14.

51. Commonwealth v. Colonial Combing etc. Co. (1922) 31 C.L.R. 421.

52. Currie, Crown and Subject (1953) 55, 56.

53. [1916] St.R. Qd. 225.

54. [1975] 2 W.L.R. 1, 7. AC

55. (1) Clough v. Leahy (1904) 2 C.L.R. 139, 157.

(2) Williams v. Silver Peaks Mines Ltd. (1915) 21 C.L.R. 40, 49.

(3) J.E. Verreault et Fils Ltee v. Attorney-General for Quebec (1975) 57 D.L.R. 3rd 403. SCC.

56. Attorney-General v. Lindgren (1819) 146 E.R. 811.

57. Mitchell, The Contracts of Public Authorities (1954) 57.

58. Rederiaktebolaget Amphitrite v. R. [1921] 3 K.B. 500.

59. Ibid. 513.

This decision was relied upon by the Privy Council in an unreported case from Malta (Buttigreig v. Cross, decided 10 October 1946) mentioned by Mitchell, op. cit., 24, n.2.

60. Hogg, Liability of the Crown (1971) 134.

61. Turpin, Government Contracts (1972) 23.

62. (1) Ayr Harbour Trustees v. Oswald (1883) 8 App.Cas. 623.

(2) William Cory & Son Ltd. v. London Corporation [1951] 2 K.B. 476.

(3) Southend-on-Sea Corporation v. Hodgson [1962] 1 Q.B.416,424 per Lord Parker:-

"After all, in ~~the~~ case of a discretion, there is a

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duty under the statute to exercise a free and unhindered discretion."

63. Minister of Crown Lands v. Page [1960] 2 Q.B. 274, 291.

64. R. v. Dominion of Canada Postage Stamp Vending Co. Ltd. [1930] S.C.R. Can. 500, 506, 510.

65. N.Z.P.D. Vol. 330, 792.

66. "The Cotton Mill Agreement" [1962] N.Z.L.J. 169.

67. Watson's Bay and South Shore Ferry Co. Ltd. v. Whitfield (1919) 27 C.L.R. 268.

"The contract was not the completed exercise of a discretion ... it was an anticipatory fetter on the future exercise of discretion and public action."

68. "The Dependence of Law on Political Fact".
Mitchell, "The Sovereignty of Parliament - Yet Again" (1963) 79 L.Q.R. 196, 207.

69. Denning J., in Central London Property Trust v. High Trees House [1947] 1 K.B. 130.

70. Ski Enterprises Ltd. v. Tongariro National Park Board and Another [1964] N.Z.L.R. 884.

71. (1) McKay v. Attorney-General for British Columbia [1922] 1 A.C. 457, 461.

(2) Commercial Cable Co. v. Governor of Newfoundland [1916] 2 A.C. 610.

(3) Auckland Harbour Board v. R. [1924] A.C. 318, 326-327.

72. Churchward v. R. (1865) 1 Q.B. 173, at 209.

73. Rayner v. R. [1930] N.Z.L.R. 441.

74. N.S.W. v. Bardolph (1933-4) 52 C.L.R. 455.

75. (1925) 32 A.L.R. 1, 2-3.

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76. Commonwealth Fabric Corporation Act 1962, 2nd Schedule.

77. Appendix to the House of Representatives, Vol. I, 1962, BI, Pt.II, 26.

78. Appendix to the House of Representatives, Vol. I, 1962, BI, Pt.I, 60.

79. Statutory Regulation 1958/105, the Cabinet Rules for the Conduct of Crown Legal Business, contained the following provision:-

Rule 7. "When the form of an instrument has once been so settled it will not be necessary to submit similar instruments for revision unless there is reason to believe that there has been a change in the law or circumstances affecting the form of the instrument, or unless the instrument is an exceptional one in the practice of the Department concerned."

On 25 June 1962 Cabinet amended these rules, in Amendment No, 1, S.R. 1962/108, by inserting, after Rule 7, the following rule:-

Rule 7A. "All contracts relating to the establishment or extension of any type of industry or commerce in New Zealand, being contracts which provide for Government assistance of a kind or to an extent not then available to others who are or may be interested, whether by grant of a total or partial monopoly, financial aid, tariff or import control protection, or other right or privilege, are to be referred in draft form by a Minister or Permanent Head to the Solicitor-General before being brought before a Minister for signature."

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80. A view expressed by Sir Francis Bacon 350 years ago, and still, it is suggested, valid today.

81. "If you bring all the lawyers in then you scare the big companies away", in an interview with David Mitchell, June 1966.

"The Nelson Cotton Mill: A Case Study in the Politics of Development", unpublished M.A. Thesis, 1967, 60.

82. Fitzgerald v. Muldoon [1976] 2 N.Z.L.R. 615.

LXAD ADAMS, G.J. The Nelson cotton mill agreement.