LEGISLATION NOTES

CUSTOMS AMENDMENT ACT 1987

The Customs Amendment Act 1987 ("the Act") substituted a new Part VA (sections 186A to 186F) in the Customs Act 1966 — the source of New Zealand's anti-dumping and countervailing law.

For the unfamiliar, dumping occurs where foreign producers sell identical or similar goods under identical or similar circumstances for a lower price in the market of import than in the market of origin. The term "countervailing" refers to the situation where duty is imposed to offset the effects of subsidies or other incentives in the market of origin.

The Act was passed as a result of the decision taken by Cabinet in June 1986, that New Zealand should become a signatory to the GATT Anti-Dumping Code, Article 16 of which requires all the member nations to "ensure . . . the conformity of its laws, regulations and administrative procedures with the provisions of this agreement".

The decision to become a party to the Anti-Dumping Code was itself a response to the breaking down of import licensing and reduction in tariffs which, when in force, had combined to discourage dumped and subsidised imports.

Once a complaint has been made under the Act it becomes the task of the Comptroller of Customs to carry out an investigation, it is then the responsibility of the Minister of Customs to "make a preliminary determination, on the basis of the information made available during the investigation"; section 186J(f).

Probably the most significant change brought in with the Act concerns the initiation of an investigation. It is no longer possible, as it was under previous legislation, for the Comptroller of Customs to initiate an investigation merely on the grounds that the complaining industry has shown that dumping has in fact taken place. Section 186H now requires the Comptroller to be satisfied that dumping has occurred or is about to occur, that a New Zealand industry will be materially injured and that such injury has been or will be caused by the dumping. The threshold for initiating an investigation under the Act is now much higher than it has been in the past and the burden now falls upon the complaining industry to show clearly the existence of dumping, material injury and causation.
A further innovation in the Act is the use of the term "like goods". As can be seen from the definition above, a dumping investigation is essentially an exercise of comparison; that is between the allegedly dumped goods and goods of a like nature of domestic manufacture. The previous legislation was somewhat ambiguous in its terminology using the term "goods of a class or kind", alongside the term "like goods". In adopting the consistent use of the term "like goods" the Act uses a term which is known and understood by this country's major trading partners and conforms to the Anti-Dumping Code which has widespread international recognition.

As material injury to a domestic industry is one of the essential elements in a successful dumping complaint, the Act now gives some clear guide-lines in this matter. Section 185F sets out the matters that the Minister should examine (s. 185F(1)), and matters to which the Minister shall have regard (s. 185F(2)). As well as providing guidance to the Minister, section 185F now enables an industry to make out a complaint of injury in terms that are directly consistent with the Act.

The Act now makes the dumping investigation subject to specific time limits. Section 185F (in relation to preliminary determinations) and section 185K (final determinations) impose time limits of 60 and 90 days respectively from the date of initiation by the Comptroller. The intended effect of this is to give swift protection to domestic producers who are entitled to such protection. The previous legislation did not provide any time limits on the Comptroller's investigation of a complaint.

A good deal of the Act is devoted to the mechanics of applying anti-dumping and countervailing measures, including; calculation of export price and normal value (sections 186B and 186C respectively) and the collection of dumping and countervailing duty itself (section 186L).

One small area of deficiency in the Act in its present form is its failure to deal clearly with the problem of causation. There is an absence of guidance in assessing whether or not dumping is sufficiently causative of injury when there are multiple possible causes. The Anti-Dumping Code, in Article 3.4 adopts the approach that each possible cause is to be considered in isolation and if dumping is a material contributing factor then anti-dumping measures may be invoked. It is presumed that the Minister of Customs would adopt this course, though the Act does not say so.

Finally, a curious provision introduced for the first time by the Act is found in section 186P. This section provides for the situation where dumping of goods in New Zealand is materially injuring an industry in a third country. The Government of that third country may request that the Minister in New Zealand apply the provisions of the Act in relation to the dumped goods. This section effectively makes the third country a part of the New Zealand market for the purposes of the Act. It is most likely to be invoked, if at all, by a Pacific Forum Nation.
In conclusion there is little doubt that the Act is well placed to become the principal means of effective protection against dumping in the New Zealand market. The reasons for this are:

i. By following more closely the procedures set out in the GATT Anti-Dumping Code, New Zealand's major trading partners are more likely to understand and anticipate the likely consequences of dumping in New Zealand.

ii. By adopting internationally recognised principles the Act is likely to inspire the confidence of the industries that it is intended to protect. Industry will therefore more readily seek relief under the Act.

iii. The body of law already developed in other jurisdictions will now assist in the interpretation and application of anti-dumping measures in this country. This should result in greater efficiency at Departmental and Ministerial level and therefore better service to New Zealand industry.

- Paul N. Collins

CONSTITUTION ACT 1986

Introduction and Background

In July 1984, following the general election, unexpected difficulties arose over the transfer of power from the outgoing Government to the newly elected Government. Surprisingly, there appeared to be no means by which the successful party could immediately form a Government in order to recommend urgent measures to the Governor-General. Instead, the defeated Prime Minister had to accept the directions of the incoming Government and recommend such measures (none of which he was in favour of).

Although the issue was resolved, these events highlighted problems with present constitutional provisions. As a consequence Cabinet established an Officials Committee with three principal objectives:

i. to clarify the rules relating to the transfer of power after a general election;

ii. to terminate the residual power of the United Kingdom Parliament to make laws for New Zealand; and

iii. to carry out a general reorganization of the statutory constitutional provisions.

This note will consider the provisions that seek to satisfy the first two objectives, as this is the area where significant changes have been made in the law. The significance of the numerous other minor and procedural alterations that were a consequence of the rationalisation of the New Zealand constitu-
tional provisions, will be apparent from careful reading of the statute.

The Act, which became effective on 1 January 1987, is based on the reports of this committee, which were published in February 1986. It is in five parts: Parts I to IV deal with the Sovereign, while the final part contains repeals and consequential amendments to other statutes.

The Sovereign

Part I provides that the Sovereign in the right of New Zealand is the Head of the State, and expressly recognises the role of the Governor-General as the Sovereign's representative in New Zealand.

The Executive

The constitutional tool required to avoid a recurrence of the problems experienced during the 1984 change of government is contained in section 6 of the Act. In substance this section provides that a person may be appointed and may hold office as an Executive Councillor or as a Minister of the Crown if he or she:

i. is a member of Parliament, or;

ii. has been a candidate at a general election immediately preceding appointment, but in that case shall vacate office at the expiration of forty days from the date of appointment unless within that period he or she becomes a member of Parliament.

Now, as soon as the results of an election become clear, the Governor-General will be able to appoint new provisional Ministers to recommend urgent measures, before the writs have been fully returned. The elected Government need no longer rely on convention and expect the outgoing Government to agree to requests for recommendations. Significantly these changes received bipartisan support, both major political parties recognising their necessity.

The Legislature

Part III of the Act is in three divisions; the House of Representatives, Parliament and Parliament's powers in respect of public finance.

i. The House of Representatives

The continuance of the House of Representatives, as originally constituted by section 32 of the New Zealand Constitution Act 1852, is provided for in section 10.

ii. Parliament

The General Assembly is established by section 14, with the word
'Parliament' replacing 'General Assembly' to describe the legislative entity made up of the Head of State and the House of elected representatives. The assembled body of elected representatives will still be called the 'House of Representatives' and its members will continue to be known as 'Members of Parliament'.

The provisions of section 53 of the New Zealand Constitution Act 1852 empowering the New Zealand Parliament to make laws for the 'peace, order and good government of New Zealand' are embodied in section 15 of the new Act, with the exception that the territorial delimitations of the legislative competence of the New Zealand Parliament have been omitted. Over the years a number of legislative changes have widened the original powers provided in section 53 of the 1852 Act:

i. the adoption of the Statute of Westminster restricted the United Kingdom Parliament's power to make laws for New Zealand solely to where legislation had been expressly requested and consented to by the New Zealand Parliament, and empowered the New Zealand Parliament to enact legislation repugnant to any United Kingdom statute whose influence extended to New Zealand;

ii. the passing of the New Zealand Constitution (Amendment) Act 1947 (UK), gave the New Zealand Parliament the power to amend the provisions of the 1852 Constitution Act; and

iii. the New Zealand Constitution Act 1973 provided the General Assembly with full power to make laws having effect both within and outside New Zealand.

The new section seeks to both replace and consolidate these alterations while at the same time terminating the residual power of the United Kingdom Parliament to make laws for New Zealand. This residual power was seen as an anachronism by the Officials Committee, as use of the power in 1947, requesting the United Kingdom Parliament to pass the Constitution (Amendment) Act 1947 made it unnecessary ever to invoke it again. Certainly an on-going power of the United Kingdom Parliament to legislate for New Zealand, and the subsequent limiting of the New Zealand Parliament's absolute sovereignty, would appear to be incompatible with New Zealand's present independent status.

To implement these changes section 26 of the Act declares that the New Zealand Constitution Act 1852, the Statute of Westminster 1931, and the New Zealand Constitution (Amendment) Act 1947 cease to have effect as part of the law of New Zealand. As these Acts provide the basic grant and recognition of the New Zealand Parliament's legislative competence, the question arises: does New Zealand now have an autochthonous constitution?

Other constitutions recognised as being autochthonous are expressly and
deliberately declared to be self-sourced;\(^1\)

We, the people of India . . . do hereby adopt, enact, and give to ourselves this Constitution.

However, the source of New Zealand's legislative power still emanates from the New Zealand Constitution Acts passed by the United Kingdom Parliament, which were not repealed by the 1973 and 1986 New Zealand Constitution Acts, and can still be found on the United Kingdom statute books. As the New Zealand Parliament's legislative competence continues to be derived from Acts of the United Kingdom Parliament, the New Zealand Constitution is not self-sourced, and therefore cannot be described as autochthonous.

In a wider context, the exact extent of the powers of the New Zealand Parliament have not yet been fully tested. The ability of Parliament to place manner and form restraints on future Parliaments is as yet unresolved.\(^2\)

Section 16 provides that a bill, which has been passed by the House of Representatives, becomes law when the Sovereign or the Governor-General assents to it. Notably there is no express provision allowing the Sovereign or Governor-General to refuse to assent to bills which have been passed by the House of Representatives, or to return bills to the House with suggested amendments; although the section does leave open the possibility that assent could be withheld.

The term of Parliament is set at three years by section 17, which incorporates section 12 of the Electoral Act 1956. This section, like the section it replaces, has been entrenched by way of section 189 of the Electoral Act, and requires any proposal to repeal or amend it to be passed by 75 percent of all the members of the House of Representatives or be approved by a majority of voters at a referendum.

The potential difficulties associated with repealing an entrenched provision did not eventuate, as the Electoral Act was expressly amended to account for these changes by the Electoral Amendment (No.2) Act 1986, which was read and passed concurrently with the Constitution Act 1986 by more than 75% of all the members of the House.

Section 19 is a new provision requiring that Parliament meet not later than six weeks after the date fixed for the return of the writs. The requirement that the General Assembly meet, rather than simply be summoned, mandates that the activities set out in Standing Orders 4-36 be performed, although no remedy is specified if these activities are not carried out. In light of the difficulties that arose during the 1984 change of government, and the relatively lengthy delay in the first meeting of Parliament in New Zealand (compared with other Commonwealth countries), inclusion of such a provision appears to be justified.

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1. Indian Constitution having effect from 26 Jan 1950; see also the Constitutions of the Federal Republic of Germany, Western Samoa and Ireland.
iii. Parliament and Public Finance

The principles relating to Parliamentary control of public finance inherent in Article 4 of the Bill of Rights of 1688, are embodied in section 21 of the new Act. The raising of revenue, the raising of loans and any public expenditure all require legislative authority. In addition, any appropriation or charge on the public revenue must be initiated by the Crown, pursuant to section 22.

The Judiciary

The Chief Justice and other High Court Judges may be removed from office only on the grounds of misbehaviour or incapacity to discharge the functions of office, as provided in section 23 of the Act. This redrafted section takes away the Governor-General's power to suspend, but empowers the Governor-General to remove Judges where previously it was solely the Sovereign's prerogative.

Furthermore, section 10 of the Judicature Act 1908, which directs that the salary of a High Court Judge is not to be reduced during the continuance of the Judge's commission, is embodied in section 24 of the new Act.

Conclusion

The New Zealand Constitution Act 1986 is not a constitution in the sense that it does not set out to provide a formal written document illustrating the whole of New Zealand's constitutional structure. Rather, it is an attempt to rationalize into one document important constitutional provisions that have previously been scattered through a number of New Zealand and United Kingdom enactments. In doing so, significant changes have been made to the New Zealand Constitution, including terminating the residual power of the United Kingdom Parliament to make laws for New Zealand, and making appropriate amendments to ensure future changes of government are not complicated by the constitutional problems experienced following the 1984 general election.

The Act is a consequence of taking advantage of the opportunities presented when the need for constitutional reform became apparent. As such, recognition for the timely clarification and overhaul of New Zealand's constitutional law is deserved for both the reports of the Officials Committee and the worthy objectives established by Cabinet.

— Duncan Simmester