STUDENT COMPANION

EQUITY

Jessica Palmer

Stevens v Premium Real Estate Ltd
[2009] NZSC 15

The Supreme Court's ruling in *Stevens* is significant for fiduciary law for several reasons: it casts considerable doubt on any previous notion set by the Privy Council in *Kelly v Cooper* [1993] AC 205 that an agent's fiduciary duty to his or her principal can be readily excluded by implication, particularly where it is common for the agent to have several principals with similar interests; it provides some clarification to the way in which equitable compensation ought to be determined; and, most controversially, it allows a possible double recovery.

The Stevenses appointed Premium to sell their home, believing it to be worth $3m. The house was initially advertised as available to offers over $2.8m and then offers over $2.7m. After a few weeks, an offer of $2.2m was received. The counter-offer of $2.8m was rejected. The Stevenses then opted for a tender process for the house and during this time, a Mr Larsen (as a trustee) made an offer of $2.525m through Ms Riley, a representative of Premium.

Although initially wanting to counter-offer $2.8m, the Stevenses accepted $2.575m from Mr Larsen after being told by Ms Riley that an extra $50,000 was the most he would pay. Having been asked by Mrs Stevens about Mr Larsen, Ms Riley had said that although he looked scruffy, he had the means to pay; and that he lived on the other side of town and was finding the travelling to his office too much. No mention was made of the fact that Mr Larsen was a residential property speculator, buying and quickly reselling houses at profit with minimal alteration or redecoration and that he usually bought giving the impression that the properties would be used as his own family home. Premium had been involved in several of the previous deals and Ms Riley knew Mr Larsen's modus operandi.

Mr Larsen relisted the property with Premium even before settlement had occurred. Following some work on the house and an international marketing campaign, it sold six months after the purchase for $3.55m.

The Stevenses alleged breaches of the Fair Trading Act 1986, of contract, and of fiduciary duty by Premium and claimed return of the commission and damages. The Stevenses were successful at trial and in the Court of Appeal, although damages were reduced on appeal. The Supreme Court gave leave to appeal on both liability and remedy.

All judges upheld the finding of breach. The majority judgment given by Blanchard J for himself, McGrath and Gault JJ and concurred with by Tipping J ruled that Premium had committed a breach of its fiduciary obligation of loyalty by failing to disclose material information to the Stevenses and by actively misleading them. Blanchard J rejected the applicability of the ruling in *Kelly v Cooper* that a fiduciary's duty of disclosure of confidential information is impliedly excluded in real estate agency because of the need to maintain confidences with several different principals with competing interests. This point was obiter given that the information about the purchaser was held not to be confidential and did not give rise to a conflict between duties owed to the vendors and any duty owed to the purchaser (from past and future dealings). Nevertheless, it stands as a reminder that loyalty is a strict requirement that does not give way simply because of practical difficulties it may create.

Elias CJ also held that Premium had committed a breach but on the more limited ground of the misleading and incomplete information given by Ms Riley to the Stevenses. Her Honour doubted the applicability of any more general an obligation on estate agents to provide material information because of the need for such agents to be able to deal with parties with competing interests.

In relation to remedy, a claim for an account from Premium of the profit made by Mr Larsen was rejected because Premium had not participated in the profit nor had there been any collusion between Mr Larsen and Premium. The Bench was unanimous in instead awarding both compensation for loss of profit to the Stevenses and repayment of the commission paid to Premium.

On the workings of equitable compensation, Elias CJ again differed on her approach. The onus of proving that loss was caused by the breach rests on the plaintiff and may be presumed in certain situations such as material non-disclosure by a fiduciary. In the opinion of the majority, the defendant fiduciary's ability to rebut the presumption and claim that loss would have occurred anyway is to be considered a narrow one and where there is any doubt, that doubt must be resolved against the fiduciary. Accordingly, the standard of proof which the fiduciary must satisfy is high. In contrast, Elias CJ asserted that the defendant fiduciary ought to be able to rebut the presumption of causation on the usual civil law standard of the balance of probabilities. Faced with a choice, Blanchard J justifies a generous approach to establishing a causal link between breach and loss by the policy of deterrence. Again, his Honour's approach illustrates the demanding nature of the fiduciary obligation.

In application, the majority measured the amount of compensation as the current market value of the house at the time of the contract as accepted by the trial judge ($3.25m) less the price the vendors actually received ($2.575m) net of commissions on both amounts that would have been payable. Premium had failed to prove "with enough rigour" that the Stevenses would not have been able to sell for this much had there been no breach.

Finally, in addition to equitable compensation, the Stevenses were also awarded disgorgement of the commission paid to Premium. All judges rejected the contention that this was a form of accounting for profits which could not be given in combination with compensation. Blanchard J described it as forfeiture of remuneration for work not done because Premium had so dishonestly breached, justified on the basis that it is equity's method of deterring disloyal behaviour. Elias CJ referred to it as repaying a benefit that has not been earned, perhaps suggesting it is a type of restitution for unjust enrichment. Tipping J's judgment was addressed solely to this issue and he suggests a theory of remedies that allows "restorative damages", which have the effect of restoring value that has been transferred without a sufficient basis, to be given cumulatively with compensation or disgorgement damages.

This aspect of their Honours' rulings involves important issues of the taxonomy of the private law and the purpose of different monetary remedies. It calls first for an analysis of those different remedies and the relationships between them before a policy justification such as deterrence should be used to determine their availability. Whether Tipping J's analysis is persuasive remains for more detailed consideration elsewhere.

MEDICAL LAW

Nicola Peart

ACC v D
[2008] NZCA 576

This appeal overrules Mallon J's decision in *ACC v D* [2007] NZAR 679 (noted in [2007] NZLJ 301) that a pregnancy following a failed sterilisation was a "physical injury" to the mother and was therefore a "personal injury caused by medical misadventure" within the meaning of the Injury Prevention, Rehabilitation, and Compensation Act 2001. Referring to recent overseas case law, Mallon J held that the reluctance to treat an unwanted pregnancy as an injury was outdated. From the woman's point of view it could be described as a "physical injury", because the physical

impact of the pregnancy constituted harm to the woman or an interference with her bodily integrity. While the natural and ordinary meaning of "physical injury" suggested harm or damage, it could also mean interference with bodily integrity: paras [65]–[69].

The majority of the Court of Appeal disagreed. In their view an unwanted pregnancy was not a physical injury. Tracing the history of the accident compensation legislation, they concluded that the Accident Rehabilitation and Compensation Insurance Act 1992 was intended to narrow cover and reduce the elasticity of the previous regime. That supported the natural and ordinary meaning of "physical injury", which required harm or damage, rather than the wider meaning that included invasion of bodily integrity. As Ms D had not been physically harmed or damaged by the pregnancy or childbirth, she had not suffered a personal injury. The Court accepted that it was odd that an unwanted pregnancy would be the only result of medical misadventure for which cover was not available, but oddities were inevitable in a non-exhaustive scheme that had to draw the line somewhere. It was for the legislature to determine where the balance lay.

Young P dissented. In his view the expressions "personal injury", "physical injury" and "gradual process" caused by medical misadventure were sufficiently broad to encompass unwanted pregnancy resulting from a medical misadventure. Furthermore, he did not think his approach was inconsistent with the rather confused legislative history.

The result was predictable. Classifying an unwanted pregnancy as a personal injury is controversial, as the conflicting overseas case law shows. There was also some ambiguity in the High Court decision as to what exactly the injury was. As Tobin pointed out in "Common Law Actions on the Margin" [2008] NZ L Rev 37 at 51, Ms D's complaint was not the physical impact of the pregnancy on her body. She wanted redress for the birth of the child, but that was not classified as the injury. If the injury was a gradual process that began at conception and continued throughout the pregnancy until birth, which was also suggested, why would other unplanned pregnancies not come within the definition? The Court of Appeal steers a safe and familiar course, leaving it to Parliament to resolve these difficult questions.

Sam v ACC
[2009] 1 NZLR 132

The principal issue in this case was whether a prenatal injury was caused by accident for purposes of cover under the Injury Prevention, Rehabilitation, and Compensation Act 2001. The appellant was born in January 2002 with cerebral palsy as a result of oxygen deprivation shortly before or during birth. The medical evidence listed seven possible causes for the loss of oxygen; some related to the cord and others to placenta disease, but no definitive cause could be established. The claimant sought compensation for medical misadventure and personal injury by accident. ACC declined the claim because there was no medical misadventure and no external force that could qualify as an "accident" as defined in s 25(1)(a)(i) of the Act.

In the District Court only the claim based on personal injury by accident was pursued, but it failed for lack of causation. The appellant did not establish which of the possible causes of injury caused his cerebral palsy. The Court also held that there was no "accident", because there was no external force to the mother's body. Citing *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA), the Court held that at the time of the injury the foetus was not a "person", but part of the mother.

The High Court also dismissed the child's appeal. It disagreed with the District Court's approach to the issue of causation, because the Judge had failed to consider whether any of the non-remote possible causes of the oxygen deprivation would have come within the definition of accident. But it upheld the District Court's finding that there was no "accident", because the natural and ordinary meaning of the words "the application of a force … external to the human body" refers to a force external to the mother's body. Even though a foetus becomes a "person" on live birth, it was inside the mother when it was injured. While the possible cord related causes could be external to the foetus, they were still internal to the mother. If Parliament had intended to include forces external to the foetus but within the mother, it would have chosen clearer words.

Mallon J was right that *Harrild* did not assist in determining this case. The child in *Harrild* was still born and the question was whether the stillbirth was an injury to the mother for purposes of ACC cover. Because the child was not born alive, it never became a "person" in the eyes of the law. The question whether a child on live birth could claim cover for prenatal injuries was therefore irrelevant and four of the five appellate Judges either did not discuss it or raised it merely as a question for consideration. Only McGrath J addressed the issue and thought such a claim was possible. His opinion accords with overseas precedent where civil claims for prenatal injuries have been upheld: *Montreal Tramways v Leveille* [1933] 4 DLR 337 (SCC); *Watt v Rama* [1972] VR 353; *Burton v Islington Health Authority* [1992] 3 All ER 833 (CA). However, in each of these cases a third party caused the injury. Tortious liability is not usually imposed on the mother: *Dobson v Dobson* [1999] 2 SCR 753 (SCC). However, a child who is born alive with injuries sustained before birth as a result of a car accident caused by its mother's negligence, as the child in *Dobson* did, would be covered by ACC, because the injuries would have been caused by a force external to the mother. On live birth, the child would be deemed to have been a person at the time of the accident.

COMMERCIAL LAW

Barry Allan

Fisk v CR Grace Ltd
(HC, Wellington CIV 2007-454-543, 18 November 2008, Joseph Williams J)

A growing crop of potatoes was destined to be processed into chips. Whaitiri Potato Company Ltd (in liq) had entered into agreements with two landowners under which it had the right to grow and harvest potatoes for one season with obligations to pay rent, return the land to pasture and pay a penalty if late in harvesting. It did plant potatoes but failed to harvest them or make any payment before going into liquidation.

This provoked the landowners to re-enter the land and terminate the rental agreements. Interim orders were made to allow the liquidators of Whaitiri to harvest the crops (to prevent them being wasted) and to sell them. In issue was who had rights to the sums produced from the sale of the potatoes.

In one corner was a bank, pursuant to a security interest it had taken over all property of Whaitiri and registered in accordance with the Personal Property Securities Act 1999. Its argument was that, as Whaitiri owned the seeds, had planted and cultivated the potato plants and entered into a contract of sale with a chip processor, it was the owner of the potatoes produced. This made them subject to the bank's security.

The two land owners asserted rights to the potatoes, which would be effective to deprive the debtor (Whaitiri) of any rights in them and thus, by s 40, prevent the bank's security interest attaching. This was on the basis of the ancient doctrine of emblements; although it gives rights to tenants to harvest annual crops which have not matured at the time of termination of their tenancy, these rights are lost if the termination is because of the tenant's own default.

The Judge thought it an "odd" doctrine that would see property in the potatoes determined by whether Whaitiri had been a good tenant but accepted that this was established by *Oland's case* (1602) 77 ER 235 and that New Zealand courts had confirmed it. He quotes with approval Hinde, McMorland and Sim, *Land Law in New Zealand* (para 6.027) that this reflects a policy choice to encourage "limited owners" such as short term tenants to cultivate the land but that policy did not support protecting those whose default saw them lose rights to the land. *Bulwer v Bulwer* (1819) 2 Nbarn and Ald 470 is an example of this "clean hands" doctrine in operation, where the defendant was given rights to use land as a benefit of his employment but resigned before his crops matured. This disentitled him from coming back to claim the matured crop.

A prior question arose, however, over characterisation of the potatoes. As his Honour saw matters, if the potatoes were "chattels",

they belonged to Whaitiri and were thus subject to the bank security. If they formed part of the land, they would belong to the landowner as part of the reversion unless the tenants could make use of the doctrine of emblements. Although s 2 of the Sale of Goods Act 1908 includes emblements within the definition of "goods" and s 44 of the PPSA refers to growing crops, these did not assist with the characterisation question here.

At para [46] the Judge says "It is obvious that the parties to an agreement can treat a crop as a chattel separate from the land if they choose to do so" but there was no provision in either of the agreements to that effect. Although his Honour considered the possibility of the potatoes being fixtures, he did not mention *Trustbank Canterbury Ltd v Lockwood Buildings Ltd* [1994] 1 NZLR 666 where Holland J discounted the expressions of parties as to whether something is a fixture.

Section 100 of the PPSA would only protect the bank's security as against the land owner if the landowner's rights were created after the security interest or if the landowner had consented to the security. No consent was given here, and in relation to the bank security predating the interest of the landowner, all his Honour has to say is (para [48]) "Whatever right the Bank had in the unplanted seed that right disappeared as the seed itself became annexed to the land and slowly transformed into the much larger crop". His conclusion:

> [50] The essential principles applicable to the present case therefore appear to be as follows: crops that fruit once within a single growing season run with the land as a first principle. They belong to the party with the right in possession at the point they are harvested except where the emblements exception applies. In this case although the leases were terminated before harvest, a right of emblements does not apply to allow Whaitiri to harvest the crop after termination of the lease because the lease was determined as a result of the plaintiff's own act, namely failure to pay rent or comply with any of the other lease covenants during the period prior to re-entry and termination. I am satisfied therefore that the crop belonged to Grace and Hurley as at the date it was harvested. It must follow that the proceeds of sale of that crop once severed from the land belong also to those two parties.

Progressive Enterprises Ltd v Commerce Commission

(HC, Auckland CRI 2008-404-165, 23 December 2008, Asher J)

Many retailers promote products by giving buyers the opportunity to win prizes. What happens if, at the time of sale, the closing date for the prize has already gone by? Two cereal products were sold in the appellant's supermarkets, under its house "Signature Range" brand, bearing a sticker indicating that five prizes of trips to Australia could be won. In addition, there were so-called promotional "wobblers" (or signs) attached to the supermarket shelves and other promotional material. None gave any indication of the closing date for the promotion. This was only disclosed in a pamphlet inside the packages, so would only be seen upon purchase.

Progressive contracted out the conception, development, sourcing, promotion and advertising of Signature Range products to a third party. That third party in turn arranged for the cereal manufacturers to include the pamphlets in the packages. Shortly after the closing date, Progressive held the prize draw and notified the winner. Unfortunately, there were still cereal products in-store and in the supply chain bearing the stickers promoting the prize.

To make matters worse, the manufacturers continued to deliver stickered packages to Progressive for a further three months. Progressive's management was not aware of this; in fact it had instructed the manufacturers to destroy these products and paid for that. Once it did become aware, it took steps to remove all promotional material and stickered stock from the shelves. This appears to have taken six weeks to be fully implemented.

The Commerce Commission laid charges under s 17 of the Fair Trading Act 1986 which prohibits the offering of prizes and gifts in connection with the sale or promotion of goods "with the intention of not providing them or of not providing them as offered". The charges were limited to the period during which Progressive's management knew the stickered products were still being sold.

The District Court had found Progressive guilty, apparently on the basis that there were junior staff members selling the products with knowledge that the competition had expired, even if management was not aware. On appeal, the first element of the offence relating to the offering of prizes was clearly satisfied, but was there the required intention of not providing them? Asher J saw this as having two elements: whether s 17 introduced an offence of strict liability and, if not, whether its mens rea requirements were satisfied.

His Honour accepted that the protection of consumers was the purpose of Act, but as he says (para [47]) "violence cannot be done to the plain meaning of the words of the statute simply to better achieve the general purpose of the Act". Section 17 was in "stark contrast" with ss 9 to 16 as they were absolute prohibitions of misleading and deceptive conduct whereas s 17 makes specific reference to intention. This indicated "that the imposition of a mens rea requirement was intended and entirely deliberate". There had to be a positive intention not to provide prizes knowing they were being offered, the two mental states being the knowledge of the offer of the prizes and the concurrent intention not to provide the prizes. As an aside, this is a tacit acceptance that if there had been proceedings brought under s 9 for misleading conduct or charges laid under ss 10 or 13, there would be no need to be troubled by any such mens rea requirement.

In establishing the requisite intention, the difficulty facing the Commerce Commission was the fact that no single Progressive staff member knew of the offer of prizes while also intending that the prizes not be provided, as its investigation had not found any person who had restocked the shelves with the offending product, whilst at the same time having knowledge that the competition had closed. As a result, it could not rely upon the orthodox principle articulated in *Lennard's Carrying Company Ltd v Asiatic Petroleum Company Ltd* [1915] AC 705 allowing the attribution of the state of mind of a natural person to a corporate entity. This principle is confirmed and extended by s 45 of the FTA, which allows the state of mind of any agent or employee, regardless of status, to be counted as that of the company.

This raised the question of whether the corporate mens rea requirement could be satisfied by aggregating the states of mind of two (or more) employees, ie, one who had no intention of providing prizes (such as those in management, who knew the competition had closed) and one who was knowingly offering the prizes, even without knowledge the competition had closed. While the statutory purpose did suggest a "stringent" duty be placed upon traders, the statutory wording tended to point away from aggregation. So too did the reluctance of the Court of Appeal, in a civil context, to allow aggregation. The decision closest to being on point was *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133, where it was argued that the collective knowledge held by the respondent's employees of the complainant's disability added up to unconscionable conduct. The Court there was concerned at the consequences such an approach would have for large, multi-function companies and did not allow aggregation. Asher J concluded:

> [87] An aggregation of mental states would impose an even greater duty on companies to ensure that no misrepresentation as to prizes were made, and this would benefit consumers consistently with the purpose of the statute. However, the Legislature has stopped short of imposing strict liability in relation to s 17, and has not specifically permitted aggregation of mental states of company servants and agents when it had the opportunity to do so in s 45. Given that aggregation of mental states has not been shown to be a generally established principle or practice, one might expect the Legislature to say so explicitly if it intended to depart from practice and authorise the aggregation of mental states. To hold that a company had a specific mens rea when no servant or agent had that mens rea could be seen as unfairly tarnishing the reputation of a company.

ADMINISTRATIVE LAW

John Hopkins

Mitchell v Glasgow City Council
[2009] UKHL 11

This Scottish case is of particular interest in New Zealand in view of *Couch v Attorney-General* [2008] 3 NZLR 725, previously discussed in this column ([2008] NZLJ 241 and 242). *Couch* saw the Supreme Court accept the possibility that exemplary damages could be sought against the Crown for a failure of its alleged duty to protect her. The extent of this duty is yet to be established as the facts of this case have not yet been heard.

Mr Mitchell, a 72-year-old resident of Glasgow City Council housing scheme, was battered around the head by his neighbour James Drummond. He later died in hospital. Drummond pled guilty of culpable homicide and was sentenced to eight years, later (and controversially) reduced to five years on appeal. It emerged that Drummond had threatened and abused the Mitchell family over a five year period. This stemmed from Mitchell's complaints to the council about Drummond's antisocial behaviour and seems to have started for a request that he stop playing loud music. Drummond threatened to kill Mitchell on several occasions over this time and there seems little doubt that Drummond was a "neighbour from hell".

Events came to a tragic head after Drummond was informed by the city council that as a result of the complaints, he risked being evicted. Drummond went to Mitchell's house and attacked him, leaving him with a fractured skull and other injuries. He died of a heart attack, nine days later.

Mr Mitchell's family took this case against the city council for their failure to act, both in not evicting Mr Drummond and, more central to the claim, their failure to inform neighbours of the dangers they faced after his meeting with the council. They also claimed a breach of art 2 of the European Convention on Human Rights. It is only the common law issues that we will examine here.

The council claimed that there was no case to answer as even if all the claims were proved, it would still owe no duty of care to the individual concerned. The trial court agreed with the council and the action did not proceed to the facts. The Inner House disagreed and accepted at least the possibility of damages in this case. The council took a final appeal to the House of Lords.

The legal question that faced the House of Lords was similar to that faced by the Supreme Court in *Couch*. The lack of ACC in Scotland means that exemplary damages were not at issue, and the normal rules of negligence would apply. The core issue was therefore the same: to what extent can a public body be held liable for the actions of a third party when there has been an alleged failure to act on the part of the public body?

The House of Lords held that although there was a possibility for such a duty to exist, in this case, it could not do so. The House held that unless the individual harmed by the third party could show some special relationship with the public body concerned, then no liability could arise. In doing so the House distinguished these facts from those in *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12. In *Hartwell* the public authorities had been held liable for the injuries caused by an errant officer because his actions (failure to secure police firearms) had itself created the risk.

In *Mitchell* the actions of the council had not created the risk: the claim rested only on the council's failure to act. Mitchell was an "ordinary" member of the public and neither he, nor his family, could be owed a duty of care of the type claimed. On the more general point Lord Hope summarised the view of the court when he stated "as a general rule … a duty to warn another person that he is at risk of loss, injury or damage as the result of the criminal act of a third party will arise only where the person who is said to be under that duty has by his words or conduct assumed responsibility for the safety of the person who is at risk".

Such an approach appears conservative. It does not deny the possibility of damages for members of the public injured by failures of public bodies, but it does not recognise a general responsibility on the part of such authorities to the public in general. Instead their responsibilities are equivalent to those operating in the private sector. In allowing *Couch* to proceed, the Supreme Court made it clear that a claimant in such a situation must prove a "special proximity" with the body in question. If this is interpreted according to the approach of the House of Lords in *Mitchell* it may prove difficult for Mrs Couch and others to achieve financial redress for the omissions of public bodies.

INTERNATIONAL LAW

Myra Williamson

UN Human Rights Council – New Zealand's Periodic Report

In May 2009, New Zealand is scheduled to provide its first report to the UN Human Rights Council. A 27-page draft report dated 16 February 2009 is currently available from the Ministry of Foreign Affairs and Trade website. The report is divided into four sections: methodology and consultation process; background of country; promotion and protection of human rights; and identification of achievements, best practices, challenges and constraints. There is also a short annex on Tokelau (a non-self-governing territory administered by New Zealand since 1926) which outlines the relationship between Tokelau and New Zealand as well as Tokelau's commitment to human rights.

Public submissions on New Zealand's draft report closed on 17 March. According to the Ministry of Foreign Affairs and Trade website, the final report "will be available in due course" and is due to be presented to the Human Rights Council between 4 and 15 May. Fifteen other states will also be under review in that session.

The Human Rights Council is a body within the UN system made up of 47 States responsible for strengthening the promotion and protection of human rights around the globe. The Council was created by the UN General Assembly on 15 March 2006 by GA 60/251. The main purpose of the Council is to address situations of human rights violations and make recommendations on them. The Periodic Review Process is one of the means of achieving that objective.

Section 4 of New Zealand's draft report, which identifies achievements as well as challenges and constraints, is particularly interesting. The draft report claims that since the development of the *New Zealand Action Plan for Human Rights* in 2005, New Zealand has "made significant progress in improving human rights in most areas". The draft report refers to New Zealand's refugee quota, increased resources for child health, New Zealand sign language, Maori language and broadcasting, the Civil Union Act 2004, prostitution law reform, freedom of expression and religious diversity and the open invitation to all UN Special Procedures Mandate Holders.

The draft report raises several points, two of which are discussed briefly. First, in relation to violence within families, it mentions at p 17 that in June 2007, s 59 of the Crimes Act 1961 was repealed and substituted with a new provision that there is no justification for the use of force for the purpose of disciplining children. It claims that this legislative amendment made New Zealand the eighteenth country in the world to ban the physical punishment of children. The report does not mention, as could have been acknowledged in section 4.2 regarding challenges and constraints, that the anti-smacking debate is far from over and that a group has attempted to force a referendum on the repeal of s 59. The second point of interest relates to the open invitation to UN Special Procedures Mandate Holders, discussed on p 21. Whilst the draft report acknowledges the official visit to New Zealand in November 2005 by Rodolfo Stavenhagen, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, there is no recognition of the fact that Stavenhagen's report (see E/CN.4/2006/78/Add.3, 13 March 2006) was critical of the foreshore and seabed legislation and that Stavenhagen made a number of recommendations that have not been implemented.

The draft report is a worthwhile read for any student interested in human rights. Comparison of the draft and final reports may provide further insight into the way New Zealand views its human rights commitments. ❐