

# ‘ALMOST IDENTICAL’ COMPANY NAMES IN NEW ZEALAND: ‘NOT YET PASSÉ’<sup>1</sup>

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MATTHEW BERKAHN\*

## I. INTRODUCTION

Section 22 of New Zealand’s *Companies Act 1993* provides that a company name may not be reserved by the Registrar of Companies if it is ‘almost identical’ to another name already registered or reserved. The last case dealing with the meaning of ‘almost identical’ was heard in the year 2000. That case – *The Paint Factory Ltd v Registrar of Companies* (‘*Paint Factory*’)<sup>2</sup> – confirmed that only names that are ‘virtually indistinguishable’ from existing names fall within the statutory prohibition. It also concluded, contrary to the decision in the earlier case of *Stanley-Hunt Earthmovers Ltd v Registrar of Companies* (‘*Stanley-Hunt*’),<sup>3</sup> that the test is the same, whether the words making up the names in question are distinctive or commonplace: any difference in the names’ ‘key words’, including the addition of a date or a numerical or geographical marker, is sufficient. Names that are merely confusingly similar are not the concern of the Registrar. Actions to protect interests in such names must be brought under fair trading, not company, laws.

Despite the courts’ recent silence, the issue is not dead. The *Stanley-Hunt* and *Paint Factory* cases provide two inconsistent, yet equally authoritative, tests. Guidelines issued by the Registrar of Companies to assist applicants when reserving a company name also reveal some uncertainty about exactly what makes two names ‘almost identical’.

This article examines the relative merits of the two approaches in light of the apparent intent of s 22, and suggests some amendments to the provision to better reflect that intent.

## II. COMPANY NAMES

The name chosen for a company is important. It is the means by which the company identifies itself as an entity separate from those who create, finance and operate it;<sup>4</sup> and can also be

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1 This description comes from a 1997 review of New Zealand company names cases by Peter Watts, ‘Company Law’ [1997] *New Zealand Law Review* 319, 322.

\* Senior Lecturer in Law, Massey University, Palmerston North, New Zealand.

2 [2000] 3 NZLR 220.

3 (1997) 8 NZCLC 261,403.

4 Doug Tennent, ‘Company Formation’ in John Farrar (ed), *Company and Securities Law in New Zealand* (2008) 21.

a significant marketing tool.<sup>5</sup> There are business naming consultants<sup>6</sup> whose service is the generation of effective company names. Random business name generators are also available.<sup>7</sup>

All companies registered in New Zealand must have a name – a name is the first ‘essential requirement’ listed in New Zealand’s companies legislation.<sup>8</sup> Reservation of a name is the starting point for incorporation. Section 20 of the *Companies Act 1993* (NZ) provides that the Registrar of Companies may not register a company unless its name has first been reserved. A name is reserved by the completion of an application to the Registrar, who then checks the proposed name to confirm that it complies with the requirements of the Act. These requirements are set out in s 22(2):

The Registrar must not reserve a name –

- (a) The use of which would contravene an enactment; or
- (b) That is identical or almost identical to the name of another company ...; or
- (c) That is identical or almost identical to a name that the Registrar has already reserved ... and that is still available for registration; or
- (d) That, in the opinion of the Registrar, is offensive.

Paragraphs (a)–(c) are relevant to this article.<sup>9</sup>

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- 5 [W]e contend that a well-chosen name can give a company a decided marketing edge over comparable competitors, and that the branding effect of a strong corporate name can be especially important for service companies. Why? Because in services the company name *is* the brand name’: Leonard L Berry, Edwin F Lefkowitz and Terry Clark, ‘In Services, What’s in a Name?’ (1988) 66(5) *Harvard Business Review* 28, 28.
  - 6 A Hundred Monkeys <<http://www.ahundredmonkeys.com>> at 23 October 2009, itself a naming and branding company, lists more than 110 such business on its website. One, Names & Brands <<http://www.names-n-brands.com/>> at 23 October 2009, boasts that ‘the problem of finding great names has been solved! ... Names & Brands is the ultimate service for creating business names. It is a website that implements several naming techniques developed by professional naming consultants. It combines a set of powerful name creation tools with extensive databases to generate the ideal name for any purpose’. Another, ABC Namebank <<http://www.abcnamebank.com/>> at 23 October 2009, claims to ‘bring cutting edge strategies for merged entities, consolidation of names, competitive name analysis and solutions for international trademark concerns and positioning of global domain names. This experience of hundreds of projects over a quarter century helped us write books on the science of naming and also be invited to lecture at major conferences worldwide’.
  - 7 See, eg, 2 Robots <<http://www.2robots.com/2003/06/18/random-business-name-generator/>> at 23 October 2009. This site allows users to select a business type from a drop-down menu and then click a button labelled ‘Give me a business name!’ The generator produces names like ‘Illustrative Artistry’ (for a graphic design business) and ‘Cataclysmic Planet Drawings’ (for a comic book business).
  - 8 *Companies Act 1993* (NZ) s 10(a). In contrast, Australian companies need not have a name as such. An Australian company’s ‘name’ may consist of the expression ‘Australian Company Number (or ‘ACN’) followed by the company’s ACN, along with the words ‘Limited’, ‘Proprietary’ or ‘No Liability’, depending on the company’s type: *Corporations Act 2001* (Cth) s 148. The ACN is a unique nine-digit number allocated by the Australian Securities and Investments Commission (‘ASIC’) to each company upon registration: *Corporations Act 2001* (Cth) s 9.
  - 9 *Companies Act 1993* (NZ) s 22(2)(d), compared to the rest of s 22(2), is very straightforward – there does not appear to have ever been a New Zealand case dealing with an offensive company name. Only one case discusses the kinds of names that might be ‘offensive’ in terms of what is now s 22(2)(d), and it dates back to 1964. *South Pacific Airlines of New Zealand Ltd v Registrar of Companies* [1964] NZLR 1 actually dealt with the issue of whether a company could register with a very similar name to another company, but the court also noted that the Registrar might consider the following to be offensive: names that are obscene; that might give offence to a friendly state; or that might offend a particular section of the community or a particular religious group.

*A. Names Whose Use ‘Would Contravene an Enactment’*

The courts have consistently held that this provision applies only to statutes that prohibit or restrict the use of particular words or phrases.<sup>10</sup> The Registrar is not required to consider whether a name will contravene more general enactments such as the *Fair Trading Act 1986* (NZ), s 9 of which prohibits conduct in trade that is ‘misleading or deceptive or is likely to mislead or deceive’.

This was held in the first case dealing with the then recently enacted s 22, *Flight Centre (NZ) Ltd v Registrar of Companies* (‘*Flight Centre*’).<sup>11</sup> An existing company – Flight Centre (NZ) Ltd – unsuccessfully challenged the Registrar’s decision to reserve the name ‘Rotorua Flight Centre Ltd’. It argued that the name breached s 22(2)(a), in that it contravened both s 9 of the *Fair Trading Act*, and also s 13(f) of that Act, which prohibits false representations of ‘sponsorship, approval, endorsement or affiliation’.<sup>12</sup> Blanchard J concluded that it was simply ‘not suitable or sensible to require the Registrar ... to conduct a wide-ranging inquiry of this kind’. The policy of the Act is, Blanchard J held, for the name-approval process to be speedy. If the Registrar was required to consider whether a name might contravene any and every enactment, that process would be undesirably slowed down.

In *New Zealand Conference of Seventh-Day Adventists v Registrar of Companies*,<sup>13</sup> the plaintiff church was attempting to force a company formed by some church members – Seventh-Day Adventist Resource Centre Ltd – to change its name on the grounds that the name should never have been reserved in the first place.<sup>14</sup> The church claimed that the name contravened an enactment under s 22(2)(a), as it would mislead or deceive people into believing that the company was connected with the church in contravention of s 9 of the *Fair Trading Act*. The court refused to order the company to change its name, holding that it was impossible to

state in advance that the use of a particular name would necessarily, and in all circumstances, contravene the Fair Trading Act. The Registrar’s function when making a decision under s [22] (2) is confined to matters which arise out of the name itself, it does not extend to an inquiry as to how the company concerned proposes to carry on its business ... There is nothing in s [22](2) to suggest that the role of the Registrar is anything other than to consider the very name itself and to decide whether by virtue of its inherent characteristics its use would necessarily contravene an enactment.<sup>15</sup>

10 For example, the *Flags, Emblems, and Names Protection Act 1981* (NZ) prevents certain words from being used without express authorisation, including ‘Royal’, ‘Government’ and other words suggesting royal or government patronage; ‘United Nations’ and the names of its specialised agencies; ‘Anzac’ and ‘Returned Services’; and names suggesting a connection with any Crown Research Institute, such as ‘Wheat Research Institute’, ‘Institute of Nuclear Sciences’ and ‘New Zealand Communicable Diseases Centre’. The *Reserve Bank of New Zealand Act 1989* (NZ) provides that companies (other than authorised banks) cannot be registered under any name including the words ‘Bank’, ‘Banking’, or ‘Banker’. The *Co-operative Companies Act 1996* (NZ) restricts the use of the word ‘Co-operative’ to companies entitled to be registered as co-operative companies under the relevant legislation.

11 (1994) 7 NZCLC 260,612, 260,615.

12 In separate proceedings brought under the *Fair Trading Act 1986* (NZ), Flight Centre (NZ) Ltd succeeded in obtaining a permanent injunction against Rotorua Flight Centre Ltd, restraining the display of the words ‘Flight Centre’ at its business premises and in its promotional material, or otherwise engaging in conduct representing that it had any affiliation with Flight Centre (NZ) Ltd. The injunction did not require Rotorua Flight Centre Ltd to change its name: *Flight Centre (NZ) Ltd v Rotorua Flight Centre Ltd* (Unreported, HC Rotorua, Smellie J, 13 January 1997).

13 [1997] 1 NZLR 751.

14 *Companies Act 1993* (NZ) s 24(1). This provision allows the Registrar, if he or she believes on reasonable grounds that the name under which a company is registered should not have been reserved because it contravenes s 22(2), to require the company to change its name. The Registrar may serve written notice on the company and, within 20 working days of being notified, the company must change its name. If it does not do so, the Registrar may select an appropriate name and enter that name on the register in place of the offending name: *Companies Act 1993* (NZ) s 24(2).

15 *New Zealand Conference of Seventh-Day Adventists v Registrar of Companies* [1997] 1 NZLR 751, 759.

The court said that a decision on the contravention or otherwise of an enactment like the *Fair Trading Act* must instead be made in proceedings brought under that Act, rather than under the *Companies Act 1993* (NZ). It is therefore the responsibility of applicants – not the Registrar – to satisfy themselves that the name applied for does not infringe any rights under any such statutes.

### B. 'Identical or Almost Identical' Names

The New Zealand courts have also – with one exception – been consistent in their approach to this provision. Parliament's intention when s 22 was passed into law, evident from 'the history of the passage of the legislation against the background of the former law and reports of the Law Commission which preceded it',<sup>16</sup> has generally led the courts to consider that the troublesome 'almost identical' category is one of very limited magnitude.

In the *Flight Centre* case,<sup>17</sup> Blanchard J cited the Registrar's interpretation of 'almost identical' with approval:

There is much to be said for the view of the Registrar that names which are 'almost identical' are those in which the key words and the order in which they appear make them virtually indistinguishable from one another.

He noted that names with different geographical locations – 'Rotorua' and 'NZ' in this case – attached to the same descriptive words, 'Flight Centre', cannot be said to be almost identical. It is clear, however, from the reference to 'key words' that his Honour did not intend his test to be confined to geographical markers or to descriptive words only.

Blanchard J's approach was confirmed by Salmon J in *Dr Rust Ltd v Registrar of Companies*,<sup>18</sup> where it was held that s 22 does not require the Registrar to consider the question of whether members of the public are likely to be confused by the similarity of a proposed name to one already reserved or registered. That would necessitate the Registrar examining evidence on that issue, which is beyond the apparent intention of the section. The courts' consideration is instead directed entirely at the words of the names themselves. The court duly held that the two names in question – 'The Rust Doctor Ltd' and 'Dr Rust Ltd' – were not 'almost identical'. Although the key words 'Rust' and 'Doctor' (or 'Dr') were the same, their order was different, and this appears to have been enough to satisfy the requirements of s 22(2) in Salmon J's eyes.

The use of a year marker as the only distinguishing feature was considered in *Stanley-Hunt Earthmovers Ltd v Registrar of Companies*,<sup>19</sup> the only case to cast doubt on the otherwise accepted test promulgated by Blanchard J in *Flight Centre*.

The court considered whether the proposed name 'Stanley-Hunt Earthmovers (1996) Ltd' was almost identical to the name of an existing company, 'Stanley-Hunt Earthmovers Ltd'. Under the *Flight Centre* test, a date marker would be treated in the same way as a geographical marker; as a key word which, as it appears in one name and not in the other, would be sufficient to distinguish the two names. Tompkins J, however, while purporting to accept the approach taken in *Flight Centre*, added that he considered 'that in some particular cases some other considerations may be pertinent'.<sup>20</sup>

His Honour held that the two names in question were almost identical, and ordered the second company to change its name on the grounds that it should never have been allowed to be reserved. He distinguished this case from the *Flight Centre* case by noting that two of the key words used in both names – 'Stanley-Hunt' – were distinctive, rather than simply descriptive of the business in which the two companies were involved. While the words 'Flight Centre', for example, described a type of business and nothing more, the words 'Stanley-Hunt' were a particularly distinctive pair of words, and so the mere addition of a year to one of the names was not enough to stop them being almost identical under s 22(2)(b). While accepting that

<sup>16</sup> *Flight Centre (NZ) Ltd v Registrar of Companies* (1994) 7 NZCLC 260,612, 260,615.

<sup>17</sup> *Ibid* 260,614.

<sup>18</sup> (1997) 8 NZCLC 261,501.

<sup>19</sup> (1997) 8 NZCLC 261,403.

<sup>20</sup> *Ibid* 261,405.

considerations such as the nature of the business carried on, and the place where a company operates, are irrelevant, he held that the Registrar should have regard to the extent to which any distinguishing feature is likely to result in members of the public distinguishing between the two separate companies. In the judge’s opinion, the public was likely to regard the two companies as closely related or connected.

The most recent s 22 case, *The Paint Factory Ltd v Registrar of Companies*,<sup>21</sup> represents a return to the mainstream. The two names under consideration were ‘The Paint Factory Ltd’ and ‘The Paint Factory (PN)<sup>22</sup> Ltd’. Williams J disagreed with the test applied by Tompkins J in *Stanley-Hunt*, and held the distinctiveness of the words used in company names to be irrelevant to the issue of whether or not they are almost identical:

The statutory task is for the Registrar and for this court on appeal to consider the whole name of each of the two companies in context and form an objective view as to whether they are ‘almost identical’. The test does not vary according to whether the two names under consideration contain commonplace words or words that are striking because they are arcane, dramatic, made up or outlandish. Finally, this Court departs from *Stanley-Hunt* in formulating a test that names can be ‘almost identical’ if they describe the activities of the two companies since there is no general statutory proscription ... [A company may select] any name it chooses, whatever its field of business and however large or small the company or however grandiose or bland the name.<sup>23</sup>

Williams J also held that names that are different due to geographical, numerical or date markers ought not to be regarded as almost identical ‘unless there were other factors about the names which led to that conclusion’. Objectively, names containing such differences look and sound different to each other. His decision was that the geographical marker ‘PN’ was enough to distinguish the two names for the purposes of s 22(2)(b).

To summarise, the generally accepted test under s 22(2) really only proscribes names that are, to all intents and purposes, the same. The fact that names may be ‘similar’ – even similar enough that people are likely to be confused by them – is not an issue that concerns the Registrar when reserving a name under the *Companies Act 1993* (NZ). The Registrar’s role under that Act is confined to checking for identical names – he or she has no discretion to refuse to reserve a name that is even slightly dissimilar to an existing company’s name.

This is clearly the intent of the provision, a point highlighted by Blanchard J in *Flight Centre*. His Honour asked himself<sup>24</sup> ‘what Parliament intended when the new s [22] was passed into law?’, and decided that it was ‘proper to look at the history of the passage of the legislation against the background of the former law and the reports of the Law Commission which preceded it’ before coming to a decision. He noted the New Zealand Law Commission publications that ultimately led to the enactment of the *Companies Act 1993* (NZ),<sup>25</sup> including the recommendation that

limited discretion [be] consciously adopted as a means to ensure that registration of companies is not delayed by administrative considerations of name desirability, and that effort and resources are not unnecessarily devoted to the topic by the Registrar.<sup>26</sup>

He also referred to the following statement by the Minister responsible for the Companies Bill when moving the second reading of that Bill:

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21 [2000] 3 NZLR 220.

22 Short for ‘Palmerston North’, the city in which the company planned to operate its business.

23 *The Paint Factory Ltd v Registrar of Companies* [2000] 3 NZLR 220, 224–5.

24 *Flight Centre (NZ) Ltd v Registrar of Companies* (1994) 7 NZCLC 260,612, 260,615–261,616. The focus of Blanchard J’s discussion was the *Companies Act 1993* (NZ) s 22(2)(a), but his comments are also helpful in ascertaining the policy behind the rest of s 22.

25 Law Commission, *Company Law*, Preliminary Paper No 5 (1987); Law Commission, *Company Law Reform and Restatement*, Report No 9 (1989).

26 Law Commission, *Company Law Reform and Restatement*, above n 25 [358].

Company names that cause confusion will cease to be a matter for the Registrar of Companies but will be a matter for the respective companies to litigate. The Registrar will be concerned only with identical or offensive names.<sup>27</sup>

These sources support the approach taken in the majority of cases. Tompkins J's alternative approach, involving an assessment of the 'distinctiveness' of the words used in the names, and of the likelihood that members of the public will not be able to distinguish between the two companies involved, is not consistent with the apparent policy of the Act to simplify and speed up the name reservation process.

There are arguments for the opposing view. Tennent notes that

Williams J's criticism of the position taken by Tompkins J is founded upon valid points. However, it also needs to be remembered that the reason that the Registrar scrutinises a name prior to reservation is to ensure that the name will not impose any further problems with regards to confusion, breaches to legislation and the like ... It could be argued therefore that the more robust approach that is taken by Tompkins J is one which minimises the possibilities of future conflict and possible litigation ... The focus of Tompkins J's approach, it is submitted, is sound and should not be hastily brushed aside.<sup>28</sup>

Watson,<sup>29</sup> while noting that the *Stanley-Hunt* case

creates a difficulty in that it moves the role of the Registrar away from a solely administrative function back to one where the Registrar must exercise his or her discretion,

describes the decision as a 'victory for common sense'. The approach taken in the other cases, she believes, unfairly puts the onus and expense of protecting the rights to a name on 'those who are in no way wrongdoers'.

These are valid arguments, but they do not pay adequate attention to the practicalities of the Registrar's role. The New Zealand Companies Office receives something like 100 000 applications for the reservation of company names per year<sup>30</sup> – almost 50 applications per working hour. These figures make it impractical for the Registrar to make judgments on such fine issues as whether the words in a particular name are distinctive enough to allow members of the public to distinguish that name from another, or whether the public is likely to regard two companies with similar names as closely related or connected.

### C. The Registrar's policy

A further complicating factor is the Registrar's own policy on which names are considered 'almost identical'.<sup>31</sup> This policy is almost – but not quite – consistent with the test generally applied by the courts. It should be noted that the Registrar's policy has no legal force, a point noted by Williams J in the *Paint Factory* case,<sup>32</sup> and previously in *Asia Pacific Trading Corp. Ltd v Registrar of Companies*.<sup>33</sup>

The Registrar's practice is to disregard the following words and phrases when determining whether names are 'almost identical':

<sup>27</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 23 February 1993, 13353 (Douglas Graham, Minister of Justice).

<sup>28</sup> Doug Tennent, above n 4, 26.

<sup>29</sup> Susan Watson, 'Cerberus or St. Peter?: The Registrar's Role in Relation to Company Names in New Zealand' (1998) 1 *New Zealand Intellectual Property Journal* 311, 312, 314.

<sup>30</sup> See New Zealand Companies Office <<http://www.companies.govt.nz/cms/site-tools/about-us/statistics>> at 23 October 2009.

<sup>31</sup> The policy may be viewed on the New Zealand Companies Office, *Fact Sheet: Company Names* <[http://www.companies.govt.nz/cad-docs/F/FS\\_Company\\_Names.html](http://www.companies.govt.nz/cad-docs/F/FS_Company_Names.html)> at 23 October 2009.

<sup>32</sup> *The Paint Factory Ltd v Registrar of Companies* [2000] 3 NZLR 220, 222. Williams J noted that although not bound by such views, 'of course, the Court will always give weight to views expressed by an official of such experience'.

<sup>33</sup> (1989) 4 NZCLC 65,173, 65,179.

- The definite article (‘the’) when it is the first word in a name;
- The following words appearing at the end of a name:
  - ‘Company’, ‘and Company’ or ‘Company Limited’;
  - ‘Limited’, ‘Tapui (Limited)’<sup>34</sup> or ‘Unlimited’;
- The following abbreviations whenever they appear in a name:
  - ‘&’ for ‘and’;
  - ‘No’ for ‘Number’;
  - ‘Co’ or ‘Coy’ for ‘Company’;
  - ‘N.Z.’ or ‘NZ’ for ‘New Zealand’; and
  - ‘Bros’ for ‘Brothers’;
- Punctuation marks, plurals, accents, spaces between letters, case and typeface.

The policy defines an ‘almost identical’ name as a name in which the key words and the order in which they appear make that name virtually indistinguishable from another name. This was the statement adopted in *Flight Centre* by Blanchard J as the basis for his approach to almost identical names.

The difficulty with this policy lies in the disregarding of the emphasised words above: ‘Company’, ‘and Company’, ‘Company Limited’ and ‘Unlimited’. All of the other words and phrases on the list can logically be disregarded either because (a) they are required for all companies in any case; (b) they are merely alternative renderings of the same words, rather than different words as such; or (c) they are so inconsequential as to be meaningless. The emphasised words fall into none of these categories: though ‘Company’ may be a common component of many names, it is not a requirement. Neither is ‘Unlimited’ – New Zealand companies whose shareholders have unlimited liability are not required to include ‘Limited’ in their names, but neither are they required to have ‘Unlimited’ (or anything else) in its place.<sup>35</sup> The most that could be said about these words is that they are ‘commonplace’ and *The Paint Factory* makes it clear that commonness is not enough to render words irrelevant under s 22(2).

The specifying of certain abbreviations that may be disregarded, presumably to the exclusion of others, is also potentially problematic. If the policy is applied strictly, then, for example, ‘Charles Smith and Company Ltd’ would be considered ‘almost identical’ to ‘Charles Smith & Co. Ltd’, but not to ‘Chas. Smith and Company Ltd’. A statement that abbreviations in general are to be disregarded would be preferable.

### III. CONCLUSION

Although there have been, it seems, no further cases on the issue of ‘almost identical’ company names since the *Paint Factory* case<sup>36</sup> and, perhaps understandably, also little academic comment on the subject,<sup>37</sup> the issue is not dead. The cases provide two inconsistent, yet equally authoritative, tests (both decisions having come from the High Court, with the issue never having been considered at any higher level). As noted above, the Registrar’s guidelines add to the uncertainty about exactly what makes two names ‘almost identical’.

It is admittedly difficult to assess the reasons for the lack of cases post-2000. It may be that the uncertainty as to the meaning of ‘almost identical’ has made parties reluctant to challenge the Registrar’s decisions on this issue. Alternatively (or perhaps additionally), it may be that

34 ‘Tapui’ is the Maori equivalent of the English word ‘Limited’. Companies whose shareholders have limited liability may use ‘Tapui (Limited)’ as an alternative to ‘Limited’ at the end of their names under the *Companies Act 1993* (NZ) s 21.

35 See *Companies Act 1993* (NZ) s 21.

36 A search of Brookers’ online case law databases (Brookers Online <<http://www.brokersonline.co.nz>> at 23 October 2009) produced no cases on this point since *The Paint Factory* in 2000.

37 Only the following include any comment on the issue of ‘almost identical’ company names: Watts, above n 1, 237, 242–3, 319, 322–4; and Watson, above n 29, 311. The two articles by Watts are reviews of significant company law cases (not confined to those dealing with company names) from the year preceding each article’s publication, and contain only limited commentary by the author. The observations noted by Doug Tennent, above n 4, 26, are a rare example of comment on the issue by a textbook author.

disaffected parties have accepted that the Registrar will only disallow names that are very close, and are instead pursuing other legal options to protect their interests in their names.<sup>38</sup> In either case, an amendment to s 22 would be useful – whether that amendment serves to clarify the meaning of the section or simply to bring it into line with its accepted interpretation.

The best solution to the current uncertainty may be to remove the phrase ‘almost identical’ from s 22 altogether – after all, the ‘almost’ in ‘almost identical’ has been practically disregarded in most cases, and this seems to have been the intent of the legislation all along – and perhaps to add more guidance on what will be considered ‘identical’. The only such guidance that presently exists appears in the Registrar’s policy – a policy that is both non-binding and flawed for the reasons noted above. The equivalent Australian provision may provide a model, in substance, if not in form. The Australian law on company names is found in Part 2B.6 of the *Corporations Act 2001* (Cth), along with reg 2B.6.01 of the *Corporations Regulations 2001* (Cth). Section 147(1) of the Australian Act states that the only names that are not available to companies are those that are ‘identical (under the rules set out in the regulations)’ or ‘unacceptable for registration under the regulations’. The relevant regulation (reg 2B.6.01) refers us to schedule 6 of the *Corporations Regulations 2001* (Cth). This provides that, in assessing whether names are ‘identical’, certain matters are to be disregarded – the definite or indefinite article; required words like ‘Proprietary’, ‘Limited’ and so on; plurals, typeface and abbreviations. Names that are unacceptable for registration include offensive names and those that suggest a connection with the government, the royal family or Sir Donald Bradman<sup>39</sup> when there is no such connection.

This regime, while cumbersome in its arrangement, provides the certainty and internal consistency that the New Zealand law currently does not. Its elements all have statutory force, and are consistent with each other, whereas the New Zealand position is an uncertain mix of statute, inconsistent case law and non-binding policy statements by government departments.

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38 If this is the case, an interesting question (outside the scope of this article) is whether a dispute resolution service, along the lines of that developed for the protection of rights to internet domain names, would be a more cost-effective alternative? See Domain Name Commission, *Dispute Resolution Service* <<http://drs.dnc.org.nz/drs/>> at 23 October 2009.

39 The name of legendary Australian cricketer Sir Donald Bradman was added to what is now schedule 6 of the *Corporations Regulations 2001* (Cth) with effect from October 2000, by the *Corporations Amendment Regulations 2000* (No. 8) (Cth). The amendment was instigated by then Australian prime minister John Howard – ‘Australia’s number one cricket fan’, in the words of ABC Radio’s *The World Today* – after Bradman launched legal action against various companies that had attempted to register under names suggesting a connection with him. The law change appears to have been motivated more by Howard’s ‘passion for cricket and his adulation for the Don’ than by any real need for specific legislative intervention: see ABC Radio, ‘Howard Moves to Protect the Don’s Name’, *The World Today*, 13 October 2000 <<http://www.abc.net.au/worldtoday/stories/s199191.htm>> at 23 October 2009.

————— ‘ALMOST IDENTICAL’ COMPANY NAMES IN NEW ZEALAND: ‘NOT YET PASSÉ’  
APPENDIX: SUGGESTED AMENDMENTS TO THE *COMPANIES ACT 1993* (NZ) s 22  
(Suggested additions are indicated by bold type, deletions by bold type struck through).

- (2) The Registrar must not reserve a name –
- (a) The use of which would contravene an enactment **that prohibits or restricts the use of particular words or phrases**; or
  - (b) That is identical ~~or almost identical~~ to the name of another company ~~or another company under the Companies Act 1955~~;<sup>40</sup> or
  - (c) That is identical ~~or almost identical~~ to a name that the Registrar has already reserved under this Act ~~or the Companies Act 1955~~ and that is still available for registration; or
  - (d) That, in the opinion of the Registrar, is offensive.
- ...
- (4) **The following matters shall be disregarded when determining whether names are identical for the purposes of subsection (2) of this section:**
- (a) **The use of the definite or indefinite article as the first word in one or both of the names;**
  - (b) **The use of ‘Limited’ or ‘Tapui (Limited)’ in one or both of the names;**
  - (c) **Whether a word is in the plural or singular number in one or both names;**
  - (d) **The type, size and case of letters or other characters, accents, spaces between letters or characters, and punctuation marks, used in one or both names; and**
  - (e) **The fact that one name contains a word or expression and the other name contains an abbreviated form of that word or expression.**

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40 With effect from 1 July 1997, companies in New Zealand must be registered under the *Companies Act 1993* (NZ): *Companies Reregistration Act 1993* (NZ) s 3. Continued reference to the previous Act – *the Companies Act 1955* (NZ) – is therefore unnecessary.