The Nelson cotton mill agreement – a lesson from 1960 for 1978

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There is in New Zealand no special body of law governing contractual relationships between the Crown and other parties, and, consequently, we must turn to private contract law to solve the difficulties which may arise in such relationships. These difficulties, however, are not always susceptible of a narrowly legal solution. A contract to which the Crown is a party cannot be viewed in isolation from political and economic considerations, both national and international. In this article the writer examines one such contract, entered into by one government and rescinded by its successor.

I. 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 considers[1] "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.

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1 L. Fuller, *Legal Fictions* (Stanford, 1967) 137.

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 providing for the establishment of the mill, and the second providing for the rescission of the first — is of more than academic interest in 1978, for it demonstrates a pattern of inadequacy and inconsistency which must not be permitted to recur.

II. BACKGROUND TO THE AGREEMENTS

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. The National Party and some members of the Labour Party favoured the encouragement of efficient and economic industries. A decline in terms of trade in the latter half of the 1950s, however, convinced many members of the Labour Party of the need to provide protection to encourage industrial development 'in depth'.

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

The Labour Party won the election and the new government introduced wide-ranging import controls. The Minister of Industries and Commerce, the Hon. P. N. Holloway, and the Minister of Finance, the Hon. A. H. Nordmeyer, 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 "industrialisation 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:[2] "New Zealand faces the alternatives of rapid substantial industrial development or slowly falling living standards".

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 of 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 "industrialisation in depth" was one of the Labour Party's major planks.[3]

In June 1960 the government organised an Industrial Development Conference. The government's attitude was clear.[4]

> 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.

2 Report of Department of Industries and Commerce, 1959. Appendix to the Journals, House of Representatives, Vol. 4, 1959, H. 44, Pt. I, 5.
3 *The Press,* Christchurch, 8 November 1960, p. 18, col. 3.
4 *The Press,* Christchurch, 14 June 1960, p. 16, col. 2.

In spite of opposition from academics such as Professors B. P. Philpott, J. B. Condliffe, and H. R. Rodwell, 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. New Zealand already possessed expertise in the manufacture of woollen products, and the importation of cotton goods was a heavy drain on 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.

III. HISTORY OF THE 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.[5]

In March the Prime Minister, the Rt Hon. 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 million cotton spinning, weaving and processing mill at Nelson, which was expected to be in production in 1961. The railway would facilitate the transportation of the factory's products. Mr Nash did not acknowledge that the mill was not yet at the planning

5 "Economic Survey of the Nelson Region", Department of Industries and Commerce, Wellington 1962.

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 to 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 promised would mean for Nelson an era of economic growth, a large capital investment, and employment for many people; it would also mean for New Zealand a major saving in overseas exchange and a major reduction in the price of cotton goods.[6]

Early in August 1960 directors of the company, satisfied that they 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 acknowledgement 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.[7] 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.

The agreement took the form of an exchange of letters and bore little overt resemblance to the usual form for a binding legal contract. This in itself was no bar to its validity and no innovation,[8] but it is significant in the light of later developments that the agreement was not submitted to the Crown's legal experts

6 *Evening Post*, Wellington, 1 March 1960, p. 28, cols 1-2.
7 Commonwealth Fabric Corporation Act 1962, First Schedule.
8 The Rongotai Airport Agreement also took the form of an exchange of letters.

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.[9] 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 one important respect from the other major agreements of the time.[10]

Before considering details of the contract itself it is appropriate to consider the development of events leading to its recission.

IV. HISTORY OF THE SECOND AGREEMENT

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:[11] "The completion of negotiations having been announced a week ago by the Directors of the Company, a £5 million plant is to be established at Nelson and is expected to begin production in 1961." He gave no details to the House of the terms of the agreement.

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.

9 Agreements, details of which were published in the *Evening Post,* Wellington, 7 February 1962, p. 9, cols 1-3, were made with
— Consolidated Zinc Pty. Ltd, to establish a plant to smelt imported aluminium;
— Alcan Industries Ltd, to establish a plant a produce aluminium flat sheet;
— Pacific Steel Ltd, to establish a steel-rolling mill;
— Ajax Ltd, to establish a plant to manufacture steel and brass screws;
— G.K.N. Ltd, to establish a plant to manufacture wire;
— Cookes N.Z. Wire Rope Co., to establish a plant to produce wire rope;
— Austral Standard Cables, to establish a plant to produce telephone cables;
— N.Z. Refinery Co., to establish a plant for the distillation of refined products;
— N.Z. Distillery, to establish a factory for the production of gin;
— McKendrick Glass Ltd, to establish a plant for the production of glass.

10 "There is no other agreement known to exist in this country whereby a commercial concern is given a protected monopoly forever for its shareholders." Hon. J. R. Hanan, N.Z. Parliamentary debates Vol. 330, 1962: 753.

11 N.Z. Parliamentary debates Vol. 323, 1960: 1555.

On 14 December the company was assured of the government 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 commitment undertaken, and sought an assurance of co-operation 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",[12] and "the contract, having been made by a New Zealand Government, had to be kept".[13] Mr Holyoake in London for the Prime Ministers' Conference from 8 March to 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 the Minister of Trade and Industries, 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:[14] "Work is progressing in the establishment of a cotton mill and production is to commence in 1962." Ten days later he declared[15] (ironically in the light of future events)

> I think I 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.

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.[16]

Mr Marshall advised Smith and Nephew of his intention to release 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[17]

> 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.

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

12 Hon. J. R. Marshall, Minister of Industries and Commerce, N.Z. Parliamentary debates Vol. 329, 1961: 3542.
13 Mr R. D. Muldoon, N.Z. Parliamentary debates Vol. 328, 1961: 2748.
14 *Evening Post,* Wellington, 14 July 1961, p. 13, cols 1-2.
15 Article in N.Z. Supplement to the *London Financial Times,* 24 July 1961. N.Z. Parliamentary debates Vol. 331, 1962: 1440.
16 N.Z. Parliamentary debates Vol. 327, 1961: 1524, 1560.
17 N.Z. Parliamentary debates Vol. 330, 1962: 763.

might itself withdraw magnanimously allowing that it would seek no damages for breach 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 its 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.[18]

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, were 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.[19]

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 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 million, and that was a measure of damages or of compensation. He did not intend to use £1 million of the taxpayers' money to terminate the agreement.[20] This was a strange statement. It should have been known that the company was not yet committed to that extent. The following day 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, 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 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

18 N.Z. Parliamentary debates Vol. 331 ,1962: 1617.

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

20 N.Z. Parliamentary debates Vol. 329, 1961: 3982.

the guarantees, the monopolies and the various terms set out in the agreement."[21]

On 29 November a Cabinet committee, headed by Mr Shand in Mr Marshall's absence, was formed to attempt to find a common ground for agreement and renegotiation.[22] A specially constituted officials' committee[23] was set up to advise the Cabinet, chaired by Mr Foss Shanahan, who was known to be opposed to the agreement. Other members of this 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.[24] 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."[25] 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.[26] On 30 August this agreement was ratified by the Commonwealth Fabric Corporation Act 1962.

This second agreement, which raises the question of the necessity for parliamentary authorisation of contracts involving the expenditure of public funds will be discussed in a later part of the paper. At this point it is necessary to discuss in more detail the reasons which led finally to the rescission of the original contract.

21 N.Z. Parliamentary debates Vol. 331, 1962: 1618.

22 This committee was composed of the Minister of Labour, Hon. T. P. Shand; the Prime Minister, Rt Hon. K. J. Holyoake; the Minister of Finance, Hon. H. R. Lake; the Minister of Justice, Hon. J. R. Hanan; the Under-Secretary of Industries and Commerce, Mr B. E. Talboys.

23 This committee was composed of Mr Foss Shanahan of the Department of External Affairs; 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; Mr H. R. C. Wild, Q.C., the Solicitor-General.

24 N.Z. Parliamentary debates Vol. 331, 1962; 1453, 1454.

25 *Otago Daily Times,* Dunedin, 7 March 1962, p. 1, col. 7.

26 Commonwealth Fabric Corporation Act 1962, Second Schedule.

V. REASONS FOR THE RESCISSION

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, it is necessary to look to 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[27] and repeated by Mr Marshall[28] in the House during June. Although he personally held firmly to the maxim of International Law, *pacta sunt servanda,*[29] he declared that it was "not in the public interest" for the venture to proceed for the following reasons

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

(2) In those lines the company was going to need 80 per cent of the market.

(3) 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.

(4) Workers were likely to be displaced from the manufacture of certain types of cotton goods.

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

(6) 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.

(7) 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 New Zealanders 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.

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

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

(10) 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 earlier. A Cabinet committee and an officials' committee had 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."[30]

27 *Evening Post,* Wellington, 1 February 1962, p. 16 cols 1-3.
28 N.Z. Parliamentary debates Vol. 330, 1962: 385.
29 Interview of author with Sir John Marshall, former Prime Minister of New Zealand, Wellington, 1 August 1977.
30 Hon. D. J. Eyre, N.Z. Parliamentary debates Vol. 330, 1962: 797.

A. 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 (c. and f. all substantial New Zealand 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 commencing 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 believed that the words "similar products" were 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.

2. 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."[31] 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 other than meat wraps were not specifically tied to any source or to any date.[32] 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 had prevailed, the public would have been denied the benefit and the company would have been 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. Increased costs and taxation could be passed on in price increases.

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 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 and on the same conditions, of a market for all extensions of its production (manufactured pursuant to agreement with the New Zealand Government) disposable in New Zealand.

31 Mr J. E. Leavey, *Evening Post*, Wellington, 1 December 1961, p. 8 ,cols. 1-2.

32 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.

> . . . as soon as the company is manufacturing any product and supplying a reasonable share of the New Zealand market therewith an appropriate protective tariff will by the relevant procedure be established, nothwithstanding that assurance of 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 a combination of both continue to be provided with a reasonable assurance of the New Zealand market.

The interpretation of that 80 percent led to much disagreement. The Labour Government and the Department of Industries and Commerce had apparently held it to mean 80 per cent of what Smith and Nephew was then providing from its United Kingdom factories. According to Mr Nash that meant 80 percent of 7½ percent of the total market.[33] Mr Skinner produced from somewhere the figure of 22 percent. According to the company, however, it meant just what it said — 80 percent of the total market in New Zealand for such products. A wide measure of disagreement indeed.

The crop of secret industrial agreements shows that this was not itself an unusual promise. Austral Standard Cables were guaranteed 90 percent of the market and the Wire Rope Company was guaranteed 75 percent, 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, and 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 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 also regarded as unsatisfactory. For example, the agreement that the company be provided with protection for up to 33⅓ percent of the market for meat wraps could have operated to prevent the importation of meat wraps made from substitute materials such as plastics, which might compete with the company's share of the total market.

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 licences would be available exclusively to the company.[34]

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,[35] and, of course, the Crown has

33 N.Z. Parliamentary debates, Vol. 329, 1961: 3509.

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

35 Crown Proceedings Act 1950, s. 17(a). Declaratory relief is available.

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 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 legal and binding one entered into by the properly constituted Government of New Zealand."[36] A contrary view, however, was expressed by Dr O. C. Mazengarb, Q.C.[37]

> 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. The Company 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 it is appropriate to 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 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.

The several points raised by Dr Mazengarb may now be considered. 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

36 Hon. J. R. Marshall, N.Z. Parliamentary debates Vol. 329, 1961: 3982.

37 Address to the Constitutional Society, Dunedin, 16 April 1962, *Evening Post,* Wellington, 17 April 1962, p. 7, cols. 2-5.

promise was a statement of policy, an expression of intention not meant to be binding.[38]

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.[39] This Common Law right has long been recognized by statute, and is presently embodied in the Crown Proceedings Act 1950.[40] In contrast with section 6, which creates liability of the Crown in tort, section 3 proceeds on the basis that the Crown is contractually liable, merely giving to the court 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 power to its ministers 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.[41]

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 to contract.

One view, that of which Dr Mazengarb was an adherent, 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.[42] 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,[43] and the legislature has many

38 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.

39 *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."

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

41 E.g. *Thomas* v. *R.* (1874) L.R. 10, Q.B. 31; *Rederiaktebolaget Amphitrite* v. *R.* [1921] 3 K.B. 500, 503; *J. E. Verreault et Fils Ltee* v. *Attorney General for Quebec* (1975) 57 D.L.R. (3d) 403 (S.C.C.).

42 *The Case of Saltpetre* (1606) 12 Co. Rep. 12, 77 E.R. 1294, cited in *Attorney-General* v. *de Keyser's Royal Hotel* [1920] A.C. 508, 565.

43 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 the 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.

times expressly authorised the government to enter into particular contracts or categories of contract. Much of the legislation,[44] 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.

A second, and 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.

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 *State of New South Wales* v. *Bardolph*[45] complicates the matter further by allowing that an undertaking of doubtful validity at its inception may, if long practised 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.[46] The court in *Bardolph* would appear to have followed the lead of the court in the *Wooltops* case,[47] 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 decision which is often used[48] to justify the restriction on Crown contractual power is *Australian Alliance Insurance Co. Ltd.* v. *John Goodwyn,*[49] but that was complicated by the fact that the carrying on of insurance business necessarily involves the expenditure of public moneys, which in the absence of statutory authority is forbidden by the Constitution Act 1867. The existence of such a statutory restriction also explains the recent Australian decision in *Cudgen Rutile (No. 2) Ltd.* v. *Chalk.*[50] No such constitutional restrictions limit the power of the executive in New Zealand, and further the cotton mill contract did not involve the expenditure of public funds.

It is suggested that the third of the three current views is the one to be preferred. It is supported by a long line of authority,[51] and strengthened by the existence of multifarious activities established and conducted by the Crown without statutory authority. This view would allow to the Crown as a legal person at Common Law all those contractual rights which are not expressly forbidden it by statute — in

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Appendix to the Journals, House of Representatives, Vol. I, 1975, B I Pt II, 65; Vol. 2, 1947, B I Pt II, 22, 23.
The Commonwealth Fabric Corporation Act 1962 itself contains provision for the making of further agreements if it should become necessary.

44 The Iron and Steel Industry Act 1959, and the 1965 Amendment.

45 (1934) 52 C.L.R. 455.

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

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

48 Currie, *Crown and Subject* (Wellington, 1953) 56.

49 [1916] St. R. Qd. 225.

50 [1975] A.C. 520, 532.

51 E.g. *Clough* v. *Leahy* (1904) 2 C.L.R. 139, 157; *Williams* v. *Silver Peak Mines Ltd.* (1915) 21 C.L.R. 40, 49; *J. E. Verreault et Fils Ltee* v. *Attorney-General for Quebec* (1975) 57 D.L.R. (3d) 403 (S.C.C.).

contrast with the restricted rights expressly or impliedly conferred on legal persons which are the creatures of statute — despite the fact that this must increase 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.

Dr Mazengarb's belief that the contract was invalid would so far appear to be untenable. 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.[52]

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".[53]

The doctrine of executive necessity was first expounded in England in 1921 in the *Amphitrite* case.[54] We see conflict yet again, this time between Dicey's principle that the Crown should be subject to the law, a factor which is emphasised in the Crown Proceedings Act 1950, 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 percent 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 ground that there could be no valid contract of that kind between the Crown and the shipowners[55].

> 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 hamper its freedom of action in matters which concern the welfare of the State.

This suggests that the Crown is not competent to enter into 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

52 *Attorney-General* v. *Lindgren* (1819) 6 Price 285; 146 E.R. 811.
53 Mitchell, *The Contracts of Public Authorities* (London 1954) 57.
54 *Rederiaktebolaget Amphitrite* v. *R.* [1921] 3 K.B. 500.
55 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.

Rowlatt J. himself excluded from its bounds, will to some extent fetter its future executive actions.

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 was sounded 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[56] as "analogous to if not identical with 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 any contract".[57] Most of the case law in this area[58] concerns public authorities other than the Crown which had purported to enter into contracts the fulfilment of which would have necessitated a failure to exercise duly their statutory powers. That the principle relates also to the Crown was made clear by Lord Devlin in 1960. Both *William Cory*[58] and *Page*[59] 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.[60] A similar but more definite view has been expressed in the Supreme Court of Canada where Newcombe J. declared:[61]

> 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 contract 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

56 Hogg, *Liability of the Crown* (Sydney, 1971) 134.
57 Turpin, *Government Contracts* (Penguin, 1972) 23.
58 *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App. Cas. 623; *William Cory and Son Ltd.* v. *London Corporation* [1951] 2 K.B. 476; *Southend-on-Sea Corporation* v. *Hodgson* [1962] 1 Q.B. 416, 424 per Lord Parker: "After all in a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion."
59 *Minister of Crown Lands* v. *Page* [1960] 2 Q.B. 274. 60 Ibid., 291.
61 *R.* v. *Dominion of Canada Postage Stamp Vending Co. Ltd* [1930] S.C.R. Can. 500, 506, 510.

ceased to have any meaning."[62] This point was raised also by C. N. Irvine.[63] 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.[64] The Minister of Customs in 1960 had a complete discretion as to the grant or refusal of import licences under the Import Control Regulations 1938, particularly regulation 10. (These regulations were made under the Customs Act 1913 and the New Zealand Reserve Bank Amendment Act 1936.) 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 this was at no time officially proposed had perhaps more to do with politics than with the law.[65] It would have been politically unwise, both nationally and internationally, and unjust to an old-established English company with a fine reputation — a company which was a substantial importer of 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.[66]

Despite the fact that in this instance the Crown could not itself claim that the contract was ultra vires the Minister, for fear of damaging the country's reputation and credibility and perhaps fearing for 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 contracts 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 benefitted 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 it was as if 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,[67] but that may be distinguished on the ground that the granting of the licence concerned, which was of long but specified 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 are concerned, however, the Minister was given an absolute discretion as to the

62 N.Z. Parliamentary debates Vol. 330, 1962: 792.
63 "The Cotton Mill Agreement" [1962] N.Z. L. J. 169.
64 *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."
65 Cp. Mitchell, "Sovereignty of Parliament — Yet Again" (1963) 79 L.Q.R. 196, 207.
66 Denning J., *Central London Property Trust* v. *High Trees House* [1947] 1 K.B. 130.
67 *Ski Enterprises Ltd* v. *Tongariro National Park Board and Another* [1964] N.Z.L.R. 884.

granting or refusal of a licence and was not required to give any reasons for refusal, subject only to the requirement that any action must under the 1938 Regulations 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.

VI. ANALYSIS OF THE SECOND AGREEMENT

The 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,[68] apparently on the doubtful authority of an obiter dictum of Shee J. in the *Churchward* case,[69] 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*,[70] and *N.S.W.* v. *Bardolph*[71] a 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 coincides with that of Lord Haldane in *Commonwealth of Australia* v. *Kidman*,[72] 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,[73] 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 of the 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; the Public Revenues Act 1953 allows quite wide powers of spending prior to or in excess of appropriation.

The agreement concluded by the National Government with the company

68 *McKay* v. *Attorney-General for British Columbia* [1922] 1 A.C. 457, 461; *Commercial Cable Co.* v. *Governor of Newfoundland* [1916] 2 A.C. 610; *Auckland Harbour Board* v. *R.* [1924] A.C. 318, 326-327.

69 *Churchward* v. *R.* (1865) 1 Q.B. 173, 209.

70 *Rayner* v. *R.* [1930] N.Z.L.R. 441.

71 *N.S.W.* v. *Bardolph* (1933-34) 52 C.L.R. 455.

72 (1925) 32 A.L.R. 1, 2-3.

73 Commonwealth Fabric Corporation Act 1962, 2nd Schedule.

involved not only an agreement without parliamentary authority to disburse public funds, but also an actual disbursement of £447,956 of such funds. The details of this transaction are to be found in the report of the Controller and Auditor-General for the year ending 31 March 1962.[74] 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.[75] 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 of the Treasury under delegated powers. Section 51 limited expenditure to 1½ 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 1962, 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.

VII. CONCLUSION

What lessons remain for 1978. 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. New Zealand's reputation as a country which 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. 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 greater 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 as 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 publics* 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 New Zealand should follow the French and apply different rules to the interpretation and

74 Appendix to the Journals, House of Representatives, Vol. I, 1962, BI, Pt II, 26.
75 Appendix to the Journals, House of Representatives, Vol. I, 1962 BI, Pt I, 60.

resolution of different classes of contract. It is suggested, however, that contracts which appear to conflict with existing international or contractual obligations, to offend against the precepts of international law, to give exclusive privileges in perpetuity, or to fetter ministerial discretion, must be assessed by the Crown Law Office and by a commission, such as the Industrial Development Commission, independently 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 to consult trade organisations which were affected by industrial development policy, and constituted the Tariff and Development Board. The Cabinet rules were amended,[76] 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 statutory force. 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 the stage of formalising the contractual negotiations would appear to outweigh the benefits of flexibility.

At a time when clamorous calls for more open government are continually heard, a time when 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 multi-national 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,[77] but despite Dr Sutch's expressed views,[78] 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

76 The Cabinet Rules for the Conduct of Crown Legal Business 1958, contained the following provision

> 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 S.R. 1962/108, by inserting, after Rule 7, the following 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.

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

78 "If you bring all the lawyers in then you scare the big companies away," in an interview with David Mitchell, June 1966. Cp. "The Nelson Cotton Mill: A Case Study in the Politics of Development", unpublished M.A. Thesis, University of Canterbury, 1967, 60.

this, but also that they do not offend against the law. *Fitzgerald* v. *Muldoon*[79] is authority for the proposition 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 agreements 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 expediency 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, nevertheless many present Cabinet Ministers were Members of Parliament then — Santayana believed that those who do not remember their history are doomed to repeat it. It is hoped that the "Great Cotton Mill Disaster" and the lessons to be learnt from it are fresh in the politicians' minds as a permanent example of the misuse of powers allowed to the Crown in the interests of just and efficient government.

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