SECTION 98 OF THE COMMERCE ACT 1986: WHERE DO THE LIMITS LIE?[*]

Introduction

The Commerce Commission's information gathering powers are central to its role as the public agency responsible for enforcement action under the Commerce Act 1986. Without those powers, it could not perform its functions effectively, and the ability of the legislation to achieve its policy goals would be seriously impaired. Seen from the perspective of maximising the Commission's effectiveness, and bearing in mind the serious harm caused by anti-competitive conduct and the often covert nature of that conduct, there is a strong case for very broad powers to obtain relevant information from those that are likely to have it.

But these are not the only interests in play. The privacy interests of individuals, and also companies, are affected by any coercive information-gathering power. And the power to compel an individual to attend an interview with the Commission, and answer questions (without the benefit of the privilege against self-incrimination) is a significant interference with liberty, in respect of which appropriate safeguards are essential.

The substantial compliance costs that can be involved in responding to information requests also need to be borne in mind. Competition and regulatory proceedings often raise wide-ranging issues about a company's costs, prices and corporate strategies over an extended period. The Commission, acting on incomplete information, will often need to frame requests in general terms to be sure of receiving all relevant information – but for recipients of such notices, the cost of locating and compiling the information requested can be significant. And the increasing use of quantitative analysis can lead to even more extensive (and expensive) data requests.

The need to strike a balance between these competing policy concerns suggests that this area is likely to be somewhat fraught, with tensions both at the policy level and in the context of particular cases.

In New Zealand, there is the added complication that the Commerce Act 1986 deals with these issues very sparsely. It was enacted before the New Zealand Bill Of Rights Act 1990 (" NZBoRA ") led to an increased focus on specifying the outer limits of such powers, and safeguards for their use.

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Over the last few years, acting both for parties dealing with the Commission and for the Commission itself, I have been struck by the large number of significant practical issues on which the Act provides little guidance, and where caselaw also provides very limited direct assistance. In the time available, I can do no more than identify some of these issues, and sketch tentative answers to a handful of practically important questions.

To anticipate one of my key conclusions, we should not be surprised by disagreement about some of these issues. It seems to me inevitable that some of these will end up being tested in the Courts. Nor is this a bad thing. The Commission should not shy away from acting on what it believes, on the basis of legal advice, to be the fullest extent of its powers: to do anything less would be to fail to do its job. On the other hand, there is nothing unreasonable in particular individuals, or companies, taking action to defend the important interests protected by the NZBoRA, where those interests are intruded on by action taken by the Commission. Litigation of this kind should not be seen as unhealthy, or unreasonably confrontational. Rather, it reflects the importance of the issues involved, the uncertainty of the statutory framework, and the interest of the parties and the wider community in achieving greater certainty in this area.

Ultimately, it seems to me that these powers need to be reviewed, and re-enacted in terms that are consistent with the modern statutory environment. Revised provisions should provide more guidance to the Commission and to those affected by the exercise of the powers. If litigation about the scope of the powers prompts this, then that also is no bad thing.

The issues that I will touch on in this paper are:

- when can section 98 powers be exercised?
- what information can be requested?
- to whom should s 98 requests be addressed?
- what are the rights of an individual summoned to a section 98 interview?
- what powers does the Commission have to prohibit disclosure of section 98 interviews?
- what can the Commission do with the information it obtains under s 98?

The relevant statutory provisions

I begin by setting out, for ease of reference, the relevant provisions of the Commerce Act 1986 and of the NZBoRA.

Commerce Act 1986 provisions

Section 98 of the Commerce Act provides:

> **98. Commission may require person to supply information or documents or give evidence—**
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> Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person—
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> (a) To furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
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> (b) To produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or
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> (c) To appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

Section 103 provides for a number of offences relevant to s 98 notices, including offences of failing to comply with a notice without reasonable excuse, and misleading the Commission. It provides:

> **103. Offences—**
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> (1) No person shall—
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> (a) Without reasonable excuse, refuse or fail to comply with a notice under section 70E or section 98 of this Act; or
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> (b) In purported compliance with such a notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading; or
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> (c) Resist, obstruct, or delay an employee of the Commission acting pursuant to a warrant issued under section 98A of this Act.

(2) No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.

(3) No person, having been required to appear before the Commission pursuant to section 98(c) of this Act, shall—

(a) Without reasonable excuse, refuse or fail to appear before the Commission to give evidence; or

(b) Refuse to take an oath or make an affirmation as a witness; or

(c) Refuse to answer any question; or

(d) Refuse to produce to the Commission any book or document that that person is required to produce.

(4) Any person who contravenes subsection (1) or subsection (2) or subsection (3) of this section commits an offence and is liable on summary conviction to a fine not exceeding $10,000 in the case of an individual, or $30,000 in the case of a body corporate.

(5) Proceedings for an offence against subsection (4) may be commenced within 6 months after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.

A person required to provide information under s 98 cannot rely on the privilege against self-incrimination to refuse to respond: s 106(4). But statements made to the Commission in answer to a question put pursuant to a s 98 notice are not admissible against their maker in criminal proceedings, or in penalty proceedings under the Act: s 106(5). (There are limited exceptions to this exclusionary rule in s 106(6), in respect of perjury and s 103(1)(b) proceedings.)

Other privileges, in particular legal professional privilege, are not affected by these provisions and can be relied on in the context of a s 98 response.

Section 100 confidentiality orders

Section 100 of the Commerce Act 1986 provides:

100. Powers of Commission to prohibit disclosure of information, documents, and evidence—

(1) Subject to subsection (2) of this section, the Commission may, in relation to any application for, or any notice seeking, any clearance or

authorisation under Part 5 of this Act, or in the course of carrying out any other investigation or inquiry under this Act, make an order prohibiting—

(a) The publication or communication of any information or document or evidence which is furnished or given or tendered to, or obtained by, the Commission in connection with the operations of the Commission:

(b) The giving of any evidence involving any such information, document, or evidence.

(2) Any order made by the Commission under subsection (1) of this section may be expressed to have effect for such period as is specified in the order, but no such order shall have effect,—

(a) Where that order was made in connection with any application for, or any notice seeking, any clearance or authorisation under Part 5 of this Act, after the expiry of 20 working days from the date on which the Commission makes a final determination in respect of that application or notice, or, where that application or notice is withdrawn before any such determination is made, after the date on which the application or notice is withdrawn:

(b) Where that order was made in connection with any other investigation or inquiry conducted by the Commission, after the conclusion of that investigation or inquiry.

(3) On the expiry of any order made under subsection (1) of this section, the provisions of the Official Information Act 1982 shall apply in respect of any information, document, or evidence that was the subject of that order.

(4) Every person who, contrary to any order made by the Commission under subsection (1) of this section, publishes or communicates any information or document or evidence commits an offence and is liable, on summary conviction, to a fine not exceeding $4,000 in the case of a person not being a body corporate, and $12,000 in the case of a body corporate.

Relevant provisions of NZBoRA

The NZBoRA does not, of course, override other legislation (NZBoRA, s 4). But the courts will strive to interpret other legislation, such as the Commerce Act, consistently with the NZBoRA, as required by section 6: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.” And the Commission, which is part of the executive branch of government, is required to exercise its powers in accordance with the NZBoRA (s 3).

The following provisions of the NZBoRA are relevant to the interpretation of sections 98 and 100 of the Commerce Act, in the light of section 6 of the NZBoRA, and apply when the Commission exercises its powers under those provisions:

14. Freedom of expression—

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

…

21. Unreasonable search and seizure—

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person—

Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained—

(1) Everyone who is arrested or who is detained under any enactment—

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a Court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment—

> for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
>
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

These provisions need to be read together with section 5, which provides:

> **5. Justified limitations—**
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> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Implications of NZBoRA rights

NZBoRA limits on use of s 98 power – requests for documents etc

Section 21 of the Bill of Rights protects everyone, including corporate bodies (see s 29), from unreasonable search and seizure: *Tranz Rail* [2002] 3 NZLR 780. The words and policy of section 21 are broad enough to apply to the Commission's section 98 powers.[1] In *NZSE v CIR* [1992] 3 NZLR 1 the Privy Council assumed that the exercise of the Commissioner of Inland Revenue's power to require the production of documents under section 17 of the Inland Revenue Department Act 1974 was a "search" under section 21. Overseas cases take a similar approach.

Whether a search or seizure is unreasonable depends on the subject matter, and particular time, place, and circumstances. A central purpose of section 21 is to ensure that governmental power is not exercised unreasonably. It requires legitimate state interests to be weighed against any intrusion on individual interests.

Although Courts have held that expectations of privacy will not be as great in the commercial world as they are in the domestic sphere, in particular in the regulatory context, corporations as well as human beings do have legitimate privacy expectations (see *Tranz Rail* para 28). While the extent of those privacy expectations must be measured against the legislative and regulatory environment in which the corporation operates, it is not appropriate to deny corporations any such expectations.

A concern with the infringement of fundamental rights by intrusive powers of this kind has been expressed by the High Court of Australia. In *Daniels Corp v ACCC* [2002] HCA 49, (2002) 192 ALR 561 Callinan J said:

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[1] For a discussion of the "law enforcement focus" of s 21, and its application to the Commerce Act, see Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (Wellington, LexisNexis, 2005) ch 18, esp paras 18.8.3, 18.9.3, 18.10.6, 18.11.7, 18.29.

> "Creatures of the Executive of which this respondent is one are increasingly being armed with broader and more intrusive powers. That they are of these kinds requires, if anything, that the true and permissible ambit of the intrusion be carefully scrutinized and not be extended unnecessarily or in the teeth of unabridged (by legislation) fundamental, longstanding rights."

The Supreme Court of Canada has considered whether similar powers infringe the corresponding provisions of the Canadian charter, and concluded (correctly, in my view) that they do not. The Supreme Court held that an order to produce documents constitutes a seizure, but that it is not inherently unreasonable and that the public interest in the freedom and protection of citizens in the market-place prevails over the minimal infringement of the privacy interests of those required to disclose information of an economic nature. The Court considered that the privacy interest of corporations is relatively low with respect to requests for economic information: *Thomson v Canada* (1990) CanLII 135 (SCC).

The result reached by the Canadian Courts is that provisions such as s 98 are not inherently contrary to the rights protected by the charter, but particular exercises of the powers conferred by these provisions must be scrutinised for consistency with the charter, and will be unlawful if they are inconsistent with the charter rights.

The test for when a s 98 notice requiring production of documents or information amounts to an unreasonable search or seizure is likely to be essentially the same as the common law test of whether the s 98 notice is unreasonable or oppressive. The NZBoRA may however encourage the Courts to draw the line for permissible requests slightly more conservatively, whether the challenge takes the form of judicial review proceedings or proceedings for breach of NZBoRA rights.

NZBoRA limits on use of s 98 power – interviews under s 98(c)

Where a person is required to attend an interview and give evidence under s 98(c), the better view is that that amounts to detention under an enactment for the purposes of ss 22 and 23 of the NZBoRA: see *Sullivan v Ministry of Fisheries* [2002] 3 NZLR 721; *Official Assignee v Murphy* [1993] 3 NZLR 62.[2]

In *KPMG v Davison* [1996] 2 NZLR 278 (CA) Richardson J held that the "statutory obligation to attend to give oral evidence [before a Commission of Inquiry], to answer questions and to produce documents is a substantial intrusion on privacy and personal liberty."

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[2] See Butler & Butler, op cit, paras 19.7, 20.5.11.

Section 22 prohibits arbitrary detention. The Courts have held that "arbitrary" connotes a lack of "reasonableness" and "necessity": *R v Goodwin (No 2)* [1993] 2 NZLR 390. Hammond J held in *Manga v Attorney-General* [2000] 2 NZLR 65 that all unlawful detentions are arbitrary, and lawful detentions may also be arbitrary if they exhibit elements of inappropriateness, injustice or lack of predictability or proportionality.[3]

Attorney-General v Neilsen [2001] 3 NZLR 433 confirms that it is not enough that the arrest or detention be permitted by law. The Court of Appeal considered that section 315 (the Crimes Act provision for arrests without warrants) does not justify the conclusion that Parliament intended that arrest should be the usual response, and provide the usual method of bringing people within the criminal justice system. The Court applied *Wednesbury* principles to determine that the arrest in that case was unreasonable. Other less intrusive steps should have been considered and, in that case, employed – the plaintiff should have been summonsed to appear in Court, rather than being arrested.[4]

In practice the Commission now proceeds on the basis that ss 22 and 23 apply to s 98(c) interviews, advises interviewees that their rights under the NZBoRA will be respected, and in particular acknowledges the right to counsel under s 23.

The Courts are more likely to be willing to intervene in s 98(c) cases than in cases involving document requests. The interference with liberty is much greater, and such interviews affect the rights and freedoms of individuals rather than corporations.

When can the s 98 powers be exercised?

Use for investigations authorised by the Act

The Commission can only require information to be provided under s 98 where the information is required for the purpose of an investigation which the Commission has statutory authority to undertake: *Commerce Commission v Telecom* [1994] 2 NZLR 421 (CA).

The threshold for use of the section 98 powers

Section 98 authorises the Commission to request information where the Commission "considers it necessary or desirable" for the purposes of carrying out its functions and exercising its powers. This is not intended to be a very high threshold. In particular, the "desirable" limb is much less demanding than the necessity test prescribed for the issue of search warrants under section 98A. The decision of the Court of Appeal in

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[3] See also Butler & Butler, op cit, para 19.8.14.

[4] See Butler & Butler, op cit, paras 19.8.23 to 19.8.26.

Tranz Rail Limited v District Court and Commerce Commission [2002] 3 NZLR 780 emphasises this distinction and suggests, at least by inference, that it will not be difficult to meet the section 98 threshold.

The need for a broad approach to this threshold is underlined by the difficulty of detecting covert anti-competitive agreements and understandings. Recent cases in which I have been involved for the Commission have featured conspiracies to mislead the Commission, destruction of documents, and concealment of documents under the floorboards of senior executives' homes. The Commission's powers need to be effective even where the Commission has very little information about suspected breaches, and swift and effective action is needed to ensure that critical information is not withheld or destroyed.

But the fact that the threshold is not a high one does not mean that there is no threshold at all. Suppose, for example, that the Commission decided to audit ten large companies, selected at random, for Commerce Act compliance. Plainly the Commission could not simply serve section 98 notices on those companies, requiring them to provide all documents relevant to any breaches of the Commerce Act that those companies may have committed in the last three years. Nor could the Commission adopt a standard practice of issuing section 98 notices to every listed company in New Zealand, on an annual basis, requiring each company to state whether or not it is aware of any breaches of the Commerce Act that it or its subsidiaries have committed, or may have committed, in the previous 12 months, and if so, to provide particulars.

The reason that requests of this kind would not be lawful can be put in two ways:

- it is not the function of the Commission to conduct random audits for Commerce Act 1986 compliance, or to require compliance statements of this kind. So requesting information for these purposes is not authorised by the Act, for reasons similar to those identified by the Court of Appeal in the 1994 *Telecom* case;

- it is the function of the Commission to investigate suspected breaches of the Commerce Act 1986. But there must be some reasonable basis for suspecting that a particular breach may have been committed, before it can be necessary or desirable to exercise coercive powers to obtain information that would be relevant to such a breach.

At what point can the Commission reasonably consider that it is desirable to exercise its section 98 powers? Put another way, in what circumstances would a Court be willing to grant judicial review of a decision by the Commission to exercise those powers? It seems to me that there are five overlapping requirements that must be met.

First, the power must be exercised in good faith for a purpose that falls within the Commission's functions and powers. If the Commission has misunderstood the ambit of its functions, and has embarked on an investigation or inquiry that falls outside those functions (for example, because it is directed to policy issues, or because the matter it is investigating could not on any reasonable view amount to a breach of the Act), its coercive powers are not available to it. This view, expressed by the Court of Appeal in the 1994 *Telecom* case, is reinforced by section 19 of the Crown Entities Act, which provides that an act of a statutory entity (such as the Commission) is invalid, if it is done otherwise than for the purpose of performing the entity's functions.

Second, the Commission must have directed itself correctly on the test for exercise of the power. The person(s) making the decision must have identified the question as being whether use of section 98 powers is necessary or desirable for the purpose of the relevant investigation.

A third, and closely related, point is that the person making the decision must have turned their mind to whether use of section 98 is necessary or desirable *having regard to the alternative options available to the Commission*, and in particular the possibility of requesting that information be provided on a voluntary basis. It is desirable to use section 98 powers only if there is a rational basis for considering that it is preferable to use section 98, rather than simply asking that the information be provided voluntarily. This is reinforced by the NZBoRA requirement that the exercise of the powers be proportionate. This is unlikely to be a demanding threshold: certainly, it is nowhere near as high as the threshold set by the Court of Appeal in *Tranz Rail* in the context of the necessity test. But the question of whether it is desirable to make a request under section 98 can only, it seems to me, be answered having regard to the available alternatives. The use of section 98 powers will be unreasonable and disproportionate, and so inconsistent with the NZBoRA, unless the Commission has considered whether, and formed the view that, no less intrusive alternative exists to enable it to achieve its objectives.

The need to consider less intrusive alternatives is particularly relevant in the context of s 98(c) interviews. For example, summoning an individual based in Invercargill to appear in person in Wellington the next day will be desirable (and proportionate) only if there is a good reason not to interview the person on a voluntary basis, and if there is a good reason not to conduct the interview in Invercargill (including by video conference), or on greater notice to the interviewee.

This approach is consistent with the approach of the Inland Revenue Department to the use of its information requesting powers under section 17 of the Tax Administration act 1994. IRD's standard practice statement, SPS 05/08 Section 17 Notices (June 2005) provides (at para 7): "Inland Revenue will usually request

information, books or documents without expressly relying on section 17. This practice fosters a spirit of reasonableness and mutual cooperation." The matters which IRD decision-makers are required to take into account before using s 17 include previous requests (and the level of compliance), and the impact of the request on the suppliers of the information.

There is also an analogy with the approach to arrest powers in police general instructions and internal guidelines, as discussed in *Attorney-General v Nielsen* [2001] 3 NZLR 433 (CA). The test in the arrest context is not one of necessity, but alternative less intrusive options must still be considered.

Fourth, there must be some rational basis for the Commission to suspect that the investigation may disclose a breach of the Commerce Act 1986 (or some other matter that it is within the Commission's functions and powers to investigate). The Commission does not need to know for sure that a breach has occurred, or even to have reasonable grounds for believing that a breaches occurred. Putting the test this high would make it impossible for the Commission to investigate suspected breaches in many cases where enforcement action is abundantly justified, and there is no other way of gathering relevant information and evidence. The best analogy is probably Part 1 of the Serious Fraud Office Act 1990, which provides for the Director of the office to exercise certain powers, including the power to request documents, if he or she has reason to suspect that an investigation into the affairs of a person may disclose serious or complex fraud. In the context of section 98, the appropriate test for ensuring that a request is not oppressive (applying the common law test), or arbitrary (applying the NZBoRA test), is in my view that the Commission must have reason (ie some rational basis) for suspecting that the investigation may disclose a breach of the Act.

Fifth, there must be some rational basis for thinking that the person to whom the request is addressed may have documents or information of the kind requested.

It should be very rare indeed that there is any doubt about whether the Commission has satisfied the threshold requirements for use of the section 98 powers. In some of the cases I have been involved in, where doubts have been expressed about this by those on the receiving end of section 98 notices, the difficulty has not been failure to meet these threshold requirements, but rather transparency of the Commission's reasons for concluding that the requirements are met. The recipient of a section 98 notice can of course make a request under the Official Information Act for the relevant decision paper, and can request reasons for the issue of a section 98 notice under section 23 of that Act. But such requests often raise difficult practical issues. There will frequently be good reasons for the Commission to decline to release decision papers in relation to section 98 requests, where this would disclose confidential information, or would prejudice a continuing investigation. From a timing

perspective, it is not normally practicable to resolve differences about what should be released before the deadline for responding to a s 98 notice expires.

The Commission could, it seems to me, address some of these concerns by taking a leaf from the Inland Revenue Department's book, and adopting and publishing more explicit criteria for exercising its section 98 powers, including a list of the factors it takes into account before issuing a section 98 request. The release of a decision paper with appropriate headings that match the published criteria, even with most or all of the accompanying text redacted, would go a long way to reassuring recipients of section 98 notices that the request was well founded, and was not arbitrary.

What information can be requested?

Information must be relevant to the Commission's investigation

The information requested must be relevant to the investigation being undertaken by the Commission: *Telecom Corp of NZ Ltd v CC* (1991) 3 NZBLC 101,962; NZAR 155.

In the 1991 Telecom proceedings challenging the Commission's use of its s 98 powers, Gallen J held that the onus falls on the party from whom the information is sought to persuade the Commission or Court that it is not relevant. (A similar approach was taken in Australia in *Melbourne Home of Ford v TPC (No 2)* (1979) 40 FLR 428, 434.) The Court is likely to be deferential to the Commission's judgment on matters of relevance, as the expert body responsible for conducting the inquiry: a challenge on relevance grounds would succeed only if the material sought is plainly irrelevant to the inquiry which the Commission has authority to undertake.

Section 98 notice cannot require new information to be created

In *Telecom Corp of NZ Ltd v CC* (1991) 3 NZBLC 101,962; NZAR 155 Gallen J held that documents cannot be produced that do not exist or cannot be found.

In *Dunlop Olympic v TPC* (1982) 40 ALR 367 at 371 the Federal Court of Australia held that while the recipient of a notice can only be required to furnish information which is in his knowledge or control and cannot be required to undertake a general investigation of matters beyond his control, that does not mean that compliance with a s155 notice (the Australian equivalent of s 98) may not involve a degree of investigation to determine matters which are properly to be seen as being with the information or control of the recipient of the notice. This is particularly the case where the recipient is a company. The knowledge and information of the company would normally be the knowledge and information of its officers. And the officer responsible for formulating the response will commonly need to make inquiries of responsible officers, employees and agents.

Because s98 allows the Commission to require parties to furnish *information*, it seems clear that *documents* containing that information will in many circumstances have to be created. In *Hart v Deputy Commissioner of Taxation* [2005] FCA 1748 the Australian Federal Court considered a similar provision requiring information to be provided at the request of the tax department. The applicant argued that it could not be required to create new documents for the purposes of such a request. This argument was rejected: the Court held (correctly, in my view) that the respondent having to bring a document into existence was the necessary physical mechanism by which the information was to be communicated.

Thus it is open to the Commission to require new *documents* to be created which embody or set out information already held by the respondent. But a s 98 notice cannot require new *information* to be created or obtained, where that information does not already exist, or is not held by the respondent. Nor can the Commission require the respondent to undertake new modelling work or analysis pursuant to a s 98 notice.

There is a grey area where information (eg raw data on prices and costs) exists, but the Commission's request requires extensive research or compilation or analysis in relation to that material, to enable the respondent to provide a response in the form requested. A point will be reached where the Commission's request amounts to a request for new information to be brought into existence, or is oppressive because of the work and cost involved in accessing or processing the existing data. These concerns, which can overlap, will raise questions of degree in each case. They are more readily addressed on a case by case basis, rather than in the abstract. If concerns arise in a particular case, the first step should be to approach the Commission to explain those concerns and seek a variation of the notice. If the Commission does not agree to amend the notice in a manner that addresses the concerns, an application to the High Court for a declaration of invalidity in respect of that request, and for interim relief, will normally be the prudent alternative to simply refusing and arguing that there was a reasonable excuse for not responding.

Concerns about the clarity or extent of a s 98 request

Recipients of s 98 requests often raise concerns about the precise scope of a request, and about the breadth of requests. The Commission seeks to frame requests as clearly and precisely as possible, but is often acting on incomplete information about the nature and timing of suspected breaches, and under time pressure. Especially at an early stage of an inquiry, Commission staff may not have a clear appreciation of what information is likely to exist, and how readily or otherwise it can be accessed and provided.

The Commission is, in my experience, very willing to engage with recipients of s 98 notices on questions of clarification, scope and timing. Where concerns about any of these issues arise, they should be identified and raised with the Commission as early as

possible, rather than waiting till the last minute when the notice is about to expire. The Commission will generally respond to reasoned concerns with a modified notice, or an extension of time for compliance.

In theory a request could be challenged in court as unreasonable and disproportionate, if it seeks an unreasonable amount of information (or information that is so difficult and costly to access – eg data stored on a legacy IT system – that it is not reasonable in all the circumstances to require it to be provided), or if the time for compliance is unreasonably short. But the cost and delay involved in court proceedings suggests that this would only be appropriate in an extreme case. And the relief ultimately obtained will at most be a narrowing of the request, or an extension of time for compliance – this sort of objection is not likely to lead to a request being set aside in its entirety. A practical and common-sense approach by both parties should enable court action to be avoided, in this context.

Does section 98 apply to section 103 prosecutions?

One issue which I have encountered recently is whether section 98 powers can be used to collect information in relation to a suspected breach of section 103.

There is a good argument that section 98 is not intended to be used to collect information in relation to section 103 offences. Although the introductory words of s 98 are very general, referring to the Commission "carrying out its functions and exercising its powers under this Act", there is a strong argument that this refers to the Commission's substantive trade practices functions, and not the secondary function of investigating possible breaches of s 103.

The Commission can make reasonable arguments for a broad, literal reading of s 98. But on balance it seems to me that reading s 98 to cover s 103 investigations is inconsistent with the scheme of the Act, and inconsistent with s 23 of the New Zealand Bill of Rights Act ("NZBoRA").

The scheme of the Act supports a narrow reading for two reasons:

- it is somewhat circular to use s 98 to investigate possible breaches of s 103, which in most cases relate to compliance with s 98. Section 98 is more naturally read as applying to the substantive functions conferred on the Commission by the earlier provisions of the Act, with s 103 consequential on s 98;

- the removal of the privilege against self-incrimination when providing information under s 98 is consistent with the need for the Commission to have broad investigative powers to uncover and take action in respect of anti-competitive conduct. But there is no similar rationale for removing the privilege in respect of s 103 breaches. Provisions such as s 103 are common on the statute

> book, and are not normally accompanied by a power to require a person to answer questions about possible breaches, and to do so without the benefit of the privilege against self-incrimination.

There is also a strong argument that the narrower interpretation should prevail on the basis of section 6 of the NZBoRA, which requires the Court to prefer a meaning consistent with the Bill of Rights Act where an enactment can be given such a meaning. The NZBoRA provides that a person who is detained *on suspicion of an offence* has the right to refrain from making a statement, and to be informed of that right. That right is not relevant where a person is interviewed under s 98 in relation to a substantive breach of the Commerce Act, even if that person may be liable in respect of that breach, as such breaches are punishable by civil penalties and are not offences. If s 98 could be used to interview a person suspected of a s 103 offence, however, the s 23(4) right to silence of the accused person would be relevant, and would be removed by s 106.

The right to silence can be subject to certain reasonable limits. But the better view is that there is no sufficient justification for limiting that right in the s 103 context. So s 98 should be read as not applying to investigations of suspected s 103 breaches, to avoid inconsistency with the NZBoRA.

Put another way, the Commission would need to argue that the general words of ss 98 and 106 give the Commission a power to question persons suspected of a s 103 offence, and remove that person's right to silence. This would be a significant abrogation of rights protected by the NZBoRA, which is not normally found in respect of other legislation similar to s 103. I doubt that a Court would consider that this was correct.

A similar approach, limiting general words conferring an investigative power, was adopted by the Supreme Court of Canada in *R v Jarvis* (2002) SCC 73. In that case, the Supreme Court of Canada held that the tax department's general audit powers were not available to investigate potential offences under the Income Tax Act (as opposed to substantive questions concerning tax liability). The powers were available "for any purpose related to the administration or enforcement" of the Income Tax Act. The Court considered that the general audit powers were conferred for the purposes of the regulatory provisions of the tax legislation, not for the purpose of the criminal provisions. This ensured that the privilege against self-incrimination was not curtailed outside the context in which that curtailment was justified and appropriate.

Persons to whom a section 98 request can be addressed

Telecom challenged the Commission's practice of addressing requests for documents and corporate information to individuals, rather than to the company, in *Telecom Corp of NZ Ltd v CC* (1991) 3 NZBLC 101,962; NZAR 155. Gallen J held that there is

nothing to prevent the Commission issuing notices to individuals as well as or instead of the body corporate, and there may be legal and practical reasons for doing so. However a person cannot be required to furnish documents to which that person does not have access.

The judgment in that case does not clearly address whether, where a s 98 notice requiring documents to be provided is addressed to an individual, the notice should be treated as addressed to that person in their personal capacity or as an agent for the company. This is important, and the Commission can in my view be required to clarify which of these is intended, as this determines whether the person with the legal obligation to respond (and who is exposed to penalties for failure to respond) is the individual, or the company.

If the notice is directed to the company through a particular person as agent, then the company must respond with all documents and information properly sought.

If the notice is addressed to an individual in his or her personal capacity, that person is required to provide information known to him or her even though it was obtained in their capacity as an employee or agent of the company. But individuals have no entitlement to copy or provide corporate documents in their personal capacity, and could be instructed by their employer that they are not permitted to do so. Those individuals would then have a reasonable excuse, in terms of section 103, for not providing the relevant documents. Similarly, individuals to whom notices are addressed in their personal capacity have no entitlement to access corporate information, and their employer could prohibit accessing company information for the purpose of responding to a notice addressed to an employee in his or her personal capacity.

So far as s 98 notices requiring a person to attend an interview and give evidence are concerned, the Commission's normal practice is to address the notices to individuals – a company cannot attend an interview, or give evidence on oath. The Commission does not normally specify in the notice whether the notice is addressed to the person as an agent for the company, or in their personal capacity, but is in my experience willing to clarify this point if requested to do so.

The Commission can properly interview an individual in their personal capacity about matters which have come to their knowledge as an employee or agent of the company. The legal obligation to respond to the questions under the Act prevails over any express or implied obligations of confidence owed to the company. Individuals interviewed under s 98 should not, unless authorised by their employer, disclose privileged information: and if they do so inadvertently, this will not amount to a waiver of privilege by the employer, as the individuals in their personal capacity have no ability to waive the employer's privilege.

The rights of an individual summoned to a section 98 interview

As noted above, a request that a person attend a s 98 interview amounts to detention under an enactment for the purposes of the Bill of Rights Act. The person attending the interview has certain rights as a result, in particular the right to legal advice.

A s 98 interview notice will be unlawful if it amounts to an "arbitrary" detention – including where it is unreasonable in all the circumstances, for example because using the s 98 power is an unwarranted and unnecessary interference with the interviewee's liberty, which is not justified by the public policy reasons for requiring their attendance.

The right to counsel in s 23 implies a right to a person's counsel of choice. This right is of course subject to limits that are prescribed by law and are reasonable in a free and democratic society, under s 5. No ability to limit who attends as counsel is prescribed by law in the Commerce Act context. There is no express provision to this effect, and there is no basis for implying such a power as it is not needed to make the legislation work. (And of course such a power should only be implied if it would be reasonable – so the two section 5 requirements overlap, in this context.)

Whether such a limit would be reasonable depends on its purpose: if the Commission cannot order that interviews be kept confidential under s 100 (the view I express below), there can be no good reason for objecting to the attendance of a lawyer on the basis that he or she may subsequently be interviewed, as the earlier interviewee could disclose the content of the interview to the lawyer in any event.

In Australia there are a number of decisions to the effect that lawyers can be excluded from interviews by the ACCC and ASIC, or required to give undertakings not to use the information except for the purpose of the interview. One recent decision, *Gangemi v ASIC* (2003) 45 ACSR 383, is discussed in more detail below. It seems to me that these decisions are not of any assistance in the New Zealand context, however, as:

- in Australia there is no equivalent statutory right to counsel, or statutory requirement that any limit on that right be prescribed by law;

- the policy rationale for implying these powers on the part of the ACCC and ASIC is the desirability of preserving confidentiality in respect of interviews conducted for the purpose of their investigations. However as discussed below, I consider that the New Zealand Commerce Commission does not have the ability to insist on interviews being kept confidential by interviewees. The Australian Courts recognised, in *Constantine v TPC* (1994) ATPR 41-291 (1994) 120 ALR 341, that there would be no point in requiring non-disclosure undertakings from a lawyer if the client is free to disclose the content of the interview to third parties. Logically the same applies to exclusion orders.

The High Court of Ireland has held that there is a strong presumption in favour of freedom of choice of representation in proceedings before the Irish Competition Authority, and that a general prohibition on a lawyer representing more than one person in any matter before the Competition Authority infringed the right to fair procedures under the Irish Constitution: see *Law Society of Ireland v Competition Authority* [2005] IEHC 455 (21 December 2005), discussed by Sarah Keene in *NZ Lawyer* (March 2006).

Does the Commission have the power to prohibit disclosure of section 98 interviews?

The Commission has on a number of occasions taken the view that, under s 100, it can make orders preventing interviewees from disclosing the content of s 98 interviews. The aim of such orders is to prevent discussion of the specific questions asked in the interviews, and the answers given, in order to avoid disclosure of the Commission's line of inquiry to prospective witnesses. The Commission is in my experience willing to confirm that such orders are not intended to prevent discussion of the underlying events drawing on knowledge held independently of the s 98 interview.

The Commission considers that s 100 is broad enough to enable it to make orders of this kind, and that there are strong policy reasons for protecting the confidentiality of s 98 interviews, in order to protect the integrity of the investigative process. The rationale is that the Commission's ability to conduct effective investigations would be undermined if interviewees could discuss the content of interviews with other prospective interviewees involved in the same matter.

I struggle with this interpretation of s 100. That provision does not in my view authorise orders of this kind. Rather, it applies only to information supplied to the Commission, and can be used only for the purpose of protecting the confidentiality of commercially sensitive information for the benefit of the person to whom it is confidential.

The language and scheme of the Act

The words of s100 and the scheme of the Act suggest that s100 is intended to protect information provided by other parties to the Commission (and not vice versa).

Section 100 refers to " any information or document or evidence which is furnished or given or tendered to, or obtained by, the Commission in connection with the operations of the Commission." It does not refer to information or documents produced or information communicated *by* the Commission.

The Act deals separately, in s 106(7), with protection from disclosure of "any information furnished or obtained, documents produced, obtained or tendered, or evidence given, in connection with the operations of the Commission." The broader

language of s 106(7) contrasts with the limited reference in s 100 to certain types of information received by the Commission.

The Courts have read s 100 as designed to protect confidential information provided to the Commission by market participants. In *Lion Corp v Commerce Commission* (5/3/87, Wellington HC, M666/86) Quilliam J observed (at p15):

> The question of confidentiality arises because of the sensitive nature of some of the documents from a commercial point of view and from the advantage which competitors may be able to derive from being able to see the information contained in the documents. This is recognised by the legislature in s100 of the Commerce Act. The Commission is empowered by s 98 of the Act to require the production to it of a wide range of information. That power is not limited to information in the hands only of parties to an application before it but extends to "any person". It is not surprising, therefore, to find that in s 100 the Commission is given power to control the disclosure of the information supplied to it.

On appeal (*Brierley Investments v Lion Corporation* [1987] 1 NZLR 600) the Court of Appeal, in discussing the Commission's confidentiality orders, referred to the Act as containing "a number of provisions recognising that the field is one where there is or may be a special need for privacy or protection; and that the persons providing the information have certainly or probably provided it on the understanding that it will be confidential."

Legislative history

Section 100 was reviewed in the mid-1980s as part of the review by the Information Authority of all secrecy provisions contained in Acts, following the enactment of the Official Information Act 1982. Parliament determined that most secrecy provisions should be removed. The exceptions included section 100 on the basis that "the sensitivity of the information [in this area] is such as to justify a special regime for questions of access to that information" (NZPD, 10 February 1987, p6903). As a result section 100 was retained, although it was amended so that section 100 orders only apply for a finite period.

This rationale for retaining s 100 confirms that it is intended to protect sensitive information belonging to market participants, not the Commission's investigative process.

The absence of any power to make confidentiality orders to protect an investigative process in other statutes which establish regulatory regimes and confer investigative powers also confirms that the power is not a corollary of the desirability of conducting

confidential investigations. For example there is no such power in the Fisheries Act 1996, or in the Serious Fraud Office Act 1990.

In the 1992 *Review of the Commerce Act 1986* by the Ministry of Commerce, Treasury, the Department of Justice and the Department of the Prime Minister and Cabinet, there is a statement (at para 6.41) that the "the purpose of section 100 is to protect commercially sensitive information". While the review is not strictly speaking admissible to assist interpretation of section 100, it provides useful background context, and confirmation of the understanding on which officials have acted in developing policy in this area.

This exchange, while not directly applicable to s 100, also confirms that the purpose of such provisions is to protect confidentiality of market information for the benefit of the holders of that information, and that it cannot be used by the relevant agency to inhibit discussion of the underlying material.

The protection of the right to freedom of expression in the NZBoRA provides further support for rejecting the Commission's expansive reading of s 100. Section 100 should be interpreted to be consistent with that right, so far as possible. In this case, it is possible – indeed natural – to read s 100 as applying only to information provided to the Commission, and as exercisable only for the benefit of the person entitled to the confidential information.

The Commission may be concerned that this approach would seriously inhibit the effective performance of its investigative functions, and allow witnesses to conspire to mislead it. However this is in my view an unduly gloomy response. If any witness actually does deceive or knowingly mislead the Commission, that witness commits an offence under s 103. And if witnesses conspire to frustrate or defeat a Commission investigation, that would be an offence under s 116 of the Crimes Act 1961, which prohibits conspiring "to obstruct, prevent, pervert, or defeat the course of justice". Section 116 is the provision relied on by the Police and Serious Fraud Office in this context: it is not easy to see how the Commission could reasonably suggest that its processes require additional protections over and above those available to the SFO.

Comparison with Australia

The Commission does derive some support for its approach from a number of Australian cases, and early English cases, which uphold an obligation of confidence in the context of investigative interviews.

In *Constantine v TPC* (1994) ATPR 41-291 (1994) 120 ALR 341 the Australian Federal Court held that there was an implied requirement in the Trade Practices Act that ACCC interviews under section 155 *had to be held privately*, and a further implication from that that the ACCC had all the necessary powers to ensure the

privacy of such interviews by for example requiring interviewees to maintain confidentiality in respect of the interview, and requiring the interviewee's legal adviser to give an undertaking to maintain confidentiality in respect of the interview.

A similar approach was taken in *Gangemi v ASIC* (2003) 45 ACSR 383, which involved an investigation under section 13 of the ASIC Act. Gangemi was required to attend an examination by ASIC under section 19. ASIC directed that Gangemi and his solicitor must not discuss with or disclose to any other person any matter concerning the investigation which was disclosed in the examination, or Gangemi's answers to any questions. ASIC also objected to Gangemi being represented by his chosen lawyer, on the grounds that there was a risk that that lawyer would disclose the content of the interview to other clients involved in the matter.

There is no express power in the ASIC Act to make such directions in respect of an investigation (as opposed to an administrative hearing) or any express statutory provision comparable to section 100 of the Act. Section 22 provides, however, that an examination must take place in private.

French J held that it "is clear enough from *NCSC v Bankers Trust* that the requirement of privacy in relation to hearings imports an element of secrecy which is not for the benefit of those who are witnesses at the hearing nor able to be waived by them. So too the statutory requirement of privacy in relation to examinations is evidently in aid of the investigative process rather than protective of the interests of examinees. The power of an inspector to give directions as to who may be present during an examination (s 22(1)) and the restrictions on the publication of written records of examinations (s 25(2)) are indicative of a legislative intention to protect the secrecy of the examination. Such a policy is not surprising given the character of the examination as an investigative tool." The Judge observed however that it would be "desirable that, as is the case with hearings, the matter be put beyond doubt by the enactment of an express power with clear sanctions for the breach of directions so given."

The Judge held that the purpose of the implied power to direct non-disclosure on the part of the examinee and the legal representative must be to protect the integrity and efficacy of the investigative process. Once that process is complete, there is no further statutory purpose in maintaining a prohibition on disclosure. The non-disclosure orders that were made in these cases, being unlimited in time, were beyond power. They should have been expressed to apply for a limited period, which should not extend beyond the end of the investigation.

These Australian cases do not seem to me to support the Commission's broad reading of section 100, or to imply any broader power under the New Zealand Act:

- they are not concerned with the interpretation of a corresponding provision – there is no equivalent to s 100 in the Australian Act. So they cannot assist in interpreting that provision;:

- in New Zealand, Parliament has expressly considered the appropriate scope of confidentiality orders to be made by the Commission, and has conferred a more limited power;

- an implied power of this kind would not work in the context of the New Zealand Act, as there would be no sanction for breach of such an order (by comparison the Trade Practices Act contains a provision for punishing contempt of the Commission – s162);

- New Zealand legislative material confirms this was not Parliament's intention;

- reading s 100 in this way, or implying such a power, would be inconsistent with the NZBoRA. In particular, s 5 requires limits on the rights protected by the NZBoRA to be prescribed by law – any limit on freedom of expression in New Zealand should be expressly set out in legislation, not implied by the Courts.

Commission practice

The Commission itself has historically treated s100 as having the purpose of protecting confidential information provided to it in the course of its operations: *Re Fisher & Paykel* (1987) 1 NZBLC (Com) 104,177. The High Court has recorded that this is the practice of the Commission: *Lion Corp v Commerce Commission* (5/3/87, Wellington HC, M666/86) at p15.

What can the Commission do with the information it obtains?

There is a line of cases in England and Australia, recently followed in New Zealand, to the effect that where a public body has the power to compel or obtain information from any person, the information obtained is held subject to an obligation of confidence owed to that person, and can be used only for the purposes of performing the public functions of the body.

Thus in England it has been held that information obtained by Police under a search warrant is subject to an obligation of confidence owed to the person from whom it was obtained, and cannot be used or disclosed except for the purpose of performing police functions, and certain related public functions: see *Marcel v Commissioner of Police* [1992] Ch 225, [1992] 1 All ER 72 (CA); *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691.

In Australia the High Court has held that information obtained by ASIC under a power similar to s 98(c) can only be used for the purposes of performing ASIC's statutory

functions, or as otherwise permitted by law: see *Johns v ASIC* [1993] HCA 56; (1993) 178 CLR 408. In that case ASIC was authorised by its empowering legislation to disclose the information to a Royal Commission, but the disclosure was held to be improper because the interviewee had not been given notice of the proposed disclosure, and an opportunity to oppose the decision, before the disclosure took place. The High Court held that in making the decision to disclose:

- the confidentiality of the information was a factor that ASIC was required to take into account, and that it had done so;

- because disclosure was apt to adversely affect the interviewee, ASIC was obliged to observe the rules of natural justice before making a decision to disclose the information. It had failed to do so, with the result that the disclosure decisions were declared to be invalid.

The decision of the High Court of Australia in *Johns* assumed the same broad approach to permitted uses of compelled information by ASIC that the English Courts adopted in *Marcel*. Although there are dicta to the effect that the purpose for which a power is conferred limits the purpose for which the information can be disseminated or used, the purpose is consistently treated as performance of the functions of ASIC generally, rather than the more limited purpose of a particular investigation in the context of which the power was exercised.

In *The Stepping Stones Nursery Ltd v Attorney-General* [2002] 3 NZLR 414, Harrison J followed *Mercel* and held that the Police owed a duty of confidence in respect of information obtained through the exercise of a search warrant to the person whose premises had been searched, and that the duty of confidence was breached by disclosure of information obtained through the search to a trade competitor. The Judge quoted with approval the following passage from *Marcel* (see para 38):

> "In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The user for any other purpose of documents seized in exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation."

And at paras 37-38 the Judge said:

> "[37] Again, in reinforcement of the strict nature of the duty of confidentiality imposed on the police, and the equally narrow scope of the recognised exceptions, in *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691 Lord Bingham LCJ noted at p 698:
>
> > "When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty." (Emphasis added.)
>
> [38] Later at p 699 Lord Bingham LCJ added a gloss to the effect that any police disclosure should only be made after:
>
> > ". . . the exercise of a careful and bona fide judgment . . . [and only where it is] . . . for the purpose of preventing crime or alerting members of the public to an apprehended danger . . .."

These cases apply with equal force to the Commission, where it obtains information under s 98. The limit on use of compelled information is well established in the cases, and is underpinned by the right to be free of unreasonable search and seizure, which includes the right to have the extent of any such intrusion limited and confined to the purpose for which it is authorised. This has a number of important consequences:

- the information is prima facie confidential, and is held by the Commission subject to an obligation of confidence;

- the information can be used or disclosed by the Commission only for the purpose of performing its statutory functions;

- the Commission is free to use the information for the purpose of performing any of its functions. It is not limited to using the information for the purpose for which it was originally obtained. This conclusion is reinforced by the many cases which confirm that information and evidence obtained lawfully under a search warrant issued in respect of suspected offence X can be used to investigate or prosecute the person searched in respect of other offences, in the absence of a statutory restriction on so doing. See eg *R v Jefferies* [1994] 1 NZLR 290 (CA);

- before disclosing the information to any other person, the Commission needs to be satisfied that it is appropriate to do so having regard to the confidential nature

of the information, and must comply with the rules of natural justice by giving the owner of the information an opportunity to be heard on whether disclosure is appropriate, and the terms on which any disclosure should take place.

The Commission may argue that any obligation of confidence is overridden by the Official Information Act. However it seems to me that there would generally be good grounds for withholding information compelled under s 98 (leaving the obligation of confidence intact):

- under s 9(2)(b), on the grounds that disclosure "would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information"; and

- under s 9(2)(ba), to "protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information … would be likely otherwise to damage the public interest." The public interest in this case is the public interest in protection of the rights conferred by the NZBoRA.

Final comments

In this already lengthy paper, I have addressed only a selection of the important practical issues raised by s 98, and some of these in much less depth than others. As this discussion illustrates, the issues are difficult, and often admit of more than one reasonable view. I have expressed preliminary views on a selection of issues to stimulate debate, and in the hope of eventual clarification through debate and discussion. We should not shy away from a vigorous debate on these topics, as without this, there is no prospect of achieving greater understanding and consensus, or at least identifying those issues on which consensus cannot be achieved, with a view to their resolution through other means, whether court proceedings or legislation.

31 July 2006