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# LAW COMMISSION

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*Report No 28*

## Aspects of Damages: The Award of Interest on Money Claims

May 1994  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand society.

The Commissioners are:

Sir Kenneth Keith KBE—President  
The Hon Justice Wallace  
The Hon Justice Blanchard  
Leslie H Atkins QC  
Professor Richard J Sutton  
Joanne Morris OBE

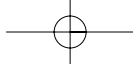
The Director of the Law Commission is Alison Quentin-Baxter QSO.  
The office is at 89 The Terrace, Wellington.  
Postal address: PO Box 2590, Wellington, New Zealand 6001.  
Document Exchange Number 8434.  
Telephone (04) 473 3453. Facsimile (04) 471 0959.

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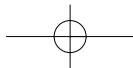
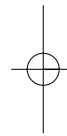
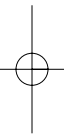
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24 May 1994

Dear Minister

I am pleased to submit to you Report No 28 of the Law Commission, *Aspects of Damages: The Award of Interest on Money Claims*.

The report is the third arising from the Law Commission's review of aspects of damages. In 1991, we reported to you on *Employment Contracts and the Rule in Addis v Gramophone Co* (NZLC R18 1991), and on *The Rules in Bain v Fothergill and Joyner v Weeks* (NZLC R19 1991).

The Law Commission considers that both the statutory law and common law in respect of interest is unsatisfactory. Notably the law fails to compensate plaintiffs effectively and consistently for being kept out of money lawfully owed to them. As a result, the Law Commission recommends a comprehensive mandatory scheme for the award of interest on money claims in court proceedings.

We recommend the enactment of the draft Interest on Money Claims Act included in this report.

Yours sincerely  
K J Keith  
President

Hon Douglas Graham MP  
Minister of Justice  
Parliament House  
WELLINGTON

## Summary of Recommendations

The following recommendations are made:

### 1 Interest should be awarded

- on all money judgments and valid money claims (paras 36–57; draft Act s 7(1)),
- from the date of entitlement to the money to the date of payment in full (paras 57–59; draft Act s 6(1)),
- at a rate which fluctuates with market interest rates, and compounds over time (paras 85–98; draft Act s 8(1), sch 1 cls 2 and 3), but
- only if proceedings for recovery of the money claim have been commenced (paras 99–119; draft Act s 16).

### 2 The interest rate should be calculated

- by reference to the two-year government stock yield rate (paras 138–148 and paras 158–159; draft Act s 8(1) and sch 1 cl 2),
- compounding on monthly rest days (paras 160–166; draft Act s 8 and sch 1 cl 3),
- without taking into account any taxation consequences of the award of interest (paras 174–187),

and should be incorporated into a table of multipliers (to be published monthly by the Department of Justice) from which the appropriate award can be readily calculated in each case (paras 167–173; draft Act s 8(1) and sch 1 cl 1).

### 3 The award of interest should be mandatory with the court having only a limited discretion to vary the amount payable (paras 188–

228; draft Act s 10). Special provision needs to be made, however, in respect of

- rates of interest fixed by contract or by particular Acts (paras 195–208; draft Act ss 13, 14),
  - judgments in a foreign currency (paras 210–211; draft Act s 9),
  - contractual obligations incurred before the proposals become law (paras 81–84 and 228; draft Act s 15(1)), and
  - other unforeseen cases (paras 225–227; draft Act s 10).
- 4 The claim to interest may be enforced by obtaining judgment and subsequently bringing debt enforcement proceedings (paras 229–248). There should be certain restrictions, however, on enforcing claims to interest, where the debt is small or the attachment of income procedure is used (paras 50–56 and 248; draft Act s 12(3)).
- 5 There should be consequential changes to a number of Acts dealing with awards of interest in legal proceedings (paras 197–208; draft Act s 19 and sch 3).



## 1

## Introduction

1 As part of its ongoing review of “Aspects of Damages”, the Law Commission has considered the current law relating to awards of interest on debts and damages.

2 Presently, the courts may award plaintiffs interest when giving judgments for debts or damages. These awards are intended to compensate successful plaintiffs for losses which they have suffered as a result of the late payment of money owing to them. The amount awarded is payable by the defendant along with the sum originally claimed.<sup>1</sup>

3 It is not hard to conceive of reasons why money owed to people who are ultimately successful plaintiffs is paid late or not at all. Litigation to assess liability may be long and complicated. The defendant may be unable to pay. Even if the defendant has the resources to pay, there may still be compliance and enforcement difficulties. These are a few of the reasons why the payment of debts may not be forthcoming or why damages are not paid as soon as possible after a cause of action arises. The references in this report, therefore, to late payment or to plaintiffs being kept out of pocket, are not necessarily intended to reflect any wrongdoing on the part of defendants. But even where the defendant cannot be blamed in any normal legal sense for a delay in payment, it is unfair to award the successful plaintiff a money sum which does not compensate for the delay, since the plaintiff was entitled to timely payment. The unfairness becomes more readily

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<sup>1</sup> The term *plaintiff* refers to the party to legal proceedings who brings a money claim and the term *defendant* to any person who must make the payment as a result of the money judgment of the court. In some cases, the defendant may counterclaim, seeking a money judgment. References to a “plaintiff” include a defendant who makes such a counterclaim.

apparent if the plaintiff has to borrow, in turn, in order to pay his or her own debts in a timely fashion, or if investment opportunities are lost as a result of the defendant's non-payment.

4 The Law Commission is of the view that the present law about interest on debts and damages is unsatisfactory for a number of reasons. These are described more fully in chapter 2. Briefly, the present law

- approaches the award of interest in a variety of different ways which are inconsistent in principle, policy and practical outcome,
- gives too great an emphasis to judicial discretion in cases where interest clearly ought to be awarded,
- is too closely tied to fixed rates of interest in a constantly fluctuating financial environment, and
- does not provide a simple administrative method of assessing the appropriate award of interest.

5 In this report, we recommend a scheme for reform of this area of the law, adopting, in part, the approach taken by the British Columbia Law Reform Commission in their *Report on the Court Order Interest Act* (LRC 90 1987). The scheme is simple. It provides compensation to successful plaintiffs without being unfair to unsuccessful defendants. The scheme creates certainty in this area of the law, allowing litigants to more easily assess the outcome of proposed litigation or litigation in progress. Because the scheme will not affect any agreements the parties may have negotiated as to interest, it preserves the parties' freedom to regulate their own affairs.

## THE PROCESS OF CONSULTATION

6 The Law Commission prepared a preliminary paper (NZLC PP17 1991) and distributed it to a wide range of interested persons and organisations. These included Ministers, government departments, judges, members of the legal profession, academics, law societies, community law centres, and a number of other persons with whom the Law Commission regularly consults. In addition, because of the subject matter of our proposals, the Law Commission distributed the preliminary paper to a number of consumer groups for comment. The Law Commission has been greatly assisted by the responses received and by advice from the wide range of persons with whom it has consulted. They have helped us examine alternative proposals for reform and have drawn our attention to issues which required further attention. Those who responded formally to the preliminary paper are listed in

appendix H. Where their response is particularly noted in this report, the respondent is designated by the number allocated on that list (for example, [6]). A number of other people, also mentioned in appendix H, gave us a great deal of assistance both before and after the preparation of the preliminary paper. The Law Commission very much depends on the process of consultation and is most grateful to all those who have taken part.

7 Reference should be made, however, to one aspect of our consultation which was notable because of the responses we did not receive when we publicised the project. We were conscious of the impact that our recommendations might be thought to have on consumers, particularly in the current economic climate, and, accordingly, wanted to involve them as much as practicable in our discussions. In our preliminary paper we said that we thought it unlikely that our proposals would, of themselves, cause hardship for either consumers or small businesses (paras 99–102). The few responses we received on this topic tended to confirm that our proposals will not have a significant impact on consumer debtors. Defendants falling within this category are generally likely to be liable to pay interest anyway, under the terms of the contracts which created the debt. Nevertheless, in chapter 3 of this report, we make some provision for hardship to be dealt with where it arises.

## OUTLINE OF THE REPORT

### 8 This report

- surveys the defects of the present law (ch 2),
- describes the major features of the Law Commission's proposals for reform (ch 3),
- details how we propose that interest be calculated and how calculations may then be made by using a table of multipliers (ch 4) (with practical examples of their use in the draft Act, sch 2 (app A)),
- indicates when the scheme should not apply and examines the need for, and limits of, judicial discretion (ch 5), and
- looks at particular issues relating to enforcement (ch 6).

The report includes a draft Interest on Money Claims Act (with commentary) in appendix A. The Law Commission recommends that legislation be enacted to give effect to these proposals. There are also a number of other appendices showing matters of detail and calculation.

## 2

## Why the Present Law is Defective

9 Damages are compensation intended to restore plaintiffs to the position they would have been in if a wrong or breach of contract had not been committed. The cost of the injury suffered is converted by the court into a fixed amount of money. But that assessment is often made at a later date, and there can be further delay before the money is actually paid to the plaintiff. When payment is delayed, plaintiffs will not be fully restored to their former position unless an additional allowance is made for the delay.

10 As a matter of general principle, therefore, people kept out of pocket should be able to recover interest on money owed to them from the date they were entitled to the money until it is paid in full. The law should compensate plaintiffs realistically for the loss they suffered. The law should also be certain. Plaintiffs should know what they are entitled to and defendants should know what their obligations are, without having to expend resources in finding that out. Awards of interest should be made on a simple, fair and consistent basis.

11 Under the present law, liability for interest may be based on either common law or statute. The principal statutory provisions are reproduced in appendix B to this report. The courts' practice in applying the general law and the relevant statutes is discussed in depth in paras 11–41 of the preliminary paper (NZLC PP 17). It is not reproduced here.

12 The Law Commission considers that both the statutory law and the common law are unsatisfactory in a number of respects. The defects, which we describe in this chapter (summarising the more detailed critique found in paras 11–41 of the preliminary paper), have led us to recommend a mandatory scheme for interest.

## THE GENERAL LAW

13 Originally, the common law did not allow the recovery of interest for the late payment of debts and damages. The historical reasons for this are not entirely clear, but the rule appears to have developed from an aversion to usury. At the same time, juries had relatively unrestricted powers to award damages. This led to awards of damages out of proportion to the right being protected. The courts responded by formulating principles to limit the award of damages where the damages claimed were too remote. The principle applied in tort actions was “foreseeability”. In contract, the principle declared was that damages not reasonably within the “contemplation” of the parties were too remote for recovery. The principle of contemplation facilitated the award of interest in some cases. If it was known or reasonably contemplated that loss in terms of interest would be suffered, the courts were prepared to award interest. But in other cases, where that could not be established, no interest was payable for any period before judgment was given.

14 A significant practical problem with the test of contemplation is that it requires an examination of the facts by a court in each particular case. What was within the contemplation of the parties is not always immediately apparent until there is a court hearing. Assessment varies from case to case. The time and cost required to make the assessment can sometimes outweigh the value of any interest which might be awarded.

15 In addition to the rules developed by the courts of common law, the principles of equity developed by the court of chancery also provide some basis for an award of interest. But they apply only in an extremely limited group of cases. Here, too, each case has to be assessed on its own merits and there is no established way of determining, in advance, whether interest will be awarded, and, if so, at what rate.

## STATUTE

16 Legislation has been passed in a number of countries to supplement the common law governing the recovery of interest. In New Zealand, the relevant statutory provisions are s 87 of the Judicature Act 1908 and r 538 of the High Court Rules 1985 (and their respective equivalents: ss 62B and 65A of the District Courts Act 1947). These provisions, like the common law, distinguish between two periods of time in respect of which interest may be awarded:

- the period between the date on which money is owed and the date on which a court gives judgment (pre-judgment interest); and

- the period between the date on which the court gives judgment and the date on which the money is actually paid (post-judgment interest).

### **Pre-judgment interest**

17 The power to award pre-judgment interest in the High Court and Court of Appeal is given by s 87 of the Judicature Act 1908 (and, in District Courts, by s 62B of the District Courts Act 1947 which is in substantially the same terms). The relevant part of s 87 reads:

**87. Power of Court to award interest on debts and damages—(1)**

In any proceedings in the High Court or the Court of Appeal for the recovery of any *debt or damages*, *the Court may, if it thinks fit*, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. (emphasis added)

The “prescribed rate” is stated in the Act, and may be varied by Order in Council.

18 The provision is too narrow in that it applies only to *debts or damages* claims, and not to monetary claims generally (an example offered by one respondent [11] was a claim to compensation under the Contractual Mistakes Act 1977). As well,

- it confers a discretion on the courts when the principle of compensation is a general one,
- interest cannot be awarded under the section in default judgment proceedings, and
- simple interest is unlikely to be accurate enough to reflect the true cost of a delay in payment.

#### *Should the award be discretionary?*

19 The court, if it chooses to award pre-judgment interest at all, may choose the rate of interest to be awarded, and the sum and time period over which it shall accrue. Any claim for interest then, is dependent upon judicial determination. It is not automatically available to aggrieved persons nor is its quantum easily ascertained. As will be seen (paras 45–49), there is a tendency to take into account matters which are not relevant to the loss the plaintiff has suffered as a result of the delay in payment. This wide discretion may make it more difficult for the defendant to ascertain what sum should be paid in full satisfaction of the claim.

*No interest where judgment is given by default*

20 Rule 460 of the High Court Rules provides a procedure for recovering a quantified sum of money (a “liquidated demand”). This is known as judgment by default. Where a defendant does not file a statement of defence, judgment may be sealed in favour of the plaintiff. No hearing is required, and the registrar seals judgment without further consideration of the merits of any possible defence.

21 Judgment by default may not be given, however, in respect of interest which cannot be claimed “as of right” (r 460). This precludes a claim for interest under s 87 (although not, apparently, claims based on common law or equity—see para 94 of the preliminary paper). The practical effect is that if the plaintiff wishes to claim interest under s 87, it will be necessary to set the matter down for a formal hearing, with consequent extra expense. The expense may outweigh the benefit of the interest award so that a plaintiff with a deserving claim for interest is deprived of a convenient way of enforcing it.

22 The position may be compared with the procedure for obtaining summary judgment under r 136 and the Code of Civil Procedure. If there is no real defence, the court may give judgment summarily without a full trial. In these cases, however, the court is free to exercise its discretion under s 87.

*Simple or compound interest?*

23 When a court awards interest, it is not authorised to give *interest on interest* (see proviso (a) to s 87(1)). This appears to be the general rule for all statutory awards of interest, both before and after judgment. Section 65A of the District Courts Act 1947, applicable to post-judgment interest, is the only statutory provision that may possibly permit interest to be compounded. Section 65A reads, in part:

(2) Every judgment debt ... shall carry interest from the date of the judgment or order on the amount for the time being remaining unpaid.

(3) Such interest shall be at the rate for the time being prescribed by or under s 62B of this Act, *and shall accrue from month to month.* (emphasis added)

But this reading of the Act is doubtful, and in practice the courts award simple interest only. Similarly, interest awarded at common law is invariably simple interest. In equity there are a limited range of situations (for example, cases in which a fiduciary has misappropriated funds for business use) where the practice is to award compound interest, but these are exceptional.

24 Simple interest does not reflect business practice. When money is borrowed, interest accrues on outstanding balances which include interest charges already incurred. For example, where a bank lends money to a customer, there will normally be regular payments of interest during the term of the loan. If payments are not made, the outstanding interest is capitalised and interest charged upon it. Where interest does not compound, it fails to compensate adequately the person to whom money is owed.

### Post-judgment interest

25 A right to post-judgment interest in the High Court and Court of Appeal is given by r 538 of the High Court Rules and in the District Courts by s 65A of the District Courts Act 1947. Rule 538 reads, in part,

**538. Interest on judgment debt**—(1) Every judgment debt *shall* carry interest from the time of judgment being given until the judgment is satisfied. (emphasis added)

Subclause (2) states that the interest is generally to be awarded at the rate prescribed by the Judicature Act 1908. This provision is preferable to s 87 of the Judicature Act 1908 in so far as it provides a clear right to interest and is applicable to all judgments, whether obtained at a hearing or by default. But it is not an absolute right to the prescribed interest rate. Traditionally, the rate of interest was immutable. But it may now be reduced (but not increased) at the discretion of the court: r 538(2) (and compare the earlier provision, SR 1975/140 r 6). There has been no reported case where this discretion has been exercised.

26 That question apart, there are two problems:

- the prescribed rate is fixed and does not fluctuate in a way which takes into account changes in standard interest rates; and
- there is no apparent reason why there should be a discretionary scheme and a variable interest rate before judgment, and a mandatory interest scheme after judgment.

### *A fixed rate*

27 The prescribed rate of interest does not reflect the loss suffered from having to borrow, not only because it does not compound, but also because interest rates change. A fixed rate will not always mirror the value of money during the time the plaintiff was kept out of pocket. Sometimes the rate will be too low, while at other times it will be too high and the plaintiff will receive a windfall. Though it can be changed,



in practice there has often been a considerable time lag before prescribed interest rates reflect economic realities. For example, in the latter half of the 1980s, indicator interest rates soared beyond 20 percent, while in more recent times the same rates have dropped below 10 percent, some as low as between 6 percent and 7 percent (see app D). Nevertheless, the prescribed 11 percent rate was maintained throughout this period and to our knowledge there has been only one instance (*Adams v Tivoli*, unreported, HC Auckland, 24 September 1993, CP 817/91, Smellie J) of a court awarding less than 11 percent (see Judicature (Interest on Debts and Damages) Order 1980 SR 1980/54).

*Two distinct schemes undesirable*

28 As already mentioned in para 25, it appears that the mandatory wording of r 538 automatically entitles a person to interest after judgment, while the award of interest before judgment is discretionary. But interest before and after judgment should be awarded on the same terms and at the same rate. There appears to be no valid reason why two schemes are necessary.

29 The reasons for the distinction are historical. It has been accepted for a very long time that interest (at a prescribed rate) should be added to judgment debts (see Judgments Act 1833 (UK) s 17, on which the New Zealand provisions were founded). But there was much greater controversy about whether interest should be awarded in respect of the period before judgment (see NZLC PP17 ch 1). During the nineteenth century, the law on this subject was developed in part by the courts, and in part by the legislature. There is a tradition of keeping the law of pre-judgment and post-judgment interest separate. This tradition has been accentuated by the legal doctrine that all prior rights and obligations “merge” into a judgment, so that the prior rights and the judgment are seen as two different things. But that technical rule cuts across the broader purpose of ensuring that plaintiffs are adequately compensated for delays in payment of moneys they are owed.

30 Another aspect of the same problem is the award of interest in cases of contract, where the contract itself provides for a rate of interest (usually higher than the prescribed statutory rate). Because the contractual right merges in the judgment, it may not be possible to continue interest at the contractual rate. In England, the practice has been, nevertheless, for payment of interest at the higher rate to be enforced along with the judgment debt (see 26 *Halsbury's Laws of England* (4th ed) para 553; 17 *Halsbury's Laws of England* (4th ed) para 424). Whether this practice could be adopted in New Zealand in the face of r 538(2)

(which provides that the court may only fix a rate which is *lower* than the prescribed rate) is unclear. Again, there seems no good policy reason to reduce the contractually agreed rate of interest merely because judgment has been entered.

31 For the above reasons, the Law Commission suggested in its preliminary paper (NZLC PP17) that the present law is unsatisfactory. The responses we have received also indicate dissatisfaction with the present law relating to pre-judgment and post-judgment interest. The respondents generally (though not in all cases) support our proposals for reform.

## CONCLUSION

32 The object of an award of interest in court proceedings is to compensate the plaintiff for not having the money during the period for which it is due and unpaid. The various methods used in the present law are either too cumbersome or costly (because they require individual assessment in each case) or not realistic (in that they do not reflect current rates of interest and do not compound over time). The next chapter—chapter 3—sets out the Law Commission’s basic recommendations which are designed to solve these problems. Chapter 4 elaborates some details of the mechanics of the proposals.

33 Not all our respondents agree with our underlying premise, that it is usually desirable to provide a plaintiff with effective compensation for the loss of the use of money. One respondent [28] specifically questioned whether, in a society functioning largely on debt, “the automatic award of interest at a high rate compounding monthly” was a good thing. Such a regime could impact adversely on people in financial difficulties. However, the general tenor of responses was to the effect that something needed to be done about the present law and the general concern that a defendant who was financially able should have no incentive to defend or delay proceedings was not infrequently expressed. If there are questions about this policy, it seems to the Law Commission that they are more appropriately directed towards defendants who are insolvent or have financial problems (see NZLC PP17 para 99). Chapter 6 of our report explores that aspect in greater detail.

### 3

## What Should be Done?

34 The most convenient way of giving compensation for the loss suffered because of non-payment of a debt is by allowing interest. The precise rate awarded is a matter of implementation, and in chapter 4 the Law Commission suggests a way of fixing a rate of interest which is likely to approximate that loss. That question aside, the essential features of the Law Commission's proposals are that interest

- is awarded on all money judgments, and
- is calculated from the date the money became payable until it is paid, and
- is awarded at a rate which fluctuates and compounds over time, and
- becomes payable only if proceedings are commenced.

35 These proposals were first advanced in the preliminary paper (NZLC PP17) and are now brought forward as final recommendations. Each will be addressed separately in this chapter. Alternative possibilities and corresponding legislative provisions were canvassed in chapter 2 and appendix B of the preliminary paper. Except where there is evidence of support for an alternative proposal, the Law Commission does not intend to review them again in this report.

### INTEREST SHOULD BE AWARDED ON ALL MONEY JUDGMENTS

36 It is recommended that, in general, interest be awarded

- on every money judgment,
- irrespective of the conduct of the plaintiff or the defendant, and

- with the award being mandatory, unless the amount of the valid claim is less than \$3000.

There will be some special exceptions to this general rule, which are discussed in chapter 5. In addition, the parties to a contract will be free to exclude or vary the application of the Act to money either of them owe the other. These circumstances apart, it is proposed that every money claim which is brought to judgment should include a component of pre-judgment and post-judgment interest.

37 Brief mention needs to be made of tribunals and arbitrators. In the draft Act included as appendix A to this report, we have excluded tribunals from the definition of the term *court*. Tribunals are not included in the definition of *court* since their powers to award interest, if any, are provided for under their own legislation. In the case of the Disputes Tribunal, which has express power to award interest, that power will continue under the Interest on Money Claims Act. The legislation will be amended, however, so that the award of interest may follow the methods of calculation adopted in the Interest on Money Claims Act. With respect to arbitrators, the draft Interest on Money Claims Act contemplates its application by arbitrators. The Law Commission's report *Arbitration* (NZLC R20 1991 paras 252–261) recommends that any arbitrator should have the same powers to grant remedies and relief as the High Court, a view to which we adhere in this report. Accordingly, the proposals in the draft Act appended to this report would (on the enactment of the legislation recommended in the *Arbitration* report) also apply to arbitrators.

### **Every money judgment**

38 The Law Commission recommends that the scheme have a broad coverage. The key definition is that of *money judgment*. The scheme will apply to any judgment or order given in a civil case, which requires the payment of money or which acknowledges the existence of a liability measurable in money. This definition includes claims which are not, strictly speaking, claims for the recovery of debts or damages, for example, claims for contribution and indemnity, and applications under the Insolvency Act 1967 to have transactions set aside as voidable preferences.

39 The legislation will have no application to proceedings to recover specific property. To take a concrete example, where the official assignee sets aside a voidable transaction, the appropriate remedy might be either an order for the return of the property transferred by the

bankrupt, or for payment of its value. The legislation will apply in the latter case only. If the former remedy is sought, and the assignee wishes to claim compensation for the defendant's use of the property, then the claim should be made as one for damages. To that extent only, the claim could be for a money sum, and might be augmented by an award of interest.

40 Pre-judgment interest should be available on all money judgments as a matter of course. Presently, pre-judgment interest is available only at the discretion of the court under s 87 of the Judicature Act 1908, or else at trial as part of an overall assessment of the quantum of the damages and interest to be awarded. Both require a specific assessment by the court. Under the Law Commission's proposals pre-judgment interest will usually be available without the need to rely on judicial discretion or to prove a right to it based on the general law. Nor need there be a trial to assess its quantum. It will be sufficient to ask for an award of interest in the statement of claim. The amount can be readily calculated by the parties or the registrar, without referring the matter to a judge.

41 Pre-judgment interest should be available where a plaintiff obtains judgment by default. This is an extension of the present law. The current inability to include pre-judgment interest when seeking judgment by default means that parties who might be entitled to claim pre-judgment interest must carefully weigh up the costs involved in doing so. Often these costs will be disproportionate to the sum in question, rendering that sum not worth pursuing. This effective denial of the right to interest is contrary to principle and there is no need for it. The Law Commission's proposals will redress this without increase in costs.

42 There will be limits to the general principle of recovery of interest. The basic purpose of our proposals is to ensure that compensation provided by law is not reduced because of the delay in payment. If, however, a judgment is not designed as a compensatory measure, there is no occasion to include an interest component to compensate for late payment. Most money judgments are compensatory, that is to say, they reflect the loss the plaintiff has suffered, the unjust enrichment the defendant has acquired at the plaintiff's expense, or money or the value of goods or services promised but not paid or delivered.

43 Sometimes statutory provisions providing a basis for money judgments have different purposes which go well beyond compensation. The purpose behind these provisions can be generally referred to as "actions for profit" (*Dyer v Best* (1866) 4 H & C 189; LR 1 Exch 152;

and see *Whittington v Cohen* (1895) 14 NZLR 572, 580) and are often in the nature of a penalty, or, in some cases, are aimed at ensuring the adequate prosecution of offences. Such provisions are found in taxation legislation (eg, Goods and Services Tax Act 1985 s 67). Other examples are rare, and instances of their being invoked in the courts are even rarer. They include treble damages for pound-breach (that is, the retaking from the custody of the law a chattel which has been impounded under the Distress and Replevin Act 1908) and *qui tam* actions (where a “common informer”, not necessarily being the aggrieved party, sues for and shares part of a penalty imposed on another person; see, for example, s 37(2) of the Pawnbrokers Act 1908). A modern example is the penalty (treble the amount due) imposed by s 85 of the Student Loan Schemes Act 1992 on those who evade their responsibility in relation to student loans.

44 It is recommended that judgments serving these kinds of purposes be excluded from the operation of the proposed legislation. This legislation is designed to compensate a plaintiff who has been kept out of pocket and so has no application to statutory or court imposed penalties. This policy is already observed in relation to fines for criminal offences, which do not attract interest.

### **Irrespective of the conduct of the plaintiff or the defendant**

45 Awards of interest should not depend on the conduct of the parties. Where a plaintiff delays bringing proceedings, the award of interest should not be reduced. Nor should it be enlarged where a defendant is guilty of improbity.

#### *The delaying plaintiff*

46 Occasionally (in current practice), awards of interest are reduced to penalise plaintiffs who delay bringing proceedings. This point was referred to in some submissions [2, 13], and the further point was made that delay may have an impact on defendants who have limited cover for indemnity insurance [15]. Reference was also made [8] to the fact that people who have the option to bring claims (for example, landlords who have a right to seek a rental review) sometimes defer their claims without apparent reason, lulling the other contracting party into a false sense of security. Plaintiffs may also obstruct settlement by making unreasonably high claims [15].

47 In the Law Commission’s view, the principle of compensation requires that, in general, awards of interest should be mandatory and

should not be compromised by using the interest mechanism to promote other policies in relation to the conduct of proceedings. Accordingly, interest should not be reduced under our scheme on account of the plaintiff's delay except in special circumstances (paras 209–227). This view accords with a common concern expressed in the responses we received (though it was not a universal one). If a plaintiff is guilty of inexcusable delay, that can, and should, be dealt with by the court in other ways. For example, the court may take the delay into account when awarding costs. There are other doctrines which may apply too: estoppel, limitation of actions, and the equitable doctrine of laches.

### *The unscrupulous defendant*

48 Similarly, interest under the Law Commission's proposals should not in general be used to punish a defendant for his or her conduct. As in the case of the delaying plaintiff, where a defendant should be punished, that can be done in some way other than by the increase of interest. Neither should the period over which interest accrues be increased because the defendant took undue time to investigate the claim. Because the aim of the Law Commission's proposals is to compensate the plaintiff, any enquiry about the conduct of the defendant becomes irrelevant.

49 The purpose is not to punish a defendant, but the practical effect is that there should be little if any advantage to a defendant who deliberately delays payment. To this extent at least, we are able to concur with the observations of some respondents [15] who expressed concerns about that practice. One respondent [7] went further and suggested vigorous measures to prevent solvent defendants from using the present legal system as a means of financing their own operations. However, such measures are beyond the scope of the present enquiry.

### **The award is mandatory, unless the amount due is less than \$3000**

50 Once it is accepted that the conduct of the parties is irrelevant, it is a very short step to the proposition that the award of interest should, in general, be mandatory. Most of those who responded to our preliminary paper seem to accept this view. There are, however, two qualifications. The first (which comes into play where there are difficulties in stating how much is owing at the date money becomes due) is discussed in the next section of this chapter. The second relates to small debts.

51 One problem with small debts is that they generate only small amounts of interest which can, in relative terms, be quite costly to assess. This is particularly so where (as frequently happens) the debt is repaid over a period, with very modest regular payments. The problem was not taken up in our preliminary paper, and is by no means central to the general scheme the Law Commission proposes. It is, however, a very real one. If the plaintiff claims interest, then this could involve court staff in a time-consuming exercise checking calculations, without a countervailing benefit to the plaintiff. Further, these are the debts where it can most cogently be argued that imposing a realistic rate of interest may make it more difficult for debtors who are genuinely trying to meet their commitments.

52 Perhaps the simplest way of dealing with this problem is to provide that no interest may be claimed on any debt unless it exceeds \$3000. This is the general rule adopted after judgment has been entered in District Courts; District Courts Act 1947 s 65A. However, that provision does not extend to pre-judgment interest. The Law Commission has reservations about extending this provision any further, as

- some defendants are able to pay interest on small debts and should be made to do so,
- some claims will be considerably older in time than others, not necessarily through any fault of the plaintiff; fairness would appear to require that there should be an equality of effective compensation (taking into account the delay factor) as between plaintiffs with old and new debts, and
- plaintiffs with contract debts may be entitled to obtain interest under their contracts, while those who have different types of claim will not. (The only way of dealing with this anomaly would be to deprive plaintiffs of their contractual rights, but ease of calculation does not seem a sufficient ground for depriving a plaintiff of vested contractual rights.)

The Law Commission concludes that the case for depriving plaintiffs of pre-judgment interest on small claims has not been sufficiently made out.

53 On the other hand, given that the debt is small and the calculations potentially onerous, there is a cogent reason for leaving the method of calculation of *pre-judgment* interest to the discretion of the court, as it is now. Admittedly, in those cases where there have been instalment payments so that calculations are complex, the principal burden of



calculation will fall on the shoulders of the plaintiff when formulating the statement of claim, rather than on court staff. But calculations will still need to be made for the period up to the date judgment is entered. A further consideration is that, had a claim of the same size been brought before the Disputes Tribunal, assessment of interest would be within the discretion of the tribunal (see Disputes Tribunal Act 1988 s 20). It would be undesirable to have substantially different interest provisions, depending upon whether the matter comes before the tribunal or the courts, since that would encourage “forum shopping” amongst those with small claims.

54 There is, in the Law Commission’s view, a good case for depriving plaintiffs of the right to *post-judgment* interest in respect of small debts, as is the case currently in the District Courts (see District Courts Act 1947 s 65A). This may be justified on a number of grounds. First, as has been said, there is a risk that the parties and court staff may be burdened with complex ongoing calculations which produce only a small additional amount for the plaintiff. Secondly, once a small judgment of this kind is entered, it will probably be either enforced immediately or any thought of execution abandoned. If it is enforced under the provisions for regular instalments of debt, then (for reasons which will be explained in ch 6) there may be good reason to require that any interest component be waived. If the judgment is pursued no further, this will be because the plaintiff has become aware that the defendant lacks resources to pay. To allow the plaintiff who has taken that decision to accrue interest in the hope that one day the defendant will become solvent serves no useful social purpose and makes it that much more difficult for the defendant to recover financially.

55 The resulting shape of the law is a little complex, but it is difficult to suggest any simple solution which does not create anomalies. The Law Commission recommends that, where the amount of the claim is less than \$3000,

- pre-judgment interest under the proposed legislation will be awarded only at the discretion of the court,
- if there is any other basis for claiming interest (for example, contract), it will be available for the pre-judgment period, and
- post-judgment interest will not be claimable, upon any basis.

56 Those proposals will come very close to ensuring that interest on small debts will not be collectable from insolvent defendants. Most plaintiffs who have to rely on the court’s discretion will probably prefer

not to seek pre-judgment interest, so they can apply for judgment by default. Those who enter judgment for a sum which includes pre-judgment interest may well not be able to enforce it, even if they get an order for regular payment of instalments. There will be no post-judgment interest. The only defendant who is likely to pay interest, therefore, is the one who has the resources to pay the debt and is deliberately trying to avoid or delay payment.

## INTEREST RUNS FROM THE DATE OF ENTITLEMENT TO THE DATE OF PAYMENT

### **The general rule**

57 The general rule is that interest should run from the date on which the money falls due (the “date of entitlement”) until the date of payment. In cases of breach of contract, this will be the date on which the plaintiff is deprived of something promised under the contract. In tort, it will generally be the date on which the damage is suffered. *Once interest has started to run*, it will continue until the date of payment, which may be made directly to the plaintiff or by way of payment into court.

58 Note, however, the words *once interest has started to run*. This assumes that an event has occurred which triggers the award of interest. As will be seen later in this chapter (paras 99–115), under the Law Commission’s scheme, the mere fact that money is due and unpaid does not trigger the right to interest. That right does not arise until proceedings are brought. Once that happens, and only then, will interest be calculated back to the date of entitlement.

59 Once interest begins to run it continues until the date the debt is paid. Where interim or part payments are made, interest should accrue only on the sum outstanding (see draft Act sch 2 (app A) for an example of how interest will be calculated in cases of part payments).

### **A special case: the date of quantification**

60 The general rule is that interest runs from the date of entitlement, that is, the date the cause of action arose. This should be observed whenever it is clear what amount should have been paid on the date of entitlement. Sometimes the amount payable will be provided for, as in the case of a contract to pay a certain sum on a certain date. On other occasions it will have to be settled by the court at a later date, as, for example, where property of uncertain value is wrongfully destroyed by

the defendant. The court may settle the value as at the date of entitlement (the date of destruction), and interest will run on that amount from that date.

61 For reasons of fairness, convenience or necessity, however, courts sometimes assess the amount payable as at a different date. For example, suppose that the defendant is a builder who has built the plaintiff a house. Two years later it is found to be fundamentally defective. It requires a large sum to repair, and the plaintiff sues the defendant for damages. Strictly speaking, the date of entitlement would be the date that the builder broke the contract by providing a defective house. But the only fair way of assessing damages is to find out what amount is going to be needed, two years later, to put the house right. That will be taken as the date of quantification, that is, the date *as at which damages are assessed*.

62 The date of quantification may or may not be the day the court actually performs the task (the date of assessment). In the above example, the case might not actually get to court until much later, long after the damage has been discovered and repaired. The court can still quantify the damages as at the two-year point, however. The date of quantification is a date selected by the court as a point of reference. It need not be, and frequently is not, the date the matter comes to court for a decision.

63 Under the Law Commission's proposals, where the date of quantification is later than the date of entitlement, interest runs from the date of quantification. No interest is payable for the period before the date of quantification because the original sum fully compensates the plaintiff for all losses up to that date. For the period after the date of quantification, however, the Law Commission's scheme for the award of interest will apply.

64 These examples, and the principle which lies behind them, are relatively simple. The issue becomes more complex when the court is trying to include in its quantification of damages some adjustment to the award, to take into account changes in value over time. This is so where the award reflects the fact that the plaintiff has

- lost something of value, and
- received compensation for loss of the thing either earlier, or later, than the date on which the thing would have produced that value.

Exactly the same general principle still applies, however, in determining the date from which interest should run.

### *Quantification before loss*

65 Courts sometimes have to make an award in anticipation of a loss which has not yet occurred. Suppose, for example, the plaintiff has a profitable agency business for a manufacturing firm. One of her employees, in breach of contract and fiduciary duty, persuades the manufacturing firm to employ him as the agent instead. The plaintiff is in a position to prove that she would have retained the agency for at least two further years, and made let us say \$10 000 per month from the agency over that period, but for the defendant's breach.

66 An award of damages is sought at the beginning of the two-year period. Assessing damages in such cases takes into account a number of factors, but for present purposes it is sufficient to concentrate on how the continuing "income stream" of \$10 000 should be reflected in the award. Now it is clear that the correct amount of the award could not be \$240 000, because that would over-compensate the plaintiff. If she had received that sum at the beginning of the two-year period and invested it to obtain interest, then the total amount she would have at the end of the two-year period would be considerably more than the agency contract would have given her. The only amount she could have invested from the agency contract would have been the \$10 000 each month. The court, in making an award, must discount the \$240 000 to make an allowance for that difference.

67 What the court is saying, in effect, is this: "By the end of two years, you could have accumulated \$240 000, together with interest on each monthly payment as it was received. What is awarded now is a smaller sum, but if you invest it immediately it will in two years time produce the amount you would have acquired if the wrong had not been committed." In cases such as this, the precise date as at which that assessment is made is crucial, if the money remains unpaid. An award of interest made to run from a later date will result in under-compensation for the plaintiff. If interest is made to run from an earlier date, the plaintiff will be over-compensated for her loss.

68 Unfortunately, it is not always clear from the terms of judgments which date the judge is taking as the date of quantification. A just award may well be one in which the court tries to weigh a number of imponderables, none of them calculable in a straightforward way by reference to any particular date. It is still essential, for the operation of the proposed scheme, that some date (which may only be an approximation) is fixed as the date "as at which" damages have been assessed. This is why the Law Commission's proposed legislation specifically provides that

the date of entitlement or quantification be stated in the judgment. If, by oversight, that statement is omitted, then the judgment can be corrected by one of the parties referring it back to the judge who awarded it.

### *Quantification after loss*

69 There is the converse situation, where the amount awarded must reflect lost opportunities and changes in the value of money, between the date of entitlement and the date of quantification. An example is a case where the defendant has promised to provide the plaintiff with specially designed machinery which is essential for the plaintiff's new production line. The defendant fails to deliver the machinery and, despite the plaintiff's best endeavours, it takes two years to obtain an appropriate machine from elsewhere. In the meantime, the plaintiff has lost the benefits of increased production and the replacement machine costs more because of inflation. The plaintiff does not bring an action for recovery until the new machine is in place.

70 Damages in these circumstances may be awarded cumulatively under two heads, both of them calculated as at the date the new machine is acquired:

- lost profits, based on the monthly profit figures and including an interest component reflecting the fact that, but for the breach, profits would have accrued over a period of time; and
- the extra amount required to pay for the new machine.

71 It will be apparent that such an award includes all sums necessary to compensate the plaintiff up to the date of quantification. The lost profits reflect the "loss of use" factor. Any inflation element will be reflected in the interest rate selected in calculating the lost profits, and in the cost of a new machine two years later.

72 Interest should run, once more, from the date of quantification. In the above example, it would be the date the machinery was acquired. To allow interest to run from the date of entitlement (when the contract was first broken) would over-compensate the plaintiff in respect of the intervening period, since compensation for the delay factor and the loss of the use of the machinery is already included in the award. To award interest only from the date the award is made (which could be a considerable time after the date of quantification) would deprive the plaintiff of compensation for delay occurring after the date of quantification.

73 The practical effect of the Law Commission's proposals is that, in quantifying damages, the court will continue to have a considerable

discretion in selecting the date as at which the calculations are performed. For the period up to that date, it may use whatever methods it thinks fit (within the general parameters of the law on awards of damages) to measure what the plaintiff has lost, both in general terms and in respect of the delay in receiving compensation up to that time. Once it has settled a date of quantification in respect of any particular “head” of damages, however, the statutory scheme will normally take over. Compensation for delay in payment after that date will come to the plaintiff in the form of an award of interest under the statute.

### **Particular cases which may cause problems**

74 Some respondents took the view that invariable rules about the commencement of interest are inappropriate [15, 21, and 23]. They favour greater latitude being given to the courts when setting a date from which interest is to run, especially where a plaintiff either has been dilatory in bringing proceedings or claims an inflated sum of damages.

75 However, as discussed in paras 45–49, to use the mechanism of interest to mark disapproval of a party’s conduct will compromise the principle of compensation. To choose a date from which interest will accrue, other than the date of entitlement to the money, will usually be arbitrary. The only discretion a court should have is over how, and as at what date, the plaintiff’s loss should be quantified.

76 Nevertheless, the Law Commission recognises that there may be some cases where the fact that an award has to be quantified at a date before trial (in some cases considerably before) might sometimes cause practical difficulties as regards the liability for interest. One respondent [8] referred to the potential problem of rent reviews under long-term leases. Under the Law Commission’s proposals, arbitrators will be obliged to award interest on rent reviews. Leases commonly provide for rent reviews by agreement or by reference to arbitration and often contain “ratchet” clauses whereby the rent cannot be decreased below its present level although it may be increased on the review dates. Rent reviews can take place well into the review term, with the result that the tenant is bound to pay increased rents back-dated to the beginning of the review period perhaps for months or years.

77 The Court of Appeal has now held that a cause of action for a “debt or damages” within the meaning of s 87 of the Judicature Act 1908 does not arise until the award is published. Interest accrues only from that date (see *Body Corporate Number 95035 v Stubbs Investments Limited*

*and Ors*, unreported, Court of Appeal, 22 March 1993, CA 215/92). The Court accepted that this “may not seem a fair and reasonable result” because, by prolonging the review through challenges in the Court, lessees could have, for an unreasonable period, the use of money which rightfully should have gone to the lessor. The Court appears at least to have left open the possibility that, had s 87 been more widely formulated to cover causes of action which arise for money claims (as with the Law Commission’s proposals), then interest might have run from the date on which, according to the lease, the revised rental began to apply.

78 The Law Commission concurs with the Court of Appeal’s underlying assessment of the situation, but not with the further comments by the Court on this subject. It went on to suggest that in the particular case, any injustice was mitigated by the fact that the lessor had control over the timing of the review proceedings. Under the Law Commission’s proposals, the lessor’s delay in bringing proceedings is not of itself to be taken as justification for a court declining to award interest. The Law Commission considers that the Court’s assessment of the justice of the situation does not meet fully the arguments for mandatory awards of interest, which have been advanced in this chapter. There may be circumstances where it would be unconscionable for the lessor to insist on back-dating the rental increase and it should be estopped from doing so. Apart from that, it is difficult to see how the lessor’s conduct in delaying proceedings justifies reducing the amount the lessor should obtain to compensate for late payment. Neither the plaintiff’s loss, nor the benefit the lessee acquired by retaining the property at a lower rental than that which had been agreed upon, was affected by the delay.

79 Leases often provide for increased rental to run from a certain day, and give lessors an immediate right at that time to take proceedings which will settle the amount and ensure the payment of that money claim. For example, the Building Owners and Managers Association of New Zealand Inc (“BOMA”) Standard Office Lease contains a clause which reads:

Any variation in the Annual Base Rent resulting from [a determination under the rent review provisions of the lease] shall take effect on and from the particular review date.

For the reasons already given, the Law Commission considers that interest should also run from that point, even if the lessor might have brought proceedings at an earlier date than it did. The lessor had stipulated for payment as from the review date, and the force of that stipulation should, in future, be recognised when awarding interest.

80 The Law Commission agrees, however, that there is a potential injustice for lessees *under existing leases* if the opposing view, confirmed by the Court of Appeal as being correct in law, is to be reversed with retrospective effect. One might assume that the parties may be expecting some increased sum to be payable where a contract provides for review. Modern commercial leases contain interest provisions so that they may expect to pay interest contractually. However, if they have left the matter to be governed by existing law, they will not be expecting any interest to accrue on that increased sum for the period prior to its determination.

81 The problem is part of a much wider issue. It could equally be said of any contract entered into before our proposed legislation takes effect that, had the parties known of the law now proposed, they might have drafted their contract in a different way to avoid liability for prejudgment interest. This is particularly true of long-term contracts. Leases with upset rental clauses provide the most common and obvious example but there are many others. The Law Commission therefore proposes that the recommended legislation have no application, in its mandatory aspect, to money claims under contracts entered into before it comes into force. They will continue to be subject to the court's general discretion, similar to that now exercised under s 87 of the Judicature Act 1908. For most types of contract, this exception will quickly cease to have any effect since they have only short-term implications. But contracts entered into for longer terms do call for special treatment.

82 For leases and other contracts entered into after the passage of the legislation, however, no such exception should be made since parties will be free to contract differently if they so wish. In fact, as alluded to earlier in para 79, this is commonly the practice now. For example, the BOMA Standard Office Lease also provides its own regime for interest which reads:

Without prejudice to the other rights powers and remedies of the Lessor under this Lease if any rent or other moneys owing by the Lessee to the Lessor on any account whatsoever pursuant to this Lease shall be in arrear and unpaid for seven (7) days after the due date for payment thereof (whether any formal or legal demand therefore shall have been made or not) such moneys shall bear interest compounded on quarterly rests and computed from such due date until the date of payment in full of such moneys at the rate calculated under ... the First Schedule and the said interest shall be recoverable in like manner as rent in arrears.

There is, in our view, nothing peculiar about applying a special legislative provision regarding the award of interest to review clauses. The



parties could agree to a term in a contract to the effect that the review process be put in train before the expiry of the rental term as exists for public leases under s 22(2)(a) of the Public Bodies Leases Act 1969 (again common in current practice) or simply provide that interest will not be payable, or that the Interest on Money Claims Act will not apply.

83 In order to safeguard contracts presently agreed to, the Law Commission proposes that contracts entered into before the proposed legislation comes into effect be exempted from the mandatory provisions of the legislation, regardless of the length of the term of the contract. Where the parties have entered into such a contract, the provisions of the contract apply in so far as they deal with interest. Where no provision is made, the court will continue to have a discretion to award interest, as it does now.

84 The general rule, however, will be that interest on money claims will run from the date of entitlement, and that date will, in the case of contractual claims, be determined by the terms of the contract itself.

## A FLUCTUATING AND COMPOUNDING RATE

85 To reflect commercial reality, interest should be awarded at a fluctuating rate. It should be compounded at regular rests. It is difficult to conceive any other method which more closely reflects the full cost of delay. Nevertheless, we have received responses expressing concern over this aspect of our proposals.

### **A fluctuating rate**

86 The Law Commission proposes that the rate of interest follow fluctuations in current market interest rates, so that the assessment of loss is as accurate as possible. This prevents the under-compensation or over-compensation which results from use of a fixed rate under the present law.

87 One response [13] we received said that “attempting to calculate interest over a long period of time where the rates may have fluctuated monthly, will inevitably result in confusion”. Others [10, 11, 17], on the other hand, supported the proposal that the statutory rate fluctuate to reflect existing commercial rates. While on the face of it this may present complications for practitioners and clients in calculating interest owing, the proposal to publish multiplier tables in the *New Zealand Gazette* should mitigate the effects of any complicated calculations that are necessary.

88 We consider the latter view to be correct. Use of the table of multipliers will eliminate complications in the mechanism for calculating the quantum of awards. We discuss the tables of multipliers in chapter 4 and appendix E.

### **Compound interest**

89 Whenever reform in this area of the law has been attempted, it has been found that the principle of compensation can only be met by compound interest. While acknowledging arguments against compound interest, it is an essential ingredient of our reforms, necessary to reflect commercial reality. While some respondents agreed [18], the responses we have received which oppose compounding do so on a number of different grounds.

#### *No call for compounding*

90 It was argued in some responses [8, 27] that to elevate compound interest to the norm would, in many cases, over-compensate plaintiffs. In tort actions, for example, many plaintiffs are not utilising borrowed funds and may not even have bank overdrafts. In the absence of public demand for compound interest, there should be no move to change the existing law which provides for simple interest only.

91 This is not a compelling objection to compounding. People who lend money out at interest usually expect the interest to be paid at regular intervals during the term of the loan—something which does not happen with an unpaid debt or claim. Accordingly, the question becomes, what is the appropriate interest rate to be and how frequent should be the “rests” for calculating compounding interest.

92 Unpaid plaintiffs will be either borrowers or lenders. The behaviour of the “average” plaintiff our scheme seeks to reflect does not go to either extreme (see para 121). Viewed as a lender, the average plaintiff will not be a speculative lender accepting high returns for high risk. As a borrower, he or she will not be a poor credit risk who must pay high rates of interest. So the rate should not be too high. Nor should it be too low. One cannot assume that the average plaintiff, if paid the money, would invest it with a bank at low rates of interest, when better rates could safely be obtained elsewhere. Without being able to know precisely what loss plaintiffs will suffer, the Law Commission is of the view that the plaintiff can be compensated best by a rate of interest which reflects the true cost of money over time. Such a rate will approximate what the average plaintiff would have done with the money if paid on time.

93 Once a suitable rate has been selected, there is no reason to believe that plaintiffs will be over-compensated by merely compounding the rate. The rate will compensate in a commercially realistic fashion.

*Compound interest leads to over-compensation*

94 One respondent [12] said that, apart from claims by banks or other financial institutions who are able to achieve the compounding of interest on their funds, compounding should not be permitted in the usual run of cases. In some cases, people are not able to manage their money to achieve compound interest on their returns.

95 We have said that the conduct or position of the parties should not affect the method of calculating compensation. Compensation should not be measured by how well individual plaintiffs and defendants manage their finances. Nor can there be one rule for banks and good financial managers and another for those who have difficulty managing their finances. The question is, what is the cost, in the general run of things, to a plaintiff who is not paid the money when due. As we have said (paras 23–24), the award will be inadequate if interest is not payable on a compounding basis.

96 Another argument against compound interest is that, as many awards already contain hidden interest components, compound interest will result in over-compensation. Where there appears to be a hidden component built into the price of goods (for example, where the cost of goods is inflated to accommodate payment by instalments over time), that component is agreed to by the defendant when entering into the agreement for sale and purchase. In the Law Commission's view, the effective application of a general principle of compensation should not be compromised merely because in some cases the amount payable under a contract is already too high. Whether the defendant should have struck the particular bargain, and whether the court should intervene to protect the defendant from any unfair advantage which may have been taken of the plaintiff's position, are separate issues.

*Adverse effect on some defendants*

97 Compounding will increase the length of time it will take to pay the judgment debt, and the judgment debt will grow until paid in full. As has been pointed out to us [26], and as already addressed in our preliminary paper (NZLC PP17 para 99), this will undoubtedly cause some difficulties for defendants who are genuinely trying to pay their judgment debts. This concern, however, must be balanced against the fact that the money is owed to the plaintiff and that compounding

interest is required to compensate the plaintiff for the loss suffered by not having that money when entitled to it. This issue is better addressed by preserving the present threshold on post-judgment interest (see above paras 50–56), and providing for limitations on some of the enforcement remedies which may be available to the plaintiff (see ch 6).

98 The Law Commission is generally of the opinion that the arguments against a compounding interest rate carry little force, once it is accepted that plaintiffs should be fairly and genuinely compensated for being kept out of money. Specific concerns raised by those who criticise the use of compound interest can be addressed in other ways. Even if a general element of over-compensation were to result from compounding (see para 96), there may be better ways of dealing with that than by undermining the principle of compensation which is achieved, in part, by compounding. But in any event the Law Commission does not consider that objections based on the claim that the plaintiff will be over-compensated can be supported.

#### INTEREST BECOMES PAYABLE ONLY WHEN PROCEEDINGS ARE COMMENCED

99 In our preliminary paper we said that we were not proposing that debts automatically attract interest in the absence of legal proceedings to enforce them (NZLC PP17 para 88). We propose no change to that approach. Unless the right to interest is stipulated as part of the contractual obligations of the defendant, the plaintiff will not be entitled to interest until proceedings for recovery have been issued. It has been asked whether this rule denies some plaintiffs what is justly due to them and whether, instead, the entitlement to interest should arise upon a debt being incurred.

100 This raises a wider question: is the right to interest at all times an inherent part of the “right” which the plaintiff has through being owed money? If so, two consequences follow:

- the plaintiff is entitled to interest from the time the money became due; and
- the plaintiff is entitled to treat the interest as an inherent part of the money owing, for purposes such as bankruptcy and like proceedings.

The Law Commission takes the view that, for reasons of policy, which we will discuss shortly, it is preferable not to accord the plaintiff such an extensive right to interest before proceedings have actually been

commenced. Once they are commenced, however, then the right to interest should be an inherent part of the money claim, and no distinction should, in general, be drawn between the principal and the interest component of the debt.

### **Should there be an immediate entitlement to interest?**

101 There are two alternative possibilities which deserve serious consideration:

- the interest component has the status of a debt which falls due as from the date the principal should have been paid but was not (“immediate entitlement”); or
- interest only becomes due when proceedings are issued, even though, when it does become due, it is calculated from the date of non-payment (“deferred entitlement”).

102 Before we consider these separately, we make reference to a third possibility, that there is no entitlement to interest until the date the claim is heard. As a matter of policy, it is difficult to see any merits whatsoever in that position. Why should the defendant be able to delay payment right up to that point, without incurring interest charges? But that appears to represent the current law. Indeed, in a system where the award of interest lies in the discretion of the court when giving judgment, it can appear a logical way of approaching the problem. But it is not the best way.

103 The current law in this area has been the subject of recent judicial comment. In *Goh v BNZ* (Wellington, CP 128/91, 30 March 1992) the whole sum of a debt was paid to a creditor prior to the date of hearing and the creditor sought interest and costs on the sum paid out. It was argued that, where the whole sum of a debt has been paid to a plaintiff prior to the date of hearing, the court has no jurisdiction to allow the plaintiff interest since s 87 of the Judicature Act 1908 only empowers the court, in any action for the recovery of debts or damages, to “order that there shall be included in the sum for which judgment is given” interest at the prescribed rate. Since the plaintiff had been paid the whole of the sum which it claimed prior to the date of hearing, there could be no “sum for which judgment was given” so the court had no power to include interest in that sum.

104 The Court accepted that argument. In giving its judgment, the Court cited (at 9) *Paul Hastings Real Estate v Atkinson-Jones* (Wellington, CP 59/86, 28 October 1986) where McGechan J said (at

10) in respect of a similar argument:

The consequence is that if there is no judgment given, there is no sum for which interest under s 87 can be included, and interest cannot be awarded. The argument is perhaps more attractive in language and logic than in result, as *it means a defendant can pay a debt in full the day before hearing and escape liability entirely under s 87, whereas payment the day of or after hearing results in interest liability*. That distinction seems somewhat artificial. Nevertheless, as the law stands I believe the submission to be correct. (emphasis added)

The Law Commission can see no reason why such an artificial result should be tolerated in modern legislation, and does not propose to consider this possibility further.

### *Immediate entitlement*

105 On one view of the matter, the only fair system is one which recognises the plaintiff's loss from the very moment it happens, that is, when the money is not paid. Lord Brandon in *President of India v La Pintada Compania Navigacion SA* [1985] AC 104, 129 said that, in an ideal system of justice, a creditor would be able to recover interest on a debt in three cases, namely, where it remains unpaid

- before proceedings for its recovery have begun,
- after proceedings for its recovery have begun and before they have been concluded, and
- after a judgment is given.

In this ideal system, a person who is paid late, regardless of whether proceedings are instigated for recovery of the debt, would be entitled to interest. A defendant who paid a debt in full a day before proceedings were to be issued would be treated in the same way as a person who paid the debt a day after proceedings were issued; both would be liable to pay interest on the debt.

106 This view was advanced in two of the responses we received [6, 21], although in general it cannot be said that there appears to be any significant public or professional support for it. In our preliminary paper (para 91), we ascribed this lack of support to the general spirit of "give and take" which prevails in such matters, although, as was pointed out to us [6], the "give" appears to be all on one side (that of the creditor), while the "take" is all on the other. We appreciate that the justification for our initial assessment requires rather more detailed elaboration than we gave it in the discussion paper.

107 In the Law Commission's view, adopting the approach in para 105

would have an undesirable effect on the legal relations between creditor and debtor before proceedings are issued, while making no difference at all to the ultimate enforcement of the debtor's liability for interest after proceedings have commenced.

108 Taking the latter proposition first, if the debtor simply fails to pay a debt, proceedings will be brought in the court, and interest added on to the amount claimed in the creditor's statement of claim. At that point, the debtor will have to meet the demand for both the debt and interest, regardless of whether it technically fell due before proceedings were issued or not. Judgment will eventually be entered for the full amount, if it is not paid beforehand. At this end of the process, it does not matter whether there is a system of "immediate" or "deferred" entitlement.

109 There is a considerable difference, however, at the beginning of the process, before court proceedings are issued. It concerns the way in which debts are paid, and accounts settled.

110 It is reasonable to assume that a debtor who owes money, but has not agreed to pay any interest, will tender the amount of the debt without any interest component. The creditor generally will then take the money, without referring to any claim for interest. Nothing will be said about whether this is paid in full settlement. The consequence of this, under the present law (where the right to interest under s 87 of the Judicature Act 1908 is linked to obtaining judgment), is that the payment extinguishes the debt.

111 This situation would be changed significantly under a system of immediate entitlement. Payment of the principal would not extinguish the debt because the interest would remain outstanding. The apparent consensus at the time of payment would not be effective in law to bar the creditor's claim to interest. The parties' silence would probably not be sufficient to establish an undertaking on the creditor's part not to claim interest (*HBF Dalgety Ltd v Morton* [1987] 1 NZLR 411). In any event, the payment of part of the debt would not, in these circumstances, constitute consideration for forgiving the remainder.

112 The Law Commission considers that it would be unwise to introduce such a law, as part of a proposal which has been debated as one to improve the present law governing the interest in court proceedings. In the example given above, the law should remain as it is, allowing full settlement to be effected on payment of the principal of the debt.

113 The immediate entitlement approach might, of course, be modified by providing that entitlement to interest would not arise until interest was specifically demanded by the creditor. However, the Law Com-

mission does not consider that creditors should be allowed to change the underlying situation simply by demanding interest as part of the settlement (as they could under a system of immediate entitlement). As there is, at present, no general understanding that interest is payable in such circumstances, and no demand to create such a rule, the law is best left as it is.

### *Deferred entitlement*

114 The Law Commission proposes instead a system of “deferred entitlement”, that is to say, the right to claim interest arises only when the creditor issues proceedings (though the amount is then calculated by reference back to the date of entitlement). This preserves the current rights of the parties prior to the issue of proceedings. It also provides an incentive to the debtor to settle claims without forcing the creditor to resort to court proceedings. Moreover (like the award of costs), it provides some additional benefit to the plaintiff who has to institute proceedings for recovery, the cost of which is never fully recovered from a defendant.

115 The system of deferred entitlement, then, is to be preferred because it is closer to present understandings in relation to payment of claims before proceedings have been issued, it encourages early payment of debts, and it does not imply that a claimant has a substantive legal right to interest under the common law (though in practice, once proceedings have been issued, the grounds on which interest will be denied will be very limited indeed).

### **Should interest be an integral part of a judgment debt?**

116 Under the Law Commission’s proposals, once proceedings have been commenced, the plaintiff will have a clear claim to interest, irrespective of whether judgment is in fact entered. Any settlement or payment in satisfaction will, therefore, have to take that additional liability into account (though, if the amount payable is genuinely in dispute, the plaintiff can waive the claim to interest as part of a compromise arrangement). Once judgment is entered, that part of the judgment debt which is interest, and that which is principal, will be indistinguishable. As far as the plaintiff and the defendant are concerned, there will be no point in an exercise which (for example, on a payment of part of the debt) is designed to show a reduction in the “principal” of the debt, as distinct from payment on account of the interest accruing due. There may be consequences when it comes to taxing the accrued interest, but that is a



matter for the plaintiff and the Commissioner of Inland Revenue to determine (see paras 174–186).

117 In practice, it is difficult to see any significant legal consequences of this change in the law, as regards the collection and enforcement of the debt. Where the question becomes important, however, is in the area of insolvency. As one respondent [1] correctly points out, it is presently thought to be unclear whether post-judgment interest is an integral part of a judgment debt. So, where bankruptcy proceedings based on non-payment of a judgment debt have been brought against a judgment debtor, payment of the principal without interest can in practice bring the bankruptcy proceedings to an end.

118 The Law Commission proposes it be made clear that, as between debtor and creditor, interest accruing after judgment is an integral part of the judgment debt. But, although interest should be an integral part of the judgment, the fact that part of a judgment relates to interest does have some bearing on how the judgment should be enforced. This will be discussed in chapter 6.

## CONCLUSION

119 When compared with the present law, the Law Commission's proposals are simple and direct, and will effectively compensate the general run of unpaid plaintiffs for losses caused by late payment. While some of the features of the proposals appear novel, in our view they are realistic and in accordance with expectations in the contemporary commercial environment.

## 4

# How Interest Should be Calculated

120 The Law Commission proposes a system of awarding interest which is designed to compensate a plaintiff in a fair and realistic way. The most effective method is to adopt an interest rate which fluctuates according to current financial indicators, and which compounds over time. It is now necessary to look at this method of calculation in more detail. In particular, the following questions need to be asked:

- On which indicator interest rate should the statutory rate be based?
- How often should interest be compounded?
- In what form should the results of these calculations be made known to the public?
- What account should be taken of the impact of taxation?

Each of these questions will be dealt with in turn.

### THE APPROPRIATE INDICATOR RATE

121 Two points should be made first. One is that the system the Law Commission proposes will work only if a single interest rate is adopted as the rate which will automatically be applied in every case. Any other form of calculation would be too complex. The parties and court registrars would have to look at the particular circumstances of each case, or else would have to categorise each plaintiff or defendant (it is not clear which) according to some predetermined personal criteria (for example, as a potential lender or borrower). That is expensive and uncertain, for only marginal gain. The Law Commission accepts that there can only be one rate. It follows that it must also accept that the compensation offered by that rate will not exactly correspond to the actual gain or loss. Some defendants will pay more than they gained,

and more than their plaintiff suffered, as a result of the delay. Some will pay less. But that is not unjust because the costs of making any more precise calculation would outweigh whatever plaintiffs and defendants could gain as a result.

122 The other point is that no indicator rate will ever perfectly correlate to the true cost of delay in payment even to the average plaintiff. It will always be arguable that some factor is important to the market when it sets an indicator rate which is irrelevant for our purposes. No degree of skill in selecting or adjusting a rate will determine a “perfect” result. There is a range of rates of interest which are reasonably serviceable for our purposes. The task is to select from these a rate which, in the public mind, is likely to be generally acceptable. It must not be clearly inferior to one of the others, and if, by reason of later movements in the economy, it should become so, it should be possible to change it.

123 With these reservations in mind, we propose to consider, first, what to look for in a rate, and secondly, what are the relevant rates and how they match our proposed criteria.

### **How to choose an appropriate rate**

124 What then should one look for in such a rate? The following criteria are helpful. The rate should be

- regularly published and easily ascertainable,
- reasonably stable,
- balanced between a standard borrowing rate and a standard lending rate,
- based on a term which corresponds roughly to the average period that money which is sued for is likely to be outstanding, and
- free from irrelevant risk factors.

Each is considered briefly below.

#### *Regularly published*

125 A familiar rate is more likely to be accepted by the public because people know where it comes from. The more knowledgeable will appreciate why it goes up or down, as the case may be. There is no need for lobbying to change the rate. Litigants and potential litigants can also, if need be, calculate interest for themselves. They can

understand in advance how their liabilities will be affected, in relation to any claim which is likely to be unsettled for a substantial period of time.

### *Reasonably stable*

126 Every interest rate is susceptible to a number of influences, some economic, and some the consequence of market reaction to political action. Short-term loan interest rates are particularly likely to respond rapidly to political events, Reserve Bank of New Zealand monetary policy, government fiscal policy, and the perceived need for administrative controls or other means to implement those policies. Longer term interest rates reflect especially the market's assessment of money supply and demand in the future, expectations about the rate of inflation, and the government's performance generally. But all of these events will contribute in some way to every interest rate. Short-term interest rates are sometimes higher than long-term interest rates, sometimes lower, depending upon the general mix of factors operating in the economy at the time.

127 A rate which does not fluctuate unduly, or which does not react in an unbalanced way to one or two particular economic factors only, is preferable to one which does. A rate which fluctuates too much invites invidious comparisons among defendants who have incurred liabilities over similar but not exactly parallel periods. A rate which is unduly affected by one factor will not be seen to reflect the true cost of money. (See the graphs in app D for a comparison of the stability of the various possible indicator rates.)

### *Balanced as between borrowing and lending rates*

128 There is no distinction between a borrowing rate and a lending rate. For every borrower there must be a lender, and each must agree on the same rate as regards their own particular loan. In practice, however, there can be significant differences in interest rates offered by lending and borrowing institutions.

129 The Law Commission has looked for a rate which is (if a borrowing rate) conservative, or (if a lending rate) on the high side for a cautious investment. In our preliminary paper (NZLC PP17 para 112), we tentatively concluded that a conservative borrowing rate was preferable. Our reason for doing this was that we thought most plaintiffs would need to borrow (or forgo paying off borrowed money) during the

time their claim remained outstanding. We also thought that it was important to give an incentive to the defendant (who would also most likely be a borrower) to pay outstanding claims.

130 Though a good proportion of the submissions we received favoured this approach, further thought has caused us to revise it. The underlying assumption we made is perhaps open to the charge that it is more intuitive than factual. Our secondary policy of encouraging repayment is not altogether consistent with our fundamental stance, which tries to hold a balance between plaintiffs and defendants, without wishing to encourage or discourage any particular form of conduct. As it has turned out, the conservative borrowing rates of the last year or so have been criticised for being higher than is necessary or desirable. We now have no fixed preference for a borrowing as opposed to a lending rate, but believe the indicator rate should be somewhere between the two.

*The term of the loan corresponds with the period for which the money is outstanding*

131 We envisage that most seriously contested cases over substantial money claims will take at least two years from the date the debt was incurred, to the date when final judgment is given. Where there is no serious contest, the time taken to reach resolution may depend upon the time defendants take to resolve their financial position. Many cases will settle sooner. However, it would probably be true to say that people contemplating serious litigation about money are likely to be looking two years ahead for a result, perhaps longer.

132 Given that the period during which the plaintiff will not be able to recover the money is likely to be a substantial one, it is reasonable to choose a rate which applies to debts which are outstanding for a similar length of time. At least the rate will be seen to reflect the inconvenience factor in being kept out of one's money for that period. Moreover, the longer period of the loan will tend to give the rate somewhat more stability, another desirable feature.

*Excludes irrelevant risk factors*

133 Loan interest rates are generally calculated having regard to three major risk factors:

- The risk of *default* (that is to say, the debtor cannot pay, and there is no property from which to recover the debt, so the capital is lost).

- The risk of capital loss, through *loss of value of money* (that is to say, interest rates rise, so that capital tied to lower interest rates will lose its value).
- The risk of capital loss through *changes in the overseas rates of exchange* (that is to say, the New Zealand dollar is devalued and the nominal capital has reduced purchasing power).

134 The second and third of these risks would appear clearly relevant where the defendant delays paying money. With the money, the plaintiffs could take steps to avoid these risks, or lend the money out at rates which would compensate for those risks. It does not seem to the Law Commission that an indicator rate should be excluded because it is substantially influenced by such risks. These influences affect all rates of interest.

135 The Law Commission has more difficulty with the first of these risk factors. Intuitively, there would appear to be something wrong in a court decision which assessed, as a loss which should be borne by the defendant, the risk of the defendant becoming insolvent. There can often be a very real risk of insolvency, until such time as the defendant does eventually pay, but the Law Commission knows of no case where an award reflecting such a risk has been made.

136 The reason for this may well prove on analysis to be that, immediately the cause of action arises, the risk of the defendant's inability to pay has already passed to the plaintiff. No amount of delay in payment alters that risk, or justifies the court in making the defendant pay more because of it. Still less does it justify the court ordering those defendants who eventually turn out to be solvent to pay extra money by way of compensation to their plaintiffs. The people who have suffered are not those plaintiffs, but the plaintiffs who sued the insolvent defendants and got nothing. There seems to be no discernible policy reason for attempting, in such a clumsy way, to pass the loss from the whole group of plaintiffs to the whole group of solvent and insolvent defendants.

137 The Law Commission would not wish to state categorically that risk of default is totally irrelevant. But we nevertheless prefer to put to one side those indicator interest rates (for example, rates on unsecured loans, or commercial bank borrowing rates) which can reflect a substantial loading for the risk of personal default.

### **The appropriate rate**

138 Having explored the criteria for selecting a rate, we now consider the available indicator rates. In our preliminary paper (NZLC PP17

paras 107–109) we referred to rates which could be used as possible indicators. These are:

- the call rate—4.75 percent
- the two-year government stock yield rate—5.51 percent
- the 90-day bank bill rate—5.25 percent
- the first mortgage housing rate—7.8 percent
- the average base lending rate—9.5 percent.

(These rates are December 1993 rates published by the Reserve Bank of New Zealand in the *Weekly Statistical Release* of 20 January 1994.) To this list, we would add two others suggested in submissions. One is the fringe benefit tax rate (which we consider alongside the first mortgage housing rate). The other is the treasury bill rate (which we consider alongside the government stock yield rate).

139 Any one of these rates would appear, by most of the criteria we have listed, to be reasonably acceptable. The general movement in the rates is outlined in appendix D, from which the reader may assess whether they have proved over time to be on the high or the low side of the true cost of money and how volatile they have been. Within this group of relatively conservative borrowing or lending rates, however, one or two stand out as better choices.

#### *The call rate*

140 The call rate is the average rate offered by banks for money invested with them on call. (It is not to be confused with the call money market rate shown in the graphs in app D.) It was supported by only one of our respondents [26] as an appropriate indicator rate for interest on damages. The investor receiving the call rate has the assurance that the principal can be obtained from the bank at any time. So the rate is based on loan conditions quite different from those which confront the plaintiff seeking to recover an unpaid debt. If the investor were content to leave the money with the bank for a longer period (say two years), a higher rate of interest would be obtained. Further, the call rate would appear to be somewhat less stable than other bank rates, and is, the Law Commission believes, liable to be affected by seasonal and short-term political considerations. It is therefore less satisfactory than other rates considered in this section.

141 There is a further consideration, which applies to bank rates generally, but especially to the call rate. This is the general administration

and convenience factor associated with the terms that banks offer. A bank maintains a very extensive local network, which allows it to receive money from individual investing customers, on terms convenient to them. It then lends quite different sums of money to borrowing customers, on terms which meet borrower needs. It absorbs the risk of debtor default, and the administrative cost of servicing, borrowing and lending requirements. All of this has a cost, which (along with profit margins on the resources necessary to provide the network) will normally be passed on to the investing or borrowing customer, or both. This administrative and convenience factor is not applicable to the situation between plaintiff and defendant in a pending court case. The "true cost" of money to them will be more than the bank's call rate, and less than its loan rate.

### *The government stock yield rate*

142 Government stock is a security denominated in New Zealand dollars, offered by the government on the security of its ability to tax its citizens to repay the money. Conventionally, it is a secure investment whose default risk factor is rated at zero. The term of this investment varies, from 90-day rates (the treasury bill) through to 10 years. It is initially issued in very large blocks, through an active market. It is then distributed by brokers through an equally active secondary market to members of the public who want smaller blocks of stock. (We note that the New Zealand Stock Exchange has recently begun publishing quoted market yields for some government stock; it is hoped that this will be expanded in time to include the two-year government stock yield.)

143 The government stock yield rates are established by trading in the market. In recent years the government has not offered stock with a fixed interest rate, but rather has invited tenders for these securities, which in effect incorporate the yield that tenderers hope to achieve in the secondary market where they trade the stock. The rates offered in the successful tenders form the basis for the stock yield rate, which is calculated back so as to produce an annual interest rate. The rates are published regularly by the Reserve Bank of New Zealand.

144 Ninety-day treasury bills are issued by either weekly or daily tenders. The treasury bill rate is established somewhat differently from the government stock yield rate. By convention, these bills are tendered and taken at five base points (0.05 percent) below the rate established on the markets for bank commercial bills (the bank bill rate, discussed below). The government decides how much of the money tendered it will take up on that basis.



145 The Law Commission believes that these rates come much closer than does the call rate, or any bank lending rate, to establishing a fair indicator of the cost of delay in paying money, as viewed by a plaintiff, for these reasons:

- stock is bid for in large amounts, thus excluding the convenience factor for small customers, and reducing to a minimum the factor of administrative cost;
- the rate is established by a strong market in which a number of willing buyers deal with a willing seller, which is free to defer selling if in its opinion the rate is too high; and
- government securities are exposed to relevant risk factors—capital loss through fall in capital value, or in exchange rates—but only in a very limited way to default risk (see paras 133–137).

146 Government stock rates also have the advantage of being offered over a range of different periods, thus giving a wider choice in possible interest rates. It would, of course, be possible to average out all government stock rates, but there seems little advantage in that when one can choose the particular period which most closely corresponds with the average term which plaintiffs are likely to be kept out of their money.

147 At first sight, it may appear that the 90-day treasury bill rate is the best choice among the government rates, since it is not as affected as the others might be by speculation about future trends in the New Zealand economy. Being a short-term rate, it suits the method of calculating interest we contemplate in our proposals, that is, a regular recalculation of the tables of multipliers which apply the rate according to current economic conditions. However, a number of considerations have inclined the Law Commission against that choice. First, it is not in itself a regular published rate (though it can readily be deduced from other published rates). Secondly, the Law Commission believes it is more likely to be affected by short-term political and economic factors than are the longer term rates. Thirdly, it does not reflect a rate based on an investment for the period from when a debt or damages (or some other money claim) is incurred to the date a judgment debt is paid in full.

148 The Law Commission, therefore, prefers a rate which reflects a longer term investment than 90 days. The logical term, for the reasons mentioned in paras 131–132, would be two years. Still longer term rates could perhaps be used instead, and they should tend to be even more stable. But they also contain a greater element of speculation about how

the New Zealand economy is likely to perform over a much longer (and politically imponderable) period. All in all, much can be said in favour of the two-year government stock yield rate.

#### *The bank bill rate*

149 Bank bills, or commercial bills, are a form of short-term borrowing (with terms of 30, 60 and 90 days), used by companies and banks, which are traded on the wholesale market. The lender receives a certificate redeemable at some later date for a greater value than the sum actually loaned to the company or bank. Bills are "accepted" by a registered bank which has the primary responsibility to pay the face value of the bill. If they are issued by a bank they will have a registered bank as both drawer and acceptor, thereby providing a lower risk of default than might be expected if issued by some companies.

150 This bank bill rate has the advantage of being set by a market dominated by large buyers and sellers. However, it shares with the treasury bill rate the disadvantage of being a relatively short-term rate. In addition, there would appear to be a significant increase in the rate due to the "risk of default" since in all other respects, except for the identity of the borrower, the conditions of the bill are the same as for treasury bills yet the rate of interest is higher. By and large, we do not think that this rate is to be preferred to the two-year government stock yield rate.

#### *The first mortgage housing rate*

151 In our preliminary paper, we proposed the use of the first mortgage housing rate as the indicator rate of interest for our proposed scheme. The first mortgage housing rate is the weighted average of the interest rates currently offered by the 10 major providers of housing finance (that is, the ANZ Banking Group (NZ) Ltd, ASB Bank Ltd, Bank of New Zealand Ltd, Countrywide Banking Corporation Ltd, National Australia Bank (NZ) Ltd, the National Bank of NZ Ltd, Post Bank Ltd, Trust Bank NZ Ltd, United Banking Group and Westpac Banking Corporation). Weighting is in accordance with each institution's total outstanding lending for housing purposes. Returns are made monthly to the Reserve Bank of New Zealand. The Reserve Bank publishes the rate regularly each month.

152 The rate meets many of the criteria we have suggested for an indicator rate. It is stable, familiar, regularly published and easily

ascertainable. Though an institutional borrowing rate, it is conservative and is very much towards the lower end of the spectrum, as far as the risk of default is concerned. Not many of our respondents had difficulty with it. But it was pointed out, by way of objection [29], that it was likely to be higher than the rate which safely invested money is likely to earn, and therefore could in an appreciable number of cases over-compensate the plaintiff. Further, the institutional housing lender usually provides money for a long term, upon conditions which are designed to meet the special needs of home owners and substantial borrowers. The arrangements between plaintiff and defendant are very different.

153 An additional objection which could perhaps be made is that the rate may not reflect the outcome of a perfect market. The lenders are a limited group of institutional providers, who may well see benefit in following the principles of "price leadership" rather than full competition. The borrowers are for the most part consumers who may have limited time to test competitiveness, and who indeed have been encouraged to establish a "history" with the particular institution from whom they seek a loan. This is not to say that competitive forces do not play a role but, rather, that market forces have been less well-honed here recently than they have been elsewhere.

154 Nevertheless, the first mortgage housing rate is a convenient rate, and our previous research has shown that it can be translated readily into the prescribed rate required for our proposed scheme. On balance, however, we are inclined at this time to recommend the two-year government stock yield rate as preferable, for the various reasons which have been canvassed.

155 One respondent [23] suggested that, if we were to select a mortgage rate, using the fringe benefit tax rate might be preferable. This is the rate used to calculate the taxable benefit conferred by an employer who grants loans at concessionary interest rates to its employees. It is, in fact, based on the first mortgage housing rate. Rather than reflecting that rate as it fluctuates monthly, it is reviewed and adjusted in the middle of each quarter. It would certainly be a useful option if (as some respondents suggested) interest rates under our scheme were also reviewed every three or six months. However, for reasons discussed later in this chapter, the Law Commission still prefers monthly reviews of interest. No great advantage would result from using the fringe benefit tax rate in preference to the first mortgage housing rate, and in fact the calculation would be much less convenient.

### *The average base lending rate*

156 The average base lending rate is the rate from which the major trading banks calculate their rates of interest. The Law Commission is advised by the New Zealand Bankers Association that the base lending rate is established having regard to

- the cost of funds (weighted according to their origin in bank deposits and market borrowing),
- the margin for prudential liquidity reserve,
- operating and delivery costs associated with loan assets,
- overall balance sheet structure and profitability objectives, and
- market competition factors.

It is then applied as a starting point for determining the appropriate rate of interest in individual cases. The rate is increased having regard to such factors as the extent of the security (if any) offered to the bank.

157 If one wanted an institutional lending rate as the indicator, one must choose between this rate and the first mortgage housing rate. Of the two, in the Law Commission's view, the latter is clearly preferable. The base lending rate has a bias towards commercial borrowers, and takes into account their special needs as clients of the bank. Nor is it the most conservative borrowing rate that a plaintiff or defendant might achieve, so that choosing this rate increases the possibilities for over-compensation. While, therefore, it is realistic—and if anything may be too low—for commercial disputes, it is too high to govern the entire range of cases which may come before the courts.

### *Conclusion*

158 It seems to the Law Commission that the choice between interest rates turns on a single, major question. Should the indicator interest rate be chosen so as to reflect, as closely as possible, the cost of delay in the payment of money? Or should it be made to reflect the most conservative rate under which a financially responsible plaintiff could have borrowed money from an established lending institution? If the first is the correct approach, then the Law Commission considers that the best rate to choose is the two-year government stock yield rate. If the second is correct, then the Law Commission's preference would be for the first mortgage housing rate.

159 For reasons which have already been discussed (para 130), the Law Commission prefers the first approach. It therefore recommends that the indicator rate be the two-year government stock yield rate.

#### HOW OFTEN SHOULD INTEREST COMPOUND?

160 The question of how frequently interest should compound is related to the frequency with which the rate chosen is recalculated, although that is not the only factor. Because our proposed method of calculation (described in paras 167–173; see also app E) does not allow interest for fractional periods, a short period between each compounding period leads to greater accuracy in assessing the appropriate interest for the relevant period, given that debts can be incurred and paid on any day between the regular dates of calculation (the “rest” days). In our preliminary paper we suggested that interest should compound at monthly rests. The first mortgage housing rate which we initially favoured as the indicator rate is also published on a monthly basis, which leads to ease of calculation. The same is true of the two-year government stock yield rate.

161 Four respondents [12, 22, 23 and 27] have made the point (in respect of the first mortgage housing rate) that even if a case can be made for compounding, it need not follow that interest be compounded at monthly rests. It was argued that the first mortgage housing rate, though published monthly, is an annual rate and does not of itself justify monthly compounding. Rather, they said, the rate should compound annually or at most six-monthly.

162 The same argument could be made in respect of the two-year government stock yield rate, which is the rate the Law Commission now recommends as the indicator rate. But it is very important to discern just what is meant by a “rate”. Not all indicator rates are initially expressed as true annual interest rates. Certainly, the two-year government stock yield rate is not. While it is expressed as an annual rate, it is actually convertible half-yearly. What this means is that interest is paid out or compounds each half-year, and the effective half-yearly rate is simply the annual rate divided by two. No account is taken of the fact that the notional mid-year interest payment could be reinvested for the remainder of the year to produce an additional return. That additional return should be reflected in any statement of the “true” annual interest rate. For example, 7.27 percent per annum payable half-yearly yields a true interest rate of 7.40 percent.

163 The Law Commission's proposals take into account this difference between the expressed interest rate and the "true" interest rate. (The detailed calculations are shown in app E, and only the principles are discussed here.) The expressed interest rate is first converted into an effective monthly rate. For example, a half-yearly convertible rate of 7.27 percent does not translate into a monthly rate of 0.6058 percent (being 7.27 percent divided by 12). Rather, using formula 1 in appendix E, it translates into an effective interest rate of 0.5969 percent per month. That reflects a true annual interest rate of 7.40 percent. If the government stock yield rate remains constant for one year, the amount owing will be augmented each month by 0.5969 percent of the current total (see formula 2 in app E). Using that formula, a debt of \$100 due in January is made to increase to \$107.40 by January of the following year.

164 Now the main objection to compounding is the instinctive fear that it will lead to defendants having to pay more than they should. But the Law Commission's proposals do not have that effect. They depend upon calculations based upon the true annual rate. The true annual rate is converted into an effective monthly rate for use in the table of multipliers. As in the example above, the interest rate applied to each monthly calculation should yield the same true annual interest rate whether interest compounds monthly, quarterly, half-yearly or annually. In that example, if the defendant pays nothing off the \$100 debt for a whole year the defendant will be charged interest monthly on the compounding sum. But the total interest bill at the end of the year is no greater than if the true annual interest rate had been charged on the original principal, in one lump sum, at that point. Under these proposals, then, it is financially a matter of indifference to the defendant who pays nothing during the whole year, whether interest compounds monthly or annually.

165 Once that concern is disposed of, the Law Commission believes that monthly compounding is clearly preferable to compounding annually or semi-annually. There are two advantages to compounding on a monthly rate. First, the indicator rates are published by the Reserve Bank of New Zealand, at monthly intervals. Secondly, because our proposed method of calculation (described in paras 167—173; see also app E) does not allow interest for fractional periods, the shorter the period between rests, the greater the accuracy in assessing interest for the relevant period. Using a monthly rate still involves some imprecision, as will be seen. But any distortions which would result are less than where rest or calculation days are farther apart.

166 Also, as one of our respondents pointed out [18], most individuals and businesses pay outgoings (such as rent, mortgage payments, utility charges, loan repayments, and credit card payments) at monthly intervals. Monthly payment reflects the reality for both those deprived of their money and those who take the benefits of not paying a debt when it is due.

#### HOW SHOULD THE CALCULATIONS BE PUBLISHED?

167 If the scheme is to be workable, it is important that the calculations to which we have referred be put into accessible form, and made available as official tables for the calculation of the interest component of moneys claimed in court proceedings. Enquiries have been made of the Government Actuary, who has expressed his willingness to undertake the task, and indeed has given us considerable assistance in formulating the present proposals. Once the tables have been prepared, they will be notified to court staff, and will be published in the *New Zealand Gazette*. The Law Commission hopes that they will be of sufficient general commercial interest to be published periodically in the financial pages of the main daily newspapers (as one of our respondents [12] has suggested), and in financial journals.

168 It is essential that the result of these calculations be published in a form which makes them easy to use. In addressing this problem, we have adopted the general approach recommended by the British Columbia Law Reform Commission in its *Report on the Court Order Interest Act* (LRC 90 1987). This involves a table of multipliers. The method of calculation used to prepare those tables is shown in appendix E. The tables assume that the debt will be repaid in the month for which the table is issued. All that the user needs to know to make the calculation is the amount of the debt and the starting date. To find the total amount payable, the user goes back to the year and month when the plaintiff became entitled to the money (or to the year and month of quantification). The user finds the “multiplier” for that month. Multiplying the amount of the debt by the multiplier produces the total sum that the defendant is obliged to pay.

169 The calculation can, of course, be more complicated where parts of the money claimed are due at different times. Interest on each part will need to be calculated separately. Alternatively, it may be that the defendant has already paid part of the debt. It will be necessary first to make an overall calculation for the total sum payable. Then the user deducts credits for the period or periods which run after those partial payments were made. These credits can be worked out from the same table. Users will find the tables unfamiliar at first, but the Law Commission

suggests that as they get to know them better, users will find the calculations simpler to make than if the interest payable under the present law is worked out with a calculator. Examples are given in the draft Act, schedule 2 (app A).

170 In one respect, the calculations will not be ideally precise. The multiplier is accurate month by month, but will not produce the equivalent of a precise daily rate of interest. If, for example, a debt became due on the 3rd of the month, and was paid on the 3rd of some later month, the multiplier will calculate interest precisely to the day. But it will come up with the same figure for a debt due on the 3rd, and paid on the 28th; or a debt due on the 28th, and paid on the 3rd. Compared with what would happen if interest were calculated daily, the defendant underpays in the first example, and overpays in the second.

171 The Law Commission takes the view that accuracy month by month is sufficient for present purposes, and is reluctant to introduce complexity for the sake of a few days' interest one way or the other. Relatively speaking, the amount will be small, since it may be assumed that the money will have been outstanding for a considerable period before proceedings are issued. Furthermore, the monthly multiplier can hardly disadvantage the debtor, who can generally choose the day of the month on which the money will be paid.

172 To achieve complete accuracy, it would be necessary to produce multiplier tables more frequently, perhaps even daily. We do not believe that the extra expense is worth the gain. Alternatively, the parties could be invited to calculate additional daily interest for themselves, based on the rates for the first month and the last month. The precision of such a calculation is debatable. All of this assumes, in any event, that the parties can identify precisely the day when the money became due. In the absence of a judicial determination, there may be argument about that. On balance, it seems preferable to leave the monthly multiplier as it stands.

173 A further possible source of difficulty is the delay between the end of the month, and the time the next month's figures are published. We are assured that this will be very small, no more than a few days. We do not doubt that, in those cases where payments are made during that period, satisfactory arrangements can be made between the parties. The defendant can either agree to pay an additional sum later, or else put the estimated additional sum into the hands of a stakeholder to await publication of the next month's table.



## IMPACT OF TAXATION

174 Finally, the Law Commission considers what the impact of taxation will be on our proposed scheme, and whether any adjustment needs be made in the scheme, or in the laws of taxation, to accommodate taxation difficulties. These matters have been discussed with the Inland Revenue Department, and advice has also been sought from a barrister specialising in taxation.

175 It will be recalled that, under our proposed scheme, a defendant will not incur liability for interest until the plaintiff brings legal proceedings. At that point, interest becomes an integral part of the debt. But, in fact, it is unlikely that interest will be paid until the amount of the debt is settled and payment made in full. The plaintiff will then be paid the original sum due, multiplied by the “multiplier”, so as to produce a larger amount which includes interest. The law seems clear that the plaintiff will have to treat the additional amount as taxable income.

176 The Law Commission takes the view that, if the interest is taxable in the plaintiff’s hands, there is no occasion to reduce the amount of interest on account of taxation: see *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176, 192–193. Here, the case is clear: the plaintiff is being compensated for loss of benefits (presumably taxable) that would have been gained if the money had been paid on the due date. The plaintiff may be worse off, since, if the money had been paid then, the plaintiff might have been able to employ it in some non-taxable, but nevertheless gainful, manner. Therefore, there is no reason to reduce the multiplier in order to take into account the general effect of taxation.

177 The matter cannot be left there, however, because there are some unresolved problems about the time at which the interest is taxable. These arise both under the general taxation law, and under the accrual regime which now applies to certain taxpayers who receive income from “financial arrangements” as defined by s 64B of the Income Tax Act 1976.

178 As far as the general liability for tax is concerned, it would appear that (but for the accrual regime) pre-judgment interest on a money claim would be taxable in the year it is received. However, financial institutions (and possibly taxpayers who make interest-bearing loans) would treat interest as having been derived when it accrued. Where there is doubt about whether the money will be paid, those taxpayers might in due course write off an unpaid debt, and claim a refund for

any tax which may have been paid in respect of unpaid interest. At least this is our understanding of the position.

179 Different principles apply under the statutory accrual regime which now applies to many taxpayers, irrespective of the business they conduct. The interest component of a financial arrangement must be spread over the entire term of the loan, irrespective of when the debt is paid or becomes payable. The term “financial arrangement” in s 64B includes any “debt”. It is not altogether clear what types of liability are characterised as “debts” under the accrual regime. It may be arguable that there is no “debt” if the amount of the claim is indeterminate and has still to be settled by the court.

180 The Law Commission is advised, nevertheless, that at least in some, and possibly in all, cases to which our proposals apply, interest will constitute a “debt”. If so, the interest will have to be spread over the income years during which the debt existed: s 64C(2). The plaintiff may therefore have to pay income tax on money which has not yet been received, there being quite a strong risk it will never be received. That could happen either because the claim is ultimately rejected by the court, or because the defendant proves insolvent. But if the plaintiff does succeed, then the Commissioner of Inland Revenue could claim that the interest should have been declared in the earlier income years. Of course, that would require quite a complex calculation, using multipliers which may have changed considerably by the time the debt is paid. That is an accounting matter, which can be worked out with the concurrence of the Commissioner of Inland Revenue, or in accordance with traditional accounting standards.

181 Not all taxpayers are subject to the accrual regime. Some are still permitted to pay tax solely on a “receipts” basis. The main example is the taxpayer who is not a company or a trust, and who has a limited investment (no more than \$600 000 capital, or \$70 000 per annum in interest) in financial arrangements. That person is a “cash basis holder” under s 64D. But the exemption is lost where the amount accrued under those financial arrangements exceeds the amount returned on a “cash receipt” basis by more than a certain amount (currently \$20 000). A single claim, if it is large (let us say, \$350 000), could take a private individual outside this exemption. In the case of ordinary loans, such a level of outstanding loan moneys would not affect a lender since the debtor would normally pay some part of the interest and this would appear in the lender’s tax return for that year as a “cash receipt”. In the case of a disputed claim, it would be unlikely that anything at all would be paid while the matter awaited resolution.

182 The consequences would appear to be as follows. Some taxpayers will be able to defer any tax liability on pre-judgment interest until the date of the award, and in the meantime interest payable under the statute will compound without any deduction for taxation. When paid, these taxpayers will get the benefit of interest not only on the capital, but upon the whole of the interest which accrued in earlier months. This gives them some advantage, as compared with what would have happened had they received the money from the defendant and invested it at compound interest. Then, resident withholding tax would have been deducted from the interest component as it fell due, at the rate of 24 percent, and at the end of each year the full tax payable would have to be accounted for. This point was made by one of our respondents [25].

183 The point is well taken although, over (let us say) a two-year period, with relatively low current interest rates, the difference might not be very great. Over a single year, the difference is less than 0.05 percent of total capital. For the second year (assuming tax is unpaid) that figure would rise to about 0.25 percent. The uncertainties which already apply in selecting an appropriate rate could easily eclipse that difference, so even for those taxpayers there is little point in making any adjustment to the interest rate to take into account so small a percentage.

184 Other taxpayers, however, to whom the accrual regime applies, would appear to be worse placed. They will be obliged to pay tax throughout the period of pending proceedings with no certainty that the money will ever be repaid. Further, they will lose the opportunity to compound the debt without deduction of tax during the period before judgment.

185 Both groups of taxpayers, however, will ultimately pay tax at the appropriate rate on all interest payments received. If there is any unfairness, it is found in the slightly increased return given to the first group of taxpayers, and the possibility that the second group will lose interest on tax overpaid to the Inland Revenue Department. It would seem difficult, if not impossible, to discriminate between these two classes of taxpayers at the time interest is calculated. We could not support any adjustment to the interest rate on that basis.

186 Although in substance the results may not appear to be unduly unfair, there is a considerable amount of uncertainty surrounding the application of the accrual rules to interest on money claims. Further, where the accrual rules do apply, it cannot be easy to assess what amount to declare, especially where both the outcome of the dispute,

and the amount which will actually be recovered, are unclear. Whatever the position may be in theory, we doubt whether these claims are in fact being brought within the accrual regime under the present law. If our recommendations are accepted, that could make it somewhat more likely that an accrual regime might apply. Yet the difficulties we have mentioned will remain, and will become more widespread. It would be simpler and more desirable for the legislature to provide that all amounts payable under our proposed legislation are to be treated as being received by cash basis holders. However, it is not our role in this report to recommend substantial changes to the taxation laws; that is a matter for the Commissioner of Inland Revenue to consider.

## CONCLUSION

187 The Law Commission considers that any practical difficulties there may be in implementing its proposals can be reduced to a minimum. The above proposals, once they are accepted and understood, should quickly become part of the ordinary technique of court officials and lawyers. Admittedly, it is not possible to provide a scheme which will exactly compensate every plaintiff for the particular loss they have suffered through delay. Nor can it be said with certainty that any established rate of interest chosen as an indicator for our scheme will in fact accurately compensate the “average” plaintiff, or reflect with precision the “true cost” of a delay in payment. But, in all of these respects, our proposals will at least make a significant improvement to the current law by improving its accuracy, and avoiding the need for government interventions by regulation every time the prevailing interest rates change. Any attempt to reach greater precision may achieve nothing, while compromising the broader purposes which lie behind our proposals.

## 5

# Limits and Discretionary Powers

188 The basic scheme proposed by the Law Commission is intended to provide an appropriate remedy in the great run of cases coming before the courts. Nevertheless, there are some instances where the scheme should not apply. There are others where a limited discretion is called for. Particular problems have to be dealt with. More generally, a discretion is needed to deal with unforeseen cases. This chapter deals with these issues. It concludes with a brief comment on the transitional processes which will be needed when the Law Commission's proposals become law. These matters have all been dealt with in detail in the preliminary paper (NZLC PP17 paras 143–176), and this chapter of the report follows the recommendations that were foreshadowed there. In general, the Law Commission believes that considerable caution should be exercised in allowing any dispensations from the general scheme, since they could well result in the plaintiff being under-compensated for a clear loss, upon arbitrary grounds.

### WHERE THE SCHEME SHOULD NOT APPLY

189 The Law Commission recommends that *pre-judgment* interest should not be added to judgments

- where interest is already part of the judgment debt and additional interest will result in double compensation, and
- where the judgment does not serve to compensate a plaintiff, and further, that neither *pre-judgment* nor *post-judgment* interest should be added
- where some contractual or statutory provision applies instead.

To award interest in these cases will be inconsistent with the general principle of compensation. The three exceptions are elaborated on in this section.

### **Where interest will result in double compensation**

190 An award of pre-judgment interest may result in double compensation to the plaintiff if added to an award of damages which represents un-discounted future losses or where the damages already compensate for the loss suffered. One illustration, which has already been discussed, arises when calculating future losses (paras 65–68).

191 Another situation where compensation has already been given is where pre-judgment interest has already been awarded under the general law. Our proposals for interest do not preclude the alternative of awarding interest according to the common law or equity up to the time of quantification. The continued existence of the common law means that there may be situations where an award of damages already includes an element for lost opportunity. An example of this would be the equitable remedy of “account of profits” where a defendant is stripped of profits made from a plaintiff’s money. Where an award of damages already compensates a plaintiff for lost opportunity in this way, interest should not accrue on that part of the award, for that would compensate a plaintiff twice for the same loss.

192 No specific provision is made for these matters in the draft legislation, since the Law Commission believes they will be adequately dealt with by the court when fixing the date of quantification of the debt. It will be necessary for the judge, when making an award of damages, to signify clearly any part of the award which already compensates the plaintiff for loss of use and value of money and to assign a date of quantification to it.

### **Where the judgment does not serve to compensate the plaintiff**

193 Not all awards by a court are intended to compensate plaintiffs for loss of use and value of money. For example, awards of costs or exemplary damages are based on principles other than compensation. Costs are awards which are made to a party to vindicate legal rights. Exemplary damages are awarded to punish defendants and to deter similar conduct in the future. They do not necessarily relate to any loss the plaintiff has suffered. Therefore, pre-judgment interest as compensation for loss of use and value of money on these awards

would not generally be appropriate, and our draft legislation provides accordingly.

194 That does not imply, however, that the principles discussed in this report have no application to these cases. While the scheme we propose for pre-judgment interest could not be invoked, the courts in making an award (which is discretionary) may want to take into account the length of time which has elapsed between the original event, or the incurring of the costs, and the date of judgment. Furthermore, once costs or exemplary damages have been awarded, interest will accrue after judgment in the same way as on any other unpaid judgment debt.

### **Where an agreement or another statute applies**

195 As we said in our preliminary paper, the entitlement to interest should not supersede contractual arrangements made between the plaintiff and defendant about interest. Nor should our proposal take priority over other statutory schemes for interest.

#### *Contractual agreements*

196 Our scheme for interest does not affect contracts made between parties which provide for a default rate of interest in the event of the late payment of money under the contract. Where the contractual rate is higher than the statutory rate (which one would expect to be the case), to award interest at the lower statutory rate will deprive the plaintiff of what is properly owed to him or her under the contract. Where the parties have agreed on an interest rate to be paid, the Law Commission recommends that effect should be given to their agreement. Further, as mentioned in para 31, where a contract stipulates a rate of interest, this rate should apply both before and after judgment is entered. Whether or not the contractual rate compounds would depend on the contract. Of course, any contract requiring the payment of interest on unpaid amounts will be subject to review by the court if it is alleged to be “unconscionable” under the Credit Contracts Act 1981 s 10.

#### *Other statutory regimes*

197 Where a statute provides for the award of interest on terms different from those we propose, that statute should take priority. The maxim of statutory interpretation, that what is general does not derogate from what is special, should apply. Another statute that specifically applies its own interest regime should operate as an exception to the mandatory application of this Act. But not all such statutory provisions

are mandatory. Often they are discretionary as to interest, as in s 87 of the Judicature Act 1908 itself, and there is no good reason for a different special regime. We take it that, if the scheme the Law Commission proposes is enacted, the courts, in exercising that discretion, would want to have regard to the methods of calculating interest we have proposed. This will provide certainty and consistency of approach and ensure, in so far as the specific regime is intended to compensate a plaintiff, that it does in fact do so.

198 The Law Commission provided, in its preliminary paper, a list of New Zealand enactments which provide for awards of interest (NZLC PP17 app C). Others should be added to the list, notably the Income Tax Act 1976 and the Employment Contracts Act 1991. All the provisions known to the Law Commission are listed in appendix F of this report.

199 Dealing with these provisions, the amendments we propose to the Life Insurance Act 1908 and the Employment Contracts Act 1991 are discussed in the next part of this chapter. In chapter 6 we recommend changes to the District Courts Act 1947. The remainder can be categorised as provisions

- applying the present general rules about interest to particular situations,
- enacting separate rules about interest on particular moneys,
- providing for interest on money withheld or wrongly paid to or by the Crown,
- providing for penalties for the late payment of taxes and charges,
- providing for interest on compensation moneys, and
- relating to deposits and advances.

We look at each category in turn.

(i) *Provisions applying the general scheme to particular situations*

200 At present, there are a number of provisions which incorporate the same rules about interest as those which apply to debts and damages in the courts. Of this group of provisions, we have already discussed the Arbitration Act 1908 and s 20 of the Disputes Tribunals Act 1988 (see paras 37 and 53). Of the others, s 19 of the Crown Proceedings Act 1950 and s 4 of the Reciprocal Enforcement of Judgments Act 1934 do not



require amendment. They are both drafted to allow for interest to be awarded under the law in force for the time being which would include our proposals when they are enacted. Others (ss 41A and 67B of the Life Insurance Act 1908, s 72 of the Accident Rehabilitation and Compensation Insurance Act 1992, and s 19 of the Mutual Insurance Act 1955) which link interest to s 87 of the Judicature Act 1908 should be amended to replace references to s 87 with references to the Interest on Money Claims Act.

*(ii) Provisions enacting separate rules about interest on particular moneys*

201 This group of provisions includes statutory enactments of some common law rules and provisions for interest in particular situations where debts or damages are owing. The general approach of these sections is that, where a person advances money or is liable for the payment of money to another person, the court has power to award interest. Alternatively, an interest rate is specified and the court has power to vary that. In some of these cases, interest is payable irrespective of whether proceedings are commenced. Sometimes the rate of interest is discretionary (for example, s 33 of the Matrimonial Property Act 1976), while in others (for example, s 39 of the Administration Act 1969) once the discretion to award interest has been exercised, interest is to be awarded at a specified rate. In one case too, the discretion is subject to the stipulated maximum rate of interest which can be awarded (s 179 of the Land Transfer Act 1952).

202 These provisions do not all serve the same purpose. Some are intended to compensate persons who are not paid, on time, money to which they are legally entitled (for example, s 39 of the Administration Act 1969). In these cases, the Law Commission recommends that interest should be awarded as if it were awarded under the Interest on Money Claims Act. The other provisions provide a discretion for the particular purposes of the legislation. For example, in s 33 of the Matrimonial Property Act 1976, an award of interest allows the court to protect the value of property during the course of proceedings and is therefore a matter for consideration when quantifying an award. Similarly, in s 27 of the Unit Trusts Act 1960, there is a power to award damages and pre-judgment interest; if appropriate, a director or manager of a unit trust can be held responsible for the actions of a company which has misapplied trust moneys. The Law Commission considers that, in these cases, the discretion to award interest should be retained. Moreover, where there is another statute which applies a

discretionary regime for interest, the Interest on Money Claims Act should apply only where that other regime has not been invoked.

203 There are, in addition, a number of savings provisions (a typical example being s 55 of the Sale of Goods Act 1908) which expressly state that nothing in the Act shall affect the right to recover interest where by law it may be recoverable. The Law Commission recommends no change to these provisions. They will operate (as before) to give effect to the law for the time being governing interest on money claims.

*(iii) Provisions for interest on money withheld or wrongly paid to or by the Crown*

204 These provisions parallel those discussed in (ii) but apply to the Crown. They are straightforward provisions under which payment is to be made to the government, or by the government. As fiscal provisions, however, they are not within the scope of our review which addresses interest as compensation. Accordingly, we do not recommend amendments to them at this time.

205 Full details of the enactments discussed in para 204 are set out in appendix F.

*(iv) Provisions for penalties for the late payment of taxes and charges*

206 These sections are punitive in nature (or, at least, more punitive than compensatory), providing penalties for the late payment of taxes or charges levied by the government. Being punitive, they should not be affected by our proposals.

*(v) Provisions for interest on compensation moneys*

207 These provisions provide for the taking of land as if it were acquired under the Public Works Act 1981. Section 94 of the Public Works Act 1981 gives the Land Valuation Tribunal a discretion to award interest for the period before the actual payment of compensation for the compulsory acquisition of land. In the past, the courts have, for the most part, worked out a satisfactory way of calculating the appropriate award of interest in terms of loss of value and loss of money (see *Drower v Minister of Works* [1984] 1 NZLR 26 discussed in NZLC PP17 paras 69–70; but see *Chamberlain v Ministry of Lands* (unreported, HC Whangarei, 20 December 1990, AP 17/89, 19/89 Chilwell J and I W Lyall Esq)). In principle, however, the

Law Commission considers that, once the award of compensation is quantified, it should come within the general legal regime under which courts award interest as compensation for the late payment of money. Accordingly, the Law Commission recommends that, where interest is awarded under s 94 of the Public Works Act 1981 (or under any other Act as if it were awarded under the Public Works Act 1981), it should be awarded on the same terms and at the same rate as interest awarded under our scheme.

*(vi) Provisions for interest on deposits and advances made pursuant to statute*

208 These provisions relate to dealings by the Crown or by statutory authorities in relation to money they lend or receive as advances as a result of voluntary transactions. These provisions generally leave the rate of interest to be determined by a Minister or official. As they relate to loans to or by the borrowing or lending authority, they are analogous to contractual provisions (such as bank loans which provide for interest at “the rates and at the times and in the manner required from time to time”). They should remain in their present form.

#### A LIMITED DISCRETION IN SPECIAL CASES?

209 Besides those cases where the scheme should not apply, our preliminary paper (NZLC PP17) mentioned that there may be particular instances where the courts should have a limited discretion to depart from the statutory scheme for interest. In addition to the ones specifically referred to in our preliminary paper, respondents have directed our attention to other possible cases. We have already addressed issues of quantification and leases and renewals (see paras 76–84), concluding that no specific provision is required. We discuss the remaining cases here. These are

- judgments assessed in a foreign currency,
- obligations which are covered by indemnity insurance,
- life policies, and
- employment contracts.

#### **Judgments given in a foreign currency**

210 Where a judgment is given in a foreign currency, to award interest at the prescribed rate under our scheme may not always be appropriate. Because the exchange rate between New Zealand and the other country

fluctuates, to award interest at the prescribed rate may result in either over-compensation or under-compensation. Accordingly, where the parties can show that another rate is more appropriate in the circumstances, the courts should have the discretion to award interest at another rate.

211 This, of course, does not affect a plaintiff's general right to recover damages or interest under a contract. Where the proper law of the contract is that of another country, the contract will apply to the extent that it controls the interest rate. The discretion would apply only where proceedings are issued in New Zealand but where the currency referred to in the contract is foreign and no provision for an interest rate is made. Such instances are likely to be rare.

### **Indemnity insurance where proceedings are delayed**

212 One respondent [15] said that, where plaintiffs delay bringing proceedings, professional defendants are disadvantaged by the effects of inflation because their professional indemnity insurance is not inflation-adjusted.

213 The Law Commission does not see this consideration as one which is relevant to the reform of the law related to awards of interest. The fact that defendants are not able to obtain full protection from the effects of a loss they caused is not of itself a justification for penalising plaintiffs by reducing a compensatory award. Given that professional indemnity insurance in New Zealand is customarily "claims-based" and renewed annually, most professionals will have the opportunity to review the impact of the proposed scheme on their potential liability having regard to the implications of increases in interest rates.

### **Life insurance policies**

214 Life insurance contracts mature at the date specified in the insurance contract. Payment will not be made, however, until the owner of the policy (usually the personal representative of the life assured) makes a claim under the policy. In its response [23] to the Law Commission's preliminary paper, the association representing insurers accepted that interest should run as soon as a valid claim is lodged, regardless of any further time taken by the insurer to check the claim and carry out further investigations. This is apparently present practice, and is understood to be a consequence of the application of existing law on pre-judgment interest to life insurance payments.

215 The association did question, however, whether the effect of the Law Commission's proposals would be to allow interest to be claimed

as from the date of maturity, irrespective of the date on which the claim was made. It was suggested that current premiums are calculated on the basis of present practice, which (presumably) has a significant actuarial effect on the dollar value of life insurers' commitments. Any period of delay in payment, which the life insurers can regularly count on, is a benefit to them which can be passed on to customers as a reduction in premiums. A change in the law would disturb this settled arrangement retrospectively.

216 Under the present law, an outer limit is placed on benefits accruing to insurers in this way. Section 41A of the Life Insurance Act 1908 (inserted in 1985) states that, where money becomes payable under a life insurance policy, the insurer shall pay (in addition to moneys payable under the policy) interest in respect of a period which begins to run 91 days after death, and ends with the payment of the money. The association expressed concern at the suggestion made in our paper, that this provision might be repealed and the interest period taken back to the date of the insured's death.

217 That is not our intention. The provisions of s 41A are necessary and desirable, in that they override any term in a policy which provides, or has the effect of ensuring, that interest on the amount payable does not begin to run until the claim is in fact lodged with the insurer. Such a clause cannot be relied on in respect of interest running after the 90-day period has elapsed. The section also differs from the proposed general law of interest in that it imposes a duty to pay the interest irrespective of whether the owner of the policy institutes proceedings for it. We consider that s 41A is useful and should be retained. Having said that, however, the Law Commission recommends that the rate of interest in s 41A(3) of the Life Insurance Act 1908 be amended to incorporate the method of calculating interest under our proposed scheme. Where interest is awarded under s 41A, the rate should, as far as possible, reflect the principle of compensation.

218 Beyond this, however, our proposals could change existing practice where the sum insured is expressed to fall due at the date of maturity of the policy, that is to say, the date of the insured's death, rather than the date the claim is lodged. If proceedings were brought on such a policy, it would appear that, although the validity of the claim is not *ascertained* at the date of death, the owner of the policy will become entitled to the sum insured on that date, so interest would automatically run. The position is analogous to the case of upset rental clauses, discussed in paras 76–84.

219 The Law Commission is reluctant to recommend any special exception for insurance claims of this kind, since an anomaly would be created for one special sub-class of contract. It is by no means clear whether a significant number of policies are involved. As regards existing policies, we have already proposed a transitional provision for contracts entered into before the proposed reform becomes law, allowing the court to exercise its discretion in respect of the pre-judgment period. As regards future insurance policies, the matter will be dealt with by insurers themselves, who can, if necessary, make appropriate changes to the wording of their policies. It would then be clear to those taking out insurance that no interest is payable until a valid claim is lodged.

### **Employment contracts**

220 Section 49 of the Employment Contracts Act 1991 confers on the Employment Court and Employment Tribunal a discretion to award interest on arrears of wages or money payable under an employment contract recovered in the court or tribunal pursuant to s 48 of the Act. The discretion is the same as that in s 87 of the Judicature Act 1908 and prescribes the same rate of interest.

221 In addition, s 40 of the Employment Contracts Act 1991 provides various remedies for settling personal grievances, including the reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.

222 In the case of s 48, there is nothing about an award of arrears of wages which should render the entitlement to interest different from any other case. If the money is successfully recovered, interest should be payable from the date the employee was entitled to it.

223 The reimbursement of a sum equal to the maximum of wages or other money lost as a result of a personal grievance under s 40(1)(a), however, differs from arrears of wages under s 48. Unlike arrears of wages, the reimbursement is one head of damages which the tribunal or court can award in its "jurisdiction of equity and good conscience" in settlement of the grievance. Other heads include sums representing compensation for humiliation or loss of dignity and the loss of a future benefit. The sum awarded under s 40 is generally quantified at the date of the determination by the tribunal or court. As a result, unless the sum is assessed at an earlier date, no interest should be awarded on this sum for the pre-judgment period.

224 In our draft Act (app A), the Law Commission has assumed that awards under s 40 are quantified at the date of judgment unless the contrary is stated by the tribunal or court. As one respondent [19] has argued:

[g]iven the specialised nature of the Employment Tribunal and the Court ... the discretion available to both is entirely adequate to ensure that, in particular cases, justice is done. An obligation to award interest, regardless of individual fact situations, would make what is intended to be a system with some flexibility rather less flexible and result, on occasions, in outcomes rather less than just.

The Law Commission agrees that a mandatory award of interest under s 40 would be inappropriate.

#### A LIMITED DISCRETION IN OTHER UNFORESEEN CASES

225 While the Law Commission's proposals state the general principles applicable, there may be rare instances, beyond the ones we have already mentioned, in which the parties will have grounds to argue that the scheme should not apply or its application to the facts of the particular case should be modified. Because it is impossible to foresee all possible future situations, a limited general discretion should be provided permitting the courts to depart from the scheme to address difficulties as they arise. However, in order that our general proposals achieve their desired result, and in order to meet the need for certainty and efficiency, any discretion ought to be limited. In our preliminary paper (NZLC PP17 paras 159–164) we indicated the view that discretion should be exercised only in exceptional circumstances.

226 Three respondents [4, 11 and 22] have expressed concern about the threshold set by the word *exceptional*. Two have said that the threshold is too high and that, instead, the discretion should be able to be exercised in *special* circumstances. Another expressed the hope that "*exceptional cases* would not be circumscribed by the general application of the legislation to result in undue inflexibility". In our preliminary paper, we did not draw any clear distinction between *exceptional* and *special* circumstances. We do, however, accept that the latter test is somewhat less strict and we are content to adopt it. This will ensure that the threshold is not too high and that the scheme is not unduly inflexible. We do not think this discretion compromises the general scheme. The need to invoke it will have to be clearly demonstrated by the party who alleges that the prescribed interest rate should not apply.

227 One submission [11] went further, suggesting that we follow the Ontario provision as outlined in our preliminary paper (NZLC PP17 para 160). The Ontario model provides that the court, when choosing to depart from the scheme, must “have regard to the changes in market interest rates, the circumstances of the case, the conduct of the proceedings or any other relevant consideration”. Such a discretion would be much wider than the one the Law Commission has in mind. Nor do we think that it is necessary to specifically state the kind of special circumstances which would give rise to the discretion. The description *special circumstances* is sufficient to indicate that this is a limited discretion while still allowing for the possibility (however small) of unforeseen circumstances arising.

### TRANSITIONAL PROVISIONS

228 In our preliminary paper (NZLC PP17 para 176) we said that the scheme should apply only in proceedings instituted after it commences. We maintain our position and now recommend that it should not apply to causes of action already the subject of litigation. It would prove unsettling to arrangements already made for the conduct of that litigation to introduce new procedural rules. Further, as already mentioned (paras 80–81), the court should retain a general discretion (equivalent to that found in the present s 87 of the Judicature Act 1908) in respect of interest on money payable under any contract entered into before the proposed legislation is enacted.



## 6

# How the Right to Interest Should be Enforced

229 The Law Commission is aware that special policy considerations apply in the area of the enforcement of debts. As regards interest on money claims, there is an enforcement problem related to at least one class of people. The problem can arise either in bankruptcy or in the enforcement of judgment debts.

230 There are some defendants who are unable, as opposed to unwilling, to pay their debts, often through no fault of their own. For example, they may have been made redundant, their benefits may have been cut, their employment contracts may have been re-negotiated or they may simply be suffering as a result of current economic conditions. An award of interest makes it more difficult for honest but insolvent defendants to repay their debts.

231 In practice, it is often very difficult to distinguish between innocent and unfortunate defendants and defendants whose financial difficulties are the result of mismanagement or deliberate failure to meet their financial commitments. The law of debt enforcement does not, in general, attempt to discriminate between debtors in this way, though the debtor's lack of good faith will obviously be a matter which may be taken into account when particular decisions, dependent in part on the discretion of the court, have to be taken.

### BANKRUPTCY AND LIQUIDATION

#### **Interest for the period before adjudication**

232 The most comprehensive way a creditor may enforce a debt is by making a debtor bankrupt and proving for the debt in the administration of the bankruptcy. The provisions of s 87 of the Judicature Act 1908

have no application to proofs of debt in bankruptcy, or in the liquidation of a company. As a consequence, not all creditors can add interest to the amounts for which they prove. If there is a contract for interest, or if it can be proved as damages, then a proof of debt can include a claim for interest; so too if the creditor has obtained judgment prior to bankruptcy. Other creditors can only prove for the principal debt. The new Companies Act 1993 maintains this distinction in s 311, which allows interest up to the commencement of a liquidation only where a contract provides for that, or where judgment has been entered.

233 The Law Commission has not undertaken any extensive study of the law of insolvency and accepts that any views it may offer will be provisional. However, the distinction just described does not seem rational. All unpaid creditors have equally been kept out of their money by the debtor's default, and there is no legitimate ground to distinguish between them. The practical effect is that, where two debts are of equal amount and have been outstanding for a similar length of time, one creditor may prove for more than the other, and thereby take a greater share of the limited funds available to meet the debts as a whole.

234 The Law Commission's provisional view is that a sound system of debt enforcement would regard the proof of debt in bankruptcy as the equivalent of taking proceedings in court. This would allow whatever regime applies to pre-judgment interest in court proceedings to extend to proofs of debt in bankruptcy or company liquidation. The official assignee would, in the first instance, make the decision a court would have made. If there were any dispute, it would be referred on to the court in the manner already provided in the Insolvency Act 1967. Interest would run until the date of adjudication.

235 No hardship would be occasioned to bankrupt debtors by a change in the law which made interest for non-payment of debts available for periods prior to adjudication. There are no personal consequences for an insolvent debtor in having an increased deficit (except to the extent that a court might take the higher figure into account in determining, under s 45 of the Insolvency Act 1967, what contribution the bankrupt should make from subsequent personal earnings). It would make the proof of debt more truly reflective of the cost that delay in payment causes the creditor. It would also result in a fairer process for calculating the amounts used when determining the proportions in which creditors will share the losses occasioned by the debtor's financial failure.

236 Having formed that provisional view, the Law Commission makes no recommendation, at this time, that the Insolvency Act 1967 and the

new Companies Act 1993 be amended so as to confer a general right to interest on all creditors who lodge a proof of debt for the period before adjudication. The Law Commission recognises that any such amendments should be made within the context of a comprehensive review of the law of insolvency and that the function of the law of insolvency is not limited to the satisfaction of creditors' claims. We understand that the Department of Justice intends to undertake such a review in the near future.

### **Interest for the period after adjudication**

237 For the period after the defendant is adjudged bankrupt, different considerations apply. The general rule is that all debts (whether or not they include a figure for interest) are frozen at that point and no interest can be claimed for any subsequent period: Insolvency Act 1967 s 94. Assuming that the funds are insufficient to meet the proved debts, there would be no point in allowing a claim for interest, and, further, it would be unfair if some proving creditors (for example, contract creditors) could claim interest but others could not. If, however, there is a surplus after all general unsecured debts have been paid, then interest may be allowed proportionally on each of the creditors' claims. The rate currently allowed is that applied to judgment debts in the High Court: s 104(1)(h). It has already been pointed out that this rate does not adequately reflect the true cost to the creditor of the delay in payment. If our reform is adopted, that anomaly at least will be removed. The official assignee will then follow the new system when calculating interest.

### **ENFORCEMENT OF JUDGMENT DEBTS**

238 The other common way in which debts are enforced is by obtaining a judgment in the High Court or the District Court, and then using the various enforcement measures provided in the statutory provisions which apply to the two courts respectively.

239 The process (unlike bankruptcy) is not, in general, designed to prevent hardship to the debtor, or to bring about a fair division of the debtor's funds among the general body of creditors. The basic rule is "first come, first served", so that the first creditor to issue enforcement proceedings against a particular group of assets can use them to satisfy the entire debt, together with interest. Considerations of hardship to the debtor, or fairness to other creditors, are by and large irrelevant (with an important exception to which we will presently refer). It is certainly not the Law Commission's intention, in this report, to recommend

major changes in that system of debt enforcement, even though it may be thought to deserve reconsideration. We need to proceed with some caution in adapting our proposals to ensure fairness to debtors.

240 The debt collection system is not as harsh on consumer debtors as it might appear. First, the practical chances of successfully enforcing a large debt against an ordinary consumer debtor in financial difficulties are very small. Most of such a debtor's significant assets will be mortgaged or (if they consist of modest personal effects or small amounts of cash) protected as being required for the debtor's everyday use. Usually, the only realistic target for enforcement is the debtor's income, which may only be attached by court order, made after consideration of the debtor's financial circumstances. Secondly, if either the debtor or the other creditors consider they will be harshly or unfairly treated by any intended enforcement procedure, they can apply for bankruptcy, which will bring the procedure to an end. So, where a larger debt (perhaps in the vicinity of \$3000 or upwards) is involved, there is little point in making any special provision, and any attempt to do so would probably bring about even more arbitrary law than exists at present.

241 The position is not quite the same for a smaller debt, because here there is a very real chance of successful enforcement through the system of attachment of earnings, assuming the debtor has a regular source of income which is not fully committed to meeting family needs. The needs of the debtor, and claims of other creditors, are considered important in the enforcement processes.

242 Under the present law, judgment will usually be entered without including pre-judgment interest under s 87 (because judgments for small debts are often entered by default). It may or may not include a claim for contractual interest, if that has been agreed. The debtor is then called before the registrar, who can make an order for regular payments out of future income.

243 The practice with regard to interest, however, is not invariable. At most, the debtor will be made to pay interest up to the date that the attachment order has been sought (since, under s 65A(5) of the District Courts Act 1947, no more can be claimed than the amount specified when the process was issued). In the case of debts of \$3000 or less, post-judgment interest is not in any event available in the District Court: s 65A(2) (see paras 54–56). Subject to these limitations, the matter lies in the registrar's discretion.

244 Parenthetically, it could be suggested that the general rule against post-judgment interest on judgments of \$3000 or less is arbitrary, and

to a certain extent that is the case. However, if the debtor is solvent it may be expected that the judgment will be swiftly paid or enforced. If the debtor is insolvent then the interest component may well be removed, in any event, by the registrar before the judgment can be enforced. As already observed (paras 51, 53), there is little value in putting the creditor and registry staff to the trouble of constantly calculating what can only be a relatively small amount, given the fact that it will be unlikely to be recovered. Further, it seems unreasonable in those cases for a single creditor who has instituted attachment proceedings first, to insist on enforcing mounting arrears of interest, when other creditors have not been paid any part of their principal debt.

245 We therefore doubt whether the difficulties presently encountered in practice will be much increased by the enactment of a general right to claim interest at a realistic figure. This is particularly so in view of the fact that, for debts of less than \$3000, the award of pre-judgment interest will remain discretionary (see para 53). Two respondent organisations [5, 9], closely involved with consumer debtors, indicated that most debts of that kind would be outside the scope of the proposed legislation. We detected little in the responses we received which indicated that implementation of our proposals would result in harsh treatment for consumer debtors; nor does it appear that there is any significant desire or need for further consultation with representatives of consumers, small businesses and community groups.

246 Looking at the matter from the point of view of creditors amongst themselves, it is not easy to justify the continuation of the present system. It puts ordinary creditors in a much worse position, as regards pre-judgment interest, than creditors who have stipulated for payment of interest. If the policy of the law is avoidance of hardship amongst debtors, enforcement of interest on debts will cause just as much hardship to debtors if the duty to pay interest arises from a contractual stipulation as if it arises from the general law. If hardship is the criterion, it is difficult to see why one should be enforceable but not the other.

247 Any problems of overly harsh enforcement would be much better met, in the Law Commission's view, by a provision which formally recognises the practice to which we have referred, namely, that in making attachment of earnings, it should be within the registrar's discretion to determine whether any interest component should be included at all. That would apply both to interest under our proposals, and interest based on a contractual or other independent right. It could be provided, consequentially, that a creditor who chose to accept the

benefit of such an order (to the extent of any payments of principal under it) would be precluded from entering a further claim to pre-judgment or post-judgment interest if the court so ordered. We propose an amendment to s 84E(1)(c) of the District Courts Act 1947 which would provide specifically for the making of such an order. The court registrars, after examining the debtor, might stay any proceedings for interest on the judgment or that part of it which relates to payment of interest on the original claim.

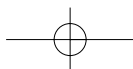
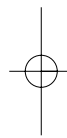
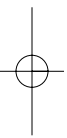
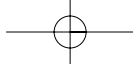
248 The practical effect might then be that creditors who choose to invoke the attachment of earnings procedure could lose the right to interest through execution, as a condition of taking the benefit of the procedure for attachment of earnings. That would protect an innocent debtor from harsh consequences, allowing financial rehabilitation without having to meet the burden of interest on unpaid debts. Apart from that, the prescribed interest rate would automatically apply when entering judgment. It would also apply to the post-judgment period in relation to all judgments except those in the District Court which do not exceed \$3000. This would allow creditors to rank fairly among themselves, when the debtor's limited assets are divided among them.

## 7

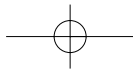
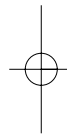
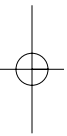
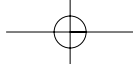
## Recommendations

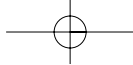
249 The Law Commission recommends that the general legislation dealing with both pre-judgment and post-judgment interest be replaced by a more comprehensive statutory scheme. Under this scheme a person who brings proceedings for a money claim which is lawfully justified will have a virtually automatic right to interest. There will be no distinction between pre-judgment and post-judgment awards of interest. The scheme will extend the award of interest to all proceedings, including judgments by default and summary judgments. It will not, however, affect contractual rights relating to interest. The prescribed rate of interest will, initially at least, be based upon the two-year government stock yield rate published by the Reserve Bank of New Zealand. Interest will fluctuate, and be compounded, on a monthly basis. Awards of interest will be calculated by reference to a table of multipliers to be published on a monthly basis by the Department of Justice.

250 To give effect to these recommendations the Law Commission further recommends the enactment of the draft Interest on Money Claims Act set out in appendix A to this report.









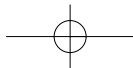
## APPENDIX A

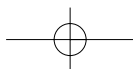
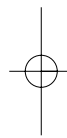
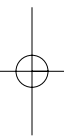
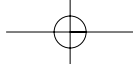
# Draft Interest on Money Claims Act

### *Note about format*

In its report, *The Format of Legislation* (NZLC R27 1993) the Law Commission recommended that, in publishing all New Zealand legislation, a new format should be adopted, involving changes to both typography and design. The purpose is to increase readability, and in that way improve access to the law for those who use it.

The draft Interest on Money Claims Act is reproduced in the format which the Commission recommended.





# INTEREST ON MONEY CLAIMS ACT 199–

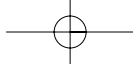
Public Act [ ] of 199–

Royal assent: [ ]

Comes into force: [ ]

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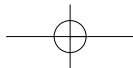
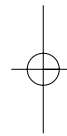
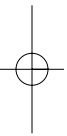
**The Parliament of New Zealand enacts the  
Interest on Money Claims Act 199-**

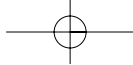
PART 1  
PRELIMINARY

**1 Purpose and principles of Act**

- (1) The purpose of this Act is to provide for the award of interest as compensation for delay in the payment of debts, damages and other money claims in respect of which civil proceedings are commenced.

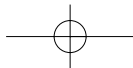
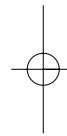
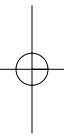
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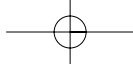




## **Section 1**

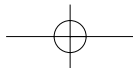
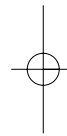
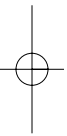
C1 The Act introduces a new system for awarding interest on moneys which are owing and for which court proceedings have been commenced. (See s 1(1).) It replaces s 87 of the Judicature Act 1908, and ss 62B and 65A of the District Courts Act 1947. Under the present law, the award of interest before judgment is a matter for the court's discretion. After judgment, interest is usually awarded as a matter of course. The Act contains provision for the awarding of interest which apply both before and after judgment.





- (2) That purpose is to be achieved by the award of interest in accordance with the following principles:
- (a) interest is to be awarded on all money claims except those expressly excluded by this Act; and
  - (b) interest is to be paid from the date on which the money claim is quantified until the date of payment; and
  - (c) the interest rate determined for this Act and specified in Schedule 1 is to reflect fairly and realistically the cost to a creditor of the delay in payment of a money judgment by a debtor and in particular
    - (i) the rate is to be capable of fluctuating at monthly intervals; and
    - (ii) interest is to be compounded at intervals; and
    - (iii) interest is to be calculated by reference to a table of multipliers; and

Section 1 continues overleaf



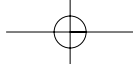
C2 The principles followed in the Act are those stated in s 1(2). They apply unless excluded by the Act itself (see Part 3) or unless some other statute applies. (See s 13.) The award of interest must fairly and realistically compensate the plaintiff (or the defendant who makes a counterclaim) for the cost of the delay in payment of the money which is due. This principle must be translated into clear rules which will enable the amount due to be readily calculated in each case and will avoid disputes about what is realistic compensation.

C3 The Act applies a well-known financial rate—the two-year government stock yield rate. This is used as the indicator of the likely cost to the plaintiff of any delay in payment. The rate is ascertained from month to month. Each month the monthly equivalent of the two-year government stock yield rate is added to the debt or liability.

C4 Interest is charged on the accumulated interest as well as the original debt. This is because debts are often outstanding for a broken period which includes part of a year. Compound interest allows more precise calculations of the amount due than does simple interest. This is essential since very large sums may be involved. But using compound interest will not increase the amount most debtors will have to pay. The monthly interest rate will be adjusted downwards to take into account the effect of monthly calculation of interest. A defendant whose debt is outstanding for a whole year pays no more than one who pays simple interest at the corresponding true annual interest rate.

C5 Contrary to what might have been expected, this method of calculation will in practice be less complicated than the calculation of simple interest under the present law. That is because the Government Actuary will prepare a table of “multipliers” which will be published each month. It will have a multiplier for each month of the preceding six years. In the ordinary case where the liability is met in full in one payment, all that needs to be done is to look in the table and find the multiplier for the date interest began to run. A single multiplication produces the total amount payable. The process is a little more complex where the liability is met by instalments, but again no more calculation is required than under the present law. (See s 8(3).)



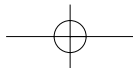
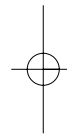
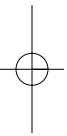


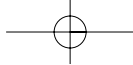
- (d) in special circumstances, a court is to have power to award such interest or compensatory lump sum as the court may direct or to make no award.

Definitions: **court**, **interest rate**, **money judgment**, **table of multipliers**, s 5;  
**monthly** see month, *Acts Interpretation Act 1924* s 4

## 2 Commencement

This Act comes into force on a day to be appointed by the Governor-General by Order in Council.

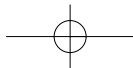
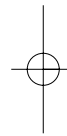
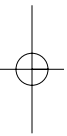


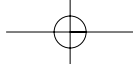


C6 In special circumstances the court has a discretion to award interest at a rate different from the indicator rate and upon different terms from those provided in s 8 and sch 1.

## **Section 2**

C7 The Act comes into force on a day to be appointed. Before the Act comes into force it will be necessary to prepare and publish the first table of multipliers. There is also a need for small changes to the High Court and District Court Rules, which should refer to the new legislation.





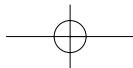
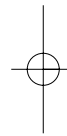
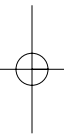
s 3

INTEREST ON MONEY CLAIMS

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**3 Application**

This Act applies to every civil proceeding commenced after this Act comes into force.



### Section 3

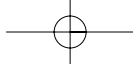
C8 The Act applies only in civil proceedings commenced after it comes into force. Although it will apply to debts incurred before that date, it is not retrospective law. It merely provides a new and improved method of assessing potential liability to compensate for delay. Under the current law the maximum rate of interest payable (which can be reduced by the court) is higher than the indicator rate provided for in the Act at its current levels.

C9 In the case of contractual liability, however, it is accepted that had the parties to the contract known that the award of pre-judgment interest would become mandatory, they might have made different contractual arrangements. To avoid retrospectivity for them, an equivalent to the old discretionary law has been retained in s 15 of the Act. It applies only to contracts entered into before the Act comes into force.

C10 This section and s 6 (which speaks of the functions of “courts”) limit the direct operation of the Act to proceedings within the court system. But it will apply to arbitrators. The Law Commission’s draft Arbitration Act s 10 (NZLC R20), provides that an arbitral tribunal, in deciding disputes, has the same power to give remedies and relief as the High Court. Section 10(1)(b) makes it explicit that that power includes a power to award interest.

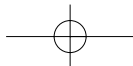
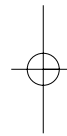
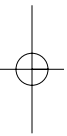
C11 However, where an arbitral tribunal is required to settle a question or matter that is not a dispute (for example, a valuation), the arbitrator will not be able to award interest. This is consistent with our recommendation, in this report, that interest should not be payable if legal proceedings have not been issued, or if there is no outstanding dispute between the parties to an arbitration (see report, para 37).

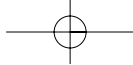
C12 Tribunals are not included as “courts” since their powers to award interest (if any) are dealt with under their own legislation. Where, however, there is a provision in that legislation dealing specifically with interest, it has been amended accordingly. (See sch 3.) The principal examples are the Disputes Tribunals and the Employment Tribunal.



**4 Crown bound**

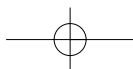
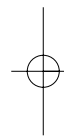
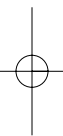
This Act binds the Crown.





#### **Section 4**

C13 Unless there are good reasons to the contrary the Crown should be bound by the same laws as its subjects: *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17(S) 1990 paras 127–175).



## 5 Definitions

In this Act

**initial amount** means the amount specified, in accordance with section 7(3), by the court in a money judgment on which amount interest is awarded for a specified period under section 7, 9, or 10;

**interest**

- (a) in relation to the payment or non-payment of interest under another Act or a contract, includes the payment of any amount, however calculated, as compensation for delay in payment; and
- (b) in relation to a claim for or award of interest under this Act, includes a claim for or award of a lump sum under section 10 or 15;

**interest rate** means the rate of interest which is to be used in preparing the tables of multipliers required to be prepared in accordance with Schedule 1;

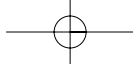
**judgment debt** means the sum of the amounts, if any, which are required to satisfy the liability of a party under a money judgment, together with interest awarded under this Act or any other Act, rule of law or equity, in respect of any period or periods specified in the judgment;

**money judgment** means a judgment or order given or made by a court in a civil proceeding which requires the payment of money or acknowledges the existence of a liability measurable in money and includes a judgment obtained by default or in accordance with a summary judgment procedure;

**pay** in relation to the satisfaction of a party's liability or a judgment debt, includes satisfy that liability or judgment debt in any way other than by the payment of money;

**table of multipliers** means a table of multipliers prepared and published in accordance with clause 1 of Schedule 1.

Definitions: **Act**, *Acts Interpretation Act 1924* s 4



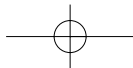
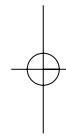
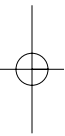
## Section 5

C14 The definitions which are central to the operation of the Act are set out in s 5:

**initial amount** This is the amount, which must be specified by the court in its judgment, to which the multiplier (see para C5) is applied in order to determine the interest payable. (See s 7.)

**judgment debt** This is the total amount of principal and interest payable.

**money judgment** This defines the remedy or relief the plaintiff must have been given if the Act is to apply. Not covered are: proceedings for fines; orders for specific remedies (eg, orders for possession of land, or the return of chattels); and declarations in respect of money falling due at some future time. (For further exclusions, see Part 3.)





PART 2  
INTEREST TO BE AWARDED

**6 Period for mandatory award of interest**

- (1) When giving a money judgment, a court must award interest under this Act for the period that
- (a) begins on the date on which the cause of action arose, or if the amount on which interest is to be awarded was not quantified at that date, on such later date as the court specifies in the judgment as the date at which that amount is to be quantified, and
  - (b) ends on the date on which the judgment debt is paid in full, unless this Act expressly provides that interest cannot be awarded under this Act or the court, in accordance with this Act, specifies in the judgment any one or more shorter periods as the period or periods for which interest is to be awarded under this Act.

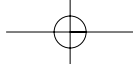
Section 6 continues overleaf

C15 Part 2 sets out the basic rules for ascertaining what interest is payable under the Act. It defines the period for which interest is payable (s 6), the sums on which interest is calculated (s 7) and the method of calculation (s 8).

## Section 6

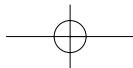
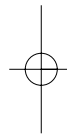
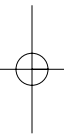
C16 The right to interest arises when proceedings are brought. Neither the current law, nor the Act, apply where proceedings are not issued, or where they are issued but not pursued to judgment. The Act cannot operate unless the court enters judgment. In fact, the parties will know that an award of interest is available (and mandatory) if the matter goes to judgment, and this may well have an effect on the amount for which they are prepared to settle a disputed money claim.

C17 Section 6(1) sets out the start and end dates for the award of interest which can run from a date earlier than when proceedings are brought. Interest is normally calculated from the date the money is first owing. However, there may be cases where the court quantifies (ie, settles the amount of) the liability as at some other date. For example, in an action for damages for failure to carry out a sale and purchase agreement, the vendor may be required to pay damages based on the value of the house some months after the date on which settlement was due and the vendor was first in default. The date of valuation may be chosen by the court as the date of quantification. In such cases, the relevant period begins from the date of quantification and not the date the liability first arose.



- (2) Notwithstanding subsection (1), interest under this Act does not accrue after the date of payment on an amount paid
- (a) after the proceeding has been commenced but before the date of judgment, in or towards satisfying a party's liability; or
  - (b) after the date of judgment, towards satisfying a judgment debt.

Definitions: **court, judgment debt, money judgment**, s 5



C18 Interest stops running only when the final payment is made and the debt (with interest) is paid in full. However, under s 6(2) interest ceases to be payable on any part of the debt which has been paid or satisfied, as from the month of payment.

C19 The court must ensure that throughout the period specified in s 6, interest is awarded in accordance with the provisions of the Act. The Act generally displaces any possible award of interest at common law or in equity (on which, see report, paras 13–15). However, a court may in appropriate circumstances still apply common law or equitable principles governing the award of interest. It may be in order to defer the date of quantification so as to delay the commencement of the statutory period. Or the court may find, in circumstances which would have called for special treatment at common law or in equity, “special circumstances” which give it the power to exercise its discretion under s 10 of the Act.

C20 The court’s duty and power to award interest during the relevant period is modified in those cases referred to in Part 3. The following sections need to be taken into account: s 11 (penalties), s 12 (costs, exemplary damages and judgments for an amount not exceeding \$3000), s 13 (where another statute applies), s 14 (where a contract applies), and s 15 (contracts entered into before the Act comes into force, and pre-judgment interest on claims not exceeding \$3000).

C21 The court’s duty and power to award interest depends further upon proper notice of the claim for interest being included in the statement of claim or counterclaim. (See s 16.)

**7 Mandatory award of interest**

- (1) In every money judgment a court must award interest in accordance with this section as compensation for delay in the payment of money except where this Act expressly provides otherwise.

Section 7 continues overleaf

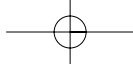
## Section 7

C22 Section 7(1) provides that, whenever giving judgment for a money claim, the court must award interest in accordance with the section. The award of interest is part of the money judgment. The calculation of the amount of interest to be awarded involves using the table of multipliers. The only exceptions are those provided for in the Act itself.

C23 The major exceptions to s 7 are set out in Part 3 and have already been listed. (See para C20.) In Part 2, it is further provided that the court has a discretion in awarding interest where the judgment sum is expressed in a foreign currency (s 9), or where there are special circumstances which justify departing from the method of calculating interest laid down in ss 7, 8 or 9. (See s 10.)

C24 The court, when it gives judgment, will approach the standard award of interest under s 7 in this way. First, it must look at the entire period specified in s 6 (from the date of the cause of action, or the date of quantification, to payment in full). Any period or periods which are excepted from the operation of the Act are then taken out. The court must then award interest under Part 2 for the remaining period or periods. Normally, that will be awarded under s 7, which provides for a standard method of calculation using the table of multipliers.

C25 Most frequently, the award under s 7 will be for a single period beginning from the date of quantification. But the scheme for the award of interest is capable of wider variation than that; in theory its operation could be quite complicated. For example, suppose the plaintiff elects first to be awarded interest at the rate provided for in a contract (s 14), and then for a subsequent period to be awarded the statutory interest rate (s 7). The plaintiff subsequently invokes the contract rate for a later period, then finally returns to the statute once more for the period remaining. This would be unusual but there is nothing in s 7 which confines a plaintiff to a single continuous period of statutory interest.



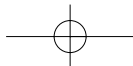
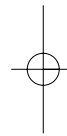
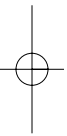
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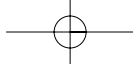
INTEREST ON MONEY CLAIMS

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- (2) When the court awards interest under this section for a period, the court must specify the amount on which interest is awarded for that period. Such an amount is referred to in this Act as an initial amount.

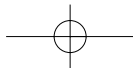
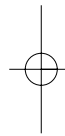
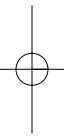
Section 7 continues overleaf





C26 The remaining provisions deal with a number of points which have not so far been covered, and are essential machinery if the scheme for the award of interest is to work effectively and comprehensively.

C27 Section 7(2) is an important procedural requirement which the courts must observe if the statutory scheme is to work. Within the period provided for in s 6 (see paras C17–C18) there may be several periods during which interest will run under s 7 (see para C25). For every period in respect of which it is to award interest under s 7, the court must specify an “initial amount”, which is the sum due when the period starts. In the simplest cases the initial amount will be a debt, or the amount as quantified by the court. The relevant multiplier will be applied to that amount.





- (3) The initial amount in respect of a period must include any amount paid in or towards satisfying a party's liability after a proceeding for a money claim is commenced but before a money judgment is given if that period begins at a date earlier than the date of that payment.
- (4) The court must award interest under this section although the judgment requires no other payment to satisfy the liability of a party.
- (5) The initial amount in respect of a period must include accrued interest on any amount on which interest is awarded under this or any other section or under any other Act or a contract for any earlier period specified in the judgment.

Definitions: **court, initial amount, money judgment**, s 5

C28 Section 7(3) deals with the situation where part of the debt has been paid after the beginning of a period for which interest is to be calculated under s 7. It refers in particular to the case where the instalment is paid after the proceedings are commenced but before judgment is given. The court must specify, as an initial amount, the whole sum for which proceedings were properly brought. However, under s 6(2) interest ceases to be payable on payments made during the intervening period. The mechanics for working this out are set out in s 8(3) and s 8(6). (See paras C33, C37.)

C29 Section 7(4) makes further provision for payments before judgment, dealing with the situation where the entire amount due (except for interest) is paid before judgment is given. The court must still award interest which continues to run until all outstanding interest is paid.

C30 Section 7(5) deals with a different aspect of the statutory award of interest having to do with the calculation of the initial amount. Normally the initial amount will be the amount originally owed. But sometimes there will be a period when interest has been calculated in some other way. (See para C25.) This could happen, for example, if interest has earlier been awarded under another statute (s 13), or in accordance with the party's obligations under a contract (s 14). At the beginning of any period for which interest is to be calculated under s 7, interest will have already accrued on the original debt. The accrued interest must be added to the initial amount and the statutory interest rate applied to the total sum.

**8 How to calculate interest awarded under section 7**

- (1) Interest awarded under section 7 for a period is, except where this Act expressly provides otherwise, to be calculated at the rate of interest specified in Schedule 1 by reference to the relevant table of multipliers prepared in accordance with that schedule. The methods of calculation are described in subsections (2) to (5) and illustrated in the examples set out in Schedule 2.
- (2) If a party pays a judgment debt in full in one payment, the amount payable is to be calculated by referring to the table of multipliers in force on the date of payment. The initial amount (as specified by the court under section 7(3)) is multiplied by the multiplier in that table which relates to the month from which interest is to be paid. The resulting sum is the total amount, including interest, required to satisfy the judgment debt.
- (3) If a party has paid an instalment or instalments of a judgment debt, the balance required to pay the judgment debt in full on a particular date is to be calculated by
  - (a) calculating, in accordance with subsection (2), the amount which would have been required to satisfy the judgment debt in full on that date if no instalment had been paid, and
  - (b) referring to the table of multipliers in force on the date of payment in full and multiplying the amount of each instalment by the multiplier in that table which relates to the month when that instalment was paid, and
  - (c) subtracting the sum, or sums if more than one instalment was paid, calculated in accordance with paragraph (b) from the sum calculated in accordance with paragraph (a).

The resulting sum is the total amount, including interest, required to satisfy the balance of the judgment debt in full on the particular date.

Section 8 continues overleaf

## Section 8

C31 Section 8 sets out the method of calculating the interest awarded under s 7. Provision is made for the production of tables of multipliers. (See s 8(1) and sch 1.) Tables will go back at least six years. They can relate to the period before the Act commences.

C32 Section 8(2) states how interest is to be calculated in the simple case where a debt is fully satisfied by a single payment. The tables current for the month of the payment are used. The amount due is calculated by multiplying the initial amount by the appropriate multiplier. The appropriate multiplier is that shown for the month in which the duty to make monetary compensation arose or as at which the liability was quantified.

C33 Section 8(3) deals with the more complex case where a debt is paid in instalments. Since the parties may well have available to them only the current table of multipliers, it is important to have a method allowing them to ascertain the correct amount from that table alone. The basic procedure is that the initial amount is first multiplied by the multiplier for the beginning of the period with all instalments disregarded. The question then becomes, how much should be deducted from that sum in respect of each instalment? To find out how much is *not* due, one takes the amount of each instalment and multiplies it by the multiplier for the month in which it was paid. This is deducted from the result of the first calculation. The defendant must pay the balance.

C34 For illustrations of how interest should be calculated in accordance with s 8 see the examples set out in sch 2.

- (4) If when a party pays a judgment debt in full the amount required to be paid to satisfy the judgment debt cannot be calculated in accordance with subsection (2) or (3) because the table of multipliers in force at the date of payment of the judgment debt has not been published as required by clause 1(5) of Schedule 1, the judgment debtor must pay the judgment creditor a sum calculated by using the previous month's table of multipliers and, as soon as the table of multipliers in force is published, must pay an additional sum being the difference between the sum payable using the previous month's table and the sum payable using the table of multipliers in force.
- (5) If interest is awarded for a period which begins more than 6 years before a judgment debt is paid in full and tables of multipliers are not available for all of that period, interest is to be calculated as nearly as may be in accordance with the methods used in Schedule 1 to prepare the tables of multipliers.
- (6) In subsections (2) and (3), a reference to paying a judgment debt in full in one payment or paying an instalment or instalments of a judgment debt is to be taken to include paying, after a proceeding for a money claim has been commenced (but before judgment has been entered) an amount or instalment in or towards satisfaction of the claim.

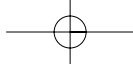
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Definitions: **court**, **initial amount**, **judgment debt**, **pay**, **table of multipliers**, s 5; **month**, *Acts Interpretation Act 1924* s 4

C35 The table of multipliers used in these examples will apply from the first to the last day of each month. (See sch 1, cl 1(3).) There may be a brief period between the time one table becomes obsolete and a new one is published. Section 8(4) says that a debtor who pays off a liability during that period must use the earlier table, and pay the balance when the current table is published. There are of course other options. Payment could be delayed. Or the parties may have advisers who are sufficiently knowledgeable to calculate what will be contained in the unpublished table. A skilled adviser who knows the latest two-year government stock yield rate and is able to use the formulas set out in sch 1 to the Act will be able to make that calculation.

C36 Section 8(5) applies where the interest period begins outside the timespan of the published tables. Interest is calculated which accords “as nearly as may be” with the methods used in the Act. There will be various ways of doing that. The simplest way is to find some earlier published table which goes back far enough. This can be used to calculate the amount as at some month which is within the current period, and the two tables can be used together. Failing that, it may be necessary to find out the two-year government stock yield rates for each intervening period and work out what would have been in the tables had they been published. (See paras C65–C67.) As a last resort, it may be necessary to find some similar but not identical indicator rate for the earlier period (see report, paras 138–157) and calculate the interest rate based on that rate.

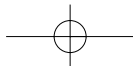
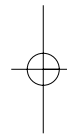
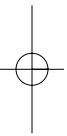
C37 Section 8(6) deals with payments made after the commencement of proceedings but before judgment. (See para C28.) These are not, strictly speaking, payments of a “judgment debt”, since judgment has not been obtained at the time of payment. Nevertheless, in calculating interest it is necessary to apply subsection (2) or subsection (3) to payments made during that period.

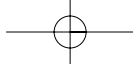


**9 Discretion where money judgment expressed in foreign currency**

- (1) If an initial amount specified in a money judgment in respect of a period is expressed in a foreign currency, the court may, instead of awarding interest to be calculated as provided in section 8, award interest on that initial amount for that period at a rate that the court considers fairly and realistically reflects relevant economic circumstances and may determine the manner (with or without compounding) by which interest at that rate is to be calculated.
- (2) The court cannot award interest under this section on an amount for any period unless interest could have been, but was not, awarded as provided in sections 7 and 8 on that amount for that period.

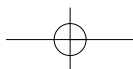
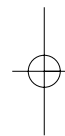
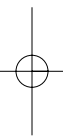
Definitions: **court**, **money judgment**, s 5





## Section 9

C38 The rate of interest prescribed in cl 2 of sch 1 is based on a financial indicator rate which will to some extent be affected by the changes in the current value of the New Zealand dollar. But judgments can be expressed in the currency of another country. The economic circumstances in that country may be different from those in New Zealand. A New Zealand indicator rate therefore may not be a fair basis upon which to calculate the effect on the plaintiff of delay in payment. Section 9 allows the court to award interest on a fairer basis, reflecting the appropriate economic circumstances, where awards in foreign currency are involved. This discretionary power applies only where the court would otherwise make an award under ss 7 and 8. (See s 9(2).)





**10 Discretion in special circumstances**

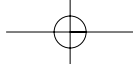
- (1) If in the opinion of the court special circumstances make it inequitable to award interest in a money judgment under sections 7 and 8, or 9, for a period, the court may, for all or part of that period,
  - (a) award interest on all or part of the amount of the money judgment at such rate and calculated in such manner (with or without compounding) as the court directs; or
  - (b) award a lump sum as compensation for delay in the payment of all or part of that amount; or
  - (c) determine not to award interest or a lump sum.
- (2) The court cannot award interest under this section on an initial amount for any period unless interest could have been, but was not, awarded as provided in sections 7 and 8 on that amount for that period.

Definitions: **court, initial amount, money judgment**, s 5

## Section 10

C39 Section 10 provides for the exercise of a discretion in “special circumstances” where it would be “inequitable” to award interest under the general provisions of the Act. Interest awarded under ss 7 and 8 involves a calculation based solely on the tables of multipliers. There may be special circumstances in which it would be unfair to award the plaintiff interest at that rate. Indeed it may be unfair to award interest at all. For example, the plaintiff may have led the defendant to believe that no interest will be claimed, and the defendant may have acted to his or her detriment based on that belief. Conversely, there may be other cases where it would be unfair to limit the plaintiff to the amount provided for in the tables. For example, the defendant may have deliberately misappropriated the plaintiff’s money and used it to make a profit, at a higher rate, in business. Section 10 allows the court to adjust the award accordingly, so as to allow a lower rate (or no interest at all), or a higher one.

C40 The circumstances must, however, be “special”. Defendants not infrequently argue (under the present law) that they did not realise that they would eventually have to pay the money, or that the matter has taken a long time to deal with, or that the plaintiff has delayed bringing proceedings. But these events are everyday occurrences in court proceedings and do not affect the application of the general principle that a plaintiff should be fully compensated where there is a delay in payment. These events cannot be regarded as special.

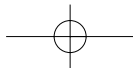
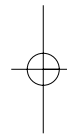
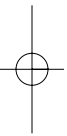


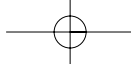
PART 3  
WHERE INTEREST IS NOT TO BE AWARDED  
UNDER PART 2

**11 No interest to be awarded on a penalty**

A court cannot award interest under this Act on an amount which is a penalty or in the nature of a penalty.

Definitions: **court**, s 5

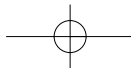
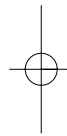
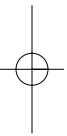


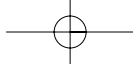


## Section 11

C41 Part 3 sets out the exceptions to the general scheme of the Act. In some cases, no interest can be awarded at all. In other cases, it will not be available under the Act, but may be awarded under other legislation, or under a contract. In other cases still, interest is awarded under the Act, but not necessarily in accordance with Part 2.

C42 Penalties may be either criminal or civil. As to criminal proceedings, the Act has no application. In civil proceedings s 11 ensures that the Act will not apply to actions to recover penalties. One example would be the action for triple damages where a tenant of leased premises has unlawfully retaken goods held under distress. Penalties such as these rarely involve compensation for a provable loss that the plaintiff has suffered.



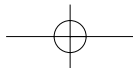
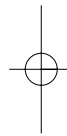
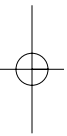


199- / PART 3 WHERE INTEREST IS NOT TO BE AWARDED s 12

**12 Restrictions on award of interest for certain specified periods**

- (1) A court cannot award interest under this Act on costs awarded to a party for a period before the date when the costs are awarded.
- (2) A court cannot award interest under this Act on an award of exemplary damages for a period before the date on which judgment is given for those damages.
- (3) A court cannot award interest under this Act or otherwise for a period after the date of judgment where the judgment is given for an amount not exceeding \$3000, excluding the amount of any interest included in the judgment for a period before the date of judgment.

Definitions: **court**, s 5

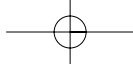


## Section 12

C43 Section 12(1) applies to the award of costs. It limits interest to the period following the date when costs are awarded. This limitation is based on both practical convenience and principle. It is often impractical to say when particular costs were incurred. Nor are costs intended to compensate the successful party for the full costs of the lawsuit. If they do not compensate the plaintiff anyway, there seems little point in introducing interest payments so as to fine tune that compensation. The court may also take significant delays into account when making the award of costs.

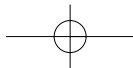
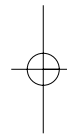
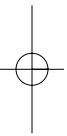
C44 Section 12(2) applies to exemplary damages, which are usually awarded to mark the fact that a defendant has not only acted unlawfully, but has done so in a high-handed or contemptuous manner. They are appropriate, for example, in cases of wilful defamation or unlawful imprisonment. They are added to the amount the plaintiff would receive for proved loss, or hurt feelings, and so are not compensatory. The subsection provides that interest on an award of exemplary damages is to run only from the date of judgment.

C45 Section 12(3) applies where the judgment is for \$3000 or less. Following the existing law which applies in District Court proceedings (District Courts Act 1947 s 65A), the Act provides that there will be no interest on judgments for such a small amount. If the defendant can pay, the judgment can usually be enforced expeditiously. If not, where any payments at all are made, they are not infrequently made in small instalments over time. This would require the parties and court staff to make extensive calculations which would not be justified by the amounts involved. The subsection obviates the need for such calculations. A related provision is s 15, which allows the court to award pre-judgment interest at its discretion on sums of \$3000 or less.

**13 No interest to be awarded for a period contrary to provisions of another Act**

- (1) A court cannot award interest under this Act in a money judgment for a period if a court has awarded interest on that judgment under another Act for that period.
- (2) A court cannot award interest under this Act in a money judgment if it would be inconsistent with the provisions of another Act to do so.

Definitions: **court, interest, money judgment**, s 5; **Act**, *Acts Interpretation Act 1924*  
s 4



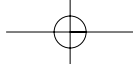
### Section 13

C46 Section 13 deals with interest under other statutes. The Act applies generally to moneys due under the provisions of other statutes. If they are silent on the subject of interest, then Part 2 of the Act applies. (For statutes in which specific reference should be made to the Act, see sch 3.) But in some cases specific provision is made for a particular rate of interest, or (more rarely) there may be an indication that no interest is to be payable at all.

C47 Section 13(1) applies where the other statute provides the plaintiff with a right to interest, in addition to any other right to interest the law may allow. In that case, the plaintiff may elect to claim interest either under the Act, or under the other statute. If the plaintiff claims and is awarded interest under that statute, no further award of interest can be made under this Act.

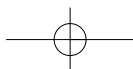
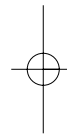
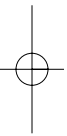
C48 Section 13(2) applies to the converse case, where it is apparent from the other statute that there is to be no award of interest at all, or, if there is, it must be done in accordance with that statute's provisions. Then the court cannot make any award under this Act.



**14 Award of interest where a contract makes relevant provision**

- (1) This section applies to a period for which a contract provides for the award of interest, or provides that no interest is payable, on any amount payable under or for the breach of the contract.
- (2) A court can award interest for a period to which this section applies in accordance with the rights and obligations of the parties specified in the contract notwithstanding
  - (a) Part 2 or section 15, or
  - (b) any rule of law that after judgment is given rights and obligations under a contract merge in the judgment.
- (3) A court cannot award interest under this Act for a period to which this section applies in respect of an amount payable under or for the breach of the contract if the court has awarded interest under the contract for that period.

Section 14 continues overleaf

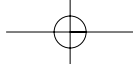


## Section 14

C49 Section 14 applies where a contract provides for payment (or non-payment) of interest. There are three rules.

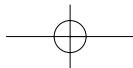
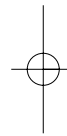
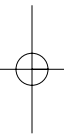
C50 The first and most basic rule, in s 14(2), is that the court can in such a case award interest in accordance with the parties' rights under the contract. (This assumes, of course, that the contract is a binding one and the person owing the money does not have grounds for having it cancelled or reviewed.) The general rules for interest in Part 2 and s 15 do not then apply. Contract interest may be awarded both before and after judgment, even though the contract rights may have merged in the judgment.

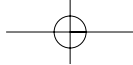
C51 The second rule, in s 14(3), is that if interest is awarded in terms of the contract, it cannot be awarded under any of the other relevant provisions of this Act. The person seeking interest will have an election to take contractual interest or statutory interest, but cannot have both. That election, however, is subject to the next rule.



- (4) A court cannot award interest under Part 2 or section 15(2) for a period to which this section applies if it would be inconsistent with the provisions of the contract to do so.
- (5) Unless the contract expressly provides otherwise, a provision in the contract as to
  - (a) the payment or non-payment of interest on an unpaid amount payable under or for the breach of the contract is to be taken to apply for the purposes of this section to the periods before and after the date when a money judgment is given in respect of that amount; and
  - (b) a rate of interest payable on any unpaid amount is to be taken to be inconsistent with an award of interest under Part 2 or section 15(2).

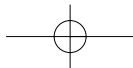
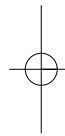
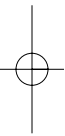
Definitions: **court, interest, money judgment**, s 5





C52 The third rule, in s 14(4), is that the statutory right to interest can be excluded by the contract. If provision in the contract (whether that interest be at a specified rate, or that no interest be payable at all) is the exclusive way in which the parties want interest to be dealt with, the statutory provisions in Part 2 and s 15 cannot apply.

C53 Sometimes contracts will make provisions for interest, but will be silent on what situations they are intended to apply to. Section 14(5) provides two rules of interpretation for commonly encountered situations. The first rule is that provisions about interest are taken to apply both before and after judgment. The second rule is that provisions about interest are taken to be the exclusive way in which interest is to be determined, so neither Part 2 nor s 15 can apply. Both rules can be displaced if the contract is expressed to show that the parties intend differently. For example, parties who are content that the contract provision should apply as long as a debt is paid in due time, may wish to allow the creditor a right to statutory interest, as an alternative, after a default has been made.



**15 Special provision for interest or lump sum in specified circumstances**

- (1) This section applies to the period before the date of a money judgment where the judgment is given for
  - (a) an amount under or for the breach of a contract entered into before the coming into force of this Act; or
  - (b) an amount not exceeding \$3000, exclusive of any interest awarded for that period.
- (2) Where this section applies to a period before the date of a money judgment, the court cannot award interest under Part 2 for such a period, but can
  - (a) award interest on all or part of the amount of the money judgment at a rate not exceeding 11 percent per annum calculated in such manner (with or without compounding) as the court directs; or
  - (b) award a lump sum as compensation for delay in the payment of all or part of that amount being a sum not greater than could be awarded under paragraph (a); or
  - (c) determine not to award interest or a lump sum.

Definitions: **court, money judgment**, s 5

## Section 15

C54 Section 15 substitutes a discretionary jurisdiction (along the lines of the existing law) for the general scheme provided in Part 2 of the Act. Unlike its counterpart in Part 2 (s 10) it does not require proof of “special circumstances”. It applies in two distinct situations.

C55 The first, (s 15(1)(a)), is where an amount is claimed under a contract entered into before the Act comes into force. The parties (had they known of the provisions of the Act) may have wished to make different provisions in their contract. (See para C8.) Interest in that case should be governed by a general provision which approximates to the law when their contract was entered into.

C56 The second, (s 15(1)(b)), is where the amount claimed is \$3000 or less. It may not be convenient, in such a case, to make a precise calculation of the amount involved, since that may be small and (as events turn out) may prove quite uncollectable anyway. The problems of calculation are accentuated if credits or part payments are included. For similar reasons to those given in para C45, it is better to allow the court to award a global sum in lieu of a detailed calculation.

C57 In either situation there is nothing to prevent the court from selecting the amount which would have accrued if Part 2 had applied as an approximate indication of a fair amount to award in the circumstances. But s 15 gives the court a wider discretion than it would have under Part 2. It may award any rate of interest up to 11 percent, or may make an award in the form of a lump sum. Or it may make no award of interest at all. (See s 8(1).)

PART 4  
SUPPLEMENTARY PROVISIONS

**16 Procedural requirements for claims under this Act**

- (1) A party who claims interest under this Act must specify in that party's statement of claim or counterclaim the section of this Act under which and the period for which that interest is claimed, otherwise a court cannot award interest under that section for that period.
- (2) A party who claims interest under section 9, 10, 14, or 15 must specify in that party's statement of claim or counterclaim the amount of interest claimed and the court cannot award interest exceeding the amount so claimed.

Definitions: **court**, s 5

**17 Amendment of Schedule 1**

The Governor-General may, by Order in Council, make regulations amending Schedule 1 so as to

- (a) substitute a different formula for any formula set out in clause 1(4) of that schedule;
- (b) substitute another person for any person on whom duties are imposed by clause 1 of that schedule;
- (c) amend the requirement under clause 1(5) of that schedule for publishing tables of multipliers;
- (d) substitute a different interest rate for the rate specified in clause 2 of that schedule;
- (e) substitute different intervals for those at which interest is to be compounded under clause 3 of that schedule but must not substitute greater intervals than 6 months.

Definitions: **interest rate**, **table of multipliers**, s 5; **month**, **person**, *Acts Interpretation Act 1924* s 4

## Section 16

C58 Section 16 provides that any party to proceedings who seeks interest under the Act must give notice of that in their statement of claim or statement of counterclaim. If that notice is not given, the court cannot award interest. The party claiming interest must also specify the amount of interest claimed. The court cannot award interest in excess of the amount so claimed. Under the general law of procedure, however, the court may allow amendments to the pleadings during the course of the hearing, if the other side is not prejudiced by them.

## Section 17

C59 Section 17 provides for a limited but necessary degree of flexibility by empowering the Governor-General to make regulations. The changes which are authorised to be made would not result in significant changes to the substance of the Act and, of course, the power to make regulations would have to be exercised in accordance with the purpose and principles of the Act which are set out in s 1. Altered economic conditions may cause a need to make changes to the formulas used in calculating the tables of multipliers. In the course of time the interest rate specified in sch 1 may become unavailable or unsuitable and this would require adjustments to the method of calculating the table of multipliers. Another possibility is an administrative need to transfer the duties of producing and publishing the tables of multipliers to persons other than those at present referred to in sch 1.

C60 The wording of s 17 accords with the Legislative Advisory Committee's guidelines (*Legislative Change: Guidelines on Process and Content* (LAC R6 1991 (rev ed) para 121)).



**18 Repeals and savings**

- (1) Section 87 of the *Judicature Act 1908* is repealed.
- (2) Sections 62B and 65A of the *District Courts Act 1947* are repealed.
- (3) Notwithstanding the repeal of section 87 of the *Judicature Act 1908* by subsection (1), that section shall continue to be in force and to apply to every civil proceeding commenced before this Act comes into force.
- (4) Notwithstanding the repeal of sections 62B and 65A of the *District Courts Act 1947* by subsection (2), those sections shall continue to be in force and to apply to every civil proceeding commenced before this Act comes into force.

**19 Amendments to other enactments**

The enactments specified in Schedule 3 are amended as set out in that schedule.

## **Section 18**

C61 In addition to the sections referred to in sch 1, rr 363, 402 and 460 of the High Court Rules 1985 will need to be amended to reflect changes to the law resulting from this Act. Rule 538 will need to be repealed. Corresponding changes will need to be made by the District Court Rules Committee to rr 372, 404 and 463 of the District Court Rules.

C62 As to matters of transition see paras C1, C7–C9.

## **Section 19**

C63 Section 19 deals with existing statutes which specifically refer to s 87 of the Judicature Act 1908. That legislation will be replaced by this Act, and the references to s 87 have been amended accordingly. There are also several statutes where the subject matter is so close that there ought to be uniformity of treatment in dealing with interest. As for other statutes which provide for the award of interest, the general principles applicable are dealt with in s 13. (See paras C46–C48.)

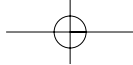
SCHEDULE 1  
AWARD OF INTEREST

See section 8

**1 Tables of multipliers**

- (1) The Government Actuary is to prepare monthly a table of multipliers giving effect to the interest rate most recently determined in accordance with clause 2 and providing for the compounding of interest in accordance with clause 3.
- (2) Every table of multipliers must be prepared in such a way that
  - (a) the latest month shown in the table is the month immediately following the month in respect of which the most recent government stock rates are available; and
  - (b) the earliest month shown in the table precedes the latest month by at least 6 years.
- (3) A table of multipliers is to be taken to come into force on the first day of the latest month shown in the table and remains in force until the last day of that month.

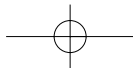
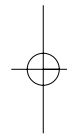
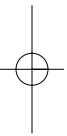
Clause 1 continues overleaf



### **Clause 1**

C64 Section 8(1) and sch 1 provide the statutory basis for the tables of multipliers, and sch 1 gives instructions on how the tables are to be prepared.

C65 A table of multipliers operates for payments made at any time between the first and last days of the month for which it is created. (See cl 1(3).) It is to be prepared when the previous month's two-year government stock yield rate becomes available. The tables work back month by month, incorporating the indicator rate for each month. Each monthly table goes back at least six years. (See cl 1(2).)



- (4) The Government Actuary is to prepare the tables of multipliers in accordance with the following formulas:

The first step is to remove the compounding effect of interest over each half-year to find an equivalent monthly rate. The formula used is

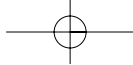
$$(1 + i/2)^{1/6} = 1 + i_m$$

where

“*i*” is the interest rate referred to in clause 2, per unit per annum, convertible half-yearly, and

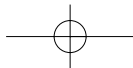
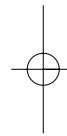
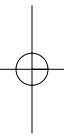
“*i<sub>m</sub>*” is that interest rate in respect of the month from which the interest has been derived in accordance with clause 2.

Clause 1 continues overleaf



C66 Two formulas are to be used in calculating the tables. (See cl 1(4).) The first converts the raw two-year government stock yield rate

- into its equivalent true annual interest rate, and
- into a monthly interest rate which will produce the same true annual interest rate.



The second step is to combine the monthly rates, in a series of calculations, to compound interest from the month of entitlement to the month of payment. Each calculation in the series represents a multiplier for a particular month shown in the table, beginning with the month before the latest month and ending with the earliest month in the table. The latest month in the table shall be given the number 1.000. The formula used is

$$(1 + i_{m-1}) \times (1 + i_{m-2}) \times (1 + i_{m-3}) \dots (1 + i_{m-n})$$

where

“**i**” is the rate of interest, per unit per month, equivalent to the interest rate determined from time to time, and

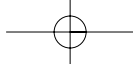
“**m**” is the latest month in the series, and

“**i**<sub>m-1</sub>”, “**i**<sub>m-2</sub>” and “**i**<sub>m-3</sub>” are respectively the equivalent interest rates for the month one month before the latest month, 2 months before the latest month and 3 months before the latest month, and

“**n**” is the number of months in the table.

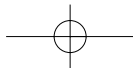
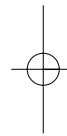
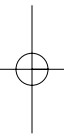
- (5) The Government Actuary must provide the table of multipliers as soon as practicable each month to the chief executive of the Department of Justice who must arrange for its publication as soon as practicable in the *Gazette*.
- (6) A table of multipliers published in accordance with subclause (5) and purporting to be a table of multipliers prepared by the Government Actuary is presumed, unless the contrary is shown, to have been prepared in accordance with this schedule.

Definitions: **interest rate**, **table of multipliers**, s 5; *Gazette*, *Acts Interpretation Act 1924* s 4



C67 The second formula is an iterative one which draws upon a series of monthly interest rates to determine the appropriate multiplier for each month. It works backward from the value of 1.000 (the current month) to the previous month  $(1 + i_{m-1})$ . The first calculation incorporates only the most recent monthly indicator rate. That is placed in the table as the multiplier for one month's interest. The next calculation works backward to the month before that,  $(i_{m-2})$ , incorporating its indicator rate and also the indicator figure for the following month. That is the multiplier for two month's interest. The process is repeated, at each step cumulating the various monthly indicator rates for all the following months. This process continues until the month six years before the current month is reached and the table is complete.

C68 Once the table is created, it can be readily updated for the following month. All the figures in the table are multiplied by the figure derived (through the first formula) from the latest two-year government stock yield rate.





**2 Interest rate**

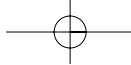
The Government Bond Yield on Secondary Market/2 year rate as published at monthly intervals by the Reserve Bank of New Zealand is the interest rate to be used for the purpose of preparing tables of multipliers under this schedule.

Definitions: **interest rate**, s 5; **month**, *Acts Interpretation Act 1924* s 4

**3 Compounding of interest**

Interest awarded under this Act is to be compounded at monthly rests on the first day of each month.

Definitions: **month**, *Acts Interpretation Act 1924* s 4

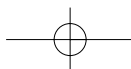
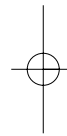
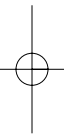


## Clause 2

C69 Clause 2 establishes the basic indicator rate (which can be changed by regulation: see s 17(1)(d).) The rate will be the two-year government stock yield rate. Although the Government does not currently issue two-year government stock, the rate is calculated on the basis of the market price for older government stock with a two-year period to run.

## Clause 3

C70 Clause 3 states the general principle that interest must compound with monthly rests on the first day of each month. For the way this principle is incorporated in the tables, see paras C66–C67.



SCHEDULE 2  
EXAMPLES OF CALCULATIONS

See section 8(1)

*Examples of calculation where judgment debt paid in one payment*

**1 Where amount on which interest awarded is quantified when cause of action arose**

*Assumed facts*

Suppose the Act comes into force on 1 January 1995. On 1 March 1995 the debtor purchases goods from the creditor for \$10 000 and fails to pay for them. On 1 July 1995 a court gives judgment in respect of the goods sold for an amount of \$10 000 plus interest under Part 2. The cause of action arose, and the amount on which interest is awarded was quantified, on 1 March 1995, the date of the sale. The judgment debtor pays in full on 15 December 1995.

*Method of calculation—(see sections 6 and 8(2))*

First, reference is made to the table of multipliers in force in December 1995 (the month in which payment of the judgment debt is made) and in that table reference is made to the entry relating to March 1995 (the month in which the cause of action arose and the amount on which interest was awarded was quantified). The figure in that entry is the multiplier to be applied to the initial amount (the amount on which interest was awarded for the period—see section 7(3)). The result is the total sum due, including interest.

*Calculation*

Suppose the entry for March 1995 in the table of multipliers in force in December 1995 indicates a multiplier of 1.0531. The total sum to be paid, including interest, on 15 December 1995 is calculated by multiplying \$10 000 by 1.0531 and is \$10 531.

**2 Where amount on which interest awarded is quantified by court at date of judgment**

*Assumed facts*

Suppose the Act comes into force on 1 January 1995. On 1 July 1995 a court gives judgment for negligent advice for an amount of \$10 000 damages plus interest under Part 2. For the purposes of section 6, the court specifies the date of judgment as the date at which the amount on which interest is awarded was quantified. The judgment debtor pays in full on 15 December 1995.

*Method of calculation—(see sections 6 and 8(2))*

First, reference is made to the table of multipliers in force in December 1995 (the month in which payment of the judgment debt is made) and in that table reference is then made to the entry relating to July 1995 (the month in which the amount on which interest was awarded was quantified). The figure in that entry is the multiplier to be applied to the initial amount (the amount on which interest was awarded for the period—see section 7(3)). The result is the total sum due, including interest.

*Calculation*

Suppose, in the table of multipliers in force in December 1995, the entry in respect of July 1995 indicates a multiplier of 1.0315. The total sum to be paid, including interest, on 15 December 1995 is calculated by multiplying \$10 000 by 1.0315 and is \$10 315.

*Examples of calculations where instalments paid*

**3 Example of calculation where judgment debt paid in instalments**

*Assumed facts*

Suppose the Act comes into force on 1 January 1995. On 1 July 1995 a court gives judgment for negligent advice for a sum of \$10 000 damages plus interest under Part 2. For the purposes of section 6 the court specifies the date of judgment as the date at which the amount on which interest is awarded was quantified. The judgment debtor pays instalments of \$1000 on 15 October 1995 and 15 November 1995 and the remainder of the money judgment including interest in full on 15 December 1995.

*Method of calculation (see sections 6 and 8(3))*

First, as required by section 8(3)(a), reference is made to the table of multipliers in force in December 1995 (the month in which final payment of the balance owing is made) and in that table reference is then made to the entry relating to July 1995 (the month in which the amount on which interest was awarded was quantified). The figure in that entry is the multiplier to be applied to the initial amount (the amount on which interest was awarded for the period—see section 7(3)).

Secondly, as required by section 8(3)(b), reference is made in the table of multipliers in force in December 1995 (the date when final payment is made) to the entry in that table which relates to the month when the first instalment was made. The figure in that entry is the multiplier to

be applied to the amount of the first instalment. The process described in respect of the instalment paid in October 1995 is repeated in respect of the second instalment paid in November 1995.

Thirdly, as required by section 8(3)(c), the total of the sums reached by the calculations made in respect of the instalments is deducted from the sum first calculated (the amount which would have been payable if no instalments had been paid.) The result is the total sum due including interest.

*Calculation*

Suppose in the table of multipliers in force in December 1995 (the month of final payment) the entry in respect of July 1995 indicates a multiplier of 1.0315. The first calculation is to multiply \$10 000 by 1.0315 which amounts to \$10 315.

Suppose that the multiplier in that table in force in December 1995 which relates to October 1995 (the month of payment of the first instalment) was 1.0120. The next calculation is to apply that multiplier to the amount of the instalment paid in October 1995. That is  $\$1000 \times 1.0120 = \$1012$ .

Suppose that the multiplier in that table in force in December 1995 which relates to November 1995 (the month of payment of the second instalment) was 1.0060. The next calculation is to apply that multiplier to the amount of the instalment paid in November 1995. That is  $\$1000 \times 1.0060 = \$1006$ .

The final calculation is to subtract \$1012 and \$1006 from \$10 315 which gives a result of \$8297. That is the amount, including interest, required to satisfy the judgment debt in full on 15 December 1995.

**4 Example of calculation where one instalment paid after proceeding commenced but before judgment and one instalment paid after judgment given**

*Assumed facts*

Suppose the Act comes into force on 1 January 1995. On 1 March 1995 the debtor purchases and takes delivery of goods from the creditor for \$10 000 and fails to pay for them. On 1 May 1995 the creditor commences a proceeding for \$10 000 plus interest under Part 2. On 1 June 1995 the debtor pays an instalment of \$1000 towards satisfying the debtor's liability. On 1 July 1995 a court gives judgment in respect of the goods sold for an amount of \$9000 plus interest under Part 2. The cause of action arose and the amount on which interest is awarded

was quantified on 1 March 1995, the date of the sale. The judgment debtor pays a further instalment of \$1000 on 15 October 1995 and the remainder of the money judgment including interest in full on 15 December 1995.

*Method of calculation (see sections 6 and 8(3) and (6))*

First, as required by section 8(3)(a), reference is made to the table of multipliers in force in December 1995 (the month in which final payment of the balance owing is made) and in that table reference is then made to the entry relating to March 1995 (the month in which the cause of action arose and the amount on which interest was awarded was quantified). The figure in that entry is the multiplier to be applied to the initial amount (the amount on which interest was awarded for the period—see section 7(3)).

Secondly, as required by section 8(3)(b) read with 8(6), reference is made in the table of multipliers in force in December 1995 (the date when final payment is made) to the entry in that table which relates to the month (June) when the first instalment was made. The figure in that entry is the multiplier to be applied to the amount of the first instalment. The process described in respect of the instalment paid in June 1995 is repeated in respect of the second instalment paid in October 1995.

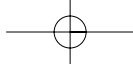
Thirdly, as required by section 8(3)(c), the total of the sums reached by the calculations made in respect of the instalments is deducted from the sum first calculated (the amount which would have been payable if no instalments had been paid). The result is the total sum due including interest.

*Calculation*

Suppose in the table of multipliers in force in December 1995 (the month of final payment) the entry in respect of March 1995 indicates a multiplier of 1.0850. The first calculation is to multiply \$10 000 by 1.0850 which amounts to \$10 850.

Suppose that the multiplier in that table in force in December 1995 which relates to June 1995 (the month of payment of the first instalment) was 1.0650. The next calculation is to apply that multiplier to the amount of the instalment paid in June 1995. That is  $\$1000 \times 1.0650 = \$1065$ .

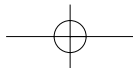
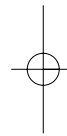
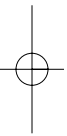
Suppose that the multiplier in that table in force in December 1995 which relates to October 1995 (the month of payment of the second instalment) was 1.0120. The next calculation is to apply that multiplier to the amount of the instalment paid in October 1995. That is  $\$1000 \times 1.0120 = \$1012$ .

**sch 2**

## INTEREST ON MONEY CLAIMS

The final calculation is to subtract \$1065 and \$1012 from \$10 850 which gives a result of \$8773. That is the amount, including interest, required to satisfy the judgment debt in full on 15 December 1995.

Definitions: **court**, **initial amount**, **judgment debt**, **table of multipliers**, s 5;  
**month**, *Acts Interpretation Act 1924* s 4



SCHEDULE 3  
ENACTMENTS AMENDED

See section 19

*Bills of Exchange Act 1908* (1908/15)

Section 57

**Delete** paragraph (c)

**Substitute:**

- (c) Where interest may be recovered under this Act, that interest must be awarded under Part 2 of the *Interest on Money Claims Act 199-* and, where a bill is expressed to be payable with interest at a given rate, that rate shall not be taken to be inconsistent with the rate provided for under Part 2 of that Act.

*Life Insurance Act 1908* (1908/105)

Section 41A(3)

**Delete:** “prescribed for the purposes of section 87 of the *Judicature Act 1908*”

**Substitute:** “specified in Schedule 1 of the *Interest on Money Claims Act 199-*”

Section 67B(1)(a)

**Delete:** “prescribed for the purposes of section 87 of the *Judicature Act 1908*”

**Substitute:** “specified in Schedule 1 of the *Interest on Money Claims Act 199-*”

*Partnership Act 1908* (1908/139)

Section 27(c)

**Delete:** “at the rate of 5 percent per annum”

**Substitute:** “at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199-*”.

Section 45(1)

**Delete:** “at the rate of 5 percent per annum”

**Insert** at the end:

“at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199-*”.

*District Courts Act 1947* (1947/16)

Section 30(1)(b)

**Insert** after “\$200,000”:

“, excluding interest under the *Interest on Money Claims Act 199-*”;



**Section 84E(1)**

- (a) in paragraph (b), **insert** after “judgment”:  
 “, including interest awarded under the *Interest on Money Claims Act 199–*”; and
- (b) in paragraph (c), **insert** at the end:  
 “or for that part of a judgment that comprises interest, whether awarded under the *Interest on Money Claims Act 199–* or otherwise”.

*Mutual Insurance Act 1955* (1955/23)

Section 19(4)

**Delete:** “prescribed rate within the meaning of section 87 of the *Judicature Act 1908*”

**Substitute:** “interest rate specified in Schedule 1 of the *Interest on Money Claims Act 199–*”

*Trustee Act 1956* (1956/61)

Section 34A

**Delete:** “at the rate of 6 percent or such other rate as the Governor-General may for the time being by Order in Council prescribe”

**Substitute:** “at the same rate and upon the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”

*Administration Act 1969* (1969/52)

Section 39(2)

**Delete:** “at the rate of 11 percent per annum”

**Substitute:** “at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”

*Private Investigators and Security Guards Act 1974* (1974/48)

Section 19(8)

**Delete:** “rate for the time being payable in respect of judgments entered in the High Court”

**Substitute:** “same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”

*Securities Act 1978* (1978/103)

Section 37(6)

(a) **Delete:** “at the rate of 10 percent per annum”; and

(b) **Insert** after “issuer” where it last occurs:

“at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”.

## Section 37A(7)

- (a) **Delete:** “at the rate of 10 percent per annum”; and  
 (b) **Insert** after “received”:  
 “at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”.

## Section 44(7)

- (a) **Delete:** “at the rate of 10 percent per annum”; and  
 (b) **Insert** after “issuer” where it last occurs:  
 “at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”.

*Public Works Act 1981 (1981/35)*

## Section 94

**Delete:** “at such rate as it thinks fit”

**Substitute:** “at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”

*Disputes Tribunals Act 1988 (1988/110)*

## Section 20

**Repeal** subsection (5)

**Substitute:**

“(5) In this section, “prescribed rate” means the rate of interest specified in Schedule 1 of the *Interest on Money Claims Act 199–*”

*Employment Contracts Act 1991 (1991/22)*

## Section 49(2)

**Repeal** subsection (2)

## Section 49(3)

**Delete:** “of 11 percent per annum, or such rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council”

**Substitute:** “specified in Schedule 1 of the *Interest on Money Claims Act 199–*”.

*Accident Rehabilitation and Compensation Insurance Act 1992 (1992/13)*

## Section 72

**Delete:** “at the rate for the time being prescribed by or for the purposes of section 87 of the *Judicature Act 1908*”

**Substitute** at the end:

“at the same rate and on the same terms as are provided for the award of interest under Part 2 of the *Interest on Money Claims Act 199–*”.

## APPENDIX B

## General Statutory Provisions Governing Awards of Interest

### Pre-judgment interest

Section 87 of the Judicature Act 1908 and s 62B of the District Courts Act 1947 govern awards of pre-judgment interest in the High Court and Court of Appeal and District Courts respectively.

#### **87. Power of Court to award interest on debts and damages—**

(1) In any proceeding in the High Court or the Court of Appeal for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment:

Provided that nothing in this section shall—

- (a) Authorise the giving of interest on interest; or
- (b) Apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement, enactment, or rule of law, or otherwise; or
- (c) Affect the damages recoverable for the dishonour of a bill of exchange.

(2) In any proceedings in the High Court or the Court of Appeal for the recovery of any debt upon which interest is payable as of right, and in respect of which the rate of interest is not agreed upon, prescribed or ascertained under any agreement, enactment, or rule of law or otherwise, there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as the Court thinks fit for the period between the date as from which the interest became payable and the date of the judgment.

(3) In this section the term “the prescribed rate” means the rate of 7½ percent per annum, or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council.

[It should be noted the Judicature (Interest on Debts and Damages) Order 1980 SR 54 increased the prescribed rate within the meaning of subs 3 of s 87 of the Judicature Act 1908 to 11 percent.]

**62B. Power of the Court to award interest on debts and damages**

—(1) Subject to subsection (2) of this section, in a proceeding for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest

at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment.

(2) Subsection (1) of this section shall not—

- (a) Authorise the giving of interest upon interest; or
- (b) Apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement, enactment, or rule of law, or otherwise; or
- (c) Affect the damages recoverable for the dishonour of a bill of exchange.

(3) In any proceedings for the recovery of any debt upon which interest is payable as of right, and in respect of which the rate of interest is not agreed upon, prescribed, or ascertained under any agreement, enactment, or rule of law, or otherwise, there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as the Court thinks fit for the period between the date as from which the interest became payable and the date of the judgment.

(4) In this section the term “the prescribed rate” means the rate of 11 percent per annum, or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council.

Rule 363, as substituted by r 15 High Court Amendment Rules 1993 (SR 1993/420), provides for interest on payments into court.

**363. Interest**—(1) A payment into Court in a proceeding in which the plaintiff has claimed interest shall be deemed to include interest, calculated to the date of the payment into Court, at the rate from time to time prescribed by or under section 87 of the *Judicature Act 1908* unless the notice of payment specifically states that it does not include interest by or under section 87 of the *Judicature Act 1908*.

(2) Where a payment into Court that does not include interest is accepted in satisfaction, the plaintiff may, within 7 days of filing the notice of acceptance, make application to have the question of interest determined by the Court.

(3) For the purposes of determining whether, under rule 360, the plaintiff has recovered a greater sum than that paid into Court, any interest awarded shall be taken into account only where the payment into Court included interest.

(4) Nothing in this rule affects the power of the Court to decline to award interest in any particular case.

The equivalent District Courts Rule is r 372.

**372. Interest**—(1) Where the Court would have jurisdiction in any proceeding to award interest to the plaintiff if it saw fit, a payment into Court shall be deemed not to include interest unless the notice of payment specifically states that it does; but it shall not be necessary to show any separate sum as being in respect of interest.

(2) Where a payment into Court does not include interest and is accepted in satisfaction, the plaintiff may, within 7 days of filing the notice of acceptance, make application to have the question of interest determined by the Court.

(3) For the purposes of determining whether, under rule 369, the plaintiff has recovered a greater sum than paid into Court, any interest awarded shall be taken into account only where the payment into Court included interest.

(4) Nothing in this rule affects the power of the Court to decline to award interest in any particular case.

### **Post-judgment interest**

Rule 538 of the High Court Rules 1985 and s 65A of the District Courts Act 1947 govern awards of post-judgment interest in the High Court, Court of Appeal and District Court respectively.

**538. Interest on judgment debt**—(1) Every judgment debt shall carry interest from the time of judgment being given until the judgment is satisfied.

(2) The interest shall be at the rate for the time being prescribed by or under section 87 of the *Judicature Act 1908* or at such lower rate as shall be fixed by the Court.

(3) The interest may be levied under any execution order upon the judgment.

**65A. Interest on judgment debts—**(1) In this section—

“Enforcement process” in relation to a judgment debt, means any summons, warrant, or order issued or made in any proceedings of a kind referred to in section 79(1) of this Act for the enforcement of that debt:

“Judgment debt” means the amount for which judgment is entered or for which an order of a Court is made in any civil proceedings.

(2) Every judgment debt of an amount exceeding \$3,000, or such other amount as may be fixed from time to time for the purposes of this section by the Governor-General by Order in Council, shall carry interest from the date of the judgment or order on the amount for the time being remaining unpaid.

(3) Such interest shall be at the rate for the time being prescribed by or under section 62B of this Act, and shall accrue from month to month.

(4) No interest shall be payable on costs incurred after the date of the judgment order.

(5) Notwithstanding subsection (2) or subsection (3) of this section, where any enforcement process is issued in respect of the judgment debt, no interest shall be payable in excess of the amount specified in the process unless a further such process is issued.

There is a separate regime for the debts of deceased persons. The relevant High Court Rule is r 402.

**402. Interest on debts of deceased person—**Where a judgment or order is made directing an account of the debts of a deceased person, interest shall be computed on such debts, unless otherwise ordered, from the date of the judgment, and as to such of them as carry interest, at the rate they respectively carry, and as to all others at the rate from time to time prescribed for the purpose of section 87 of the Act or such lower rate as the Court may order.

The equivalent District Courts Rule is r 404.

**404. Interest on debts of deceased persons—**Where a judgment or order is made directing an account of the debts of a deceased person, interest shall be computed on such debts, unless otherwise ordered, from the date of the judgment, and as to such of them as carry interest, at the rate they respectively carry, and as to all others at the rate from time to time prescribed for the purposes of section 62B of the Act or such lower rate as the Court may order.

## **Judgment by default**

Rule 460 of the High Court Rules 1985 relating to judgment by default reads

**460. Liquidated demand**—If the relief claimed by the plaintiff is payment of a liquidated demand in money and the defendant does not file a statement of defence within the number of days stated for that purpose in the notice of proceeding, the plaintiff may at once seal final judgment for any sum not exceeding the sum claimed in his statement of claim, together with—

- (a) Interest (if any) payable as of right, if such interest has been specifically claimed in the statement of claim, calculated up to the date of judgment; ...

The equivalent District Courts Rule is r 463 which is in almost identical terms.

### **Summary judgment**

Rule 136 of the High Court Rules 1985 relating to summary judgments reads

**136. Judgment where no defence**—Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim or to a particular part of any claim, the Court may give judgment against that defendant.

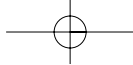
## APPENDIX C

## The Table of Multipliers

Overleaf is a complete table of multipliers for each month prepared by the Government Actuary from the two-year government stock yield rate for the period from January 1987 to March 1994. The table is as it would appear upon publication in the New Zealand Gazette. Following the table is a list of the corresponding two-year government stock yield rates. For those with a mathematical interest, the method used by the Government Actuary to prepare the table of multipliers from the indicator rates is shown in appendix E.

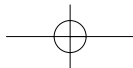
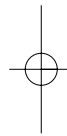
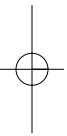


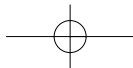
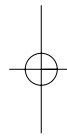
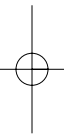
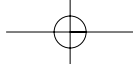


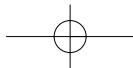
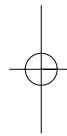
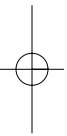
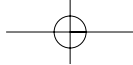


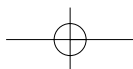
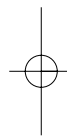
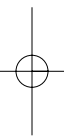
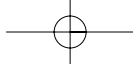
## APPENDIX D

# Indicative Interest Rate Graphs









## APPENDIX E

## How the Multipliers are Calculated from the Two-Year Government Stock Yield Rate

The method used by the Government Actuary to prepare the table of multipliers from the two-year government stock yield rates is shown below.

Yields on two-year government stock are expressed as rates per annum, convertible half-yearly. What this means is that interest is paid out or compounds each half-year, and the effective half-yearly rate is simply the annual rate divided by two. The first step is to remove the compounding effect of interest over each half-year to find an equivalent monthly rate. The formula (formula 1) used is

$$(1 + i/2)^6 = 1 + i_m$$

where “ $i$ ” is the rate of interest, per unit per annum, convertible half-yearly, and “ $i_m$ ” is the equivalent rate of interest, per unit per month.

The second step is to combine the monthly rates, in a series, to compound interest from the month of entitlement to the month of payment. The formula (formula 2) used is

$$(1 + i_{m-1}) \times (1 + i_{m-2}) \times (1 + i_{m-3}) \times \dots \times (1 + i_{m-n})$$

where “ $i$ ” is the rate of interest, per unit per month equivalent to the interest rate determined from time to time, “ $m$ ” is the latest month in the series, “ $i_{m-1}$ ” is the equivalent rate of interest one month before the latest month etc, and “ $n$ ” is the number of months in the table.

### *Example*

To illustrate the method of calculation, consider the position in May 1993.

From the list of two-year government stock yields reproduced at the end of appendix C, the rates for a few months prior to May 1993 were

April 1993	7.27 percent per annum
March 1993	7.27 percent per annum
February 1993	7.49 percent per annum
January 1993	7.58 percent per annum

Using formula 1 above, the equivalent monthly rates, per unit invested, were

April 1993	$(1 + .0727/2)^{1/6} = 1.005969$
March 1993	$(1 + .0727/2)^{1/6} = 1.005969$
February 1993	$(1 + .0749/2)^{1/6} = 1.006146$
January 1993	$(1 + .0758/2)^{1/6} = 1.006219$

Using formula 2 above, the multipliers then become

April 1993	1.005969
March 1993	$1.005969 \times 1.005969 = 1.0120$
February 1993	$1.005969 \times 1.005969 \times 1.006146 = 1.0182$
January 1993	$1.005969 \times 1.005969 \times 1.006146 \times 1.006219 = 1.0245$

These multipliers accrue interest at the two-year government stock yield rates for the period from the month of entitlement to the month of payment (in this example, May 1993). The multipliers in the table (app C) have been rounded to the nearest fourth decimal point.

## APPENDIX F

## Other Enactments Providing for the Award of Interest

As stated in paras 197–208, there are a number of enactments which provide for awards of interest. The report categorised these as provisions

- applying the general rules to particular situations,
- enacting distinct rules about interest on particular moneys,
- for interest on money withheld by or wrongly paid to or by the Crown,
- for penalties for the late payment of taxes and charges,
- for interest on compensation moneys, and
- for interest on deposits and advances pursuant to statute.

Acts which fall into these categories include:

(i) *Provisions which apply the general rules to particular situations*

The Law Commission recommends that the method of calculating interest contained in the Interest on Money Claims Act should apply to the following provisions:

- Accident Rehabilitation and Compensation Insurance Act 1992 s 72 (Payment of interest where Corporation or exempt employer makes late payment of compensation based on weekly earnings)—amend by replacing reference to s 87 of the Judicature Act 1908 with a reference to the Interest on Money Claims Act.
- Arbitration Amendment Act 1938 s 13 (Interest on awards)—the Law Commission has already recommended that an arbitral tribunal have the same powers as the High Court. See draft Arbitration Act s 10.



- Companies Act 1993 s 311 (Interest on claims)—no amendment proposed.
- Crown Proceedings Act 1950 s 19 (Interest on debts, costs, etc)—no amendment proposed.
- Disputes Tribunal Act 1988 s 20 (Power of Tribunal to award interest)—no amendment proposed.
- Life Insurance Act 1908 s 41A (Interest payable from 91st day after date of death), s 67B (Limitations on payments in respect of death of minors)—amend ss 41A and 67B by replacing the references to s 87 of the Judicature Act 1908 with references to the Interest on Money Claims Act.
- Mutual Insurance Act 1955 s 19 (Calls on premium notes)—amend by replacing reference to s 87 of the Judicature Act 1908 with a reference to the Interest on Money Claims Act.
- Private Investigators and Security Guards Act 1974 s 19 (Approved bond by private investigator)—amend s 19(8) to tie the rate of interest to the prescribed rate of interest under the Interest on Money Claims Act.

(ii) *Provisions enacting distinct rules about interest on particular moneys*

The Law Commission recommends that the method of calculating interest contained in the Interest on Money Claims Act should apply to the following provisions:

- Administration Act 1969 s 39 (Interest on legacies and annuities)—amend by replacing the words “at the rate of 11 percent per annum” with the words “at the rate which would apply if it were awarded under the Interest on Money Claims Act”.
- Bills of Exchange Act 1908 s 57 (Measure of damages against parties to dishonoured bill)—no amendment to s 57(a)(ii), but amend s 57(c) to tie interest as damages to interest under the Interest on Money Claims Act.
- Employment Contracts Act 1991 s 49 (Power to award interest on arrears of wages)—repeal subsection (2) and amend subsection (3) to tie the rate of interest to interest under the Interest on Money Claims Act.

- Partnership Act 1908 s 27 (Rules as to interests and duties of partners), s 45 (Right of outgoing partner to share profits made after dissolution)—amend references to interest to refer to interest under the Interest on Money Claims Act.
- Reciprocal Enforcement of Judgments Act 1934 s 4 (Application for, and effect of, registration of judgment)—interest awarded under this section will change on the enactment of the Interest on Money Claims Act.
- Securities Act 1978 s 37 (Void irregular allotments), s 37A (Voidable irregular allotments), and s 44 (Suspension and cancellation of registration of registered prospectus)—amend references to interest rates to interest under the Interest on Money Claims Act.
- Trustee Act 1956 s 34A (Trustees to have lien on policy money for premiums)—amend references to interest rates to the prescribed rate of interest under the Interest on Money Claims Act; s 40(3) (Power to apply income for maintenance, etc, and to accumulate surplus income during a minority)—the rate of interest under this subsection will change as a consequence of amending s 39(2) of the Administration Act 1969.

The Law Commission recommends that the method of calculating interest contained in the Interest on Money Claims Act should not apply to the following provisions:

- Fencing Act 1978 s 18 (Person taking advantage of fence)
- Land Transfer Act 1952 s 179 (Measure of damages)
- Matrimonial Property Act 1976 s 33 (Ancillary powers of court)
- Unit Titles Act 1972 s 34A (Interest on money owing to body corporate), s 36 (Certificate of proprietor's liability)
- Unit Trusts Act 1960 s 27 (Power of court to assess damages against delinquent directors of manager).

*(iii) Provisions for interest on money withheld by or wrongly paid to or by the Crown*

The Law Commission recommends that the method of calculating interest contained in the Interest on Money Claims Act should not apply to the following provisions:

- Accident Rehabilitation and Compensation Insurance Act 1992 s 77 (Recovery of over-payments and unpaid premiums by Corporation)

- Gaming and Lotteries Act 1977 s 104 (No entitlement to interest)
- Goods and Services Tax Act 1985 s 38 (Interest on certain excess tax), s 46 (Interest on refunds)
- Government Superannuation Fund Act 1956 s 16A (Interest on money held in error)
- Income Tax Act 1976 s 34A (Interest on certain excess tax), s 177 (Interest on deposits in income equalisation reserve accounts), s 413A (Interest on tax overpaid)
- Waterfront Industry Restructuring Act 1989 s 48 (Levy payable pending resolution of arbitration or proceeding).

*(iv) Provisions for penalties for the late payment of taxes, charges and levies*

The Law Commission recommends that the method of calculating interest contained in the Interest on Money Claims Act should not apply to the following provisions:

- Auckland Airport Act 1987 s 10 (Airport reserves), s 11 (Crown and constituent authorities to indemnify Auckland Regional Authority)
- Child Support Act 1991 s 173 (Penalty for late deductions)
- Fire Service Act 1975 s 53 (Failure to pay levy), s 53A (Penalty surcharge for non-payment of levy)
- Gaming Duties Act 1971 s 8 (Interest on unpaid totalisator duty), s 12 (Interest on unpaid lottery duty), s 13 (Refund of duty or interest paid in error or in excess)
- Income Tax Act 1976 s 188B (Transitional provisions for payment of income tax arising from application of section 188A), s 398A (Interest to be charged where residual income tax exceeds provisional tax)
- Local Government Act 1974 s 459 (Council may require owners of land in certain cases to provide private drains)
- Road User Charges Act 1977 s 21A (Additional charges for default in payment of amounts due)
- Stamp and Cheque Duties Act 1971 s 57 (Penalty for late presentation), s 86E (Interest on unpaid credit card transaction duty)
- Waterfront Industry Restructuring Act 1989 s 30 (Interest on outstanding payments or instalments)

- Wellington Airport Act 1990 s 11 (Airport reserves).

(v) *Provisions for interest on compensation moneys*

The following provisions provide for compensation to be fixed by reference to s 94 of the Public Works Act 1981 (Compensation for compulsory acquisition of land). The Law Commission recommends amending that Act so that the interest payable under these provisions shall be determined as if payable under the Interest on Money Claims Act:

- Crown Minerals Act 1991 s 76 (Compensation to owners and occupiers)
- Electricity Act 1992 s 57 (Compensation for damage)
- Land Drainage Act 1908 s 29 (Claims for compensation for injury or damage), s 70 (Compensation to other persons interested)
- Resource Management Act 1991 s 86(3) (Power to acquire land)
- River Boards Act 1908 s 74 (Power to take land)
- Soil Conservation and Rivers Control Act 1941 s 19(4) (Acquisition of other land), s 145B (Procedure in respect of compensation claims).

(vi) *Provisions for interest on deposits and advances pursuant to statute*

The Law Commission recommends that the method of calculating interest contained in the Interest on Money Claims Act should not apply to the following provisions:

- District Railways Act 1908 s 26 (Compensation to be given for land taken or affected)
- Family Benefits (Home Ownership) Act 1964 s 18 (Repayment of advance where death of child caused by parent), s 21 (Interest on unpaid balance of advance)
- Insurance Companies Deposits Act 1953 s 13 (Investment of cash deposits)
- Land Drainage Act 1908 s 63A (Advances to owners by local authorities)
- Local Authorities Act 1956 s 92 (Overdue interest, etc, to be recoverable with interest thereon)

- Local Government Act 1974 s 463 (Advances by council to owners in respect of cost of drainage connections), s 514 (Council may make advances to owners), s 533 (Territorial authority may advance to occupier of premises cost of installation or conservation of energy), s 558 (Repayment of advances and purchase money), s 674 (Advances by council to land owners to meet emergency expenditure)
- Maori Affairs Restructuring Act 1989 s 85 (Advances to Maori occupiers of land that is not subject to Part II of this Act), s 86 (Advances and other assistance to Maori)
- Maori Housing Act 1935 s 10 (Rate of interest on advances)
- Public Trust Office Act 1957 s 30 (Common fund), s 40 (Advances to beneficiaries)
- Public Works Act 1981 s 224 (Government and local authority may combine in works of both national and local importance)
- Te Ture Whenua Maori/Maori Land Act 1993 s 314 (Interest on unpaid moneys by way of equality of exchange for Maori land), s 334 (Interest on survey charges)
- The Maori Vested Lands Administration Act 1954 s 56 (Money for payment of compensation), s 64 (Maori Trustee may manage land as a farm)
- Southland Electric Power Supply Act 1936 s 5 (Provisions as to repayment by Board of its debt to the Crown).

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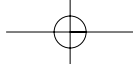
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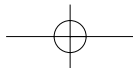
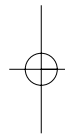
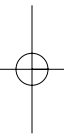




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## APPENDIX H

## Responses Received and Acknowledgments

Those who responded to our preliminary paper are:

- [1] A W Grove of Grove Darlow & Partners, Barristers & Solicitors, Auckland (latterly Judge Grove of the Auckland District Court)
- [2] Professor R J Sutton, Faculty of Law, University of Otago (now a Commissioner of the Law Commission)
- [3] The Institute of Directors
- [4] N Tollemache, Ombudsman of The Office of the Ombudsmen (now Banking Ombudsman)
- [5] The New Zealand Federation of Family Budgeting Services (Inc)
- [6] Professor S M Waddams, Faculty of Law, University of Toronto, Canada
- [7] Darlington Drilling & Piling, Masterton
- [8] C R Pidgeon QC, Auckland
- [9] AA Finance Ltd
- [10] The Corporation of Insurance Brokers of New Zealand
- [11] L L Stevens, C J Butterworth and M R Dean of Russell McVeagh McKenzie Bartleet & Co, Barristers & Solicitors, Auckland
- [12] The Rt Hon Sir Thomas Eichelbaum the Chief Justice of New Zealand and Master Williams QC (now H Williams QC)
- [13] A D MacKenzie of Rudd Watts & Stone, Barristers & Solicitors, Wellington
- [14] A L Close QC, Chairman of the Law Reform Commission of British Columbia, Canada
- [15] The Interprofessional Committee on Liability representing the New Zealand Institute of Architects, the Institution of Professional Engineers, the New Zealand Institute of Surveyors and the New Zealand Institute of Valuers and supported by the Association of Consulting Engineers New Zealand

- [16] C L Riddet of Jack Riddet Tripe, Barristers & Solicitors, Wanganui
- [17] New Zealand Bankers Association
- [18] New Zealand Society of Accountants
- [19] New Zealand Employers' Federation
- [20] The Rules Committee
- [21] Department of Internal Affairs, Te Tari Taiwhenua
- [22] J E Govan of Cook Allan Gibson, Barristers & Solicitors, Dunedin
- [23] Life Offices Association of NZ
- [24] Financial Services Federation Inc
- [25] P J H Jenkin QC, Wellington
- [26] Wellington South Community Law Centre
- [27] New Zealand Law Society
- [28] W S Shires QC, Wellington

We have consulted further with some of those listed.

A working party consisting of the Hon Justice McGechan, M Camp QC, D Clifford of Buddle Findlay, Barristers & Solicitors, C Finlayson of Bell Gully Buddle Weir, Barristers & Solicitors and S Kós of Russell McVeagh McKenzie Bartleet & Co, Barristers & Solicitors assisted with the preparation of the preliminary paper and this report. G Thornton QC, Legislative Counsel, prepared the draft legislation.

Others whom we have consulted include Professor P J M Lown of the Alberta Law Reform Institute, P Durbin of the Alexander Consulting Group, J Hodder of Chapman Tripp Sheffield Young, Barristers & Solicitors, M Neilson, J Nind and H Hoffman of the Department of Justice, the Hon Justice Fisher, G Smith of the District Court, W K Sloan for the Government Actuary, J D Earles of the High Court, D Poland, M Scott, G Burnett, R M Philp and I A Sindlen of the Department of Inland Revenue, J Schnoor of the Manitoba Law Reform Commission, E J E Hanna of the New Zealand Bankers Association, C Voller, A Boaden, C Remington, I Harrison, S Ruscoe, M Shaffrey and D Wilson of the Reserve Bank of New Zealand, Professor C Blyth of the University of Auckland, Professor J Prebble, Barrister and Professor of Law at Victoria University of Wellington, W J Coleman of Baycorp Holdings Ltd, and others.

The Law Commission is indebted to these people and organisations for their responses and generous assistance.

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