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COMPANY OFFENDERS: CAN WE CONTROL THEM?

A Look at
the Commercial Affairs Division

A Thesis
presented in partial fulfilment of the
requirements for the degree of
Master of Business Studies
in
Accounting and Finance
at Massey University

Jacqueline Christina Hall

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ABSTRACT

In July 1984, the Securities Commission published their Report which reviewed the effectiveness of the resources that were available for corporate fraud investigations.

The Government's response to the public's concern regarding corporate crime was to allocate additional resources to the Commercial Affairs Division of the Department of Justice, and confirm that the investigation, detection and prosecution of criminal offences by companies should continue to be "the shared responsibility" of the Police, and the Commercial Affairs Division.

The injection of the additional resources to combat corporate crime is in danger of being viewed as a "political sop" by the public, if these resources are not effectively deployed.

This study attempts to address this question by reviewing the structure and operational capability of the Commercial Affairs Division, with particular regard to its effectiveness to provide measures to monitor and regulate company offenders. A secondary aim was to ascertain what the concept of shared responsibility means to the investigative officers, and how it operates in practice. It was also envisaged that the study could establish a base for further research by providing the mechanism for a "before" and "after" comparison.

A detailed descriptive analysis of the role, function, structure and legal authority of the Commercial Affairs

Division was undertaken. Two questionnaires were developed. The first was directed at the investigative officers to provide information on the operational capability of the Division to combat corporate crime. The second questionnaire was directed at the controlling officer of each of the district offices to ascertain the effectiveness of the Division in terms of the number of complaints, follow-up investigations, and prosecutions. The concept of shared responsibility was dealt with by a three-pronged approach. The originators of the term were interviewed to establish what they meant by this concept and how it "should" operate. The official head of the Commercial Affairs Division was then interviewed in respect of how the concept was "thought" to operate, and finally the investigative officers themselves were surveyed as part of the questionnaire, to find out how it "did" operate.

The results of the questionnaire survey revealed that the operating capability of the investigative officers was seriously inhibited by internal problems such as lack of staff, lack of training, and a lack of resources generally. As a result of the magnitude of these inhibiting factors it was difficult to establish a clear cut finding beyond this. As you would expect, the above problems also seriously undermined the effectiveness of the Division in terms of completed investigations and prosecutions.

The study found that the perceptions held by the originator's and the official head, on how the concept

of shared responsibility should operate bears very little resemblance to reality.

It was concluded that at the present time the Commercial Affairs Division has serious internal problems that were hindering the effective monitoring and regulating of company offenders.

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CHAPTER 1

INTRODUCTION

The phrases "white-collar crime", and "corporate crime" have been heard with increasing frequency in recent years. One American writer,[1] describes "white-collar crime" as a "growth industry". The phenomenon is timeless and universal.

The way in which these offences are treated arouses strong emotions. There are allegations of bias which favours the company offender, and other economic offenders. Both in researching the subject, and in talking to those concerned with corporate crime, there is disquiet, even disillusionment about our present system for controlling corporate behaviour.

Two of the law enforcement agencies in New Zealand equipped to control corporate crime are the Police Department, and the Department of Justice. That the Police are finding it increasingly difficult to cope with "violent" crimes, let alone the "non-violent" corporate crimes, is evidenced by the following newspaper headlines:

> "Short-staffed Police Forced to Drop Cases"[2]
>
> "Criminals Gaining Ground".[3]

Effective control of corporate offenders could be seen therefore, to turn upon the operating capability of the second law enforcement agency, the Department of Justice,

through its corporate monitoring arm, the Commercial Affairs Division. The fact that a regulatory agency is created and theoretically given authority to act does not mean that the instruments will actually be used effectively. Limited budget and manpower considerations, legal and economic corporate records, the relative lack of agency co-ordination and the consequences of too drastic action on the economy, and the public, set limitations on what an agency can do in enforcement.

This study is not an attempt to argue the relationship of corporate crime to society, or the causes of this type of crime. It is an attempt to describe, analyse and evaluate the system of control within the Department of Justice to cope with corporate offenders, and to suggest reforms to it. It is written from the perspective of a reformer, not a revolutionary.

The traditional view of a shared responsibility and co-operation by the Department of Justice and the Police is tested on a practical level.

The first part of the study looks at the phenomenon of white-collar crime and the priorities for investigation and prosecution generally. Then more specifically, at the patterns that have emerged in New Zealand to grapple with the problem of enforcement of the law relating to companies. The remainder of the study deals with the operational

capability and effectiveness of the Commercial Affairs Division of the Department of Justice to monitor and combat company offenders.

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CHAPTER 2

THE PHENOMENON OF WHITE-COLLAR CRIME

DEFINITIONAL CONSIDERATIONS OF WHITE-COLLAR CRIME

The study of white collar crime cuts across the boundaries of disciplines such as law, sociology, accounting and economics. Not surprisingly, research in this area has been conducted from the disciplinary viewpoint of the individual researcher. The result being, that a common understanding of the term "white-collar crime" does not appear to exist. Everyone believes he knows what the term means, but when definitions are compared, there are usually sharp divergences. One writer, succinctly noted, that it may well be as Humpty Dumpty said to Alice, "It means just what I choose it to mean - neither more nor less".[1]

The label "white-collar crime" is encumbered by the concepts of both "white collar" and of "crime". Thus, any study of white collar crime would need to be preceded by some explanation to free the term from these conceptual constraints. Perhaps, this can be best achieved by looking at the basis upon which this term first originated.

Although other authors (for instance, Edward Ross and Albert Morris) gave attention to those categories of crimes and criminals "of the upper world",[2] the concept of white-collar crime was introduced in 1939 by Edwin H.Sutherland in his presidential address to the American Sociological Society.[3] Sutherland first used the term to refer to "a violation of

the criminal law by a person of the upper socio-economic class in the course of his occupational activities".[4] The concept turned the attention of criminologists to the study of offences which traditionally had not been included within the scope of criminology. According to Sutherland,

> "White-collar criminality in business is expressed most frequently in the form of misrepresentation in financial statements of corporations, manipulation in the stock exchange, commercial bribery, bribery of public officials, misrepresentation in advertising and salesmanship, embezzlement and misapplication of funds, short weights and measures, and misgrading of commodities, tax frauds, misapplication of funds in receiverships, and bankruptcies".[5]

In Sutherland's view, those who commit white-collar crime are relatively immune because of the class bias of the courts and the power of the upper classes to influence the implementation and administration of the law.

One writer,[6] has interpreted Sutherland's definition as implying that white-collar crime could only be detected, if at all, by officials and agencies engaged in regular monitoring and regulation of businesses. In New Zealand, this role is mainly the domain of the Commercial Affairs Division of the Department of Justice.

Another definitional approach identifies white-collar crime as a function of the dominant social, political, or economic system.[7] Detection, investigation and prosecution in this context could be extended to embrace an increased police involvement.

A more recent approach to the definition of white-collar crime has been developed by Herbert Edelhertz. His concept expands on Sutherland's definition and stresses the crucial distinctive elements of white-collar offences themselves. White-collar crime is defined by Edelhertz, "as violations of law committed essentially by non-physical means and by concealment or guile".[8]

Edelhertz developed the following four-fold classification system of white-collar crime.

1. **Personal Crimes:** Crimes by persons operating on an individual, ad hoc basis, for personal gain in a nonbusiness context.

2. **Abuses of Trust:** Crimes by persons operating inside businesses, Government, or other establishments, in the course of their occupations, or in a professional capacity; in violation of their duty of loyalty and fidelity to employer or client.

3. **Business Crimes:** Crimes incidental to and in furtherance of business operations, but not the central purpose of such business operations.

4. **Con Games:** White-collar crime as a business, or as the central activity of the business.9

A number of important implications flow from the Edelhertz definition regarding effective law enforcement. Edelhertz warned that attention to white-collar crime demands a different kind of organisational effort from attention to, say street crime.[10] The central issue in a white-collar crime case for the law enforcement official is not who committed the suspected offence - that is usually known. The question is what was the nature of the act and was it an offence? In other words, was it a slick business deal or a

crime? To answer these questions the investigator must reorient investigations very differently from the routine burglary relying far more on records and on patterns of behaviour. The offender will often attempt to conceal the true nature of the offence, which therefore requires methods of detection and analysis of patterns of behaviour uncommon to most traditional law enforcement.

THE IMPACT OF WHITE-COLLAR CRIME

The diverse definitions of white-collar crime are echoed in the varied nature of those harmed by this form of abuse. The victims can be consumers, governments or companies. The instruments of white-collar crime can include false advertising, personal solicitation, forged or stolen documents and altered records. The subject matter of white-collar crime includes gold and silver, real estate, vehicles, bank transactions, works of art, negotiable instruments, and merchandise.

White-collar crime is difficult to prosecute for a variety of reasons. Many white-collar crimes are exceedingly difficult to discover, to investigate, or to develop successfully as legal cases due to their extremely complex and intricate nature. The victim may not realise he has suffered loss until it is too late for anything to be done about it. Indeed he may never know he has been victimised. Because a substantial loss may be involved, the victim may be more interested in pursuing restitution than in seeing the guilty party brought to justice.

As civilisation becomes increasingly complex, so does activities of the criminal and the expertise needed to maintain effective control. As noted by one writer, we are witnessing the "democratisation of white-collar crime",[11] in which valuable assets are represented by pieces of paper, entries in books or, by electronic impulses stored within a computer.

Since white-collar crime is so difficult to define, it is not surprising, that it is also difficult to estimate the amount of money lost annually because of it. Costs of ordinary crimes are usually estimated primarily in financial terms and in the social costs of the fear they incite in the general public. There is no doubt that white-collar crimes involve large financial loss. The Equity Funding case,[12] which is considered the largest single company fraud known, resulted in losses estimated at $2 billion, the victims being the company's insurance clients. However, some argue that more damaging, is the destruction of public confidence in business and the capitalist system as a whole.[13]

On a more local and personal level, a top Fraud Squad investigator in New Zealand, was quoted as saying that, "People who are the victims of fraud, especially those who lose substantial sums of money or virtually everything they've got, go through a lot more anxiety and grief than perhaps if they'd been the victims of a street robbery."[14]

LIMITATIONS ON FULL ENFORCEMENT

The average, law abiding citizen, would not be blamed for assuming that full enforcement of the law is, not only desirable, but possible. However, one writer embraces the proposition that full enforcement of the law is undesirable, "on the libertarian principle that even to attempt to do so would make life in our society unbearable."[15] Quinney[16] reinforces this view, and has provided the following framework for understanding why he considers attempts towards full enforcement of the law to be unrealistic.

(a) **Procedural Restrictions**

These refer to those instances whereby full enforcement of the law is sacrificed in favour of human rights considerations. Investigating officers should not, for example, act in violation of the Judges' Rules[17] in order to obtain a confession.

(b) **Discretionary Interpretation of Statutes**

This is concerned with the flexibility within certain statutes for a public official to use discretion in determining whether an offence has been committed. This was noted by Bottomley, when he stated:

> "The subtleties of legal definitions and the great variety of circumstances in which behaviour can take place means that an exact formulation which will cover every possible alternative is unattainable for most practical purposes."[18]

Perceptions regarding type of behaviour could vary from officer to officer and each would need to make a value

judgment concerning behaviour.

(c) **Technical Difficulties**

These are created by limited resources which demand that individual investigating officers, and their superiors, must allocate enforcement priorities. This means that decisions are made as to which crimes to concentrate on and which to ignore.

(d) **Organisational Constraints**

Constraints are placed on the exercise of discretion by investigating officers by departmental policy guidelines which affect the enforcement of specific laws. Bottomley[19] refers to wider organisational constraints of the criminal justice system. Investigating officers will exercise their discretion in view of their appreciation of the priorities of other decisionmakers in the process. For example, police are reluctant to waste time proceeding against certain offenders who would only receive a token fine, or at worst be released on suspended sentence.

(e) **Idealogical Values**

An investigating officer's own idealogical values or moral standards may have a profound effect on his decisions.

(f) **Societal Pressures**

These pressures are largely bound up with the problem of certain laws being out of touch with current values of

society. If the community is reluctant to report certain offences then it is likely that the policy will begin to be ignored.

PRIORITIES OF THE INVESTIGATION AND PROSECUTION OF WHITE-COLLAR CRIME

Focusing one's limited resources on those activities perceived to have the greatest potential for social benefits is a fundmental operating principle for any government entity. Interest in effectively targeting resources heightens as those resources become more scarce relative to the demands placed upon them. A Report[20] prepared by the Criminal Division of the U.S. Department of Justice noted that increased interest in white-collar crime had produced the following:

1. An appreciation of the immensity of the problem and the practically limitless nature of the demands it could place on law enforcement resources;

2. Increased expectations and competing demands within and among government, the general public and the law enforcement community with respect to the use of law enforcement resources against various types of white collar crime; and

3. Increased demands for accountability concerning the use of law enforcement resources against white collar crime - how resources are being deployed, why, and with what results.

An overseas survey in 1978,[21] ranked 204 offences for seriousness. The American public considered the white-collar and corporate crime offences, equal to, and even more serious than many ordinary crimes such as burglary and robbery.

In recent months, public attention has been focused on the ability of our limited resources to cope with society's "violent" crimes; crimes physical in execution and immediate in impact.[22] An inherent danger of such publicity is that those crimes which are covert in nature and not immediate in impact will be overlooked in the ordering of priorities for allocation of law enforcement resources. Law enforcement should not merely be an instrument of social control. It should aim at maintaining or creating standards of conduct which will further the economic and social development of the community.

The objectives in the field of white-collar crime law enforcement have been described in the following way;

1. To protect and enhance the integrity of governmental institutions and processes;

2. To protect and enhance the integrity of the free enterprise system, the competitive marketplace and the nation's economy generally;

3. To protect and enhance the well-being of the individual citizen and provide opportunities to exercise political economic and other fundamental rights; and

4. To enhance public respect for and compliance with the nation's laws generally.[23]

THE COMPANY AS A VEHICLE FOR WHITE-COLLAR CRIME

In common with most other countries, New Zealand must grapple with the problems encountered in the detection and control of this form of criminality. In recent years the media have reflected public concern on the prevalence of criminal/fraudulent activities within the structure. Mr D.Kays, a senior partner in the accounting firm of Deloitte Haskins & Sells has stated publicly that "in approximately two thirds of all receiverships in which he has been involved, serious white-collar crime was evident".

The New Zealand law enforcement agencies, charged with controlling the criminal activities of companies and/or their directors are the Commercial Affairs Division of the Department of Justice, the Securities Commission, the Inland Revenue Department, and the Police.

The most recent company collapse to focus attention on the need for public protection was Hoffman Holdings in May 1984. An investigation into the affairs of this company by the Commercial Affairs Division revealed that $215,000 had been received by the company from approximately 250 purchasers

under contracts which the company had no prospect of performing. A public outcry in respect of this company collapse, resulted in the Government commissioning the Securities Commission to report on possible improvements in the area of detection, investigation and prosecution of the corporate offender.

The Minister of Justice, on releasing the Securities Commission Report in July 1984 acknowledged that criticism had been directed at the authorities for practising selective enforcement of the criminal law. He was referring in particular to, "the consummate ease with which some of our less worthy captains of industry are able to deceive, defalcate and disappear", and stated that "the Government will act to provide more effective measures to combat white-collar crime."[24]

The Securities Commission Report dealt with two main areas of concern: firstly the demarcation of responsibility between the Department of Justice and the Police, in investigations of corporate fraud; and secondly, the involvement of directors of failed companies in new ventures. The Report noted, that in practice, both the Department of Justice and the Police acknowledge responsibility for enforcement and advised against formal demarcation between them.[25] Instead, the Report recommended the establishment of an investigation unit to specialise in inspections, fraud and related enquiries.[26] The Securities Commission saw the problem as one of administration and enforcement. This was later translated into a "lack of expertise and resources"[27] by the

Prime Minister, Mr Lange who confirmed that the present failure to investigate aspects of white-collar crime raised the possibility that the perpetrators of major corporate frauds would be immune from detection.

In December 1984, the Government approved a five person unit costing $200,000 per year to be attached to the Commercial Affairs Division of the Department of Justice. This Unit, Mr Lange said,

> "...would consist of people competent to examine balance sheets and look behind the bluff and the purported signature of the Auditor."28

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CHAPTER 3

A BACKGROUND HISTORY OF THE CURRENT MALAISE

As the discussions and/or remedies relating to improved techniques for monitoring companies are interwoven, it will be useful to first preview a roadmap of past events.

A HISTORICAL PERSPECTIVE

1856 When introducing the Joint Stock Companies Act in 1856, Mr Robert Lowe, Vice President of the United Kingdom Board of Trade, had this to say:

> "The principle to be adopted is not to throw obstacles in the way of the formation of companies because that would be to arrest 99 good schemes in order to prevent the bad one-hundredth, but to allow them all to operate on given conditions and arm the courts with sufficient powers to check extravagence and roguery in management, and to save them from the wreck in which they may be involved."[1]

In recent years it has been recognised that the above proportions are probably more in the nature of 90 percent and 10 percent.[2]

When speaking on behalf of the new Act, Lowe[3] acknowledged two components as being essential for controlling commercial activities. One was a set of rules for company operations, the other was a body charged with the supervision of such operations armed with sufficient power to ensure fair play. In the United Kingdom this supervisory body was, and is the Board of Trade (now called the Department of Trade).

New Zealand adopted the provisions of the United

Kingdom's Joint Stock Companies Act in its first Companies Act in 1862. For the next 100 years New Zealand company legislation was modelled on equivalent United Kingdom legislation, with one obvious exception; a single body charged with monitoring and regulating a company's activities.

1956 Mr E.C. Adams, a member of the Company Law Revision Committee which was set up by the Government in 1950 to consider the suitability of the provisions of the English 1948 Companies Act had this to say:

> "A factor, which the Company Law Revision Committee had to take into the most careful consideration, was the absence in New Zealand of any one body exercising the important judicial, quasi-judicial, and administrative functions exercised by the Board of Trade in England."4

Accordingly the Companies Act 1955 substituted for the English Board of Trade, the Minister of Justice, the Attorney-General and the Registrar of Companies. One writer, observed that the single control mechanism of the English Act was translated in New Zealand as:

> "... a disjointed, potentially conflicting series of special arrangements, no one of which conferred the ability of decision and action which has enabled the informally authorised U.K. Board of Trade to succeed."5

1968 The MacArthur Committee was appointed in order to "review and report upon the provisions and working of the Companies Act 1955 and to recommend what changes in the law are desirable".[6]

1971 The MacArthur Committee felt it necessary to submit an Interim Report as "a fundamental and vitally important question has arisen for decision." The Committee stated that the value of the Companies Act to the public depends upon the extent to which its provisions are effectively enforced. In their opinion,

> "... the Act cannot be effective if offences by promoters or directors are allowed to pass without prosecution."7

To this end the Committee recommended the prompt establishment of an enlarged and strengthened organisation to administer the Act. This Companies Commission should be a body of high status, headed by a chairman, and given power to delegate to the Registrar of Companies certain functions considered desirable.

1972 As a result of the above recommendation, a new Division, headed by an Assistant Secretary (Commercial Affairs)[8], was set up within the Department of Justice. Six district offices were to be located in Wellington, Auckland, Hamilton, Napier, Christchurch and Dunedin.

Concomitant with the Government's decision to establish a Commercial Affairs Division the Monetary and Economic Council had suggested a "Finance Registrar" as a watch dog and supervisor of "financial institutions". The Council stated:

> "We consider that the provision of better information and supervision should be the main way of protecting investors and operators."9

1974 Across the Tasman a spate of company collapses focused attention on the effectiveness of the Australian legislation and enforcement agencies to cope with the corporate offender.

P.D. Connelly, Q.C. said in his Report on Queensland Syndication Management Pty Ltd & Ors;

> "It is fashionable in modern times when substantial amounts of public money are lost in questionable corporate affairs to produce a sheaf of amendments of the Companies Acts ... One cannot help feeling however that in most cases the Act and the general law are quite adequate and that it is at the point of enforcement that the system breaks down."10

1976 Several suggestions for improving the effectiveness of the Australian Corporate Affairs Commission in the fields of presentation and inspection, were advanced. It was claimed, that many of the Commission's initiatives are directed towards dealing with complaints on what has happened. However, in those instances when complaints are made about what is to happen, the Commission is lacking in preventative powers.[11] It was argued that, improvements can be made in the following two ways:

> "...firstly, the performance of the officers can be improved in both a qualitative and a quantitative sense - i.e. they can be better trained, better motivated, and better instructed - and there can be more of them; secondly, the officers of the Commission can have improved and expanded powers that will enable them to take new initiatives and act in a more forceful, speedy and efficient manner."12

During the early seventies, New Zealand was also having its share of company collapses; JBL, Cornish and Perpetual Trustees, to name a few.

1976 It was the failure of Securitibank Ltd which highlighted the need to protect the public in respect of funds being raised by the private sector.

1977 A solicitor and part time lecturer at the University of Sydney, delivered a paper at the 19th Australian Legal Convention, and referred to the disillusionment with the present system for regulating corporate behaviour. He cautioned that Australia will not achieve very much,

> "... if all that eventuates is our present uniform legislation and a higher powered financial fraud squad, staffed with people no better able to overcome the enormous obstacles now confronting our Corporate Affairs Commission."13

The "obstacles", referred to, include the difficulties of detecting corporate crime, of obtaining the necessary evidence once it is suspected, the delays inherent in bringing matters to trial, and the complex, costly and time-consuming procedures of the actual trial itself, including in many such cases proof of complex evidence and the problems of jurors to cope with the task.

1977 Only four years after the establishment of the Commercial Affairs Division, Mr B.C. McLay, the then Assistant Secretary (Commercial Affairs) commented that, "New Zealand so far has only played with the idea by creating the Division",[14] The fault lay not with the present Companies Act, which with all its faults, still does much of the job, says McLay, but with the conglomeration of small statutes. He advocated the establishment of a Commercial Affairs Commission which would draw together all the commercial legislation under a cloak of "activity legislation."

1978 The Securities Act came on to the statute books. The basis of this statute was to widen the range of the existing law for the protection of the investing public. The Act was to be brought into force in stages by Order in Council. Part I which created a five member Commission came into force immediately. The other Parts were to come into force when the new rules contemplated by the Commission were ready for enactment. During the interregnum, the "old" provisions of the Companies Act 1955 continue to be in force. It was not until the end of 1983 that the Regulations superseding the Companies Act prospectus provisions were enacted.

The next few years were punctuated by media publicity, as evidence of company fraud was uncovered. Particular examples which suggest remedies, to an obviously increasing problem are set out below.

1982 In a newpaper article, headed "Hot Shot fraud spotter wanted",[15] JBL receiver Mr Doug Hazard claimed that the most effective method of combating company fraud was for the government to appoint a corporate commissioner as a "one-man, anti-fraud flying squad" with the power and ability to inspect a company's books on the mere suspicion of fraud. The key was prompt decision-making and avoidance of long investigations. Fraud would not be controlled by adding more staff to either the police or the Commercial Affairs Division stated Mr Hazard. It was not a role for the police and, "the Commercial Affairs Division tends to worry too much about rules and regulations".

1984 "Fraud fighters need more teeth",[16] stated Mr David Mace in his speech to the N.Z. Institute of Credit and Financial Management conference in June. Mr Mace, a prominent Auckland receiver claimed that the Commercial Affairs Division and the police fraud squad are understaffed and underfunded. Until the government remedied this, "unscrupulous operators will continue to thrive".

1984 March of this year, saw the collapse of the Auckland low-cost housing company, Hoffman Holdings Ltd, whereby "hundreds of low income earners lost deposits of up to $2000.[17] The then Minister of Justice, asked the Securities Commission to review the effectiveness of the resources that were generally available for corporate fraud investigations.

1984 In July the Securities Commission submitted its Report on Hoffman Holdings Ltd.[18] The Report covered such topics as departmental functions and responsibilities in relation to corporate fraud, Section 9A of the Companies Act, resources, delays in Court, and delinquent officers. The recommendations of the Securities Commission are reproduced below:

1. The investigation, detection and prosecution of offences against the criminal law relating to corporations should continue to be a shared responsibility of the Commercial Affairs Division of the Department of Justice, and the Police.

2. The Registrar's power of inspection under S.9A of the Companies Act 1955 should be amplified in certain respects, and the jurisdiction of the High Court to appoint inspectors under S.169 should be extended.

3. Additional resources for investigation and prosecution under the Companies Act 1955 should be established in Auckland under the control of the Registrar of Companies.

4. Attention should be directed towards expediting proceedings in Court under the commercial criminal law.

The Securities Commission was of the opinion that;

> "...the law is not inadequate...The problem is one of administration and enforcement... In the past too much reliance has been placed on the deterrent effect of creating offences - which is weak unless offences are rigorously prosecuted - and too little attention has been paid to preventative measures".19

In August the publication of the Report was followed by an announcement by the now Minister of Justice, Geoffrey Palmer, that the Department of Justice is to get more manpower and more teeth to fight white collar crime. "This Government is committed to making an effective response to white-collar crime", said Mr Palmer.[20]

In December, the Government officially approved a five person special investigating unit, at a cost of $200,000 per year, to be attached to the Auckland district office of the Commercial Affairs Division.

A SHARED RESPONSIBILITY?

The law of New Zealand does not cast upon any particular agency a responsibility for the detection, investigation, prosecution or prevention of fraud. Both the Department of Justice and the Police acknowledge responsibility in their own particular sphere. The former taking the prime responsibility in bankruptcy and liquidations, and the Police taking the prime responsibility in other cases. It has been stated by the Securities Commission that this historical

demarcation line has been blurred in respect of companies by the new provisions of the 1980 Companies Amendment Act.[21] It is also acknowledged that there is a potential for overlapping and duplication, or alternatively the possibility of failure to act at all, in cases where one Department might assume that the other has a particular matter in hand.

One of the terms of reference of the Securities Commission Report was to consider whether improvements could be made in the area of,

> "the demarcation of responsibility between the Department of Justice and the Police in relation to investigations of corporate fraud."22

The Report outlined[23] four possible alternatives:

(a) Placing responsiblity on one agency to the exclusion of the other.

(b) Dividing responsibility between the two agencies according to some line of demarcation.

(c) Creating a new agency superseding both existing agencies.

(d) Continuing the shared responsibility on the basis of co-operation between the two agencies.

The Commission argued against giving responsibility to detect corporate fraud to one agency exclusively on the grounds that both agencies have skills and capabilities to contribute. Nor, did they think it appropriate to introduce a statutory segregation of responsibility between the two agencies as they could foresee difficulties in devising and applying a suitable rule of demarcation.

To create a new agency for the purpose of fraud detection was

in the Commission's view unnecessary, but they did support the undertaking of a "careful and critical examination of our present system"[24], with a view to giving formal recognition to an independent prosecution service.

In its Report the Commission recommended that the policing of corporate malpractice remain with the status quo, and that the investigation, detection and prosecution of offences against criminal law relating to corporations should continue to be a shared responsibility of the Commercial Affairs Division of the Justice Department and the Police.

A 1978 study[25], undertaken in fifteen United States prosecutors offices to examine the extent of police involvement in white-collar crime (defined as criminal prosecutions of a non-routine nature, i.e. excluding bad cheques, etc.) concluded that involvement by police was still relatively uncommon. Police had referred only three percent of the leads for criminal investigations, and assisted in only eight percent of the investigations in those cities for the eighteen month period (January 1974 to June 1975). The prosecution office itself had initiated most of the investigations (80%) and investigated sixty percent of the offences on its own initiative, with in-house investigators and without outside assistance. However, case loads were small, and the investigations lengthy. Deputy prosecutors averaged only 2.6 investigations per attorney per month, and the average elapsed time was 2.5 months.

Yet when undertaken, the police involvement would appear to

be fruitful. Investigations in which police participated were far more likely to involve serious charges than were other cases. For instance, a third of the investigations in which police assisted led to filing of felony charges, compared to 14 percent which prosecutors investigated alone, and 18 percent which had assistance from other agencies.

OBJECTIVES OF THE STUDY

This study does not address all the interesting aspects of white-collar crime law enforcement. It is limited to examining the operating capability and effectiveness of that agency which is charged with the monitoring and regulating of company formation, management and liquidation - the Commercial Affairs Division of the Department of Justice.

The Government's response to the public's concern regarding corporate crime has been to allocate additional resources to the Department of Justice, and confirm that the Police and the Department of Justice should each "retain responsibility for its own particular functions, in relation to corporate crime, but the functions should be carried out in co-operation".[26]

The prevention, deterrence, investigation, and prosecution of crimes committed within the company structure must compete with other interests for allocation of law enforcement dollars. In an atmosphere of the "user pay" principle as a feature of the New Zealand economic scene, it is imperative that enforcement of serious "covert, non-immediate impact"

crime is not relegated to the background in the ordering of priorities. The injection of the additional resources allocated to the Department of Justice in 1985 is in danger of being viewed as a "one-off sop" by the public, if they are not effectively deployed.

The objectives of this study are threefold:

1. To review the structure and operational capability of the Commercial Affairs Division of the Department of Justice, with particular regard to its effectiveness to provide measures to combat company malpractice.

2. To ascertain what the concept of shared responsibility means to those officers of the Commercial Affairs Division concerned with company investigations, and how it operates in practice.

3. To establish a base for further research within the Department of Justice by providing the mechanism for a "before" and "after" comparison in the following areas;

   (a) The Securities Commission Report highlighted the effect of the 1980 Company Amendment Act which has prompted the Commercial Affairs Division to recognise the need to focus on a **criminal** as well as **civil** aspect in respect of company investigations.

   A replication study could be undertaken at a later date to assess any change in the nature of the company offences investigated.

(b) The Corporate Fraud Unit was fully operational at the beginning of 1986 with a full complement of staff. This study could be replicated to ascertain whether the allocation of additional funds to the Commercial Affairs Division of the Department of Justice, has achieved the desired result.

This study is exploratory in nature, and could well raise points that will direct research in other areas of white collar crime. It is also envisaged that similar research on other enforcement agencies, such as the police, could be undertaken to provide information on the most effective deployment of resources to combat and control corporate malpractice.

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CHAPTER 4

THE INVESTIGATION OF COMPANIES

This chapter sets out the law generally, and also how it applies to company investigations. The parameters of the research study are defined, and operational definitions given.

CLASSIFICATION OF THE LAW

Very broadly, Court actions may be divided into two categories: civil and criminal. This dual categorisation is very simplistic and requires further explanation.

Civil is primarily concerned with the rights and duties of individuals towards each other. Its main distinction from criminal law is that in civil law the legal action is begun by the private citizen to establish rights (in which the State is not primarily concerned) against another citizen or group of citizens, whereas criminal law is enforced on behalf of or in the name of the State.

Criminal proceedings are brought against a person who has committed a breach of the provisions of some statute, that is, he has either committed an act expressly prohibited by a statutory provision or has failed to do something which is required by statute.

In criminal law it is usual to speak of **crimes** and **offences**. Strictly all crimes are offences against the law, therefore, all crimes are offences. In general the word "crime" is

used in a narrower sense to mean those offences against the law of a serious kind. The Crimes Act 1961 defines a crime as "an offence for which the offender may be proceeded against by indictment" (S.2). An indictable offence reflects the seriousness of the breach by generally coming under the jurisdiction of the High Court. The essential element of a crime is often described by the common law maxim, Actus non fecit reum misi mens sit rea (the act does not make a person guilty unless the mind is guilty). This means that when proceeding against a person two aspects need to be considered:

(a) a guilty act (actus rea), and

(b) a guilty intent (mens rea).

It is the degree of "guilty intent" which can be said to distinguish a "crime" from an "offence". The word "offence" is commonly applied to those less serious offences, ordinarily triable before a District Court under a summary proceeding.

Burden of Proof

Generally speaking, apart from certain statutory exceptions, the burden of providing any facts which are advanced in support of any proposition lies upon the person who asserts it. The "burden of proof" is always taken to have been discharged where the facts adduced demonstrate the truth of an allegation beyond "reasonable doubt", and in civil cases it will suffice if they demonstrate it upon the "balance of probability". In criminal cases however, the burden which

is cast upon the prosecution is far more onerous than the burden which is cast upon parties to civil actions. The prosecution must establish every material allegation in its case to this high degree of certainty, if it fails to do so at any point, the accused is usually entitled to an acquittal.

THE COMPANY OFFENDER

Corporate crime can be viewed from many different dimensions and any attempt to classify such acts can only be an arbitrary exercise. For example, a company may be the victim of an offence or it may be the vehicle by which offences are committed, or it may be both at the same time. This study is concerned with the deployment of resources by Government to detect, investigate and prosecute frauds perpetrated within the company structure. It is not essential to differentiate between company offences that are perpetrated either for or against the company as the law provides the means of prosecuting the company itself, those officers who have acted on behalf of the company, or both. The emphasis on the use of companies as a vehicle to commit offences, is well explained in Leigh.[1] Firstly, the company is a very common form of business organisation. One can buy very cheaply, a dormant company, or a company "off the peg" with constituent documents already drafted. In the case of a private company there are no minimum capital provisions; the law prescribes a minimum capital only for public companies. Although the law requires a private company to

issue all its share capital there is no minimum paid up capital requirement. It is not difficult to create a semblance of respectability and prosperity.

A second reason why companies can serve as a vehicle for fraud is that the company has perpetual succession. This means that although the shares change hands and the directors change, the company continues to exist under the same name. This makes it possible to deceive the public. Also if there is any delay in notifying changes in control to the Registrar of Companies, a trade supplier may think he is still dealing with the same people.

The attributes of limited liability is believed to enhance the opportunity of fraud as many people believe that directors would be unlikely to take risks with their company if they were likely to be made personally liable for the debts. In recent times however, the practice of banks and other financial institutions to require a personal guarantee from directors, especially in the case of private companies could be seen as having reduced the importance of limited liability. Also as noted by Argenti,[2] in the case of outright frauds the directors do not intend to remain to face any court proceedings.

The third reason that is often stated as facilitating fraud is the separation of ownership and control in large and even medium-sized companies. As shareholding in such companies is diffused the companies are run by management accountable to a board of directors. From this it is argued that a critical element of control over management is lacking, thus

facilitating fraud.[3]

The Investigation of Company Malpractice

In New Zealand the principal agencies concerned with company malpractice are the police, the Commercial Affairs Division of the Department of Justice, the Securities Commission and the Inland Revenue Department.

1. **The Police:** In order to combat commercial fraud there has for many years been established Fraud Squads in the three main metropolitan areas - Auckland, Wellington and Christchurch. Within each fraud squad is a Company Fraud Squad section which vary in size in accordance with the company activity in the area concerned. The following table sets out the strength of the company sections in each district in relation to the total fraud squad as at 31 December 1985. These figures are useful as a basis for comparison only, as changes in personnel numbers is an ongoing occurrence.

Table 1

Police Fraud Squad Personnel

District	Company section	Fraud squad	Total
Auckland	7 (includes one accountant)	13	20
Wellington	2 (plus 1 accountant attached to both)	6	9
Christchurch	2 (plus 1 civilian accountant attached to both)	13	16
	11	32	45

The members of the Fraud Squad are in essence generalists. In other countries such as Canada, Germany and France where prosecution units are created specially to deal with commercial fraud, police officers become specialised and in some instances are even trained as accountants and lawyers. The New Zealand police do not train their own officers as accountants but they do employ civilian accountants. As in England, the New Zealand police force is opposed to long term postings to any one branch, partly in order that officers may gain a broad experience of the different aspects of policing, partly to avoid elitism, and partly to avoid the dangers of corruption. There is however the added complication that the Police do not have a homicide squad. This means that whenever there is a homicide in the district it immediately takes top priority and some or all of the officers are in danger of being drawn from the fraud squad for an indefinite period.

The State Services Commission's Directory[4], states that one of the principal functions of the police is "the prevention of crime and offending", and "the apprehension and detection of offenders against the criminal law". This broad function means that the police can prosecute under any of the statutory legislation laid down under New Zealand law.

The police do not have the power to obtain direct access

to financial records. They can however use normal search warrant procedures, provided that a statutory power to issue a warrant exists. The Courts are reluctant to issue a warrant simply to search for evidence. Alternatively, there is also the risk of having such evidence disallowed on the grounds of it being unfairly obtained as was the case in United Kingdom.[5] In a similar New Zealand case[6], the evidence was allowed but stated to be unlawful. The result being that a suspect can, at present, make it difficult for police to discover evidence of fraud against him.

It has been suggested by the Securities Commission Report[7], that the police can overcome some of these problems by co-operation with other agencies. The most obvious avenue of co-operation being the Commercial Affairs Division of the Department of Justice, in respect of company investigations. However, the police have expressed some doubt about the efficacy of the Commercial Affairs Division's procedures. An inspection or investigation may in fact alert officers of companies, giving them the opportunity to conceal evidence. The police often find that they are called in too late to usefully interview witnesses who have been alerted. Under these circumstances it is almost impossible to obtain evidence which is admissable in Court.

2. **The Commercial Affairs Division**

The Commercial Affairs Division of the Department of Justice investigates malpractice relating to those areas over which it has statutory control, notably companies and bankruptcy. It has investigation staff which includes members with accounting and legal training. The function and statutory authority of this Division is dealt with in detail later in this study.

3. **The Securities Commission**

This Commission was established in 1978 under the auspices of the Securities Act. This Act was introduced as a comprehensive attempt to regulate all soliciting of funds from the public. Broadly, the functions of the Commission can be divided into two groups. Firstly, the law reforming function, and secondly the function of dealing with specific problems relating to a company or individual who came within the jurisdiction of the Act. In addition to the five member Commission there is a permanent body of staff consisting of an Executive Director, a Director of Legal Research, and Investigating Accountant, and a Parliamentary Counsel. The Investigating Accountant would ensure that the recommendations of the Commission were in line with current accounting practice, and to supervise the investigation of particular companies which came under the Commission's notice. However he was not expected to personally undertake major

investigations. The Commission has stated publicly on occasions that they are not a law enforcement body. It would seem therefore that any investigations initiated by the Commission would be followed through by the Commercial Affairs Division or the police.

4. The Inland Revenue Department

The Inland Revenue conducts its own investigations and prosecutions, the reason being that tax matters are traditionally kept confidential, even where the taxpayer is suspected of having committed other offences. Taxation is a specialised topic requiring investigators to have technical training and practical experience. Moreover, most cases are not in fact prosecuted, but are rather dealt with by pecuniary settlement.

DEFINING THE PARAMETERS

The company entity once formed can fall foul of several law enforcement agencies each concerned with monitoring and regulating its own sphere of influence. This study is confined to offences perpetrated by a company and/or its officers that could attract the attention of the Commercial Affairs Division, and the police. The police involvement is only relevant in respect of shared co-operation, or otherwise, which exists betweeen the two departments. This could include crimes and offences under the Companies Act 1955, the Crimes Act 1964 and the Securities Act 1978.

The Companies Amendment Act 1980 introduced, as s.461 to 461E Companies Act 1955, new provisions for criminal liability on the part of directors and other officers in a wide range of transactions irrespective of the status of the company. As noted by the Securities Commission Report[8], the statute contained no explicit provision placing responsibility upon any person for the enforcement of the new provisions.

As mentioned earlier in this chapter grounds for prosecution or action can vary considerably both in seriousness and protaganist. In this study, three "offence" types have been defined as follows:

1. **Machinery:** These are regulatory in nature and would generally only invoke a summary proceeding. The fact that many such offences are regulatory does not mean that they are unimportant. All too often, reporting requirements imposed under regulatory legislation are not complied with because management chooses to conceal questionable manoeuvres from both the public and its own shareholders.[9] An earlier research study concerned with possible breaches by liquidated private companies revealed that 31% of the companies that had not complied with a regulatory section appeared to be involved in some form of fraudulent or criminal activity.[10]

   Where intent to defraud cannot be proven, control is often only possible through charging a regulatory offence.

   In this study the word "Machinery" refers to those

regulatory type offences which are established in fact and do not require proof of intent. The penalty for such offences is usually by way of a default fine.

2. **Criminal:**

This type of offence is of a more serious nature and in some instances is capable of attracting a term of imprisonment. However in balance, the burden of proof, and the evidentiary requirements are much greater.Both the Crimes Act and the Companies Act contain several sections which can be invoked in respect of defaulting companies and/or directors and officers.

For the purposes of this study the words "criminal intent" refer to those offences which require proof of intent. The section of the Act will usually prescribe that the offence must be done "knowingly", "wilfully" or with "intent to defraud".

3. **Civil:**

Strictly speaking this form of redress is referred to as "an action" not a prosecution. Investigations are undertaken, not for a punitive result, but for the purpose of recovery of moneys under personal liabilities. For example, s.320 of the Companies Act provides that in certain proven circumstances an officer of the company "shall be personally responsible without any limitation of liability" for the debts of the company.

For the purposes of this study the word "civil" refers to those situations whereby sufficient grounds exist for an action to be brought by the liquidator on behalf of shareholders or creditors.

THE CRIMINAL PROCESS

1. The Investigative Agency and the Prosecutorial Function[11]

During the criminal investigative phase of the criminal justice process the investigator (whether it be the police or the Commercial Affairs Division) is pre-eminent. During the middle stages, the prosecutor (or by some other title) takes centre stage.

The role of the investigative agency can be described as follows:

- producing the suspects;
- building the initial criminal case;
- invoking the criminal justice process;
- preserving the incriminating evidence; and
- acting as official witnesses for the state.

The function of the prosecutor is to take the results of the investigation and translate them into acceptable legalese, a prima facie presentation, supportive evidence, and proof beyond reasonable doubt.

The prosecutor is responsible for:

- reviewing the nature of the accusation;
- examining the circumstances surrounding the alleged crime;

- studying investigative procedures employed in the apprehension;
- assessing the weight of the evidence;
- deciding if a prosecution is in order; and
- determining the official criminal charge to be lodged.

If the decision is to prosecute, it is the prosecutor's job to determine the exact charge or charges which will be filed against the suspect.

The prosecution is almost totally dependent upon the data supplied by the investigating agency. If the data is factual, accurate, and complete the prosecutor will be able to perform at a very high level. It has been argued,[12] that a highly trained, competent and professional investigative component strengthens the prosecutorial function at this primary level. On the other hand, if the investigative team lacks conceptual knowledge and professional skill, they can have a negative impact on the prosecution.

2. **The Investigative Agency and the Judicial Process**

At this stage of criminal justice involvement, the role of the investigative agency as official representative of the government and the role of the individual officer as an expert witness merge.

The primary functions of the investigative agency in the judicial process are as follows:

- they are expected to be impartial fact-finders;
- they are considered to be experienced evidence collectors;

- they are presumed to be efficient custodians of physical evidence;
- they are viewed as data collectors;
- they are information co-ordinators;
- they are seen as official representatives of the government; and
- they are assumed, by the public, to be expert witnesses.

The officers who appear in court are expected to play their supporting role in the judicial process in a thorough, competent, and professional manner. The final judgment as to whether the suspect is or is not guilty is not theirs to make. That responsibility belongs exclusively to the jury (or the judge, in non-jury trials).

The function of the defence counsel is to give his client the best defence available and to secure his client's release from the charge if at all possible. The defence counsel assumes an adversary posture and attempts to obtain his objectives by establishing doubt (or lack of credibility) in the mind of the judge, who can order a directed verdict of acquittal, or in the minds of the jurors, who have the constitutional authority to find the accused innocent of the charge.

One method of establishing the element of doubt is to successfully undermine not only the testimony but also the image of the investigative officer. The defence counsel who can show that the officers of the investigative agency are imperfect fact-finders, poor

evidence collectors or unqualified to be expert witnesses can plant the seed of doubt in the minds of those persons who make the official determination of guilt or innocence. The role of the officers of the investigative agency as informed and official witnesses is absolutely crucial to the judicial process.

It must be noted however, that the above summary of the criminal process is the textbook type ideal. It may well be that in reality the efficiency and effectiveness of the judicial process is a great deal less than the "ideal" due to undetected or unresolved problems. The Securities Commission Report,[13] and the Review team of the Department of Justice[14] made reference to unresolved problems within the judicial process, especially in the area of unnecessary court delays, and suitable deterrents.

DELIMITATIONS AND ASSUMPTIONS

1. This study is limited to investigations by enforcement officers into companies as going concerns and in liquidation. It is recognised that much of the investigative work of the Commercial Affairs Division deals with incorporated societies and the individual. However, the privilege of limited liability accorded the company as a separate legal entity must be balanced by society's perception that the company is being effectively monitored.

2. Section 210 of the Companies Act 1955 provides that the winding up of a company may be either,

(a) by the Court, or

(b) voluntary, which may be either

(i) a members' voluntary winding up, or

(ii) a creditors' voluntary winding up.

A declaration that the company is solvent is a condition precedent to a members' voluntary winding up.[15] Where a declaration of solvency has not been made the voluntary winding up is a creditors' winding up in which the creditors direct the winding up and appoint the liquidator. The Commercial Affairs Division does not have input into a voluntary liquidation nor do they have access to any of the financial records. This study will limit the investigations of liquidated companies to those companies wound up under a Court order. No attempt will be made to predict the number of investigations which may have been carried out on those companies choosing voluntary liquidation.

3. The collection of quantitative empirical data will be limited to a twelve month time period - 1st April 1985 to 31 March 1986. It was originally intended to test an earlier time period which would provide the mechanism for a "before" and "after" comparison with regard to the establishment of the Corporate Fraud Unit. This Unit has been partially operative since December 1985 but it was not until January 1986 that it came up to full

strength. It was not feasible to adopt an earlier time frame however, as the number of encumbent investigative officers would have been too few to make the study worthwhile. The chosen time frame, 1st April 1985 to 31 March 1986 necessitates the inclusion of the activities of the Corporate Fraud Unit. It is suggested however, that a "base figure" comparison is still possible, as the Corporate Fraud Unit was still in the transition stage.

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CHAPTER 5

LITERATURE REVIEW

A search of the literature both, overseas and in New Zealand did not produce any research that could be replicated. Two New Zealand studies were located however, that could be of interest to this study.

The first study, carried out in 1982, was commissioned by the Department of Justice, and the second was completed in 1985 by a staff member of the Commercial Affairs Division studying for a higher degree.

REVIEW - DEPARTMENT OF JUSTICE[1]

In 1982 a review of the management systems of all the divisions of the Department of Justice was undertaken by a team of four individuals headed by Mr J.Francis, a non-government employee.

The emphasis of the review was towards evaluation and comment on the individual management systems of each Division.

In relation to the Commercial Affairs Division, the review looked at the following areas; role and objectives, management, activities, current reporting methods and staffing concerns. Those areas which are of interest to this study are outlined below.

1. **Role and Objectives:**

   The Report stated that one of the underlying bases for the objectives of the Commercial Affairs Division was:

(a) the investigation of instances of suspected abuse of commercial enterprise operating as a going concern, and

(b) fraud or culpable irresponsibility by directors and managers of insolvent commercial organisations.2

The members of the review team concluded that acceptance of the above underlying basis for the Commercial Affairs Division's existence meant that the Division should be regarded as:

> "a Law Enforcement Division, and like all law enforcement departments, it should be measured in terms of its effectiveness in the prevention of undesirable commercial activity that can lead to loss of citizens' funds and business confidence in general; in the detection of criminal or undesirable commercial activity that can lead to commercial security being jeopardised; in the successful prosecution of offenders; in the success at getting commercial organisations to file necessary papers on time; in the success of its review work leading to advice being accepted by Government and the effect of that advice in the assurance of continued protection of citizens etc.".3

2. Effectiveness Measures

The Report suggested a number of effectiveness measures of commercial crime control, in an attempt to provide information on the degree to which public goals and objectives are achieved. The Report defined "commercial crime" to include breaches of legislation which fall within and without the orbit of the Crimes Act.

Measures of effectiveness of commercial crime control suggested by the Report had the following stated objectives.

(a) Prevention of commercial crime/breach of laws.

(b) Prosecution of offenders

(c) Responsiveness.

(d) Feeling of security.

(e) Honesty, fairness, courtesy and general satisfaction.

Set out in Table 2 below, are the effectiveness measures chosen by the review team in respect of objectives (a) and (b) above. The remaining objectives and suggested measures are beyond the scope of this study.

Table 2

Measures of Effectiveness of Commercial Crime Control

Objective	Quality Characteristic (or service aspects)	Specific Measure	Data Services
Prevention of commercial crime/breach of laws	Reported crimes/ breaches	1. Number of reported crimes/breaches a) per 100 companies b) per 1000 population	Incident reports
	Investor losses	2. Dollar losses per $1000 investment from crimes	Incident reports
	Monitoring effectiveness	3. Number of crimes detected a) per 100 bankruptcies b) per 100 liquidations	Incident reports, inspection of records
Prosecution of offenders	Partly solved crimes	4. Percentage of crimes cleared by type of crime and whether cleared by prosecution or other.	Incident reports
	Completeness of prosecution	5. Percentage of known crimes cleared by type of crime	Incident reports. Prosecution reports
	Quality: Effectiveness of prosecution	6. Percentage of prosecutions which survive preliminary hearing and percentage dropped for various reasons by type of crime.	Prosecution and court records
		7. Percentage of prosecutions resulting in conviction a) on at least one charge b) on highest charge by type of crime	Prosecution and Court records
	Speed of "Prosecution"	8. Percentage of cases cleared in less than "X" days (with "X" selected for each crime	Incident Report Prosecution reports

3. Revenue v Services Rendered

The Review team noted that in the 1980-81 year the amount of fees collected was $5.654 million, which exceeded the Division's appropriated expenditure by almost $2.5 million.[4] The fees were increased in 1975, and reviewed in 1978 and 1980. The Review team suggested that there appeared to be "no economic or commercial basis for "pricing" of these charges".[5] They expressed concern at the considerable profit that accrues to the Crown which is not "ploughed back" to make the operations of this Division more effective and efficient. The Review team referred specifically to the lack of a computer-based central filing system able to serve the whole country.[6]

The premise that, a much closer economic relationship be maintained between the income and cost of a public service, could be viewed as the "other side of the Government's user pay coin". The Review team made two specific recommendations in this regard. Firstly, that all fees and charges fixed by Statute be subject to an annual review, so that revenue and expenditure are more closely related.[7] Secondly, that where fees exceed expenditure by more than a reasonable amount, they either be reduced, or the surplus utilised to provide a better service.[8]

4. Management

Reference was made to the fact that the failure of top management to respond to requests and suggestions within a suitable time span, was considered by the Division to be inhibiting the achievement of objectives. The Review team however, were of the opinion that "this problem will largely be solved when the Management By Objectives system is fully operative".[9] In the meantime, it was suggested that regular meetings to review progress and monitor results be implemented.

5. General

The Review team discussed the advantages of modern communications, such as computers and microfilm technology, and suggested that they be exploited more fully.[10] It would enable the Division to handle more operations and provide a better nation-wide service at a lower cost from a centralised filing system.

THE ROLE OF THE COMMERCIAL AFFAIRS DIVISION OF THE DEPARTMENT OF JUSTICE IN THE NEW ZEALAND BUSINESS COMMUNITY [11]

The catalyst for this research study could well have been the findings of the Review outlined above. The thesis appeared to be directed at two questions:

(1) has the Commercial Affairs Division achieved its proposers' hopes?; and

(2) does the Commercial Affairs Division play the role in the New Zealand business community that it officially set itself?

To answer these questions the author carried out a comparative analysis of the Commercial Affairs Division, and its Australian counterpart, the Corporate Affairs Commission in New South Wales. The author does not explain however, how this comparative analysis is expected to achieve the purpose of the research.

Nevertheless, certain aspects of the research provide relevant and useful background material to the present study.

Role and Objectives of Commercial Affairs Division

Managh gave a descriptive outline of the specific duties of the New Zealand agency, e.g. insolvency administration, incorporation of new companies, public registry system, inspections under the Companies Act 1955, and the administration of minor Acts.[12]

A short evaluation of the attainment of the original perceived role inferred that the Commercial Affairs Division had not achieved its objectives. The author stated "that most of the professional staff's time is spent in the examination of company liquidations".[13]

However, there is no clear statement on the methodology used to obtain this evidence. For example, were all professional

staff in each of the regional district offices surveyed; or a sample of the whole population; or was the conclusion based on the author's own experience.

Corporate Affairs Commission (Australia)

Managh described the objectives and functions of the Australian agency.[14] From this discourse, it appeared that the function of the Corporate Affairs Commission differs in one significant respect from that of its New Zealand counterpart. It is not concerned with the practicalities of insolvency administration of, either bankruptcies, or companies. This is carried out by private liquidators. However, a liquidator must report back to the Commission if it is apparent that any offence has been committed; or if a company will be unable to pay its unsecured creditors more than 50 cents in the dollar.

Facts and figures relating to the Corporate Affairs Commission, which may be of interest to the present study, have been included in this review, where appropriate.

Investigation of Company Liquidations

During the 1980 year, 642 liquidations were reviewed by the Corporate Affairs Commission, to assess whether investigatory action was warranted. Of this number, 24 out of 25 were successfully prosecuted.

As at 31 December 1980, 100 companies were under

investigation resulting from a referral. Of these, 65 investigation reports alleged breaches such as:

"(1) Failing to keep proper books and records
(2) Incurring debts knowing they couldn't be paid
(3) Directors failing to act honestly.
(4) Making false statements in filed documents.
(5) Fraudulent misappropriation of company property.

(6) False pretences.
(7) Conspiracy to cheat and defraud." 15

In Managh's opinion, the above offences were similar to those discovered during company liquidation investigations in New Zealand. The difference being that very few were accompanied by prosecutions. He based this conclusion on an earlier research study he had undertaken in 1983, of 31 companies in liquidation drawn from the Wellington district office files.[16] Managh suggests that reluctance to take action is caused by financial resource restraints, lack of staff to carry out investigations, and possibly a lack of clear guidance by the legislation.[17]

Complaints from Public

Both agencies acknowledged a responsibility for actioning complaints received relating to companies.
Below is an extract taken from Managh's study,[18] showing the incidence of complaints dealt with by the Corporate Affairs Commission during the period 1976-1980.

	1976	1977	1978	1979	1980
Civil nature	772	745	1266	1148	1156
Complaints which justified investigative action	156	289	321	273	252
TOTAL	928	1034	1587	1421	1408

Of the 1408 complaints received in 1980, 13 reached the prosecution stage, all of which resulted in convictions. On the New Zealand scene, from Managh's experience, unless a complaint is made to the Minister of Justice or at a senior level at Head Office it tends to be "brushed aside". He claims that "it is not known" whether any company related complaints have resulted in prosecutions, but from his experience there would be few. No records of complaints are maintained by the Commercial Affairs Division.[19]

Company Inspections

The Corporate Affairs Division carried out 1438 inspections of businesses, prompted by such factors as use of unregistered names, non-lodgment of documents and non-payment of fees. Managh did not provide the incidence of prosecutions and/or convictions. Managh stated that similar figures for inspections by the Commercial Affairs Division were not available but he thought they would be relatively small.[20] Inspections under the Companies Act, being a role which has not really been developed by the Commercial Affairs Division investigating staff.[21]

Managh put forward the proposition that, the strictly limited

resources available to this agency, suggests that it may well be no more than a political sop to point to, when major businesses collapse.[22]

Police Liaison

Acting as a deterrent to corporate crime is a major role of the Corporate Affairs Division. Co-operation with the Police is facilitated by an exchange of staff. Police officers are seconded from New South Wales Police Fraud Squad for 3 year periods to assist investigatory staff in the enforcement of the provisions of the Companies Act. Investigators from the Corporate Affairs Commission are seconded for a period of 2 years to the Police Fraud Squad to provide accounting assistance to detectives.

Managh however, suggests that co-operation between the Commercial Affairs Division and the New Zealand Police force is "rare". Evidence for his statement appeared to be based on a 3 1/2 month work experience with the Lower Hutt Criminal Investigation Branch in 1982.

In his conclusions, Managh[23] suggests that New Zealand should adopt a secondment system, similar to that which operates between the Corporate Affairs Division and the Police fraud squad. He maintains that the commercial expertise at present lacking within the Commercial Affairs Division could be achieved by co-operation with the Police and by sending staff on the National Corporate Crime Course in New South Wales.

Staffing

Managh set out the staff complement for the Commercial Affairs Division as at 31 December 1980.[24] He qualfified his figures as being approximate as he was unable to obtain specific figures. The staff were occupationally graded as follows:

Administrator	1
Legal	10
Accountants	11
Clerical/Executive	198

	220
	===

The Assistant Secretary (Commercial Affairs) is an administrator. All others, except those in the accounting and legal occupational groups, are classified clerical/executive. The accountants and legal staff represent 5% and 4.5% of the total staff respectively, making the Investigative grouping only 9.5% of total staff.
At the same period, the Corporate Affairs Division staff totalled 481, the combined investigative and legal divisions representing 39.5% of total staff. It was suggested that, these figures are evidence of the completely different priorities on the skills used, and reflect the differing role each organisation is able to play in the business community.[25]

With regard to the clerical/executive occupational class of the Commercial Affairs Division, it was claimed that there was little formal training, and no professional or tertiary

qualifications are required.[26] Managh argued that the problem of recruitment and retention of professional staff could be a consequence of the relationship between the clerical and professional staff. In his opinion "all decision-making within the district office level is made by the clerical/executive stream" whereas "... the role of the professionally qualified person has been reduced to that of a well qualified, but neutered report writer."[27]

Effectiveness of the Commercial Affairs Division in administering the Companies Act 1955

It was acknowledged that measuring the effectiveness of a non-profit organisation is a difficult, albeit important task. Reference was made to the Report brought down by the review team headed by J.Francis,[28] and for the purposes of his research he adopts the Report's prosecution measure of effectiveness. Details sought were sections breached; numbers of breaches; whether prosecution was successful; and the penalty imposed.

Table 3 is adapted from information provided by Managh of prosecutions brought by the Commercial Affairs Division for the period 1 January 1980 to 31 December 1980.[29]

Table 3

Prosecutions 1.1.1980 to 31.12.1980

	Section	Number	Conviction	Penalty
AUCKLAND				
Failing to furnish annual return	132	Not given		
These were not proceeded with because judiciary deemed them to be incorrectly laid.				
HAMILTON				
Failing to furnish annual return	132	48	46	3 at $747 3 at $746 3 at $382 4 at $250 4 at $200 6 at $191 3 at $100 2 at $ 50 1 at $ 25 6 at $ 10
NAPIER				
Failing to furnish particulars of director	130)			
	)	14	11	
Failing to furnish annual return	132)			
WELLINGTON				
Not delivering up company's assets to liquidator	316	1	1	Community service
CHRISTCHURCH				
Failing to furnish annual return	several		Outcome not available as matter filed with individual files	

DUNEDIN

No prosecutions were made

In the 1980 year, the Corporate Affairs Commission laid 8,122 informations. Fines or penalties imposed totalled $441,833 in respect of 5,572 convictions or orders made. A further $64,250 in Court costs were ordered. The Corporate Affairs Commission withdrew 2,269 matters and collected $434,474 in costs in respect of these.[30]

Conclusions

On the basis of comparing the prosecution rate of the Australian agency, the Corporate Affairs Commission, with that of the Commercial Affairs Division, Managh concluded that the Commercial Affairs Division has not achieved its stated objective, that is, to control commercial crime.[31] He advocates that a more vigorous approach be adopted, and that a "defined, well-entrenched programme of enforcement" be pursued "from the very top-most echelons of the Division".[32]

Managh's conclusions however, could well be challenged on the following fundamental points. The research method adopted would appear to be a comparative analysis of the two agencies.[33] However, not only was the emphasis on the data collected dissimilar, but it was presented in a different format in each case. No reference or adjustment was made for any differences in the potential number of companies

registered within each jurisdiction, nor were the results presented as a percentage of the whole. Managh referred to the disparity between the two agencies in respect of the staff establishment, but no attempt was made to relate this variable to the final results.

THE RELATIONSHIP OF THE LITERATURE TO THE PRESENT STUDY

1. **Review Report, Department of Justice**

   The Report by the Review team was undertaken to examine the management of annual activities, with a view to recommending improved methods "for quantification of specific objectives for accountable officers, and for measurement of achieved results".[34]

   Its relationship to this study is that it provided a focus, and highlighted potential problem areas. The Report outlined several specific effectiveness measures that it considered could be applied to the Commercial Affairs Division, to quantify its objectives. This study may be able to assist in establishing to what extent the raw data, on which these effectiveness measures depend, is available.

2. **The Role of the Commercial Affairs Division of the Department of Justice in the New Zealand Business Community**

   The focus for the above research was the role of the Commercial Affairs Division in the business community, and whether it had achieved its stated objectives.

Such objectives encompassed all the activities of the Commercial Affairs Division, whereas the present study is confined to those activities which involve the investigative staff in monitoring company offenders. The Managh study however, will provide some basis for comparison in selected areas. If, as claimed by Managh, the Commercial Affairs Division does not achieve its objectives,[35] the present study may go some way to explaining why.

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11. MANAGH,J.F. **The Role of the Commercial Affairs Division of the Department of Justice in the New Zealand Business Community.** Faculty of Commerce and Administration, Victoria University, 1985

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17. Managh, J.F. (1985) op cit. p.18

18. Ibid. p.38

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20. Ibid. p.39

21. Ibid. p.21

22. Ibid. p.21

23. Ibid. p.68

24. Ibid. p.49

25. Ibid. p.50

26. Ibid. p.54

27. Ibid. p.28

28. Ibid. p.59

29. Ibid. p.62

30. Ibid. p.64

31. Ibid. p.66

32. Ibid. p.66

33. Ibid. Managh did not state a methodological approach, nor did he enunciate any research procedures.

34. Department of Justice, Review. (1982), op cit. p.17

35. Managh, J.F. (1985) op cit. p.66

CHAPTER 6

METHODOLOGY

RESEARCH METHODS

To achieve the objectives of this study, it was decided to employ the following methodologial techniques. These techniques are discussed, as far as possible, under the relevant topic headings.

Role and Objectives of Commercial Affairs Division

A descriptive analysis of the objectives, structure and function of the Commercial Affairs Division will be undertaken. The purpose is to establish why such a special agency was considered necessary, the expectations and objectives of the Division, and the legislative authority and discretionary power conferred on the agency to achieve such expectations.

Data Sources

Relevant data will be obtained from the following sources:

(a) Parliamentary Debates: To ascertain why a special agency was considered necessary to monitor commercial activities.

(b) Statutory Legislation: To identify and analyse the relevant sections in the Companies Act 1955 dealing with legislative authority, and the discretionary power of the Registrar of Companies, and delegated officers.

(c) Department of Justice Annual Reports: The Annual Report is submitted by the Secretary of Justice and

summarises the year's activities of each Division under the control of the Department of Justice. The section devoted to the Commercial Affairs Division covers such topics as the objectives of the Division, expenditure and receipts allocation, activities and achievements, and future developments. Although this study has a 1985/86 focus, a total of four years from 31 March 1983 will be perused, to ascertain whether there have been any changes in emphasis during this period.

(d) Estimates of Expenditure of Government: The Estimates for the years 1983 to 1987 will be examined to provide information on the vote allocated to the Commercial Affairs Division, and to highlight any inconsistencies.

Operational Capability of Commercial Affairs Division

It is generally accepted that competence of officers and their ability to investigate is a cornerstone to the effective means of combating corporate malpractice. This presupposes that investigatory staff are suitably qualified and adequately trained to carry out their duties in an efficient and effective manner. It also presumes that the investigating staff should not be impeded or constrained by factors detriment to the effective performance of their duties.

Data Sources

Data relating to the operational capabability of the investigating officers of the Commercial Affairs Division will be collected from the following sources.

(a) Survey of Investigative Officers of Commercial Affairs Division

Those officers in the Commercial Affairs Division whose main duty it is to undertake company investigations, will be surveyed to provide information on the operational procedures used. The data collected will be of a qualitative rather than quantitative nature. This will enable identification of problems perceived by the respondents as inhibiting their effective performance.

(b) Follow up interview: This will be conducted to clarify information gathered in (a) above. It will also provide a vehicle to flesh out those areas which contingency questions create.

Effectiveness of Commercial Affairs Division to monitor and combat company offenders

In recent years there have been many solutions to the problem of combating corporate crime, mooted. The general consensus appears to measure a law enforcement agency's effectiveness in terms of detection of crime or undesirable commercial activity, and the successful prosecution thereof.[1]

Data Source

Data will be obtained from the following sources:

(a) A Survey on the Investigative Activities of the Commercial Affairs Division:

The controlling officer of each of the regional offices will be surveyed to ascertain the number of complaints, follow-up investigations, and prosecutions handled by each office. The data is specific in nature, and will be confined to controlling officers to avoid double counting.

(b) Follow-up interview: A follow-up interview with each respondent will be conducted to enhance the quality of the information given in (a).

The Concept of Shared Responsibility

Enforcement of the law relating to non-desirable activities by companies has traditionally been carried out by both the Commercial Affairs Division and the Police. Each department being concerned with its own particular sphere. In its Report in 1984,[2] the Securities Commission, as a result of discussions with senior officers of both departments, expressed satisfaction that,

> "...both Departments are well aware of the need for co-operation. They have implemented procedures, including (in Auckland) regular meetings, to aid each other in dealing with corporate fraud ...Each agency should retain responsibility for its particular functions, in relation to corporate crime, but the functions should be carried out in co-operation."3

This recommendation to retain the status quo, which to date has not been upset by Government, was chosen from four

possible alternatives.[4]

One of the objectives of this study is to ascertain what is meant by "shared" responsibility and co-operation, and how it operates in practice.

Data Source:

Data relating to the concept of shared responsibility and co-operation will be sought from the following sources.

(a) "Originator's" View: A representative of the Securities Commission will be surveyed with regard to their concept of shared responsibility, and how it should operate, as outlined in their Report.[5]

(b) "Official" View: The controlling officers will be surveyed to establish the "official" interpretation of the concept of shared responsibility and co-operation. This will provide a framework of official policy which could serve as a basis for comparison with the "local" view.

(c) "Local" View: The local view refers to those officers undertaking company investigations and their controlling officers. The data on how these two groups perceive the operation of shared responsibility and co-operation with the Police will be drawn from their respective surveys.

POPULATION

The population for this study comprises all Investigative and Controlling Officers from the six District Offices, the

Corporate Fraud Unit and the Head Office of the Commercial Affairs Division.

SURVEY METHODS

The following survey methods were considered:

(a) Unstructured Interview: Although this method provides flexibility to highlight and pursue otherwise unidentifiable information, it does not provide an acceptable basis for comparison of techniques between one group and another.

(b) Structured Interview: This method allows a more formal structure from which to compare information obtained. As this method requires a specified time commitment, it is not conducive to obtaining extensive information.

(c) Mailed Questionnaire: This method is more acceptable when dealing with a large volume of information. It does not however, allow for spontaneous responses and can act as a restraint on possible valuable data.

Methods Chosen

It was decided that different survey methods would be employed relative to the information required.

1. **Survey of Investigative Officers.**

Because of the large amount of technical data to be collected, and the length of the survey, the mailed questionnaire was considered to be the most suitable

method. Also, as much of the data would be qualitative, rather than quantitative, a follow up interview would overcome drawbacks of the mailed questionnaire method, and enhance the quality of the information.

2. Survey of Controlling Officers

It was also decided to use a mailed questionnaire and follow up interview for these participants, for the reasons outlined in (1) above.

3. Interview with the Assistant Secretary (Commercial Affairs)

A structured interview was the method chosen, because the view sought was confined to the "official" concept of responsibility and co-operation with the Police. This method enables comparison between "official" and "local" views.

4. Interview with the Securities Commission

As the data collected from this source will provide the base from which the concept of shared responsibility and co-operation will be derived, it was decided to adopt the unstructured interview method. This would allow greater flexibility to pursue hitherto unidentifiable information.

QUESTIONNAIRES

A. DESIGN

Possible Problems

Response rate is not an issue of this study as a 100% response is required. However the genuineness of the responses must not be overlooked. Much of the credibility of the study depends on the participants giving frank and thoughtful responses to questions which may be considered sensitive.

The following areas could be identified as establishing a barrier to sincere participation:

1. Length

The problem: Would the length of the questionnaire deter subjects from responding as fully and conscientiously as possible?

There has always been an assumption that long questionnaires receive lower response rates than shorter ones. Brown[6] reported that the use of a two question postcard resulted in a higher return than a two page questionnaire. In follow-ups to the original mailing, however, there was no difference between the two techniques.

Leslie[7] was concerned with techniques for achieving high response rates, particularly in studies using questionnaires of extreme length. Among the techniques discussed are printing, study sponsership, use of telephone follow ups, and

limitation of questions essential to the study.

Other studies have shown that questionnaire length itself need not interfere with response rates. Berdie[8] points out some of the design deficiencies of previous studies to test the effects of questionnaire length on response rates. He reports a study which found questionnaire length was not related to response rate. Champion and Sear[9] looked at questionnaire response rate and concluded that the effect of questionnaire length on response rates needs further study.

A conclusion that can be extracted from the above results is that seemingly more important than questionnaire length is questionnaire content. The questionnaire items should be interesting to the respondent, relevant to the purpose of the study, and limited to essential items.

2. **Confidentiality**

The number of participants will be very small which precludes any sophisticated statistical analysis of the data. This means that much of the value of the study is to be gained by qualitative responses. This in turn, relies to a large extent on the genuineness of the replies.

There is a possibility that responses may be distorted with regard to perceived threatening questions, such as revealing a lack of expertise,

or perhaps, criticism of the existing judicial process.

Two possible solutions to this problem can be considered: anonymity, and confidentiality.

An anonymous study is one where nobody (not even the researcher) can connect returned questionnaires to the names of those completing them. A study is confidential when the researcher knows who has responded to each questionnaire but undertakes not to reveal this information to other people.

For this survey, anonymity is not possible because of the need to provide for follow up interviews, but, it is possible to guarantee confidentiality.

The questionnaires will be marked with a code number to avoid using names, and also allow for identification in respect of follow up action and interviews. Complete frankness with the participant explaining why code numbers are being used is essential to prevent any undermining of their co-operation.

3. Time Commitment

It has been suggested that you should always tell your subjects the length of time an average person takes to complete the questionnaire. However, Nixon[10] advises to limit this suggestion to only those cases where the questionnaire can be completed in 15 minutes or less. If the subject

knows ahead of time that it may take an hour or more for him to complete the form, he may never start it.

As the questionnaires being used in this study will be lengthy, it will be inadvisable to state an estimated completion time. Also, there is the risk that if a suggested time varies from the actual (especially if underestimated), the participant may resent the additional time needed to complete the questionnaire.

Selection of Respondents

It was intended to survey the population in both questionnaire surveys - the investigative officers of the Commercial Affairs Division and their controlling officers. A list of names and addresses of persons presently filling the above positions was obtained from the Assistant Secretary (Commercial Affairs). The number of potential respondents in relation to the divisional offices is set out in Table 4 below.

Table 4

Potential Respondents

CAD Office	Investigative Officers	Controlling Officers
Auckand	1	1
Corporate Fraud Unit	3 *	- *
Hamilton	-	1
Napier	1	1
Wellington	1	1
Christchurch	1	1
Dunedin	-	1
Head Office	1	1
	---	---
	8	7
	===	===

* The Chief of the Corporate Fraud Unit not only acts as a controlling officer but is also very involved in the investigation process. The relevant section covering the Unit's activities are included in the controlling officer's response from Auckland district office.

Unfortunately the above number of investigating accountants is a drastically reduced figure to that of the established positions for this occupational group (refer Table 6, p.111), especially in respect of the Auckland district office.

Content

The content of the two separate questionnaires covered the following areas.

1. **Survey on Operational Procedures of Investigative Officers of Commercial Affairs Division**

	No. of questions
Background Information This section dealt with the duties, qualifications, experience and training of investigating officers.	16

Investigative Activity This section dealt with time spent on different types of company investigations and possible offences uncovered.	5
Investigative Process This section dealt with the investigative process and the concept of shared responsibility with the Police.	17
The Decision Process This section dealt with the decision-making process in respect of company investigations.	8
General Comments This section allowed for general comments by the respondents on the role of the Commercial Affairs Division in the investigation and prosecution of company offenders.	4

	50
	===

2. **Survey on Investigative Activities of the Commercial Affairs Division**

Background Information This section dealt with the qualifications and experience of controlling officers.	5
Investigative Activity This section dealt with the number of complaints, investigations and prosecutions handled by each office.	17
Concept of Shared Responsibility This section dealt with the extent of co-operation with the Police in respect of company investigations.	4
General Comments This section invited general comments on the role of the Commercial Affairs Division in the investigation and prosecution of company offenders.	3

	29
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B. PROCEDURES

1. Pretest of Questionnaires

Pretesting involves sending the questionnaire to a sample of people as similar as possible to the people who will be receiving the actual final questionnaire.

Sletto[11] in this frequently cited article stresses the importance of pretesting. Results of this study suggest that questionnaire length may not, in itself, inhibit response rate.

The present study was unable to draw on experience as there does not appear to have been any previous study specifically attuned to its requirements. It was therefore, considered important to extensively pretest both questionnaires to assess the ease of understanding and clarity of the questions. To accomplish this, assistance was enlisted from a wide range of subjects at the pretesting phase. A total of three pretests were undertaken by respectively, a recently retired investigative officer of the Division, the Market Research Unit at Massey University, and the Research Division of the Department of Justice.

During each pretesting, any difficulties that were encountered in understanding the questions were noted and the wording subsequently modified. Both questionnaires were presented as a booklet, with a

distinctive cover. It was hoped that this would create sufficient interest, to avoid it being overlooked. The questionnaires, as sent, are reproduced in Appendix 1 and 2.

2. Letter of Authorisation

The questionnaire requested information that could be interpreted as being specifically "official" in nature. To reassure the participants that although, this was an independent study, it had the full support and official permission of the Department of Justice, a personalised letter of authorisation from the Assistant Secretary (Commercial Affairs) was attached to each questionnaire. A copy of this letter is to be found in Appendix 3.

3. Introductory Letter

A letter of introduction was also attached to each questionnaire, a copy of which is given in Appendix 4. This letter introduced the researcher, explained why the research was being conducted, the importance of each participant responding and the mechanics of returning the questionnaire. The participants were assured that their individual responses would be confidential and the code number rationale was explained. A telephone number was provided for those who might want more information about the study.

4. Follow-Up Letters and Telephone Calls

Follow-up letters were sent, and telephone calls made to facilitate response, details of which are given in "Response Rate" below.

5. Follow-Up Interviews

A substantial portion of the questionnaires required narrative responses by the participants. This aspect of the survey was well utilised by the respondents which necessitated personal follow-up interviews in most cases to ensure that there was no distortion of meaning. These interviews were structured to allow the respondents to enlarge on particular isues, and provide the opportunity for frank and open discussion.

C. RESPONSE RATE

The first mailing of the total number of questionnaires (fifteen) was carried out in mid November 1986 with the request that they be returned as soon as possible. Four of the eight investigating officers (50%) and two of the seven controlling officers (29%) responded within the fortnight. Those who had not responded by the beginning of December were sent a follow up letter pointing out the importance of their response to the results of the study. From the response of one of the controlling officers it became apparent that the wording

of a question could be open to misinterpretation. To avoid this problem an errata sheet was attached to the follow-up letter sent to the controlling officers. A copy of both follow-up letters is shown in Appendix 5 and 6. These follow-up letters resulted in one other investigating officer and two controlling officers responding.

In mid-December, the remaining six potential respondents (40%) were telephoned to check whether there were any problems, and request the likelihood of the return of the questionnaires. As a result a further three responses were forthcoming. Table 5 below sets out details of the response received to the questionnaire surveys.

Table 5

	Response Rate	
	Investigating Officer	Controlling Officer
First mailing	4	2
Follow up letter	1	2
Telephone call	2	1
Individual totals	7 = 88%	5 = 71%

Overall Total = 12/15 = 80%

As can be seen from the above Table the investigating officers produced an 88% response and the controlling officers 71%, giving an overall response rate of 80%. Although this response rate would be acceptable in the

majority of research studies, it had been hoped that a 100% response would be achieved in this study. Unfortunately this was not possible but the following explanations may provide some insight into the reasons for this.

Non Responses

Investigating Officer: Only one of the investigating officers failed to complete the questionnaire. This officer wrote that he did not have the time as yet to complete the questionnaire but "I do intend completing your questionnaire and hope to set some time aside for it in the near future."

Unfortunately the time constraint on this study precluded the inclusion of this response.

Controlling Officers: Two controlling officers failed to complete the questionnaire. One was in personal contact and expressed a strong desire to complete the questionnaire and also be given the opportunity to make additional comments. However, devoting the necessary time to this exercise was a major problem for this potential participant: and was no doubt exacerbated by the time constraint of this study.

The second controlling officer communicated his misgivings concerning both the structure and the use to which the questionnaire could be put to, and subsequently elected not to participate in the survey.

He stated that he "found the questionnaire to be so absolute in its required response that the ticking of boxes and margin notes could not accurately reflect the work undertaken by us". By way of explanation he stated that as he saw it, "a Commercial Affairs office in any particular area attempts to keep its finger on the business pulse by building up contacts and by this method very often manages to shut the gate before the horse has bolted, so that a Section 9A[12] investigation is not required but would have been had that earlier action not been taken."

It is understandable that the study must be affected by the non-responses outlined above. However, the overall effect may be offset by the fact that the district offices concerned represent only 16% of the total companies registered within the six district offices.

Quality of Responses

It is recognised that the data could have been more usefully employed if the district offices could have been identified in specific instances without revealing the source of the information. Unfortunately this was not possible, as the lack of numbers in some areas precluded being able to make specific references and ensure confidentiality.

Several of the questions, particularly in the investigative activity section, were not approached in a uniform manner by the respondents. The fault for this

may be with one, or several of the following factors. Firstly, the instructions covering the questions may have been unclear; or the length of the questionnaire may have caused the respondents to skip what they perceived to be unnecessary information, putting instead their own interpretation on what was required. They may have felt that their answers were best served by changing the format of the questions; or, they did not possess the answer in the form required, for example, the number of possible breaches.

It was not practical to establish which of the above alternatives, if any, was applicable, because neither, the respondents, nor the research study, was able to make time available. Also, it was not possible in all cases, as one of the respondents had left the service of the Division, and others were on annual leave.

On a more positive note, the qualitative responses appeared to be both, freely and fully given. This would seem to accord with the research undertaken on questionnaire design discussed earlier (pp.75-76), that length is less important than relevance and content.

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CHAPTER 7

COMMERCIAL AFFAIRS DIVISION OF THE DEPARTMENT OF JUSTICE

PART A: DISCRETIONARY AND STATUTORY POWERS

Discretionary Powers

Discretion refers to a situation in which an official has latitude to make authoritative choices not necessarily specified within the source of authority which governs his decision-making.[1] Kenneth Culp Davis, a recognised commentator on discretion, argues that a public officer exercises discretion, "...whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction".[2]

Discretion is a critical element at almost every point in our criminal justice system. It is exercised in the public official's decision to follow up a complaint, the decision to prosecute or abandon an investigation, the judge's decision to impose severe or minimal sentence. This reliance on discretionary decisions is not unique - all legal systems in history have utilised such power.[3] It is important because it maintains a flexible, individualised system of justice, but it is a system vulnerable to abuse.

Discretionary decisions by officials at one point in the system can have important effects on decisions made elsewhere.[4] When the law enforcement agents, or example, choose not to invoke their arrest powers for routine, low visibility and particular victimless crimes, their decisions

define the outer limits of sanctions to be imposed by the political system regardless of what the statutory law may provide. In this context, the author was referring to the police, but the argument can be applied equally well to the public official in the Commercial Affairs Division. They can be seen as law interpreters since their discretionary judgments give concrete meaning to the law controlling company activity.

Discretionary Criteria

There are criteria which governs the decision whether or not to prosecute. How evenly these criteria are applied it is difficult to say. As a general rule, the Commercial Affairs files and reports give no indication of why a decision whether or not to prosecute is made, making it difficult to determine what weight was given to the various principles applicable. These principles can be loosely identifed as follows:

(1) Is there evidence on which a jury could be asked to convict? An affirmative answer does not necessarily mean there will be a prosecution.

(2) Is there a reasonable prospect of conviction?

(3) How much time has elapsed since the offence was committed. This is an important consideration because witnesses' memories may have faded to the point where they cannot be relied on.

These criteria would seem to be weighed against the seriousness of the offence, the importance of the matter

generally, and the sentence which is likely to be passed. The ultimate question is whether it would be in the public interest to bring proceedings.

This application of criteria, attained prominence[5] recently as a result of the Registrar's decision not to prosecute two former directors of the failed company Sovereign Gold Mines despite strong recommendations by the Securities Commission. The prosecution recommendations followed a public inquiry into Sovereign Gold Mines, a company which went into receivership in July 1984, before its first annual report was published. The criteria applied by the Registrar was the difficulty in determining where the responsibility for alleged inadequacies properly fell. He came to the conclusion that "on balance, the interests of all parties would best be served by closing the investigation".

This decision produced an immediate response[6] from the chairman of the Securities Commission, who was strongly critical of the Registrar's failure to bring prosecutions, and his tardiness in dealing with the recommendations.

Statutory Authority

The law of New Zealand does not cast upon any particular agency a responsibility for the investigation, detection, prosecution or prevention of corporate malpractice. The Securities Commission classified the relevant statute law under the following headings:

(a) Enactments constituting crimes and offences;
(Crimes Act, Companies Act)

(b) Enactments making provision for inspections and enquiries;
(Companies Act) 7

A list of the relevant sections of the these Acts can be found in Appendix 7.

The responsibility for the general administration of the Companies Act, the Securities Act, and the Crimes Act is vested in the Department of Justice.[8]

As noted by the Securities Commission in its Report

> "...it is no special responsibility of the Department of Justice to ensure that the provisions of the Crimes Act 1961 or the Securities Act 1978 ...are applied and enforced in all cases. Likewise, the Police Department is not explicitly charged by statute with any particular function in relation to the criminal law." It is accepted by the Department of Justice however, that the Commercial Affairs Division is the monitoring arm of the Department of Justice in matters relating to the Companies Act." 9

As this study is concerned with detection, investigation and prosecution of the corporate offender, it is necessary to look more closely at the relevant statute law, particularly the legislation under the jurisdiction of the Commercial Affairs Division.

A. Enactments constituting crimes and offences

Crimes Act 1961

As can be seen from the list in Appendix 7, a considerable number of serious violations applicable to company offenders, come under the auspices of the Crimes Act 1961.

Companies Act 1955

The Companies Amendment Act 1980 introduced in S.461 to S.461E new provisions for criminal liability on the part of the directors and other officers in a wide range of transactions coloured by fraud, irrespective of the status of the company. The Department of Justice has a two-fold function in administering the Companies Act. It not only oversees the formation and management of the company as a going concern but can also investigate any irregularities that may occur when the company is being wound up. There are several instances when a prosecution can be invoked in respect of a winding up, that is not available when a company is a going concern.

Winding Up: There are three modes of winding-up, namely, voluntary winding-up (either by members or creditors), and compulsory winding-up by the court. There is thus a progression, from minimum interference in a procedure dominated by the members, to a procedure of which the major aspects are controlled by the court through the medium of the Official Assignee. Furthermore, one type of winding up may be converted to another in order that the matter may not fall outside the ambit of judicial control where there are suspicious elements in the case. That is not to say that the provisions concerning theft and fraud should not apply to voluntary liquidation. By law, a liquidator, is

bound to report offences to the Attorney-General.[10]

It is not intended to give a full account of winding up procedures. There are useful standard treatments of the topic.[11] The concern of this study is to elucidate the structure of control inasmuch as it facilitates the discovery and prosecution of criminal offences. For this purpose the most important mode is compulsory winding up by the court.

Court Winding-Up: The Companies Act sets out the grounds upon which a winding-up petition may be presented to the court (S.217). Among these are inability to pay debts, and persistent failure to comply with the provisions of the Companies Act.[12] The most prominent provision is, however, S.217(f) of the Companies Act 1955, which permits the court to order a winding up where it is of opinion that it would be just and equitable to do so. This latter provision is of cardinal importance. It includes cases of fraud and illegality in the conduct of the company's business.(S.219(1)(d). It should be stressed however, that in fraud cases, the Division does not see its functions as that of a prosecuting agency only, but also considers that it has a duty to salvage assets of the company as well as to prevent fraud.

In addition to the Registrar, a petition may be brought by a receiver, contributory or creditor. But the power of the Registrar to petition is important because a

shareholder can only bring proceedings if he can show that there would be assets available for distribution in a winding up, or that he would be personally liable for the company's debts (Bryanston Finance Ltd v de Vries).[13] Thus, if matters were left to shareholder action, an insolvent company whose affairs were tainted with fraud might escape judicial scrutiny. Shareholders could not act, and creditors, fearing that nothing would be available for distribution, might not consider it in their interests to do so. As noted by one observer,[14] Parliament, by empowering the Registrar to petition, surely signalled sufficiently its intention to depart from a theory which premised judicial control simply on the basis of the possibility of minimising pecuniary loss to creditors and members.

On the making of the winding up order, the Official Assignee becomes the provisional liquidator and he must summon separate meetings of creditors and contributories to determine whether application should be made to the Court for the appointment of a liquidator in his place. If a liquidator is not appointed by the Court, the Official Assignee acts as liquidator and is known as the Official Liquidator.

The Official Assignee has certain statutory duties assigned to him quite apart from his duties as provisional liquidator, or liquidator. Where the Court has made a winding up order or appointed a provisional

liquidator, the officers of the company must prepare and submit to the Official Assignee, within fourteen days, a statement of affairs of the company (S.231 Companies Act 1955). This is an accounting document which sets out the assets of the company and their expected realisable value, and its liabilities and the estimated deficiency or surplus. It is intended to show what assets are available to meet the liabilities of the company, and the reasons for any deficiency. The Official Assignee must submit to the Court a report on this statement of affairs, and state whether in his opinion further inquiry is desirable into any matter relating to the promotion, formation, or failure of the company, or the conduct of its business (S.232 of the Companies Act 1955). Section 232(2) further provides that the Official Assignee may also, if he thinks fit, make a further report whether there has been fraud by any person in relation to the promotion or formation of the company or by any officer of the company since its formation. He also reports instances of offences under companies legislation and other legislation to the Division, which can then make inquiries itself or ask the police to do so.

B. Enactments making provision for inspections and enquiries

The extensive provisions of New Zealand law for the investigation and inspection of companies are intended

to assist the Commercial Affairs Division in pressing for remedial orders for companies, in obtaining information to enable prosecutions to be mounted, and in indicating areas where law reform is needed.

The Companies Act contains provisions for what could be termed, preliminary inspections and full inspections.

Preliminary Inspection:

Section 9A of the Companies Act 1955 gives power to the Registrar to conduct a preliminary inspection in unqualified terms; he may order an inspection at any time if he thinks that there is good reason to do so. There is no requirement of suspected oppression or dishonesty though that may well be implied. The Registrar may require the production of any registers, records, accounts books or papers that are kept by the company. This power also extends to any registers, records, accounts, books, or papers that contain information relating to any money or other property that is managed, supervised, controlled, or held in trust by the company. The authorised officer can inspect and make records of the above documents. Information obtained is treated as confidential, except so far as it is needed for criminal prosecutions. The confidentiality aspect of an inspection undertaken as a result of the 1975 Securitibank crash, one of the largest financial collapses in New Zealand history, was claimed by the auditors to prevent any information to

be divulged to a third person. In 1983 an amendment,[15] enabled the Registrar to communicate information obtained by him under S.9A of the Companies Act 1955, to any person to whom it is desirable that such matters should be communicated in the public interest, and to any person who the Registrar is satisfied has a proper interest in receiving such matters.

The United Kingdom Act gives the Department of Trade the power to order the production of such documents from any other person having possession of them. The Department may also require the person from whom production is demanded, or any other person who is a present or past officer of, or was at any time employed by, the company, to provide an explanation of the documents. Copies and extracts may be taken. A Justice may grant a warrant for search and seizure of documents which have not been produced after a demand for production has been made. Such documents may be retained for three months or until the conclusion of criminal proceedings commenced under sundry statutes.

Limitations of Section 9A

There is a presumption that the records, accounts, books or papers have been kept by the company. The section is of little use if the directors claim that no such books or records exist.

In the recent Securities Commission Report both the

Registrar and the Police suggested that the powers should be enlarged at least to authorise interrogation relating to the location of documents and the meaning of entries in documents.[16] The Police also suggested that, the section should contain an authority to enter and search.[17]

The Commission via its Report did not recommend an authority to interrogate, as they felt that any investigation of an inquisitorial nature can be done under the authority conferred by ss.168 and 169 of the Companies Act 1955. They did recommend however, that the obligation to produce documents should be extended to agents of the company and to any person appearing to have charge of the registered office or any place of business of the company.

They also considered that the power to take possession of and remove the documents is too restrictive and recommended deleting the words "for the purpose of making records thereof".[18] It was also recommended that, the section should confer powers of entry and search at the registered office and other places of business of the company.

To date, it would appear that none of the above recommendations to amend the legislation have been taken up.

Full Inspection Powers

Full powers of inspection are contained in sections 168

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and 169 of the Companies Act 1955. Under section 168 the Court has a discretionary power to appoint Inspectors provided that the application is supported by a sufficient proportion of shareholders. The applicants must show good cause for requiring an investigation, and the Court may require them to provide security for costs.

Section 169 contains broader powers. The Court shall appoint an Inspector if the company by special resolution, or the court by order, declares that a company shall be investigated. Section 169(b) enables the Court to appoint Inspectors on the grounds that the business of the company is being carried on with intent to defraud creditors, or otherwise for a fraudulent or unlawful purpose, or in a manner unfairly prejudicial to its members, or that it was formed for a fraudulent purpose, or that its promoters or managers have been guilty of fraud, misfeasance or other misconduct towards it or its members, or that its members have not been given all the information with respect to its affairs which they might reasonably expect. These provisions are thus not limited to fraud.

Officers and agents and former officers and agents of the company must produce books and papers which are in their possession. The term "agents" includes bankers, solicitors and auditors of the company. They must attend before the Inspectors when required to do so, and they must generally give to the Inspectors all

assistance in respect of the investigation which they are reasonably able to give. Failure to comply may be brought before the High Court and treated as contempt of court.[19] If an Inspector thinks it necessary to examine a person on oath whom he has no statutory power to examine, he may apply to the court for an order that the person be examined before the Court. Admissions made before the court, like those made before Inspectors, may be used in evidence against the witness in later proceedings, whether civil or criminal.[20] Inspectors must make a final report.[21] They may make interim reports to the Court and may be directed to do so. If from any report it appears that any person has been guilty of any offence for which he is criminally liable the Court shall refer the matter to the Attorney-General,[22] and no prosecution shall be commenced except with the consent of the Attorney-General.

There have been very few full inspections into companies undertaken by the Commercial Affairs Division since its inception.[23]

Limitations of Sections 168-173

What could be viewed as a disturbing feature of our current law relating to full inspections, is the extent to which the decision to prosecute is subject to the risk of political vendetta, or political inaction.[24] This risk is offset somewhat by the fact that the

decision to appoint an inspector does not belong to the Attorney-General, but to the Court. There is still the risk however, that a full inspection, at considerable time and cost, can be undertaken only to result, possibly, in inaction on the part of the Attorney-General. There seems little point in this being, as at present, a decision of the Attorney-General's rather than the Registrar.[25]

A further limitation of the inspection powers could be that Section 168 requires the inspector to deal with the whole of the "affairs" of the company. If the inspector was able to deal with a particular event or period of time, the report could be dealt with expeditiously. Australia recognised this deficiency, and made the appropriate legislative changes.[26] Delays in producing inspector's reports can nullify their usefulness if civil actions, or summary proceedings, are to be brought within the requisite time period. Indeed, this was the case with the Securitibank S.9A report, which took so long to complete, that it placed in jeopardy any possibility of initiating criminal prosecutions.

PART B: THE STRUCTURE AND FUNCTION OF THE COMMERCIAL AFFAIRS DIVISION

The Department of Justice

The Secretary of Justice, as permanent head of the Department of Justice has overall responsibility for the department. He is responsible to the Minister of Justice for the broad direction of the work of the department, and is assisted by two deputy secretaries.

Four assistant secretaries head the Commercial Affairs, Penal Institutions, Probation and Courts Divisions respectively. They are responsible for policy guidance and direction in their areas of work and in consultation with other senior officers, for long range policy development and the setting of objectives.

To achieve its objectives the department is divided into the following divisions:

Commercial Affairs
Penal Institutions
Probation
Courts
Land and Deeds
Psychological Services
Patents
Registrar-General's Division and Chief Electoral Office

This study is restricted to the function and operation of the Commercial Affairs Division of the Department of Justice (hereinafter referred to as "the Division".

Origin and Structure of the Commercial Affairs Division

In 1950 the Companies Office was united with the Lands and Deeds Division when that division was taken under the aegis of the Department of Justice. The practical effect of this was that holders of the offices under the Companies Act, also held comparable appointments under the Land Transfer Act 1952. Thus, the Registrar of Companies was also the Registrar-General of Lands, and each district registrar of companies was also the district land registrar.

The office of the Official Assignee, responsible for the overseeing of company liquidations and bankruptcies, was undertaken by an officer trained in the Court Division of the Department. There were fulltime official assignees in Auckland, Hamilton, Wellington and Christchurch. Elsewhere the Registrar of the Supreme Court (now known as the High Court) was the Official Assignee. The result of these procedures was that the Registrar of Companies took no part in the administration of company liquidations.

In 1968 a Special Committee to review the Companies Act (MacArthur Committee) was appointed, "to review and report upon the provisions and working of the Companies Act 1955 and to recommend what changes in the law are desirable." In August 1971, the Committee presented an Interim Report,[27] which dealt "with a fundamental and important question which had arisen - the administration and policing of the Act".[28] The Committee felt that this question must be

acted upon, notwithstanding any further recommendations in the Final Report. They recommended the establishment of a "largely new" organisation to administer the Companies Act. This organisation should be strengthened by,

> "... recruiting to its staff a number of persons, including some qualified accountants, who will be capable of carrying out investigatory work into suspected offences (or breaches duty) in connection with the promotion or management of companies...Consideration should also be given to the recruitment of a staff solicitor". 29

The Committee also recommended, that the whole of the work of company liquidations under the control of the Department of Justice should be transferred to this "new enlarged" organisation.[30] They viewed with concern the division of these duties and noted that court work does not provide the skills and experience necessary in handling commercial practice.[31]

As a result of the Committee's recommendations, in September 1972, a new division of the Department of Justice, called the Commercial Affairs Division was constituted. The office of Registrar of Companies (formerly in the Lands and Deeds Division) and the Official Assignee (formerly part of the Courts Division) were brought together under one roof. Thus, the Registrar of Companies is also the Official Assignee for N.Z., and each district registrar of companies is also the district official assignee.

1. **Head Office**

The Head Office of the Commercial Affairs Division is located in Wellington. It is headed by the Assistant Secretary (Commercial Affairs) who also acts as Registrar of Companies and the Official Assignee for New Zealand. An organisation chart of the head office structure is shown in Appendix 8.

Head office stores information about the administration of Commercial Affairs Division on finances, staffing levels and movements, statistical returns, and policy papers. The statistical returns include monthly figures on bankruptcies and company liquidations, and registrations. These statistical returns of corporate entities are received from the six district offices of the Commercial Affairs, and also the Companies Offices attached to the Land and Deeds Division in Gisborne, New Plymouth, Nelson, Blenheim, Hokitika and Invercargill.

The Official Assignee for N.Z. is responsible for overseeing trends and events in insolvency matters. He also monitors the performance of the 16 Official Assignees. Six in Commercial Affairs district offices, eight attached to High Courts, and one in a District Court, and acts as their leader and adviser.

Head office may also undertake company inspections on its own behalf.

2. District Offices

The six district offices are located in Auckland, Christchurch, Dunedin, Hamilton and Napier. Each of the district offices is headed by a District Registrar of Companies (who also acts as District Official Assignee) with established positions for accountants, and in some district offices, solicitors. A typical organisational structure of a district office is shown in Appendix 9.

This study is concerned only with the operating capability and effectiveness of the district offices (and Head Office) of the Commercial Affairs Division. These offices account for approximately 92% of the companies registered in New Zealand.

3. Corporate Fraud Unit

In an attempt to grapple with the problem of corporate crime, the government, on the recommendation of the Securities Commission in July 1984, provided $200,000 per year to set up a special investigating unit. The Corporate Fraud Unit, as it became known, was officially approved of in December 1984. Located in Auckland, it was to be attached to the District Office, but directly accountable to Head Office. It would comprise a five person team, with a mandate to specialise in the more complex and sensitive company inspections, and to investigate and prosecute corporate fraud. They were

also required to look at serious breaches of the Companies Act by companies, both as a going concern, or in the course of winding up; and to deal with applications for business prohibition orders against delinquent directors.

A question was raised in Parliament in February 1984, concerning the availability of staff for the Corporate Fraud Unit. In his reply the Minister of Justice, commented that, the positions were to be advertised shortly, and he inferred that he did not envisage any difficulty with recruitment of staff, "...now that the matter of remuneration of accountants in the State Service has been settled."[32] However the Unit did experience considerable difficulty in recruiting the required calibre of staff. It was not until January 1986, that the Corporate Fraud Unit was operating with a full complement of investigative staff, and then only for a very short time.

The Unit is headed by a Chief of Corporate Fraud Unit, responsible to the Assistant Secretary (Commercial Affairs) at Head Office.

Role and Objectives of Commercial Affairs Division

The Division has two main functions - company registration and insolvency administration. The Annual Report of the Department of Justice[33] recognises the following goals and objectives.

1. **Registration:** To provide investors and creditors with a satisfactory standard of protection by disclosure on public record of up to date information in relation to the structure and activities of public companies and their finances, and of private companies, as required by the Companies Act 1955 and the Securities Act 1978.

   To provide a public record of up to date information about incorporated societies, industrial and provident societies and charitable trusts.

2. **Insolvency:** To provide for proper and orderly administration of insolvencies in personal estates, partnerships and companies.

The Division also provides the Government with advice on corporate and unincorporated financial collapses, proposals for remedy or amelioration and advice on changes in commercial activity needing new legislation or the amendment of existing legislation.

Although not specifically mentioned in the Annual Reports, the Directory[34] suggests, that an underlying objective of the division would need to be the enforcement of the statutory requirements and the investigation of instances of suspected abuse by commercial entities.

Staffing

The following staff classifications of the Commercial Affairs Division, are in keeping with the occupation categories given by Managh.[35]

Administration	=	Assistant Secretary(Commercial Affairs) - Head Office
Solicitors	=	Professional
Accountants	=	Professional (investigators)
Executive	=	District Registrar and Deputies
Clerical	=	Clerks

Each of the district offices has a District Registrar (who also acts as Official Assignee), a deputy, and supporting clerical staff. The recruitment of the professional staff (accountants and solicitors) "capable of carrying out investigatory work into suspected breaches in connection with the promotion and management of companies",[36] was to be a feature of the Commercial Affairs Division.

Certain qualifications are required as a prerequisite to appointment within the professional occupational class. All solicitors must hold a practising certificate, and the accountants must be eligible to be a member of the Society of Accountants. This means that they must hold the necessary academic qualfication plus 3-5 years practical experience.

Although the solicitors carry the title "investigating" solicitor, this is something of a misnomer. As a general rule, they carry out a supportive role only in company

investigatory work, in that they give opinions on legal matters and points of law when required. The investigative work is generally undertaken by the accountant, the exception being the Chief of the Corporate Fraud Unit who is employed as a solicitor. In the main, this study will be primarily concerned with information which relates specifically to the investigating staff.

Job descriptions of the positions concerned with the type of investigatory work under review in this study, can be found in Appendix 10. They refer to the following professional positions:

(1) Senior Investigating Solicitor - Corporate Fraud Unit
(2) Senior Investigating Accountant - Corporate Fraud Unit
(3) Investigating Accountant - District Office

Table 6 below sets out a summary of the established positions for investigating staff as at 31 March 1986.

Table 6

Investigating Staff Positions as at 31.3.86

Office	Number of established positions	Comment
Auckland	5	
Fraud Unit	5	This figure includes an investigating solicitor, and an accounts clerk
Hamilton	1	
Napier	1	
Wellington	2	
Christchurch	2	
Dunedin	1	
Head Office	1	Chief Investigating Accountant
	18	

Activities

The activities of the division are best described under three main headings:

(1) Registrations and Documents
(2) Insolvencies
(3) Investigations

1. **Registration and Documents:** The registration activities include recording and filing documents, checking prospectuses, continuing review of files to ensure all required documents have been lodged; instituting where necessary, prosecution for default; enacting strike off action in respect of defaulting companies and other maintenance duties. The above duties are usually undertaken by the clerical/executive staff.

   Table 7 below sets out the number of companies registered within each region as at 31 March 1986 in relation to the total number of entities. Included in this total are other entities such as incorporated societies, industrial and provident societies, charitable trusts and building societies.

Table 7

Corporate Entities Registered at District Offices

	31.3.86 Companies	31.3.86 Total Entities	1981/82 * Total Entities	Inc (dec)	% inc (dec)
Auckland	58,571	63,805	50,500	13,305	26.0%
Hamilton	16,120	18,767	15,800	2,967	18.5%
Napier	4,797	5,604	5,700	(96)	(2%)
Wellington	25,416	31,634	28,200	3,434	12.0%
Christchurch	15,837	18,309	16,600	1,709	10.5%
Dunedin	5,110	6,433	5,900	533	9.0%
	125,851	144,552	122,700	21,852	17.8%

* These figures are an extract from the Report of the Review team published in 1982. 37

From the above figures it can be ascertained that approximately 47% of the companies registered in New Zealand are situated in Auckland; 20% in Wellington; Hamilton and Christchurch both record approximately 13%; and Napier and Dunedin approximately 4% each.

The following results are tentative only, and have been calculated to illustrate which districts are experiencing the most growth in respect of registered corporate entities, and how each district compares relative to the others.

In total the number of corporate entities registered by the above district offices has increased by 17.8% since the Review team made its Report[38] in 1982. Auckland

shows an increase of 26% which is considerably higher than the overall percentage figure of 17.8%. Hamilton, on the other hand, has kept abreast of the 17.8% figure. Most of the remaining district offices are all experiencing some growth, but not at the same rate as Auckland and Hamilton. The exception is the Napier district office which for the same period has returned a negative growth figure of (-2%).

Each of the above registrations represents a file which contain the documents required to be filed under the various Acts, and are available for public search. Each file will have at least one document added to it each year which has to be checked for compliance. For each document filed a receipt and/or certificate is issued.

There is no constraint on a company regarding the whereabouts of its activities. This means that a company may be registered in Auckland and undertake its sole business operations in Christchurch.

2. **Insolvencies:** The Commercial Affairs Division is required to oversee and administer the handling of the winding up of insolvent personal estates, partnerships and companies. An insolvency administration would be handled by the Official Assignee closest to the operations of the entity.

There are two distinct types of insolvencies.

(1) **Bankruptcies:** These are personal insolvencies resulting from the unlimited liability of an individual, sole trader or member of a partnership.

(2) **Liquidations:** When a company, as a legal separate entity, is dissolved it is known as going into "liquidation". This may be result of a voluntary winding-up (by either members or creditors), or a Court winding up. It is the latter occurrence which involves the division in an active role. The day to day activities generated were set out by the Review team,[39] and include:

(a) Advertising winding up orders in newspapers and New Zealand Gazette; preliminary examination of company directors and officers; securing and storing business records; tracing company assets and securing and storing these; notifying creditors of meetings and chairing meetings; realising assets by tender or auction; field work in conjunction with management of estate.

(b) Settling proofs of debt and maintaining register; calculating and paying dividends; maintaining typing services for minutes of meetings, notices and so on.

(c) Maintaining trust account, investment records, receipts and expenditure; reconciliation of balances.

(d) Investigating causes of failure and taking action where appropriate.

These duties are in the main the responsibility of the clerical/executive staff, assisted and supported by the professional staff in respect of (d) above.

3. **Investigations:** To enquire into and gather evidence on all possible violations of laws administered by the Division. Violations by companies, and/or their officers, which may attract the attention of the investigative staff of the Division can occur in the following circumstances.

(1) **Company Inspections:**

On these occasions the company is generally a going concern. The Division will perhaps, receive a complaint from the public, or some other source, that the company may be in breach of the law governing its activities. In these circumstances, it is the District Registrar's role which comes into play.

In the 1985 Annual Report of the Department of Justice, it was noted that,

> "The demands on professional staff arising out of insolvency administration has hampered the extent to which inspections can readily be undertaken, and the difficulty in attracting sufficient investigating accountants has been somewhat frustrated in an area where skill, experience, and aptitude is necessary." 40

(2) **Companies in Liquidation:**

In these circumstances, the company has gone into liquidation by one means or another, and in the course of its winding up, the Division becomes aware of some wrongdoing. This may relate to a

machinery/criminal offence, or provide grounds for a civil action. In a liquidation the Official Assignee role is predominant, and in the case of a civil proceeding the Official Assignee, as Official Liquidator, can act on behalf of the shareholders, or creditors.

Procedures

After the investigative staff have been put on notice to investigate a company, the procedures followed with regard to the prosecution process differ in the case of a machinery/criminal prosecution of an offence, and a civil proceeding to obtain judgment for the recovery of moneys. The procedures followed in each alternative are set out below. It is accepted that individual district offices may not always proceed along the same defined lines, but the procedures would be similar in principle.

1. Machinery/Criminal Prosecution

   The investigative staff undertake the investigation to the point where a decision needs to be made whether sufficient evidence exists to proceed. When affirmative, the investigator refers the case on to his controlling officer, say, the District Registrar. If approval is given (by the latter), the investigator then refers the case further on to the local Crown Solicitor; who must decide whether there is prima facie evidence to justify proceedings.

In turn, if the Crown Solicitor also agrees, he/she issues to the District Registrar, an information setting out details of the offence; whereupon the latter authorises the Crown Solicitor to proceed.

On receipt of this authorisation, the Crown Solicitor interviews all investigatory staff concerned with the preliminary investigation and receives the evidence collected to date. Further collection of evidence is undertaken until the case proceeds to Court.

The costs of a machinery/criminal prosecution will normally be met by the government in the first instance. Head Office controls a fund (professional resources) with an annual allocation of approximately $130,000 for the district offices, and a separate allocation of $50,000 to the Corporate Fraud Unit. These moneys are expected to be used to employ outside professionals when the occasion arises.

It can be seen from above that the Crown Solicitor has considerable input regarding the ultimate conclusion of the investigation. The Crown Solicitor is under the jurisdiction of the Solicitor-General, and as such is appointed to act on behalf of the Crown. This means that whenever a machinery/criminal prosecution is being pursued by a government department they are automatically required to appoint the Crown Solicitor to act, unless special dispensation has been granted. In the case of the Commercial Affairs, the Solicitor-General requires any prosecution to proceed through the

Crown Solicitor.

2. **Civil Proceedings:**

In the case of an investigation which is expected to culminate in a civil proceeding, the Official Assignee in his capacity of Liquidator in a Court Ordered Winding up, has the power to act on behalf of the shareholders or creditors. A prerequisite to such action however, is the sanction of the Court, or a Committee of Inspection.[41] The Official Assignee, as Liquidator, is not bringing the action on behalf of the Crown. This means that he/she can employ an independent solicitor of his choosing, in the same way that an outside liquidator would be entitled.

In all other respects the prosecution process would proceed in a similar manner as above, except in the case of civil actions there is more likelihood of a settlement by the parties prior to a court hearing. The costs of a civil proceeding would generally be expected to be met by the estate, or if insufficient funds, by the creditors themselves.[42]

FUNDING

The Commercial Affairs Division is one of the eight divisions which comprise the Department of Justice. Funding for this Division is achieved through the Vote Summary appropriated to the Department of Justice. The total Justice Vote is then allocated on a programme by programme basis. Estimates of the sums required in the forthcoming year for each programme are then itemised, and distributed to the controlling officer of the particular programme, or division. Table 8 sets out, firstly, the total expenditure and receipts of the Justice Vote for the past five years, and secondly, the portion that specifically relates to the Commercial Affairs. The 1986-87 year figures are Estimates, and those for the previous four years, are actual expenditure and receipts figures.

Table 8

Total Expenditure and Receipts of Justice Vote

	Estimates 1886-87 (000's) $	1985-86 (000's) $	Actual 1984-85 (000's) $	1983-84 (000's) $	1982-83 (000's) $
Vote-Justice					
Expenditure	283,678	201,616	157,647	135,859	130,702
Receipts	110,526	74,976	69,237	61,989	57,301
Net Expenditure	173,152	126,640	88,410	73,870	73,400
Commercial Affairs					
Expenditure	8,905	5,552	4,446	4,310	3,948
Receipts					
Registration		11,559	10,311	8,704	7,467
Commissions *		**	347	292	204
		11,559	10,658	8,996	7,467
Excess Receipts over Expenditure		** 6,007	6,212	4,686	3,723

* These refer to commissions taken when administering insolvent estates.

** The 1986 Annual Report of the Department of Justice did not give the 1985-86 figure for commissions taken.

The Estimates Commentary for the 1986-87 year explained the increased $8,905,000 estimated expenditure figure,

> "An increase of $3.3 million (56 percent) is estimated in 1986/87 over the voted figure of $5.7 million for 1985/86. Approximately $1.8 million of this relates to personnel increases with a further $0.8 million reflecting the cost of rental accommodation."

Table 8 shows that Commercial Affairs earns a very "healthy" excess of receipts over expenditure that continued to increase quite substantially during most of the years under review. For example, the 1982/83 excess of $3.7 million had

increased by approximately 26% ($4.7 milliion) for the year ended 1983/84, and 33% for year ended 1984/85. The excess of receipts over expenditure for the 1985/86 year does not include commissions taken by the Commercial Affairs. If it is accepted that the commissions taken for the 1985/86 year should at least total the previous year, then the rate of increase of excess of receipts over expenditure can be calculated at 2%.

Table 9 analyses the percentage of the total Justice Vote expended by the Commercial Affairs, compared to the percentage of the total departmental receipts earned by the Commercial Affairs.

Table 9

% Total Justice Vote Spent compared with % of Earnings

	Estimates	Actual			
	1986-87	1985-86	1984-85	1983-84	1982-83
Percentage of Justice Vote expended by Commercial Affairs	3.2%	2.8%	2.8%	3.2%	3.0%
Percentage of Justice receipts earned by Commercial Affairs		15.4%	15.4%	14.5%	13.4%

Notwithstanding the excess shown in Table 8, the above Table 9 shows that for the five years under review the percentage of the total Justice Vote expended by Commercial Affairs is approximately 3% per year. On the other hand, the percentage of the total Justice receipts earned by the Commercial Affairs is in the vicinity of 13-15%.

It would appear that, notwithstanding, a considerably reduced rate of increase in excess of receipts over expenditure (33% to 2% in 1985/86), the percentage of the total Justice receipts earned by the Commercial Affairs has not changed for the 1985/86 year.

It is interesting to note that, although, the 1986/87 Estimates Commentary refers to a $3.3 million (56%) increase in expenditure, Table 9 shows that such increase is, in effect, returning the percentage of the total allocation to pre-1984/85 levels.

The Review team in its Report in 1982,[43] referred to this wide divergence between appropriated expenditure and receipts, and subsequently made two recommendations. Firstly, that all scales, fees and charges be reviewed annually, so that revenue and expenditure are more closely related. Secondly, where fees exceed expenditure by more than a reasonable amount for a particular service, that fees either be reduced, or the surplus be utilised to provide a better service to the public.

The registration fees and annual charges required to be paid by companies had not changed since 1980. There was, however, an increase of approximately 100%, effective from 1st May, 1986, and there is expected to be a further substantial increase in the near future.

In its Annual Report for 1985, the Department of Justice made the comment that the efforts expended in insolvency administration are not always commensurate with the benefits

gained. It was further suggested that those benefits "obtained through the use of the division's professional staff are often at little cost to creditors, and some suitable means of remuneration needs to be determined".[44]

If the determination of a "suitable means of remuneration" results in an increase in receipts earned by the Commercial Affairs; this, combined with an expected increase in fees will, based on present trends, widen the divergence between expenditure and receipts.

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9. Securities Commission (1984) op cit. para.8.5

10. See Section 322(2) of the Companies Act 1955

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12. This latter clause S.217(ea) was inserted by S.7 of the Companies Amendment Act 1973

13. Refer **Bryanston Finance Ltd v de Vries** (No.2) [1976] Ch.63; Also, **Re Gattopardo** [1969] 2 All E.R. 399

14. LEIGH, L.H. **The Control of Commercial Fraud** London Heinemann, 1982 p.162

15. refer S.3 of the Companies Amendment (No.2) Act 1983

16. Securities Commission. (1984) op cit. para.8.13.2

17. Ibid. para.8.13.4

18. Ibid. para.8.13.3

19. see Section 171 of the Companies Act 1955

20. see Section 171(5) of the Companies Act 1955

21. see Section 172 of the Companies Act 1955

22. see Section 173 of the Companies Act 1955

23. When questioned, the Registrar was only able to recall one inspection under S.168 being undertaken in recent years.

24. The Minister of Justice automatically takes on the role of Attorney-General.

25. SANTOW, G.F.K. "Regulating Corporate Misfeasance and Maintaining Honest Markets", **The Australian Law Journal** August 1977, p.547. Santow makes a similar observation in respect of the Australian legislation.

26. Ibid. p.559

27. SPECIAL COMMITTEE TO REVIEW THE COMPANIES ACT (MacArthur Committee). **Interim Report.** Wellington : Govt Printer, 1971

28. Ibid. para.6

29. Ibid. para.48

30. Ibid. para.45

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CHAPTER 8

OPERATIONAL CAPABILITY OF THE COMMERCIAL AFFAIRS DIVISION

Staff Recruitment and Retention

The recruitment and retention of suitably qualified staff is concomitant with the efficient and effective use of resources to control company offenders.

Table 10 sets out the established and filled positions for investigating officers as at 31 March 1986 and 31 January 1987.

Table 10

Investigative Officers

	31.3.86		31.1.87	
	Established positions	Filled	Established positions	Filled
Auckland	5	2	5	0
Fraud Unit	5	4	5	3
Hamilton	1	0	1	0
Napier	1	1	1	1
Wellington	2	1	2	1
Christchurch	2	1	2	1
Dunedin	1	1	1	0
Head Office	1	0	1	1
	18	10	18	7

Notes:

Hamilton:	Has been operating without an in-house investigating accountant since October 1985.
Head Office	The appointment of Chief Investigating Accountant was by promotion of Dunedin's Investigating Accountant who at present is based in Dunedin.

It would appear that the recruitment and retention of investigating staff is a very real problem. The Auckland office is especially vulnerable having five established positions, of which the two that were filled at the end of March 1986 were reduced to zero by end of January 1987. Lack of time was identified by five of the seven respondents as limiting the satisfactory performance of their duties. This lack of investigating staff must be considered all the more serious when viewed in relation to the sophisticated commercial world Auckland services and the number of companies registered (47% of the total number of companies registered within the six district offices).

The recruitment of additional personnel was considered to be one of the top ranking priorities by five out of seven respondents, (refer Table 19). This problem was seen as one of the most urgent areas of concern that could be impeding the effective control of company malpractice. The emphasis being on "appropriately trained" and "qualified" professional staff. Better employment conditions to match those available in the private sector was seen to be the key to attracting and retaining the required calibre of staff. It was also felt that the Commercial Affairs Division

should project itself as more progressive, furnishing clear objectives and direction. One respondent referred to the need to have clear objectives and division of duties between professional and executive/clerical staff. This was seen to require a lead from the District Registrar to provide more support to the professional staff in the area of administration and organisation. A similar notion was referred to by Managh[1], when he claimed that the problem of recruitment and retention of professional staff could be a consequence of the relationship between the clerical and professional staff.

The conclusiveness of this finding however, must be approached with caution, in light of Managh's reluctance to delineate a clear methodological approach.

Personal interviews with staff members indicated that in a significant number of instances, although the staff exhibited a strong willingness "to do the job to the best of their ability" they were continually being frustrated in their attempts. In some cases morale appeared to be at an all time low. In the words of one officer, "the situation cannot get any worse".

Qualifications and Experience

All seven investigative officers have professional qualifications relevant to their duties, and all bar two have relevant University degrees.

Six out of the seven officers have had experience in the

private sector (commerce or public practice). Five of these six have had in excess of 5 years private sector experience. Six out of the seven respondents had been involved in some type of investigatory work in previous positions.

It would seem that all the investigating officers presently employed by the Commercial Affairs Division, not only have more than the required academic qualifications, but also have outside practical experience, and in most instances previous investigatory experience.

In order to effectively control company malpractice the investigative officers should be able to recognise breaches of the relevant law, when and if, they occur.

The respondents' familiarity with the law relating to criminal acts by companies is shown in Table 11.

Table 11 (refer Appendix 1, Question 13)
(N = 7)

Familiarity with the Law

	Sparsely	Moderately	Very
Companies Act		4	3
Relevant company case law	1	4	2
Crimes Act	3	4	
Relevant criminal case law	3	4	

All of the respondents scored reasonably high in the area of company law. The respondent who reported a sparse knowledge of the relevant company case law has only been in the job a short time. This would seem to suggest that the investigative officers are reasonably confident that they

would be able to uncover any criminal breaches by companies under company law. Four of the seven respondents felt that they were also moderately familiar with the criminal law. Two of the remaining three respondents who claimed a sparse knowledge of criminal law are relative newcomers to this type of investigatory work, and the other is no longer involved in company inspections. One respondent commented that use was made of the in-house solicitor in respect of legislation.

Because law is a dynamic discipline it presupposes that to work effectively in this area, one must be able to keep abreast of any changes. The respondents were questioned on whether they were able to keep their working knowledge up to date in those areas of the law in which they had specified a certain expertise. If they only professed a sparse knowledge of the relevant law then it was assumed that an up to date working knowledge requirement was irrelevant. The result being that only four respondents were required to answer the reference to the criminal law, as three respondents had already indicated a sparse knowledge (refer Table 11).

Table 12 (refer Appendix 1, Question 14)

Working Knowledge

	YES	NO	Total Responses
Companies Act	7	0	7
Case law - Companies Act	5	1	6
Crimes Act	2	2	4
Case law - Crimes Act	2	2	4

All respondents claim that they are able to keep up to date with changes to the Companies Act legislation, although one officer felt unable to keep abreast of case law relating to companies. The feeling was not so positive in respect of the criminal law relating to companies. Only half of the respondents who claimed a familiarity with criminal law were able to keep their working knowledge up to date.

The respondents were then asked why keeping abreast with changes was a problem. All four claimed that they did not have access to up to date information, three of whom also claimed that they did not have the time to pursue this area. Lack of a library with relevant professional texts was also mentioned by the majority of respondents (three out of four), the presumption being a lack of funds.

Training

Adjunct to an efficient and effective investigative process is that investigative officers should not only be suitably qualified, but also sufficiently trained to enable them to

perform to a satisfactory standard.

Four of the seven respondents stated that when they took up their present appointment they received no instruction or training whatsoever. One respondent commented that to undertake investigatory duties necessitated, "relying upon own knowledge, self study and experience".

The remainder of respondents received various forms of instruction ranging from observation of another operator to brief verbal comments by the Deputy District Registrar. Two of the most recent appointments (Wellington, December 1985; and Napier, June 1986) spent two weeks in Dunedin with the now Chief Investigating Accountant.

All respondents made suggestions on improvements that could be made in respect of instructing new staff on how to carry out an investigation. The following is a summary of the responses:

(a) Specific instruction on S.9A of the Companies Act outlining powers and limitations.

(b) Experienced staff to instruct on methods and give practical assistance.

(c) Instruction on how and where to obtain practical information, e.g. police, Land Transfer Office etc.

(d) Attendance at training courses with police. It was suggested that this would necessitate attendance in Australia or the United Kingdom as New Zealand does not offer any suitable courses.

The respondents were unanimous in their response that additional investigative training skills were required to enable them to carry out their duties in an efficient and effective manner. One respondent felt "that additional

training would reinforce the impartial attitude and maturity of thought considered essential for this type of investigatory work". It would extend areas of influence and experience of officers and allow each officer to "operate more efficiently".

There was also an awareness that in many instances the investigator was "hunting in the dark", being continually thwarted by "sharp operators" in a financial and commercial world that is becoming more and more sophisticated. An illustration of the type of training felt to be lacking was investigative skills such as gathering of evidence, and more specific knowledge on banking, futures trading, commodity trading and computer crime. It was also noted by one respondent that there appeared to be inconsistencies between District Offices regarding the level of training. One of the provincial officers operating on a minimum establishment figure felt that professional isolation is a real problem, and that an inexperienced person would be at a major disadvantage. Discontent with the level of training was summed up in the statement that "the sink or swim mentality is inappropriate for this type of investigatory work".

That training is considered an important issue was further reinforced by the responses in Table 19 (refer p.153), which deals with the most important factor necessary for effective investigative work. Four of the seven respondents ranked additional training as top priority. The remaining three ranked it midway on a scale of 1 to 5. One of these three,

has been employed as an investigating accountant for several years, suggesting that training is no longer an important issue. The other two had attended a two week observation course in Dunedin within a month of their initial appointment.

Each of the respondents who ranked additional training as the most important issue, also specified training as one of the most urgent concerns impeding the effective control of company malpractice. Solutions offered included the establishment of suitable training courses by a reputable university or technical institute. The overall feeling projected is that a real commitment to training is required before improvements can be made. One respondent went so far as to say that if the Department of Justice "cannot supply proper training they should second police, or arrange for police to take over when prima facie cases of fraud are uncovered".

Management

The investigative officers were not asked specific questions on management style as it was deemed to be a topic on its own. However, several references were made by the investigative officers on this subject which it is felt should be recorded.

Several comments were made concerning "management" and "systems", and the deficiencies therein. One such comment being, "What is the point of us making suggestions etc. which

are ignored, and arranging training only to find that funds are not available or approval not forthcoming?" It was suggested that lack of motivation of existing staff was not due to lack of ability but to a lack of management. Promises, undertakings and commitments were easy to make, but if not supported by action were of little use.

Although the above comments can be construed as isolated instances they do coincide with the findings of the Review team in 1982.[2] In this Report the review team concluded that the Division believed that the achievement of its objectives were inhibited by "the failure of top management to respond to requests or suggestions within the time span necessary for effective action to be taken".

The review team felt that this problem would be solved when the Management By Objectives (M.B.O) system was fully operative. To what extent this has been achieved can, perhaps, be seen by the following comment in the 1986 Annual Report, "progress is also being made in exploring and implementing management and training systems to better cope with the work pressures".[3] Management felt that internally there was a "very good co-operative approach" within Head Office and some of the district offices. It was a system which not only allowed "people to get on with the task", but encouraged and supported them in their efforts to do so. Management described the approach as decentralised, rather than centralised, the main ingredient being to imbue the staff "with a trust in their own capabilities" to cope with a

particular task.

Personal interviews with staff indicated a lack of clear direction or departmental policy from Head Office. This absence of clear policy gives rise to an ambiguity of roles in the minds of the officers. "What are we here for?" Is the Division primarily a law enforcement agency or is the main concern a public service, such as the recovery of money for shareholders/creditors in a liquidation? The Review team points to both a clear law enforcement role and a "winding-up service" for the benefit of creditors.[4]
It is felt by staff members however, that there is a conflict of interests if satisfactory performance of these two roles is to be achieved. For example, if sanctions are applied for wrongdoing and the director of an insolvent company is prosecuted, and fined, then such action must seriously affect the satisfactory completion of the second role - that of recovery of moneys. It may well have been this problem that was alluded to by McLay, a former Assistant Secretary (Commercial Affairs) in his article on the future of the Commercial Affairs.[5]

Investigative Activity

Company investigations comprise part of the duties of the investigating staff (refer Appendix 10). They are however, the primary monitoring activity to ensure that companies are not engaging in irregular practices. As one of the objectives of this study is to establish some form of

base percentage figure which corresponds with the time spent on monitoring activities the investigative officers were asked to apportion the time they spent on each activity type. The time span was a 12 month period from 1 April 1985 to 31 March 1986.

The results shown in Table 13 below have been separated to take account of the differences in the job descriptions of the Corporate Fraud Unit and the investigating staff in the District Offices. The number of usable responses is reduced to six in this section, as one of the respondents was appointed after 31st March 1986.

Table 13 (refer Appendix 1, Question 17)

Activity Time

	N = 3 District Office	N = 3 Fraud Unit
	%	%
Company inspections	120	235
Court Windings Up (a) O.A. as liquidator	140	50
(b) Outside Liquidator	6	15
Total	266/3 = 89% *	300/3 = 100%
Total combined time =	300%	300%

* The remainder of time (11%) was spent on other activities such as bankruptcies and checking prospectuses.

From the above Table it can be ascertained that the combined District Offices spent an average of 40%[6] of their time engaged in company inspections.

No direct comparison of the above result with that of

Managh's[7] study is possible as that researcher claimed that such figures were not available for New Zealand. The Corporate Fraud Unit spends an average of 78.3%[8] of their time on company inspections. This would seem to suggest that Managh's comment, " that inspections was a role which has not really been developed by the CAD investigatory staff"[9], is no longer applicable. It could be the result of a more aggressive approach by the newly formed Corporate Fraud Unit.

It would appear from Table 13 that the investigating officers within the combined district offices average approximately 47% of their time on investigations relating to Court Winding Ups when the Official Assignee is appointed liquidator; and 2% when an outside liquidator is appointed. The remaining 11% represents other activities such as bankruptcies and checking prospectuses.

This result does not accord with Managh's study in which he states that "some" professional staff spend three-quarters (75%) of their work time checking prospectuses.[10] The professional staff in that instance however, may well refer to solicitors as well as accountants.

The Corporate Fraud Unit averages 16.7%[11] of their time on company investigations resulting from Court Ordered Winding Ups when the Official Assignee is appointed liquidator, and 5% in those instances when an outside liquidator is appointed. It would appear that the Corporate Fraud Unit's

time is usually fully engaged on company investigations of one type or another.

The survey attempted to establish how many **possible** breaches of the law relating to companies/officers were uncovered over the 12 month period.

The results obtained were too varied in approach to provide any conclusive evidence. Some of the respondents answered in a narrative form. Whilst others found that they could not give a useful answer as they had not kept the necessary statistics; their investigative approach having been "more bush fire, and ad hoc". A lack of record keeping by the investigative officers must seriously impede the introduction of any measures of effectiveness in relation to the prevention of breach of laws discussed by the Review team[12].

It is perhaps, possible to make a very general finding that possible "machinery" type offences always appear to be present in company inspections; the "criminal intent" type are rarely found; and the "civil" offence is often found.

The inconclusiveness of the above finding must also impinge on the results given in Table 14 below showing whether or not most of the **possible** offences are subject to follow-up investigations.

Table 14 (refer Appendix 1 , Question 19)
(N = 6)

Follow-up Investigations

	District Offices		Corporate Fraud Unit		Total	
	YES	NO	YES	NO	YES	NO
Machinery	1	2	0	3	1	5
Criminal Intent	2	1	2	1	4	2
Civil	2	1	1	1	3	2

With respect to the particular offences they had identified in Question 18, (Appendix 1), a total of five respondents claimed that the "machinery" type were not followed up. Two responded that neither, the possible criminal offences, nor the civil actions identified, were subject to follow-up investigations. There is no significant difference of treatment between the two groups.

The respondents were then asked to select various options that may contribute to non-pursuance of offences. This was treated as a general question by all six respondents, and does not relate to Table 14. The six respondents gave "likely punishment did not justify time spent (not cost/beneficial)", as a reason why possible "machinery" offences were not pursued. They also felt that in many instances the possible offence was not of sufficient importance to warrant prosecution. Insufficient funds was given by three of the five respondents as a factor responsible for the non-pursuance of possible offences. Lack of manpower was referred to under the "Other" option. Difficult to prove, was the overriding reason given by all

the five respondents in respect of why possible "criminal intent" offences are not followed up. Insufficient funds, and too time consuming were all chosen as reasons by at least four out of the six respondents. Two respondents specified insufficient evidence, too complex in nature, and the cost-benefit option, that the likely punishment does not justify the time.

The "civil" offence option did not attract as much comment as the other two offence types. This could be explained by the fact that the Corporate Fraud Unit does not have much involvement in liquidations. Two noted insufficient funds as a cause for non-pursuance of follow up investigations with insufficient evidence, too time consuming, and too complex in nature gaining one vote a piece.

Investigative Process

If the effective control of company offenders is an important issue, then the investigative officer's facility to cope with the required investigations must also be taken into consideration. An undue backlog of files must impinge on the efficiency of the operation. It needs to be stated however, that the information given below should be a guideline only, as many other variables which may not be revealed by this survey, may need to be considered.

Table 15 below, gives an indication of how many files the investigators are currently working on. Again, to ensure that the information is not distorted, the District Office and the Corporate Fraud Unit have been shown separately.

Table 15 (refer Appendix 1, Question 22)

Current Workload

District Offices (N = 4)

	2-5	6-10	11-15	Over 15	Min Ttl	Max Ttl	Ave Ttl	Ave p.p.
Company inspections	1	1			8	15	11.5	3.8
Court Windings Up	2	2			16	30	23.0	5.8
Bankruptcies	2		1		13	25	19.0	4.8
Securities Act, prospectuses	1		1		12	20	16.0	4.0
TOTALS					49	90	69.5	18.4

Corporate Fraud Unit (N = 3)

Company Inspections		1	1	1	32	41+	36.5+	12.2
Court Windings Up	1	1			8	15	11.5	3.8
Bankruptcies	1				2	5	3.5	1.2
Securities Act	2				4	10	7.0	2.3
TOTALS					46	71	58.5	19.5

The above figures provide a broad guideline in respect of the uncleared files handled by the investigative officers. The Corporate Fraud Unit would appear to have considerably more company inspections (12.2 per person) currently underway than does the District Offices (3.8 per person). This is in accord with the finding that the Corporate Fraud Unit devote approximately 80% of their time to company inspections.

Also, that since the establishment of the Auckland based Corporate Fraud Unit the Auckland district office refers all company inspections to the Unit; and it is not uncommon for the Unit to undertake company inspections in other districts if the need arises.

This researcher does not have sufficient information to make any judgment on whether these figures are acceptable as a performance measure. The value of the information in respect of this study is to provide some form of base figure for future research.

In respect of the above uncleared files, the Corporate Fraud Unit were actively[13] working on a total of twenty (an average of 6.7 files per person). The District Offices had a total of ten files being actively worked on (an average of 3.3 files per person).

Table 16 deals with the criteria employed by each investigating officer when deciding which cases to work on.

Table 16 (refer Appendix 1, Question 24)
(N = 7)

Criteria re Ordering of Cases

	Rank (1-5 = highest to lowest)					
	1	2	3	4	5	
First come, first served			1	1	5	
Easiest to solve		2	1	1	1	(1)
Those receiving most publicity	1	2	1		2	
Amount of money involved		6	1			
Instructions regional head	2	2		2	1	
Instructions head office	3	2	2			
Other	3					

The respondents gave multiple answers to this question which prevents any true ranking to emerge. The findings therefore, can be taken as general guidelines only. Five out of the seven respondents ranked "first come, first served" as the lowest priority. The highest priority was fairly equally divided among "instructions from regional head", "instructions from head office (although one respondent qualified this as being ministerial rather than head office), and "Other". This included applying a practical test - "those cases where a satisfactory result can be achieved quickly", and those cases which serve a public and commercial interest. Those cases "receiving most publicity" was ranked highest priority by one respondent and second by two respondents. Six out of seven related the "amount of money involved" in a case as being the second most important criteria. The remainder of responses were fairly evenly scattered with "easiest to solve" ranking second by two respondents and third, fourth, fifth and (sixth) respectively by the remainder.

The investigative officers were asked to identify those constraints or limitations which in their opinion impaired their facility to investigate to a satisfactory standard. Table 17 outlines the responses.

Table 17 (refer Appendix 1, Question 25)
(N = 7)

Constraints on Satisfactory Investigations

	No.of Responses
Lack of training	5
Lack of legal authority	2
Lack of time	5
Lack of resources	4
Lack of support from those in control	3
Other	1

Five of the seven respondents cited lack of training and lack of time as limiting their satisfactory performance. The question of lack of training has been dealt with earlier, (refer pp.134-5). Two of the five who identified lack of time, specifically referred to vacancies within their particular offices. One felt this lack of manpower "severely reduces efficiency", and the second commented that it prevented he/she "doing the job thoroughly to my personal satisfaction". One respondent claimed that "pressures applied to attend to high priority matters" meant that he/she was unable to finalise matters of lesser importance. Another felt that "other registration and insolvency work results in a lack of time available for investigations".
Lack of resources was mentioned by four out of seven respondents. Restrictions on funds for professional resources such as accountants and typists contributed to this

problem.

The investigative process within the Commercial Affairs Division is accused of being neither planned nor systematised resulting in an unsatisfactory situation. Mention was made of bureaucratic difficulties in obtaining clearance from both Head Office and the Securities Commission to undertake follow-up investigations and bring prosecutions.

Lack of legal authority was claimed by two of the seven as a contraint on effective performance. Specific powers that are seen as being necessary are dealt with later in this chapter (refer p.156). The "other" option related to a lack of relevant information, again the question of lack of training being signified as a probable cause.

To what extent, if any, the above constraints and limitations are detrimental to the efficiency of the investigative process can only be established with more indepth research. Six out of the seven repondents did claim however, that there have been instances when a case took longer than it should have. Several of the reasons given, reiterated what had already been stated, such as lack of resources, a lack of systems, lack of direction from management, and a lack of expertise due to "teaching yourself, by yourself". Other reasons given were inexperience and typing delays.

Effective enforcement relies on harnessing a variety of resources. It is therefore important that the investigative officer does not feel he must work in isolation but has the confidence and freedom to enlist assistance when required.

To what extent the investigative officers felt they would ask for help in a situation where additional expertise is warranted is shown in Table 18 below. The respondents were allowed to identify as many of the options as they felt would apply to their particular circumstances.

Table 18 (refer Appendix 1, Question 27)
(N = 7)

Enlisting Assistance

	No. of Responses
Rely on own knowledge	2
Enlist assistance of fellow officer	6
Enlist outside professional assistance	6
Enlist assistance from Police Department	5
Pass case over to Police Department	4
Other	-

Two of the seven respondents felt able to rely on their own knowledge, although both specified at least three additional options. Six of the seven would enlist the assistance of a fellow officer, especially the in-house solicitor. Six of the seven respondents would also enlist outside professional assistance when necessary. The respondent who did not respond to this option is no longer involved in company inspections. The nature of this professional help included, internally, the Corporate Fraud Unit, the Chief Investigating Accountant, and the Senior Investigating Solicitor. External help consisted of other professional bodies such as the Real

Estate Institute, registered valuers, outside legal and accounting firms, and the university.

Five respondents (which included all members of the Corporate Fraud Unit) claimed they would enlist the assistance of the Police Department, and four would pass a case over to the Police, especially if fraud was apparent. In respect of the latter option, the comment was made, "if only they would take it".

From the above it can be deduced that the majority of the investigative staff are both, "willing and able" to ask for assistance when it is deemed necessary.

The Decision Process

The question concerning the decisionmaking role terminating investigations undertaken in respect of company inspections and company liquidations did not produce any clear cut findings. Partly because the respondents used different answering methods, and partly because there did not appear to be any general policy on the subject.

A generalised conclusion could be drawn however, that in most cases the decision to abort is made by the investigating officer concerned, or, it is a combined decision by all officers involved in the investigation; rather than a directive from the controlling officer, or head office. One respondent claimed that in many instances "no notice was taken of recommendations", and another stated that almost 50% of the cases were aborted because of "insufficient

resources".

It would seem that when an investigation was aborted via a directive from above, in most cases the investigative officer had some input into the decisionmaking process. One respondent noted however, that in the above circumstances no reason was given for the decision to abort.

The respondents were unanimous in their response that the District Office should be able to bring its own actions. However this unanimity was subject to qualification by two respondents; one stated that "in theory" this appeared to be the logical solution, the other thought "it should be a discretionary" power.

The investigative officers were then asked to outline what advantages they perceived in the District Office being able to bring its own actions rather than proceeding through the Crown Solicitor. Their responses are summarised below.

(a) **Accessibility:** An important advantage recognised by three of the seven respondents was accessibility facilitating ease of instruction. This was translated by one respondent as "having own solicitor on tap for consultations". The complaint being that not only did appointments have to be arranged with the Crown Solicitor (often resulting in time delays) but a change of staff in the Crown Solicitor's office necessitated repeating information. Also, "often the person you are dealing with is not the person appearing in Court".

(b) **Speed:** Concomitant with accessibility was the advantage of speed mentioned by all respondents. Closer contact and better communication would allow actions to be brought sooner and speed up the investigative and prosecution process.

(c) **Familiarity:** Three of the six respondents regarded the District Office solicitor's familiarity with the facts (of a case), as an additional advantage. "He appreciates the problems" was the opinion of one respondent.

(d) **Cost reduction:** Two respondents considered that the above advantages culminated in a cost reduction.

(e) **Conflict of Interests:** One respondent referred to the albeit unusual, but neverthess important scenario, whereby a prosecution involves another government department. Use of the Crown Solicitor in such circumstances is a distinct disadvantage "due to possible conflict of interests and/or overriding instructions from the Attorney General/Crown Law Office".

To provide a balanced view of the situation the investigative officers were asked to outline what advantages they perceived in the Crown Solicitor bringing actions on their behalf. Again for ease of exposition the responses are summarised below.

(a) **Expertise:** Five out of the seven respondents recognised an advantage of greater expertise and experience offered by the Crown Solicitor. It was felt that the Crown Solicitor was "more au fait with the outside world and commercial reality", and would in many instances be able to bring "a different point of view to a case". In the view of one respondent it would also provide greater "economies of scale in respect of major prosecutions".

(b) **Success Rate:** One respondent felt that unless the District Office solicitor "is capable, conversant and confident in Court work" then the Crown Solicitor would offer a higher chance of success. Another suggested that the Crown Solicitor may bring a "greater responsibility to the action".

One respondent claimed that there were no advantages in the Crown Solicitor acting on behalf of the Division.

Following on from the above line of thought, the investigative officers were asked to identify who, in their opinion, is best suited to bringing an action under the three offence headings. The responses are summarised in Table 19 below.

Table 19 (refer Appendix 1, Question 45)
(N = 7)

Agency Preferred for Bringing Actions

	Machinery	Criminal Intent	Civil
CAD district office	6	2	5
CAD Head Office	-	-	-
Police	-	4	-
Crown Solicitor	1	1	2

Six out of seven respondents felt that "Machinery" type offences should be prosecuted by the CAD District Office. Two thought that this office should also be responsible for the "Criminal Intent" type of offence, and five were of the opinion that the district office was also best suited to taking "civil" actions.

None of the respondents thought that Head Office should be involved in taking prosecutions on behalf of the district office.

Four respondents claimed that the police were best suited to the "Criminal Intent" type of offence. The Crown Solicitor was thought to be best suited by one respondent in the "Machinery" and "Criminal" categories, and two respondents opted for the Crown Solicitor under the "Civil" option.

One respondent made a separate claim that an independent legal firm should be a choice in each of the three offence categories. This observation was qualified by the general comment that "we would get much better service by choosing

the solicitor for cases", i.e. horses for courses.

The Corporate Fraud Unit

The establishment of the Corporate Fraud Unit was officially approved by government in December 1984 to specialise in inspections, fraud and related enquiries. In January 1986 the Unit was fully operational with a full complement of five staff members.

The investigative officers were invited to make comments concerning the difference, if any, the Unit has had on their company investigative duties. As mentioned earlier one significant difference for Auckland is that as from January 1986, all company inspections in the Auckland region are referred to the Unit. It was also stated that the Unit has been responsible for winding up some companies. Other than this there was "no appreciable difference due to physical separation of Unit and lack of communication".

One respondent felt that the Unit was "a worthwhile part of Division's activities", and it was useful to be able to contact the Corporate Fraud Unit to check out some activity, company or person. It was thought that the Unit adopts a more aggressive attitude, and is able to co-ordinate nationally far better than the individual district office. Previously the Division were hesitant about involving others because of S.9A(2) declaration but it was felt that this was now changing.

The general feeling appeared to be that establishment of the Unit allowed the Division to have "some coherence" and

enabled it to devote more time to investigations.

Funding

It was not originally intended to deal with the question of funding as a separate issue. However, almost all the respondents referred specifically to a lack of funding, and the effect it had on the operating capability of the Division.

Lack of resources was seen by four out of seven respondents (refer Table 17, p.146), as a constraint on the effective performance of their duties. The type of resources required which gained specific mention were equipment, up to date technology, and manpower.

One respondent suggested that about 50% of investigations were abandoned as a result of a lack of resources. Tied in with this observation is the apparent lack of financial resources to bring actions. To illustrate, it was claimed that there were insufficient resources, "to prosecute anything over $50,000". Also, in today's sophisticated commercial climate many offences have an overseas element, "but we do not have the funds to follow these up".

The funding of the Corporate Fraud Unit was slated as being "a joke". "A budget of less than $200,000 (which includes salaries) is not even a "token" in this day and age to combating white-collar crime".

Legislative Authority

The question of additional legal authority was referred to several times. There appeared to be a slight inconsistency however, with regard to how importantly the investigative officers rated possible increased legal authority. In Table 17 (p.146), two out of seven respondents claimed that a lack of legal authority was a constraint on their effective performance. Whereas, in Table 20 (p.157), four out of the seven rated additional legal authority as top priority to effectively investigate and prosecute company offenders. Notwithstanding this inconsistency, the type of legislative authority thought to be lacking is worth noting. Section 9A of the Companies Act was seen to be limited in that it did not contain:

(a) powers to search, and seize documents, and

(b) power to interrogate the officers of the company.

It was also suggested that if the Commercial Affairs investigative officers were given the type of power and status accorded the police, it would allow them to project a more forceful image.

Power to look beyond the records and books of the company and access personal information, was seen as a method of deterring company offenders. That directors and/or officers of failed companies are able to disappear (usually overseas), to avoid possible proceedings, was seen as a perennial problem. A similar power to that contained in the Insolvency Act to prevent directors and/or officers of failed

companies leaving the country during the winding up process, was seen as a more evenhanded system of justice.

It is interesting to note that possible improvements to S.9A were discussed by the Securities Commission in its Report.[14]

General Comments

The investigative officers were invited to make general comments on the role of the Commercial Affairs Division in the investigation and prosecution of company offenders. Table 20 sets out in order of importance (1-5) those factors which the respondents felt were necessary to effective investigation and prosecution.

Table 20 (refer Appendix 1, Question 47)
(N = 7)

Factors necessary to Effective Investigation and Prosecution

	Ranking (1 = highest, 5 = lowest)				
	1	2	3	4	5
Additional personnel	4	3			
Additional legal authority	4	2	1		
Additional equipment	1	1	1	1	2
Additional training	4		2	1	
Other	3	1			

Four out of seven respondents ranked additional personnel, legal authority, and training as top priority, all of which been dealt with earlier. The question

of additional equipment is viewed differently by almost all respondents, attracting at least one response in each of the ranking options. The "Other" option referred to by three respondents as top priority relates to "time", "more autonomy" and "additional funds" respectively.

All seven investigative officers had suggestions to make regarding the most urgent areas of concern impeding the effective control of company malpractice. The comments regarding the need for training, qualified and competent personnel, and additional legal authority have been dealt with earlier. Other concerns of the investigative officers included:

(a) Lack of financial resources to bring actions. It was suggested that there should be a greater allocation of funds to the Division.

(b) The need to speed up Court procedures was also mentioned, to obviate the "excessive" time it takes to bring offenders to Court.

(c) An outdated database system comprising an obsolete and cumbersome manually operated records and filing system. What was needed was an effective computerised national database, which also carried information on failed companies and their directors.

(d) The question of the relative ease with which an offender is able to leave New Zealand (often with considerable

legal recourse available to the investigative officer to prevent such a happening.

One respondent commented that there was less emphasis on criminal prosecutions. The greater onus of proof required for criminal prosecutions was overlaid with the knowledge that with the advent of the Criminal Justice Act, successful criminal prosecutions were likely to be accompanied by "rather limp-wristed" sentences.

It was also claimed, that "the effect of not enforcing legislation is that it becomes unimportant and practised more "in breach" than otherwise". The solution lies in putting together a team of highly trained and experienced professionals with sufficient funds and resources, plus the automony to do the job.

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1. MANAGH, J.F. **The Role of the Commercial Affairs Division of the Department of Justice in the New Zealand Business Community** Faculty of Commerce and Administration, Victoria University, 1985, p.55

2. DEPARTMENT OF JUSTICE, Review. **Report of the Consultancy Team on Management Systems in the Commercial Affairs, Penal, Courts and Probation Divisions,** Wellington: Department of Justice, 1982, p.44

3. DEPARTMENT OF JUSTICE, **Annual Report.** Wellington Government Printer, 1986

4. Department of Justice, Review. (1982), op cit. p.40

5. McLAY, B.C. "The Future of Commercial Affairs", **The Accountants' Journal.** May 1977, pp.129-133

6. This has been calculated: combined company inspections/ total combined time (120/300).

7. Managh, J.F. (1985). op cit.

8. This has been calculated: total company inspections/ total combined time (235/300).

9. Managh, J.F. (1985). op cit. p.21

10. Ibid. p.20

11. Some of these investigations are carry overs from pre-Corporate Fraud Unit days

12. Department of Justice, Review. (1982). op cit. p.41

13. "actively" was defined as involvement within the last two weeks.

14. SECURITIES COMMISSION. **Report.** Wellington (N.Z.) 2 July 1984.
Note: It was subsequently recommended (para.8.13.4), that a legislative change be made to include the power to search, and seize documents. The power to interrogate was considered to be available under the inspection powers in S.168 of the Companies Act 1955.

CHAPTER 9

EFFECTIVENESS OF THE COMMERCIAL AFFAIRS DIVISION TO MONITOR AND COMBAT COMPANY OFFENDERS

Staffing

Each of the six regional offices is headed by a controlling officer (the District Registrar), and in the case of head office, the Assistant Secretary (Commercial Affairs).
To attain their present positions, three of the five controlling officers were promoted within their present office, and two promoted from another Commercial Affairs Division district office.

Qualifications and Experience

The highest academic qualifications of controlling officers within the Commercial Affairs Division range from School Certificate to a Batchelors degree in accounting. The latter is held by the Assistant Secretary (Commercial Affairs). Two of the remaining controlling officers have University Entrance and one has a partially completed commerce degree. This would seem to accord with Managh's statement that no professional or tertiary qualifications are required.[1]

None of the controlling officers has had private sector experience, although four out of five has had over 5 years previous experience in government, much of it within the Department of Justice.

Investigative Activity

It has been established earlier in this study[2], that the Commercial Affairs Division's activities can be divided into three main categories: registration, insolvency and investigations.

However the Review team,[3] stated one of the underlying bases for the objectives of the Division to be the investigation of instances of suspected abuse by commercial enterprise operating as a going concern.

It followed therefore, that the Commercial Affairs should be regarded as a Law Enforcement Division and as such should be measured in terms of its effectiveness in the prevention and detection of criminal or undesirable commercial activity, and the successful prosecution thereof.[4] In respect of the objective "prevention and detection of commercial crime/breach of laws" the Report outlined three specific measures that could be used:

(1) number of reported crimes/breaches - to establish prevalence,

(2) dollar losses per $1000 investment - to establish extent of investor losses, and

(3) number of crimes detected - to monitor effectiveness of law enforcement.

This study has attempted an exploratory investigation into the possibility of using the effectiveness measures outlined in (1) and (3) above. In other words, to what extent is the data, necessary to establish these specific effectiveness measures, available. This study has confined the

commercial activity to that of companies.

The controlling officer in each of the offices was asked how many complaints were received during the 12 month period, 1 April 1985 to 31 March 1986. Although given an appropriate alternative none of the respondents claimed that they were able to retrieve the data from actual records. Four of the five respondents gave "approximate" totals, and one neglected to answer this question. One of the four above, stated that "data not recorded but unlikely any complaints received as so infrequent that writer would be able to recall".

For the same period the controlling officers were asked to establish by which route the complaints were received. Unfortunately the responses received can only provide tentative findings. This was due partly to:

(a) possible misinterpretation by the respondents due, perhaps, to a questionnaire design fault, despite extensive pretesting, and or

(b) no statistics kept by the offices concerned.

The Auckland District Office referred this portion of the questionnaire to the Corporate Fraud Unit for completion as the Unit authorised almost all the S.9A company inspections. The District Registrar at Auckland stated that for the greater part of the period under review (April 1985 to March 1986) his office has had to operate periodically with two Investigating Accountants and sometimes, one. With an establishment providing for five Investigating Accountants, it has meant that only those insolvencies or liquidations

offering the hope of recovery of moneys have been undertaken. The investigating accountant also has had to cope with the registration side of the office, such as checking draft prospectuses, which has eroded the amount of time available for indepth investigations.

These tentative results are shown in Table 21 below. To provide a base for comparison at a later date, the Corporate Fraud Unit figures have been shown separately.

Table 21 (refer Appendix 2, Question 7)
(N = 4)

Source of Complaints

	District Office *	%	Corporate Fraud Unit	%
Shareholders/directors	68	50.4%	5	12.2%
General public	22	16.3%	-	-
Creditors	-	-	7	17.1%
Representations to M.P.	6	4.5%	-	-
Ministerial instructions	-	-	-	-
Registrar of Companies	5	3.7%	1	2.4%
Media	-	-	-	-
Initiated by your office	23	17.0%	28	68.3%
Fellow officer (other regions)	5	3.7%	-	-
Outside liquidator	-	-	-	-
Receiver	-	-	-	-
Police	3	2.2%	-	-
Government department	3	2.2%	-	-
	135	100%	41	100%

* District Office in this context includes Head Office.

The District Offices received by far the largest percentage of complaints from the shareholders/directors section (50.4%), compared to the Corporate Fraud Unit's, 12.2%. The Corporate Fraud Unit initiated the majority of the complaints themselves (68.3%), with a corresponding figure of 17% from the District Offices. The Unit received 17.1% of the complaints from creditors; whilst the District Offices

received 16.3% from the general public. The remainder of the complaints received by the District Offices is spread fairly evenly between representations to Members of Parliament, the Registrar of Companies, fellow officers from other regions, the police, and other government departments. From the above analysis it seems that there is very little similarity between the two groups, with regard to the source of complaints.

The "prosecution" objective outlined by the Review team [5], was to ascertain the nature of partly solved crimes, the completeness of prosecution and the quality/effectiveness of any prosecution.

Following on from the data above, Table 22 sets out the outcome of the total complaints received.

Table 22 (refer Appendix 2, Question 8)
(N = 4)

Result of Complaints

	District Office	%	Corporate Fraud Unit	%
No action taken	55	40.7%	6	14.6%
No action taken but advice on remedies given	48	35.6%	-	-
Follow up investigation	18	13.3%	35	85.4%
Passed on to Police	7	5.2%	-	-
Passed on to another government department	7	5,2%	-	-
	135	100%	41	100%

On the above figures it would appear that the Corporate Fraud Unit adopts a more aggressive attitude than the District Offices having undertaken 85.4% follow-up investigations compared to 13.3%. Too much should not be read into this result however, as the District Offices may well receive a less "serious" type of complaint. As mentioned by one respondent a large number of complaints are received on a variety of matters. These may merely be a dispute between shareholders and directors, which does not call for any action other than advice on a remedy, such as the 35.6% signalled above.

The Corporate Fraud Unit could be said to have achieved its required objective at this initial stage by actively following through on 85.4% of complaints received.

As mentioned earlier insolvency administration forms one of the main categories of the Commercial Affairs Division,[6] which requires it to be measured in terms of its effectiveness in the prevention and detection of "fraud or culpable irresponsibiliy by directors and managers of insolvent companies".[7]

The controlling officers were asked how many company liquidations resulted from Court ordered windings up during the 12 month period (April 1985 to March 1986). Table 23 sets out the responses of four district offices. Neither the Corporate Fraud Unit, nor Head Office undertake liquidations.

Table 23 (refer Appendix 2, Question 10)
(N = 4)

Insolvencies

	Ak	Nap	Wgtn	Chch	Total
O.A. appointed liquidator	129	11	58	43	241
Outside liquidator	12	1	12	3	28
	141	12	70	46	269

Auckland deals with approximately 53% of the total Court Windings Up referred to in Table 23 above.[8] Wellington is responsible for approximately 24%, Christchurch 18%, and Napier 5%. As far as it is possible to make comparisons, these figures seem to bear a direct relationship to the number of companies registered within each region.[9]

In the 28 instances when an outside liquidator was appointed (which represents 10.4% of the total liquidations), on no occasion did the liquidator report to the relevant Official Assignee that a company and/or directors should be investigated.

The Review team identified the specific effectiveness measure of partly solved crimes as, a percentage of crimes cleared by prosecution or otherwise.[10] Table 24 sets out the responses of four out of five controlling officers (one unusable response), indicating the offence categories involved when a follow up investigation was undertaken. These results were then used as the base figures for the remaining questions dealing with investigative activity.

Table 24 (refer Appendix 2, Question 12)
(N = 4)

Follow-up Investigations of Possible Offences

	Machinery	Criminal Intent	Civil	Total
Company inspections	68	17	15	100
Court Windings Up *	-	6	6	12
	68	23	21	112

* N = 3 as not applicable to Head Office

From the above figures it can be seen that investigations into 100 possible offences were undertaken with respect to company inspections. Machinery type offences accounted for 68, criminal offences 17, and 15 were of a civil nature. Very few investigations of possible offences resulted from Court Windings Up (a total of 12). This means a total of 112 possible offences were investigated in the 12 month period.

One respondent stated, that "normally where there is one offence you will find that the other categories are also involved." Although as a general rule the machinery provisions are not considered important, and are not investigated. A similar response was made by the investigative staff when it was stated that "machinery" type offences did not warrant investigation as they were not cost beneficial.[11] Notwithstanding these comments, of the total number of offences investigated, approximately 61% were machinery; approximately 20% had criminal intent, and 19% were of a civil nature.

Table 25 shows how many of the follow up investigations resulted in a prosecution.

Table 25 (refer Appendix 2, Question 14)
(N = 4)

Prosecutions

	Mach	Crim Intent	Civil	Total inv. for period
Company inspections	-	4	-	100
Court Windings Up				
(a) O.A. as liquidator	-	-	-	12
(b) Outside liquidator	-	-	-	-
	-	4	-	112

At the date of this study only four prosecutions had resulted from the 112 offences investigated. This represents approximately 3.6%. All of the above prosecutions resulted from criminal offence investigations undertaken by the Corporate Fraud Squad. Taken as a percentage of the total criminal offences investigated, the figure increases to approximately 17%. To obtain an overall perspective of the "prosecution" objective, the above results need to be viewed in conjuction with Table 28 (p.172).

The above result can be compared to Managh's study (63 prosecutions) on a tentative basis only.[12] In that study the data was collected from the six District Offices. The present study, on the other hand, includes both Head Office and the newly formed Corporate Fraud Unit, but unfortunately responses were not received from two of the District Offices. It is worth noting, however that in Managh's study all of the prosecutions (63 in total) were

machinery type offences, whereas in the present study all four prosecutions related to criminal offences.

This result should also, be viewed in tandem with the lack of manpower, and the responses made by the investigative officers concerning the non-pursuance of "machinery" type offences (refer p.141).

Of the four "criminal type" prosecutions two led to a conviction (50%). This can perhaps be compared quite favourably to the results of Managh's study when 57 out of 63 "machinery type" prosecutions (90.5%) resulted in a conviction. In a "criminal" prosecution the evidentiary requirements and proof of intent are considerably more exacting than is required to prosecute a technical offence.

Table 26 indicates how many of the follow-up investigations have been completed but are pending a hearing by the Court.

Table 26 (refer Appendix 2, Question 16)
(N = 4)

Prosecution Pending

	Mach	Crim Intent	Civil	Total inv for period
Company inspections	-	2	-	100
Court Windings Up				
(a) O.A. as liquidator	-	-	2	12
(b) Outside liquidator	-	-	-	-
	-	2	2	112

In terms of completed investigations as an effective measure it would seem that approximately 7% of the total offences investigated have been completed, either by prosecution

(3.6% as shown above), or pending prosecution (3.6%). These figures can be further analysed from the base figures given in Table 24. The machinery offences show a zero completion figure; 26% for the criminal offences; and 16.7% of the civil actions have reached completion.

Those investigations initiated in the 12 month period and still under investigation are set out in Table 27.

Table 27 (refer Appendix 2, Question 17)
(N = 4)

Cases Still Under Investigation

	Mach	Crim Intent	Civil	Total inv for period
Company inspections	14	5	4	100
Court Windings Up				
(a) O.A. as liquidator	2	2	2	12
(b) Outside liquidator	-	-	-	-
	16	7	6	112

By collating Tables 24-27 we can establish the percentage of investigations which have either been completed, or are still alive.

Table 28

Final Results of Investigations

	Mach	Crim Intent	Civil	Total
Prosecuted	-	4	-	4
Pending hearing	-	2	2	4
Still under investigation	16	7	6	29
	16	13	8	37

The above figures can be analysed to ascertain the overall effectiveness of the investigations. Sixteen (16) of the 68 machinery offences are still under investigation (23.5%). This means that over 75% of the investigations were abandoned. In respect of the criminal offence type, thirteen (13) of the 23 investigated, have been completed (4 prosecutions), or are still "alive" (a total of 56.5%). In terms of effectiveness this result could be said to have achieved the objective. Of the 21 civil actions that were investigated, a total of eight (8) are still "alive" (38%). Two are pending a hearing, and six are still under investigation. In terms of effectiveness this result could perhaps be viewed as reasonably satisfactory, as this type of action is often settled out of court.

It must be stressed that the above results cannot be viewed in isolation, and should be used as a starting point only. Limiting factors such as lack of resources and manpower must have a detrimental effect on the investigative process.

The Prosecution Process

The four respondents from the district offices were unanimous in their response that the District Office should be able to bring its own actions. Head Office however, was not in favour.

The controlling officers were then asked to outline what advantages they perceived in the District Office being able to bring its own actions rather than proceeding through the Crown Solicitor.

The responses are summarised below:

(a) **Cost Savings:** An important factor in the eyes of the controlling officers was the opportunity for cost savings. Four out of the five respondents identified this advantage.

(b) **Service:** Considerable savings in time and service was seen as another advantage by three out of five respondents. Briefing the Crown Solicitor's assistant was often time consuming, and "in some instances junior counsel are used in prosecutions their lack of experience being evident in court". It was felt that in-house solicitors generally have a better perspective of the problem. "It is sometimes difficult to convince outside solicitors that the action is serious and that the charge is brought because it is serious".

(c) **Speed:** Proximity to in-house solicitors allows ease of instruction by the District Office on the one hand, and easier access to information by the prosecuting solicitor on the other. Closer contact with the prosecuting solicitor would reduce delays and result in "quicker disposal of matters".

A motivating factor was expressed as "job satisfaction for staff to be able to see cases through". One further point considered was that "in some cases the District Office

solicitor can have more status, especially in technical and/or public interest cases".

The controlling officers were also given the opportunity of expressing those advantages they perceived in the Crown Solicitor acting on their behalf. The point was made that in most offices, the Official Assignee's offices in particular, the Crown Solicitor would only do a small proportion of the outside work. Most of it is done by other barristers who are appointed for a specific task. Two claimed there was no advantage, and the remaining responses are outlined below.

(a) **Expertise:** This was mentioned by all of the three remaining respondents, especially in the case of criminal matters. One added the rider that skill was an advantage in those cases which are "undertaken by the Crown Solicitor, partner, or very senior staff solicitor; but not when junior staff solicitors are involved".

(b) **Independence:** Three respondents saw the independence of a third party providing an additonal quality to the prosecution process. One respondent expressed this "as a different and sometimes more balanced viewpoint of the problem."

The advantage of spreading the workload was suggested as another pertinent advantage.

Following on from the above responses the controlling officers were asked to identify, who in their opinion, is best suited to bringing actions under the three offence headings. In all cases, these respondents offered more than one option in each of the "offence" categories, which nullifies any clear cut conclusion.

Their responses are set out in Table 29 below.

Table 29 (refer Appendix 2, Question 22)
(N = 5)

Choice of Prosecutor

	Machinery	Criminal Intent	Civil
CAD District Office	5	3	4
CAD Head Office	-	-	1
Police	-	2	-
Crown Solicitor	-	3	1
Other	-	1	2

All of the respondents felt that the CAD District Office should be able to be responsible for "Machinery" type offences. Three out of five thought that this office should also bring "criminal type" prosecutions, and four were of the opinion that the district office was best suited to "civil" actions. There was the qualification however, that in order to accomplish this the District Office must be adequately staffed. One respondent voted head office as best choice in bringing civil actions, and two out of five saw the police as being more suited to the "criminal type"

prosecution. The Crown Solicitor was thought to be best suited by three respondents in respect of "criminal type" offences, and one in respect of "civil" actions. There was a rider however, that it was dependent on "who was assigned to handle the case".

The "Other" categories all related to outside legal firms being asked to take "criminal type" cases by one respondent, and "civil" cases by two respondents.

General Comments

The controlling officers were invited to make general comments on what they considered to be the most urgent areas of concern impeding the effective control of company malpractice. All the respondents had suggestions to make and these have been summarised below.

(a) A "very serious" lack of resources was one of the most oft mentioned concerns. The absence of an up-to-date computer system was a constraint in "keeping up" with, let alone "catching" offenders. The movement of qualified professional staff and "experienced" non-professional staff to better paid, less stressful positions in the private sector and other government departments is a very real problem. The immediate appointment of professionals to all the outstanding vacancies within the Division was seen as the obvious answer, in concert with the regrading of senior staff within the Division.

(b) There is public and court apathy. It was suggested that it could be overcome by devoting more resources and providing a more intense approach to bringing actions in recognition of the seriousness of this type of crime. Stiffer penalties and more publicity were recommended as two methods by which to deter would-be offenders. A freer rein for the District Registrar to initiate actions without referral or restraint from inexperienced Head Office personnel was seen as being a positive move in creating public awareness.

(c) Streamlining procedures was considered a necessary requisite providing more prompt action through the Court system.

(d) The implementation of up-to-date training modules was identified as a necessary adjunct to effective control.

(e) Amendments to the Companies Act was also identified as a necessary requisite to effective control. Specifically mentioned was "the high onus of proof on the Registrar" required in S.189 applications which it was felt limited the practical powers of the Registrar.

A general observation is that neither the government nor more specifically, the Justice Department, have developed a philosophy or common objective to effectively monitor and combat "white collar crime". Too much time and effort having been put into the Penal and Courts Divisions whilst

Commercial Affairs has been ignored.

It was mooted that the Commercial Affairs Division falls far short of "what was envisaged by the MacArthur Committee" when they contemplated a strengthened organisation to monitor and police the Companies Act. It was suggested, that the Division should be able to set up a "squad" of the most experienced staff (professional and non- professional) who could be called into a particular matter anywhere in the country at a moment's notice.

REFERENCES

1. MANAGH, J.F. **The Role of the Commercial Affairs Division of the Department of Justice in the New Zealand Business Community.** Faculty of Commerce and Administration, Victoria University, 1985, p.54

2. refer p.112 supra.

3. DEPARTMENT OF JUSTICE, Review. **Report of the Consultancy Team on Management Systems in the Commercial Affairs, Penal, Courts and Probation Divisions.** Wellington: Department of Justice, 1982, p.39

4. Ibid. p.40

5. Ibid. p.41

6. refer p.114 supra

7. Department of Justice, Review (1982). op cit. p.39

8. Figures for Hamilton and Dunedin were not available.

9. refer Table 7, p.113 supra.

10. Department of Justice, Review. (1982). op cit. p.41

11. refer p.141 supra.

12. Managh, J.F. (1985). op cit. pp.62-63

CHAPTER 10

THE CONCEPT OF SHARED RESPONSIBILITY

As a matter of practice both the Police and the Commercial Affairs Division have been responsible for enforcing laws relating to company fraud and malpractice. It was acknowledged by the Securities Commission's Report[1] however, that there is a potential for overlapping and duplication, and more importantly, a potential of failure to act in cases where one Department might assume that the other has a matter under control. The general feeling is that both agencies have skills and capabilities to contribute towards the detection and prosecution of company offenders, and "that both Departments are well aware of the need for co-operation".[2]

1. The Originator's View

An unstructured interview was undertaken with a representative of the Securities Commission to clarify what was envisaged by the Commission's recommendation concerning shared responsibility and co-operation between the Police and the Department of Justice.

The Commission were of the view that their Report on this matter was of a general nature and did not warrant detailed analysis of the problem. There appeared to be a potential for overlap and duplication in respect of potential company offenders which was discussed with the

Police and the Department of Justice. The outcome of which pointed to the feasibility of a working relationship of shared co-operation between the two departments.

How the two departments effected this shared co-operation "is not really within our jurisdiction, but presumably they have got to sit down and "nut out" an understanding on where responsibility lies, or where co-operation should be put into place".

It would seem therefore, that the originator's view of the operation of shared responsibility and co-operation was dependent on a rapport of resources. Such rapport to include the establishment of their particular functions and responsibilities, and formalising a policy for shared co-operation.

2. The Official View

As mentioned earlier, the Commercial Affairs Division is the arm of the Department of Justice charged with administering the law relating to company offenders. Interviews with the Assistant Secretary (Commercial Affairs) provided the basis for the official view on how the concept of shared responsibility and co-operation with the Police operates within the Division.

From the standpoint of the Division, no formalised procedures or policies have been established with the Police. It is more a matter of referral when, and if, the occasion arises.

The Division recognises that its particular function encompasses more than traditional bankruptcy and liquidation matters, and that it has a duty to pursue fraudulent conduct by companies. However, the import of the inclusion of criminal offences by the 1980 amendments to the Companies Act was not appreciated until the Securities Commission Report in 1984.

From an official viewpoint the concept of shared co-operation with the Police is envisaged to operate on a complementary basis. The investigative officers of the Division would undertake an investigation under, say S.9A, as far as possible. If additional powers such as search and entry are required then the case would be handed over to the Police and they would take it to its conclusion. The co-operation was envisaged, not so much as a side by side operation but each department providing complementary input.

To date there has been no formalised departmental policy issued to the district offices on the subject of shared co-operation with the Police. One reason being that Head Office had been required "to deal with a myriad of matters of considerable complexity". However a "clearing of the way" was visualised "for developing policies and procedures for a more direct concerted focus" to deal with company offenders.

The official view was that there had not been any change in the frequency or nature of contact with the Police

since the Securities Commission's Report in 1984. It was felt that contact with the Police on a national basis was not substantial, with the exception of Auckland, "where there is a very good liaison which functions very well". It was considered pointless to set up a liaison system until it was able to be used. To date no system had been initiated for the sole reason that "the circumstances had not yet arisen which warranted that degree of liaison".

3. The Local View

The investigating officers and controlling officers were surveyed to ascertain how the concept of shared co-operation operates in practice.

Investigating Officers: The investigating officers were questioned on the frequency and nature of their contact with the Police. All seven respondents stated that there have been instances when **they** made contact with the Police, and four stated that the Police had made contact with them. The nature of this contact is shown in Table 30 below.

Table 30 (refer Appendix 1, Question 28)
(N = 7)

Contact with Police

	You made contact	Police made contact
Personal	5	3
Informal	4	2
Formal	1	1
Very Formal	1	1
Other	-	-

Of the seven respondents who had made contact with the police, five described this contact as "personal", four as "informal". However, one respondent qualified his response in that it referred to past contact only. The same respondent described the present contact as being "very formal".

In those instances when the Police made the initial contact, three of the four respondents described it as being "personal", and two "informal". Again, the same respondent stated that this contact related to the past, whereas present contact could only be described as "very formal".

Table 31 shows the frequency of contact with the police under the various type options.

Table 31 (refer Appendix 1, Question 30)
(N = 7)

Nature of Contact with Police

	Daily	Weekly	Monthly	Other	
Chance meeting			1	1	Infrequent
Telephone conversation			4	1	Fortnightly
Written memorandum				1	Occasionally
				1	Seldom
Informal meeting			1	1	Two monthly
				1	Occasionally
				1	
Formal meeting				1	Two monthly
				1	
Written report				1	Occasionally
Other					

From the above Table it can be seen that the frequency of contact with the Police is monthly or less. Two respondents out of the seven describe their chance meetings as monthly and infrequently. Monthly contact by telephone is the most common form of contact for four respondents, and another respondent is in touch by telephone as required - usually fortnightly. Three respondents were involved in informal meetings, respectively on a monthly, two monthly and occasional basis. The more formal meeting was the avenue used by two respondents - two monthly or less. Only one respondent claimed to be involved in a written report on an occasional basis.

How the respondents described the co-operation with the Police is shown in Table 32 below.

Table 32 (refer Appendix 1, Question 31)
(N = 7)

Description of Contact with Police

None	Poor	Fair	Good	Very Good	Excellent
	3	3		1	(past)

Three of the seven respondents described this co-operation as "poor", three as "fair" and one as "very good". The respondent, again made special mention of the fact that the co-operation in the past was excellent, and presently is "poor".

The investigative officers were then questioned concerning what change, if any, in respect of police contact has taken place over the preceding 12 months. Table 33 sets out the results.

Table 33 (refer Appendix 1, Question 32)
(N = 7)

Possible Change in Contact with Police

No change	More contact	Less contact
1	2	4

Four of the seven respondents were of the opinion that there had been a reduction in contact with the Police; two felt that the contact had increased, and one reported no change.

The explanations regarding the change in contact are recorded below.

More contact:

One of the two respondents who claimed "more contact" explained that the increase had come about because they had made a deliberate attempt to obtain a regular informal liaison with the local police. The other felt that one or two specific cases when police involvement was warranted, accounted for the increased contact.

Less contact:

Two respondents from different District Offices claimed that monthly meetings had been organised with the police but subsequently discontinued. Reasons given were a change in police personnel and lack of attendance by the police. A change in personnel within the police fraud squads combined with a change in police policy, for example an unwillingness to divulge information from the Wanganui computer, had inhibited contact.

One respondent claimed that "the police are naturally suspicious about outsiders making inroads into their areas of interest". The question of the police fraud squads having to deal with other criminal investigations such as drugs and homicides, was also raised, along with the comment that "their fraud activities are limited and have a low priority".

All the respondents suggested improvements that could be

made in respect of "shared co-operation" between themselves and the Police. It was accepted that the police also suffer from the common problem of lack of resources and that they have a very difficult role to play. The end result being however, that the division between the two departments allows offenders "to get away with things".

Specific comments are summarised below.

1. Regular formal meetings (say monthly) with CIB personnel to enable the exchange of views and find out "what each other is doing". A specific example of the information sharing that would be helpful was "the names (and companies) of all directors/secretaries of companies filed in the region that have a criminal record".

2. More access to the Wanganui Computer information.

3. A more relaxed and open attitude by the Police especially at the inspector level.

4. There would be advantages to both the Commercial Affairs Division and Police if joint investigations were undertaken when there is some criminal content.

This last comment was perhaps reinforced by the general comment that "there should be greater involvement with the police so that the Commercial Affairs Division

profile may be improved. This requires a special fraud unit in the police as well as having sufficient staff in Commercial Affairs to carry out investigations promptly and efficiently.

A more hardhitting comment on this theme was that "to date the Justice Department have not shown the commitment or ability to undertake the running of a Corporate Fraud Unit. A Unit managed, trained and administered by the Police but financed and supported by the Justice Department would be more appropriate".

Controlling Officers

The controlling officers do not as a general rule become involved in the type of investigative process which necessitates regular contact with the Police. They would be expected however, to have considerable input into the policies and procedures adopted by their staff. The controlling officers described the co-operation between their office and the Police as shown in Table 34.

Table 34 (Appendix 2, Question 23)
(N = 5)

Description of Contact with Police

None	Poor	Fair	Good	Very good	Excellent
1		1		3	

Three of the five respondents described this co-operation as "very good", one as "fair" and one as having no co-operation with the Police. A comparison

with the responses by the relative investigating officers (see Table 32) within each office revealed one significant difference of opinion. The controlling officer reported the co-operation as being "very good" but the investigating officer rated it only "fair". The remaining relative responses, although differing on two occasions, may well be caused by different values given to the meaning of the alternative words used.

The controlling officers were then questioned on any change in contact with the police that had taken place within the preceding 12 months. Table 35 sets out their responses.

Table 35 (refer Appendix 2, Question 24)
(N = 5)

Possible Change in Contact with Police

	No change	More contact	Less contact
*	2		2

Two of the five respondents felt that their office had had less contact with the Police. One of whom had previously described the contact as "very good", the other as "fair". Two respondents reported that there had been no change in the level of contact; one of whom had previously rated the contact as "very good", the other as having had no previous contact. The remaining respondent (*) had described the contact as "very good" but felt that an appropriate response alternative in

this case had not been provided. It was thought that "stretched police resources do not allow the police to be involved as they would like to be".

Three respondents offered explanations regarding a change in contact with the police. Two had specified a change of "less contact". The third had earlier reported "no change in no contact" but explains that although no liaison is yet established, "arrangements are presently in hand to have closer links between the Police and this office".

Set out below are the main reasons given by the respondents for the decrease in police contact.

(a) A lack of resources, especially in manpower. A loss of experienced staff to the private sector over the last two years has exacerbated the problem.

(b) An apparent lack of appreciation by the Police of corporate malpractice as opposed to direct fraud and misappropriation. The Police do not seem to appreciate or understand that a loss created by malpractice can be as serious as direct theft.

(c) Apart from one or two isolated personnel who are able to devote all their time in company fraud work, the police lack expertise. There is also the

added problem of reassignment of all police personnel whenever a major crime, such as homicide, occurs within the police district.

(d) Commercial fraud is given low priority by the Police, and there is a lack of incentive to get involved.

Not surprisingly, there are similarities between the comments of the controlling officers and those of the investigating officers, such as change in police personnel, the effect of other criminal investigations, and the low priority accorded company offenders. The more personal contact required by the investigating officers would account for the more specific comments made.

Two of the five respondents suggested improvements that could be made in respect of the shared co-operation between their office and the police. The main area for improvement was a "serious and genuine Government commitment to bring justice into the commercial area". This was expressed as requiring a sufficient level of priority being given to the area of criminal activity involving corporations and their officers. That appropriate resources be designated for the purpose, and a firm commitment made to getting results. It was suggested that "it is essential that the police have a separate division for corporate fraud that is not available for other police work".

REFERENCES

1. SECURITIES COMMISSION. **Report.** Wellington (N.Z.) 2 July 1984, 1984, para.8.6

2. Ibid. para.8.11

CHAPTER 11

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

Staff Recruitment and Retention

That the recruitment and retention of suitably qualified investigative staff within the Commercial Affairs Division, is a serious problem cannot be overstated. The vacancies within several of the District Offices cannot be viewed as a temporary condition; Auckland and Hamilton being two examples. Of a total number of established positions for investigative staff as at 31 January 1987, only seven positions are filled, accounting for less than half (44%).

There can be little doubt that such a chronic lack of investigating officers, not only affects the effective monitoring of company offenders, but also impinges on the morale of the remaining staff. This particularly applies to the Auckland District Office, which has established positions for five investigating accountants, all of which are currently vacant. Retention of staff (assuming they can be recruited), under such conditions must become even more difficult.

In February 1985, the Minister of Justice referred to the settlement of remuneration for accountants within the State Service, but since that date it appears that recruitment and and retention of this occupational class has deteriorated.

This would seem to indicate that, either the conditions of employment relative to the qualifications and experience required are not comparable to those offered by the private sector; or there is a paucity of suitably qualified persons. If the former is the case, then it is imperative that the government take immediate steps to rectify the situation before it is too late. If the latter, then the government must be prepared to compete for the services of investigative staff within the pool available.

Qualifications and Experience of Investigative Staff

The apparent lack of follow-up investigations and prosecutions is unlikely to bear any relationship to the calibre of the existing staff. All the investigative staff, not only have more than the required formal qualifications, but also have outside practical experience, and in most instances previous investigative experience.

Training

It would seem that since December 1985, it has been policy to send newly recruited District Office investigative staff on a two week observation course in Dunedin. This may well be part of the implemented training schemes, referred to in the Annual Report.[1]

Such an observation course would provide "familiarisation" with the workings of the District Office. However, it is unlikely, due to the relatively small number of companies[2] it administers, to be able to provide experience of

investigative skills relevant to the larger cities. A smaller centre is privy to a brand of "local" knowledge and information on potential sharp operators, not available to the larger centres. There, the sheer number and complexity of companies operating, themselves provide a camouflage, requiring more sophisticated methods.

To keep abreast, of a dynamic commercial environment, requires continuing education in accounting skills, let alone specialised areas such as commodity and futures trading. It is important that the Division ascertains the type and extent of training required to effectively monitor and combat company offenders. The ideal, is that further research be undertaken concerning the needs of both new, and existing staff.

However, on the basis of the findings of this study, it is suggested that a two-tier approach be implemented. Firstly, suitable instruction to the new recruit to give him/her the confidence to carry out their duties in an effective and efficient manner. Secondly, specialised training on a continuing basis. This is seen as utilising both internal and external resources, and could take the following form.

1. (a) Familiarisation with procedures, such as when and how to get information.

   (b) Specific instruction on how to carry out an investigation, such as a company inspection.

2. Courses on specialised areas relevant to the financial market, i.e. computer crime, commodities and futures

trading. The focus should be an investigative orientation, not generalised information.

Although the Division should be commended on making a "start" regarding the instruction of staff, there appears little doubt in the minds of the investigative staff that it falls far short of what is required.

Management

This study was not specifically designed to look at line and staff relationships, so to comment at length would be inappropriate. There does, however, appear to be a potential problem within the overall management structure. Conflict between professional and administration staff is not an uncommon occurrence in this type of line/staff situation. However, to ignore the signals of possible conflict between management and the district offices, highlighted in this study may well be to the detriment of the Division as a whole.

It should also be noted, that there appeared to be a general feeling of insufficient direction and policy emanating from Head Office.

Operating Capability

The findings in this section, reflect the exploratory nature of the research and must be interpreted within this context. Several of the conclusions in this section are dealt with under specific headings. Of the remainder, much of the

information collected is not sufficiently conclusive to make other than tentative conclusions, but could serve as a basis for future research.

During the year under review, the Corporate Fraud Unit appears to have specialised in company inspections, whilst the District Offices have undertaken a variety of activities.

It would seem that the District Office investigative officers do not appear to have an unacceptable backlog of work. Their uncleared files represent an average of 18.5 per person. A large proportion of these however, are insolvency files, which generally have a protracted life. The files that are actively being worked on reduce to an average of three files per person. This apparent lack of investigative work however, should be viewed in relation to other evidence supplied throughout the study. For example, it may well be, that at the initial stage, and for a variety of reasons, a decision is made not to undertake an investigation of a possible breach. Further detailed research into the reasons why investigations are not undertaken may well produce useful results.

The Corporate Fraud Unit's workload results show a similar number of uncleared files per person (19.5), although the average actively worked on has increased to 6.7 per person. The majority of these, are company inspections, which are generally initiated by the Corporate Fraud Unit itself (refer Table 21, p.165). As outlined in its mandate the Unit would appear to be adopting an aggressive approach in respect of

monitoring company offenders, and if they are to succeed it is important that the Department and government respond in a similar manner.

The majority of respondents appeared very positive in their attitude to enlisting assistance when required. This could be seen to reinforce the premise that any lack of "concrete" results achieved, is not necessarily due to a lack of enthusiasm, and willingness to achieve by the majority of the investigative officers.

Effectiveness of CAD to Monitor and Combat Company Offenders

It became apparent very soon, that very little statistical information is kept, or able to be retrieved. The Division scored very low, compared to their Australian counterpart, the Corporate Affairs Commission, (refer p.59), in respect of recording the nature and incidence of complaints. The Corporate Affairs Commission provides information in their Annual Report on the nature of the complaints received, the number, and the percentage that were subject to follow-up investigations.

In this study not one of the controlling officers was able to retrieve this data from actual records, although most gave approximate figures. This lack of recordkeeping must place in doubt the ability of the Division to undertake the effectiveness measure to establish the prevalence of crimes/breaches, envisaged by the Review team (refer p.54 of this study).

The "prosecution" objective outlined by the Review team[3] was to ascertain the nature of partly solved crimes, the completeness of prosecution and the quality/effectiveness of any prosecution.

It would seem that "machinery" type offences are apparent in most investigations, but are rarely pursued as they are not perceived to be either, cost beneficial, or of sufficient importance to warrant prosecution. On the other hand, the criminal offences, although rarely discovered tend to be pursued, at least initially. The evidential problems that accompany the required standard of proof in a criminal investigation is the most common cause for an investigation to be abandoned.

In respect of the investigations undertaken for machinery type offences, the Division returned a zero score for satisfactory completion in terms of prosecution or pending prosecution, although 23.5% were still undert investigation. Of the total number of criminal investigations undertaken the result was much more positive, with 56.5% completed or still under investigation. In terms of effectiveness of the investigations undertaken, the civil actions could also be said to have achieved a good result. Many of these actions are settled out of court, which means that completion in terms of prosecutions is not really a true yardstick. Notwithstanding, 38% are either pending a hearing, or still under investigation.

Although the above results can be viewed as being reasonably satisfactory in terms of completed investigations, a fact

which stands out is the relatively small number of investigations of company offenders undertaken for the period under review.

If we adopt Robert Lowe's maxim in 1856 (refer p.17), that there was the potential for 99 "good" companies, and a "bad" one hundredth, this would mean that of the 125,581 companies on the register at 31 March 1986, there is the potential for 1,258 "bad" ones. McLay in 1977,[4] felt justified in increasing this percentage to 10% (12,585) "bad" companies. Even allowing for the fact that the majority of companies are in existence for more than 1 year, the 112 investigations carried out in the period under review falls far short of either of the above figures.

It could be that, New Zealand is particularly fortunate in that companies and/or their directors very rarely offend, or alternatively, they do offend but are not investigated.

If the latter is the case, then it is important that it be clearly understood why possible breaches of the law are not followed up. If it is caused by factors within the control of the Department of Justice, and subsequently government, then they must, in the final analysis be accountable. Further research in this area would no doubt clarify the issue, but on the results of this study, lack of manpower, lack of training, and a lack of commitment by the Division to follow through with the required financial assistance needed to prosecute, have all culminated in a very small percentage of possible prosecutions reaching the final stage.

Legislative Changes

The Police, the Department of Justice, the Securities Commission, and now the investigative officers themselves, recognise limitations of the powers contained in Section 9A of the Companies Act 1955. The perceived strength of Section 9A, was that it could be initiated with the minimum of bureaucratic "red tape"; and provide inspectors with immediate access to the financial records of the company. This would allow an inspection to be completed expeditiously and secretly, with the minimum of inconvenience to all concerned. To ensure that the strength of this section is retained the lawmakers must recognise the sophisticated quality of the financial world, and those who operate within it. The question of powers to interrogate and search was raised by several of the investigating officers. This, together with the comments by the Police, and the recommendations of the Securities Commission should provide sufficient impetus for the legislators to look closely at this issue.

Prosecution Process

The Crown Solicitor is appointed to act on behalf of the Crown, unless special dispensation has been granted. Although the Division employs its own solicitors, to date no such leave has been forthcoming.

The investigating and controlling officers were unanimously in favour of the right, if desired, to initiate prosecutions

from within their District Office. Machinery type prosecutions were regarded as particularly suitable to such in-house actions. An in-house prosecuting counsel would enable greater accessibility and closer contact through which, action could be brought sooner. Considerable cost savings were seen as an additional benefit.

The prosecuting skills and expertise of the Crown Solicitor, and to a lesser extent the Police, were considered best suited in criminal type actions.

It would appear that there is sufficient basis for further enquiry into the advantages and disadvantages, of the District Offices being given the right to choose the prosecuting "option", best suited to the particular needs of the case. A cost benefit analysis could be undertaken, and discussions initiated with the Solicitor-General.

Concept of Shared Responsibility

The Securities Commission recommended in 1984, that the detection and investigation of corporate fraud should continue to be the shared responsibility of the Police and the Commercial Affairs Division. However, they did not lay down any specific guidelines on how this concept should operate. In their view, this was a matter for the two agencies concerned to address.

To date there have been no formalised procedures or policies laid down, either with the Police, or with the District

Offices themselves. The official view of Head Office is that co-operation works through complementary input of both agencies, rather than as a side by side operation.

Both the Securities Commission, in their Report in 1984, and Head Office in 1987, referred to the very good liaison in Auckland between the Police and the Division. The Securities Commission referred specifically to the monthly meetings that had been implemented to exchange ideas and information.

The local view, that of the investigative officers themselves, showed that personal contact between the two agencies does seem to occur on a reasonably frequent basis. Notwithstanding, the majority of the investigative officers still described their contact with the Police as only fair. There were repeated inferences to an excellent contact in the past compared to "poor" contact at present. This was further borne out by the fact that a significant number of both the investigative, and controlling officers felt that their contact with the Police had changed for the worse in the preceding 12 months. Two District Offices enlarged on this, and claimed that monthly meetings had been discontinued as a result of change in personnel in police fraud squads and lack of attendance.

It would appear that the perception held by both the Securities Commission, and Head Office, on how the concept of shared co-operation should operate bears very little

resemblance to reality. It is accepted that in 1984, the shared co-operation as envisaged by the Commission may well have been feasible. In today's climate of accountability for resources and restructuring of priorities, the concept of shared responsibility is unlikely to succeed unless it is accompanied by the formalising of procedures and policies. Regular monthly meetings, and the sharing of information and resources were improvements suggested in this area.

Funding

From an analysis of Table 8 (p.121) which covers the receipts and expenditure of the Justice Vote for the past five years, it would appear that the Department of Justice operates a deliberate policy of gaining an excess of revenue over expenditure in respect of the Commercial Affairs Division. The Review team, in its Report in 1982 made reference to figures relating to earlier years and recommended that there should be a closer relationship between revenue received by the Division by way of company registration charges and the services rendered.

The above comments taken in isolation could no doubt stimulate a discussion on the merits, or otherwise, of one Division subsidising another. However, when it appears that the Division in question may be underfunded to the extent that staff claim that they are unable to carry out their duties to a satisfactory standard; then it is a cause for alarm.

Government policy has been directed at each Department

providing a substantial proportion of its own funding by charging for services rendered to the public. If one applies this theory to the company form, it could be argued that in return for the revenue provided by a company, it should receive an equal amount of service. That is, the company pays revenue to the Division when it is born (incorporated), and continues step by step with annual and specific charges, until the day it dies (liquidation). In return for this payment, the company should be able to expect the Division to monitor and regulate those entities with whom it does business, to safeguard it from fraudulent activity.

One of the outstanding features of this study was the keeness exhibited by individual staff members to fulfil their role. This valuable attribute is in danger of being dissipated unless steps are taken to recognise, in concrete terms, their needs as outlined in this study.

Based on the findings of this study, it is concluded that, at the present time, the Commercial Affairs Division, as a whole cannot be said to be fulfilling the role of effectively policing company offenders. It it recognised however, that the issue has been clouded somewhat by the internal problems within the Division. The Corporate Fraud Unit, although newly formed, seems to be adopting a more aggressive attitude, but again is hindered by a lack of resources. Notwithstanding, it is suggested that further research be undertaken into alternative possibilities of a suitable law

enforcement agency to investigate company offenders. This may well be an extended and enlarged autonomous Corporate Fraud Unit; or perhaps one of the other alternative solutions put forward by the participants of this study.

RECOMMENDATIONS

For the most part, recommendations have been incorporated into the conclusions under the topic headings. However, for ease of readership, those considered to be of an urgent nature are dealt with below.

1. That urgent consideration be given to the problem of recruitment and retention. As a particular level of skill and expertise is required for this type of investigative work, it may be necessary to create a special occupation class.

2. That training schemes be implemented as soon as practicable, similar to those outlined earlier in this study. (refer p.194).

3. That procedures be implemented whereby relevant information can be recorded and retrieved, with the minimum of inconvenience. A far greater use of computer technology on both a national and regional basis is recommended.

4. That further research into the question of in-house prosecuting counsel be undertaken.

5. That the concept of shared co-operation and responsibility be defined, both with the Police and the investigating officers concerned.

6. That further research be undertaken on the question of a suitable law enforcement agency equipped to effectively monitor and regulate company offenders.

REFERENCES

1. Department of Justice, **Annual Report for the year ended 31st March 1986**, Government Printer, Wellington

2. In the Auckland region the number of companies registered represent 47% of the total, whereas Dunedin represents 4%.

3. DEPARTMENT OF JUSTICE, Review. **Report of the Consultancy Team on Management Systems in the Commercial Affairs, Penal, Courts and Probation Divisions**, 1982

4. McLAY, B.C. "The Future of Commercial Affairs", The Accountants' Journal, May, 1977, p.129

SURVEY

OF

OPERATIONAL PROCEDURES

BY

INVESTIGATING OFFICERS

IN

COMMERCIAL AFFAIRS DIVISION

OPERATIONAL PROCEDURES QUESTIONNAIRE

This questionnaire is set out in the following sections:

	Question Nos.	Page Nos.
1. Background Information	1 - 16	2 to 6
2. Investigative Activity	17 - 21	7 to 8
3. Investigative Process	22 - 38	9 to 14
4. The Decision Process	39 - 46	15 to 17
5. General Comments	47 - 50	18 to 19

INSTRUCTIONS:

Please answer the following questions by either ticking an appropriate box(es), or writing in the space provided.

DEFINITIONS:

(a) The word "Division" refers to the Commercial Affairs Division of the Justice Department (including the Head Office).

(b) The word "District Office" refers to an individual regional office.

(c) The 12 month time period mentioned in the questionnaire is **1 April 1985 to 31 March 1986.** If you have not been involved in investigatory work for the whole of this period, please answer the questions to reflect your involvement within the specified time period. Question 3 establishes your commencement date.

(d) The word "company inspections" refers to any inspection resulting from invocation of S.9A, S.168 or S.169.

(e) The word "Machinery" refers to those regulatory type offences which are established in fact and do not require proof of intent. The penalty for such offences is usually by way of a default fine.

(f) The words "Criminal intent" refer to those offences which require proof of intent. The section will usually prescribe that the offence must be done "knowingly" or "wilfully" - refer also to S.463(2).

(g) The word "civil" refers to those situations whereby sufficient grounds exist for an action to be brought by the liquidator on behalf of shareholders/creditors.

BACKGROUND INFORMATION

This section of the questionnaire deals with the duties, qualifications, experience and training of investigative officers.

1. Which office of the Commercial Affairs Division are you attached to?

   District office (please specify) ☐

   ..... ☐

   Special Investigating Unit ..... ☐

2. What is your job designation?

   District Registrar of Companies/Official Assignee ☐

   Chief/Senior/Investigating Accountant ..... ☐

   Senior/Investigating Solicitor ..... ☐

   Other (please specify) ..... ☐

3. When did you commence duties in the above designated position?

Month	Year
.....	.....

4. How did you attain your present job designation?

   EITHER, by application:

   (i) from outside government ..... ☐

   (ii) from another government department ..... ☐

   (iii) from another division of Justice Dept ..... ☐

   OR, by promotion:

   (i) from another division of Justice Dept ..... ☐

   (ii) from CAD but different regional office .... ☐

   (iii) from present CAD regional office ..... ☐

5. Did your last job include any investigatory type duties.

YES	NO

6. If you answered "yes" to Question 5, please specify nature of work.

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7. When you undertook your present appointment what form of instruction did you receive on how to proceed with an investigation, and within what time period of appointment?

	Time (mths)		
	Under 1 mth	1-3	4-6
Did not receive any instruction			
Attended Division training course on procedures			
Attended District office training course on procedures			
Head office manual			
District office manual			
Verbal instructions (please specify from whom)			
Other (please specify).....			

8. What improvements could be made in respect of instructing new staff on how to carry out an investigation?

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9. What formal **academic accounting/legal** training do you have? (Answer one, or more as applicable by ticking the appropriate option/s and specifying type)

		Name of qualification
☐	Degree (including major)	.....
☐	Professional qualification	.....
☐	Certificate	.....
☐	Partial qualification (please specify)	.....
☐	Other (please specify)	.....

10. What **practical accounting/legal** experience do you have? (Please tick as applicable, i.e. any or all options)

(years)

	Under 1	1-3	3-5	Over 5
Public practice				
Commerce				
Government Department				
Other (please specify)				

11. Do you think your job warrants **additional** investigative training skills in order to carry out your duties in an efficient and effective manner?

YES	NO

12. What reason/s do you have for thinking this way?

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13. How familiar are you with the law relating to **criminal** acts by companies in:
(Please answer both parts with a tick)

	Sparsely	Moderately	Very
(a) Companies Act			
(b) Relevant company case law			
(c) Crimes Act			
(d) Relevant criminal case law			

14. If you answered "Moderately" or "Very" to any of the options in Question 13, do you feel that you keep your working knowledge up to date?

	YES	NO
(a) Companies Act		
(b) Case law - Companies Act		
(c) Crimes Act		
(d) Case law - Crimes Act		

15. If you ticked "No" to any of the options in Question 14, why have you been unable to keep your working knowledge up to date (Please tick as applicable, i.e. any or all options)

	YES	NO
Do not feel it is relevant		
Do not feel it is important in relation to time spent on company investigations		
Do not have access to up to date information		
Do not have the time		
Do not have access to a library of professional texts		
Financial constraints (please specify)		
Other (please specify)		

16. Are there any other points you would like to comment on, that you feel could have been addressed in this part of the questionnaire?

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INVESTIGATIVE ACTIVITY

This section of the questionnaire deals with time spent on differe types of company investigations and possible offences uncovered.

17. During the 12 month period, April 1985 to March 1986 what percentage of your working time would you have spent on the following types of company investigations?

	percentage (%)
Company inspections	%
Court Windings Up (a) Official Assignee continues as O.L.	%
(b) Outside Liquidator appointed	%

18. During the 12 month period, April 1985 to March 1986, **how many possible** breaches of the law relating to companies/officers did you uncover in your investigations, under the following headings?
For example, how many possible breaches **under Company inspections** were **Machinery**?

Possible = sufficient evidence to continue with an investigation irrespective of any other constraints.

	Machinery	Crim/ Intent	Civil	Total
Company inspections				
Court Windings Up (a) O.A. continues as liquidator				
(b) Outside liquidator appointed				

19. Were most of the **possible** offences you noted above subject tc follow up investigations?

	YES	NO
Machinery		
Criminal intent		
Civil		

20. If you answered "no" to any of the options in Question 19, why do you think these possible offences were not pursued? (Please relevant **numbers** in options as applicable)

	Machinery	Crim/Intent	Ci
Insufficient evidence			
Insufficient funds			
Too time consuming			
Difficult to prove			
Too complex in nature			
Not of sufficient importance to warrant prosecution			
Likely punishment does not justify time spent (cost/ benefit)			
Other (please specify)			

21. Are there any other points you would like to comment on, tl you feel could have been addressed in this part of the questionnaire?

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INVESTIGATIVE PROCESS

This section of the questionnaire deals with the investigative process and the concept of shared responsibility between your District Office and the Police.

22. How many "uncleared" files, under the following categories, are you working on? "Uncleared" = still requiring some input from you.

	1	2-5	6-10	10-15	Over 15
Company inspections					
Court Windings Up					
Bankruptcies					
Other (please specify)					

23. How many of these are you **actively** working on at the present time? **Actively** = involvement within the last two weeks.

Total number

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24. If you have a number of cases to investigate, what criteria do you employ when deciding which cases to work on?

(Please rank the options applicable from 1-5 in order of priority)

	Rank				
	1	2	3	4	5
First come, first serve.....					
Easiest to solve.....					
Those receiving most publicity					
Amount of money involved					
Instructions from regional head					
Instructions from head office					
Other (please specify)					

25. In your opinion do you consider that your facility to investigate to a standard which satisfies you is in any way limited or constrained by the following:
(Please tick as applicable, i.e. any or all options)

Lack of training	
Lack of legal authority	
Lack of time	
Lack of resources	
Lack of support from those in control	
Other (please specify)	

26. If you ticked any of the options in Question 25, would you please give details.

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27. If, during an investigation, it becomes apparent to you that additional skills or expertise (for example, interview skills) are warranted, would you:
(Please tick as applicable; any or all options)

Rely on own knowledge	
Enlist assistance of fellow officer	
Enlist outside professional assistance (please specify nature)	
Enlist assistance from Police Department	
Pass case over to Police Department	
Other (please specify).....	

28. When investigating a company, have there been any instances when:

	YES	NO
(a) you made contact with the Police,		
(b) the Police made contact with you.		

29. If you answered "yes" to either of the options in Question 28, how would you describe the your contact with the Police?

	(a) above	(b) above
Personal		
Informal		
Formal		
Very Formal		
Other (please specify)		

30. How would you describe the nature and frequency of any contact you have with the Police in relation to company investigations? Please tick one box for each of the options.

	Daily	Weekly	Monthly	Other
Chance meeting				
Telephone conversation				
Written memorandum				
Informal meeting				
Formal meeting				
Written report				
Other (please specify)				

31. How would you describe the co-operation between your District Office and the Police in relation to the detection, investigation and prosecution of company offenders?

None	Poor	Fair	Good	V.Good	Excellent

32. Over the preceding 12 months what change, if any, has taken place with regards your contact with the Police concerning investigations of companies?

No change	More contact	Less contact

33. If you have experienced a change in your contact with the Police (whether it be more or less) can you offer any explanation as to why this should be so?

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34. Can you suggest any improvements, with regard to "shared co-operation" between yourself, as investigatory officer, and the Police, that would assist in the detection, investigation and prosecution of company offenders?

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35. In your own experience, have there been any instances when a case took longer to complete than it should have?

YES	NO

36. If you answered "yes" to Question 35, can you give any reasons why this should be so?

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37. What difference do you think the establishment of the Special Investigating Unit has made on the day to day activities in respect of the company investigative duties of your District Office?

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38. Are there any other points you would like to comment on, that you feel could have been addressed in this part of the questionnaire?

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THE DECISION PROCESS

This section of the questionnaire deals with the legal authority of the officers in the Division?

39. In the cases you, yourself, have investigated what **how many** were aborted by the following means?

	Company inspections	Company Liquidations
Decision by you as investigating officer		
Combined decision by all officers involved in the investigation		
Instructions from District Registrar of Companies		
Instructions from Registrar of Companies		
Other (please specify)		

40. When an investigation was aborted by the following means, did you, as an investigating officer, have any input into the decisionmaking process?

	YES	NO
Instructions from District Registrar of Companies/Official Assignee		
Instructions from Head of Division		

41. If you answered "no" to either of the options in Question 40, were you given any reasons for the decision to abort.

YES	NO

42. Do you feel that your District Office should be able to bring its own action in relation to the statutory legislation which it administers?

YES	NO

43. What advantages do you perceive in your District office being able to bring its own actions rather than having to proceed through the Crown Solicitor?

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44. What advantages do you perceive in respect of the Crown Solicitor bringing actions on your behalf?

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45. In your opinion who is best suited to bring an action under the following offence headings?
(Please tick an option under each offence type heading)

	Machinery	Crim Intent	Civil
CAD district office			
CAD Head Office			
Police			
Crown Solicitor			
Other (please specify)			

46. Are there any other points you would like to comment on, that you feel could have been addressed in this part of the questionnaire?

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GENERAL COMMENTS

In this section of the questionnaire you are invited to make some general comments on the role of the Commerical Affairs Division in the investigation and prosecution of company offenders.

47. Which of the following factors do you see as necessary to address the question of more effective detection, investigation and prosecution of company offences? (Please rank in order of importance, 1-5)

	Ranking				
	1	2	3	4	5
Additional personnel					
Additional legal authority					
Additional equipment					
Additional training					
Other (please specify)					

48. What do you consider to be the **most urgent** areas of concern that could be impeding the effective control of company malpractice?

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49. Do you have any suggestions for solutions to the concerns that you have raised in response to Question 48?

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50. Do you have any other information relevant to this study that you would like to share?

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Thank you for your time and assistance in filling out this questionnaire.

SURVEY

ON

INVESTIGATIVE ACTIVITIES

OF THE

COMMERCIAL AFFAIRS DIVISION

QUESTIONNAIRE

DISTRICT REGISTRAR/OFFICIAL ASSIGNEE

INSTRUCTIONS:

Please answer the following questions by either ticking an appropriate box(es), or writing in the space provided.

DEFINITIONS:

(a) The word "Division" refers to the Commercial Affairs Division of the Justice Department (including the Head Office).

(b) The word "District Office" refers to an individual regional office.

(c) The 12 month time period referred to in the questionnaire is **1 April 1985 to 31 March 1986.**

(d) The word "company inspections" refers to any inspection resulting from invocation of S.9A, S.168 or S.169.

(e) The word "Machinery" refers to those regulatory type offences which are established in fact and do not require proof of intent. The penalty for such offences is usually by way of a default fine.

(f) The words "Criminal intent" refer to those offences which require proof of intent. The section will usually prescribe that the offence must be done "knowingly" or "wilfully" - refer also to S.463(2).

(g) The word "civil" refers to those situations whereby sufficient grounds exist for an action to be brought by the liquidator on behalf of shareholders/creditors.

BACKGROUND INFORMATION

1. Which office of the Commercial Affairs Division are you attached to?

   District Office (please specify) ☐

   ..... ☐

   Head Office ☐

2. When did you take up your present position?

Month	Year
.....	.....

3. How did you attain your present position?

   EITHER, by application:

   (i) from outside government ..... ☐

   (ii) from another government department ..... ☐

   (iii) from another division of Justice Dept ☐

   OR, by promotion:

   (i) from another division of Justice Dept ☐

   (ii) from CAD but different district office ☐

   (iii) from present CAD district office ..... ☐

4. What formal **academic** training do you have?
(Answer one, or more as applicable by ticking the appropriate option(s) and specifying type)

	Name of qualification
Degree (including major)	.....
Professional qualification	.....
Certificate	.....
Partial qualification (please specify)	.....
Other (please specify)	.....

5. What **practical** experience do you have?
(Please tick as applicable, i.e. any or all options)

(years)

	Under 1	1-3	3-5	Over 5
Private sector				
Local government				
Government department				
Other (please specify)				

INVESTIGATIVE ACTIVITY

This section deals with the number of complaints, investigations and prosecutions handled by each district office.

6. How many complaints were received by your district office during the 12 month period, April 1985 to March 1986.
Please insert **number** in appropriate box.

Number via records	Approx number	Don't know

7. In the 12 month period, April 1985 to March 1986 **how many** complaints were received by your district office from the following sources?

	Number
Sharebrokers/directors	
General public (other than individually specified)	
Creditors	
Representations to M.P.	
Ministerial instructions	
Registrar of Companies	
Media	
Initiated by your office	
Fellow officer	
Outside liquidator	
Receiver	
Police	
Another government department (please specify)	
Other (please specify)	

8. How were these complaints handled by your district office? Please indicate by inserting number in each box as applicable.

No action taken	
Follow up investigation	
Passed on to another government department (other than Police)	
Passed on to Police department	
Other (please specify)	

9. How many of the above complaints which came under the Commercial Affairs jurisdiction related to the following categories:

	Company Inspections	Court Windings Up
No action taken		
Follow up investigation		
Other (please specify)		

10. During the 12 month period April 1985 to March 1986 how ma company liquidations resulting from Court ordered windings up were dealt with by your district office?

Official Assignee appointed Liquidator	
Outside liquidator appointed	

11. In those instances when an outside liquidator was appointed in above time period, on how many occasions did the outside liquidator report to you that a company and/or officers should be investigated?

Number

12. When a follow up investigation was undertaken by your district office during the 12 month period, April 1985 to March 1986, please indicate the offence categories that were involved.

	Machinery	Crim Intent	Civil
Company inspections			
Court Windings up			

13. The 1983 amendment to S.9A of the Companies Act, allowed the Registrar, or any person authorised by him to communicate information resulting from an inspection to any person if it was deemed to be in the public interest. Since this amendment, **how many** times has your office passed "S.9A inspection" information on to the police?

Number

14. In the 12 month period, April 1985 to March 1986, **how many** of th follow-up investigations resulted in a prosecution? Please treat each charge laid as a separate prosecution.

	Machinery	Crim Intent	Civil
Company inspections			
Court Windings Up (i) O.A. as Liquidator			
(ii) Outside liquidator			

15. How many of the above prosecutions led to a conviction? Please treat each charge separately.

	Machinery	Crim Intent	Civil
Company inspections			
Court Windings Up (i) O.A. appointed O.L.			
(ii) Outside liquidator			

16. How many of the follow up investigations have been completed but are pending a hearing by the Court.

	Machinery	Crim Intent	Civil
Company inspections			
Court windings up (i) O.A. as Liquidator			
(ii) Outside Liquidator			

17. Of those investigations initiated in the 12 month period, April 1985 to March 1986, that did not result in a prosecution, how many are still under investigation?

	Machinery	Crim Intent	Civil
Company inspections			
Court Windings Up (i) O.A. as Liquidaor			
(ii) Outside liquidator			

18. Of those investigations undertaken in the 12 month period, April 1985 to March 1986, how many investigations were discontinued?

	Machinery	Crim Intent	Civil
Company inspections			
Court windings up (i) O.A. as Liquidator			
(ii) Outside Liquidator			

19. Do you feel that your District Office should be able to bring its own action in relation to the statutory legislation which it administers?

YES	NO

20. What advantages do you perceive in your District office being able to bring its own actions rather than having to proceed through the Crown Solicitor?

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21. What advantages do you perceive in respect of the Crown Solicitor bringing actions on your behalf?

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22. In your opinion who is best suited to bring an action under the following offence headings?
(Please tick an option under each offence type heading)

	Machinery	Crim Intent	Civil
CAD district office			
CAD head office			
Police			
Crown Solicitor			
Other (please specify)			

CONCEPT OF SHARED RESPONSIBILITY

23. How would you describe the co-operation between your District Office and the Police in relation to the detection, investigation and prosecution of company offenders?

None	Poor	Fair	Good	V.Good	Excellent

24. Over the preceding 12 months what change, if any, has taken place in respect of co-operation with the Police concerning company investigations?

No change	More contact	Less contact

25. If you have specified a change in respect of co-operation with the Police (whether it be more or less) can you offer any explanation as to why this should be so?

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26. Can you suggest any improvements, with regard to "shared co-operation" between your District Office and the Police, that would assist in the detection, investigation and prosecution of company offenders?

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GENERAL COMMENTS

In this section you are invited to make some general comments on the role of the Commericial Affairs Division in the investigation and prosecution of company offenders?

27. What do you consider to be the **most urgent** areas of concern that could be impeding the effective control of company malpractice.

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28. Do you have any suggestions for solutions to the concerns that you have raised in Question 27?

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29. Do you have any other information relevant to this study which you would like to share?

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Thank you for your time and assistance in filling out this questionnaire.

APPENDIX 4

LETTER OF INTRODUCTION

November 1986

lephone ([redacted]

[redacted]

ar

am a Lecturer of Accounting and Finance at Massey University d am interested in the research field of white-collar crime. am presently conducting an independent study of the role and nction of the Commercial Affairs Division in relation to coping th the demands of corporate malpractice.

this end I am sending appropriate questionnaires to vestigating staff and controlling officers of each Division.

nce situations may differ greatly, and since I wish the results the study to be as accurate as possible, I cannot over-phasise the importance of receiving your completed estionnaire. In those instances in the questionnaire where no sponse category accurately reflects your situation, please make e best answer available and then qualify your response in the rgin.

would be grateful if you would complete the enclosed estionnaire as soon as possible, and return it to me in the velope provided.

A Note on Confidentiality

Please be assured that the confidentiality of your response is of vital importance. You will notice a code number on your questionnaire. This code number is to identify those questionnaires requiring follow-up action. At no time will questionnaires be idenfified by respondent.

lease feel free to ring me at the above telephone number, or to ontact me at the above address if you would like further nformation regarding the survey.

ours sincerely,

C Hall

APPENDIX 5

INVESTIGATING OFFICERS' FOLLOW-UP LETTER

4 December 1986

[redacted]

Dear

On November 17, I wrote and asked you to participate in a survey on operational procedures of investigative officers in the Commercial Affairs Division of the Department of Justice.

I appreciate that your time is limited, especially as Christmas approaches but I cannot over-emphasise the importance of **your** completed questionnaire to the results of the study.

I stress again the confidentiality of your responses. All individual comments are strictly confidential in that they are seen only by myself as an independent researcher.

Please feel free to ring me at the above telephone number or to contact me at the above address if you would like further information regarding the survey.

Thank you.

J C Hall

APPENDIX 6

CONTROLLING OFFICERS' FOLLOW-UP LETTER

4 Decmeber 1986

[redacted]

Dear

On November 17, I wrote and asked you to participate in a survey on the investigative activities of the Commercial Affairs Division of the Department of Justice.

I appreciate that your time is limited, especially as Christmas approaches but I cannot over-emphasise the importance of **your** completed questionnaire to the results of the study.

It has come to my notice that your questionnaire could be improved. I have enclosed an errata sheet and would be pleased if you would incorporate these amendments in your response. I apologise for this oversight and hope you have not been caused any undue inconvenience.

I stress again the confidentiality of your responses. All individual comments are strictly confidential in that they are seen only be myself as an independent researcher.

Please feel free to ring me at the above telephone number or to contact me at the above address if you would like further information regarding the survey.

Thank you.

J C Hall

ERRATA SHEET

1. **Questions 6 - 9**

   The word "complaints" appearing in the investigative activity section of the questionnaire, refers to complaints received in relation to **company** matters only.

2. **Question 7**

   The first option appearing in question 7 should read "**shareholders**/directors" not "sharebrokers/directors".

APPENDIX 7

STATUTORY AUTHORITIES

A. PROVISIONS RELATING TO CRIMES AND OFFENCES

CRIMES ACT 1961

S.220 Theft defined

S.222 Theft by person required to account

S.223 Theft by person holding power of attorney

S.224 Theft by misappropriating proceeds held under direction

S.225 Theft by co-owner

S.227 Punishment of theft

S.229A Taking or dealing with certain documents with intent to defraud

S.230 Criminal Breach of Trust

S.231 Fraudulently destroyed document

S.232 Fraudulent concealment

S.245 Definition of false pretence

S.246 Obtaining by false pretence

S.247 Obtaining credit fraudulently

Fraud

S.250 False statement by promoter

S.252 False accounting by officer or member of body corporate

S.253 False accounting by employee

S.257 Conspiracy to defraud

COMPANIES ACT 1955

S.461 Making false statements

S.461A Fraudulent application or destruction of property of company

S.461B Offences by officers of companies in liquidation

S.461C Falsification of records

S.461D Fraudulently carrying on business, obtaining credit or transferring property

S.461E Penalties and other provisions relating to foregoing offences

In Liquidation

S.316 Offences by officers of companies in liquidation

S.317 Penalty for falsification of books

S.318 Frauds by offiers of companies which have gone into liquidation

S.319 Liability where proper accounting records not kept

S.320 Responsibility of persons concerned for reckless or fraudulent trading

S.321 Power of Court to assess damages against delinquent directors

S.322 Prosecution of delinquent officers and members of company

B. PROVISIONS FOR INSPECTIONS AND ENQUIRIES

COMPANIES ACT 1955

S.9A Powers of inspection of Registrar

S.9B Appeals from decisions of Registrar

S.168 Investigation of company's affairs on application of members

S.169 Investigation of company's affairs in other cases

S.170 Power of inspectors to carry investigation into affairs of related companies

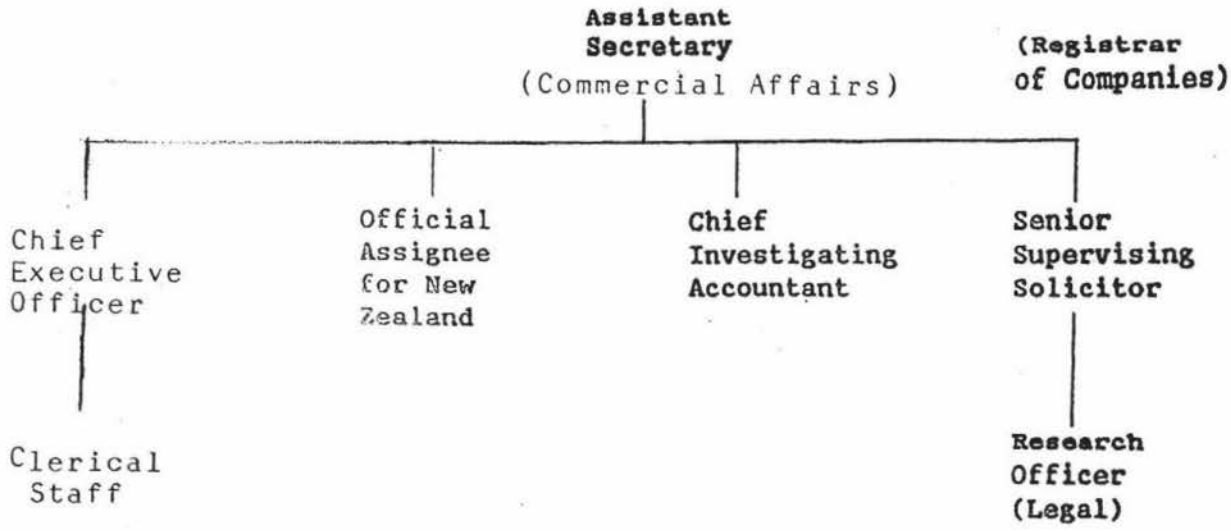
S.172 Inspector's report

S.173 Proceedings on inspector's report

APPENDIX 8

COMMERCIAL AFFAIRS DIVISION

Head Office Structure

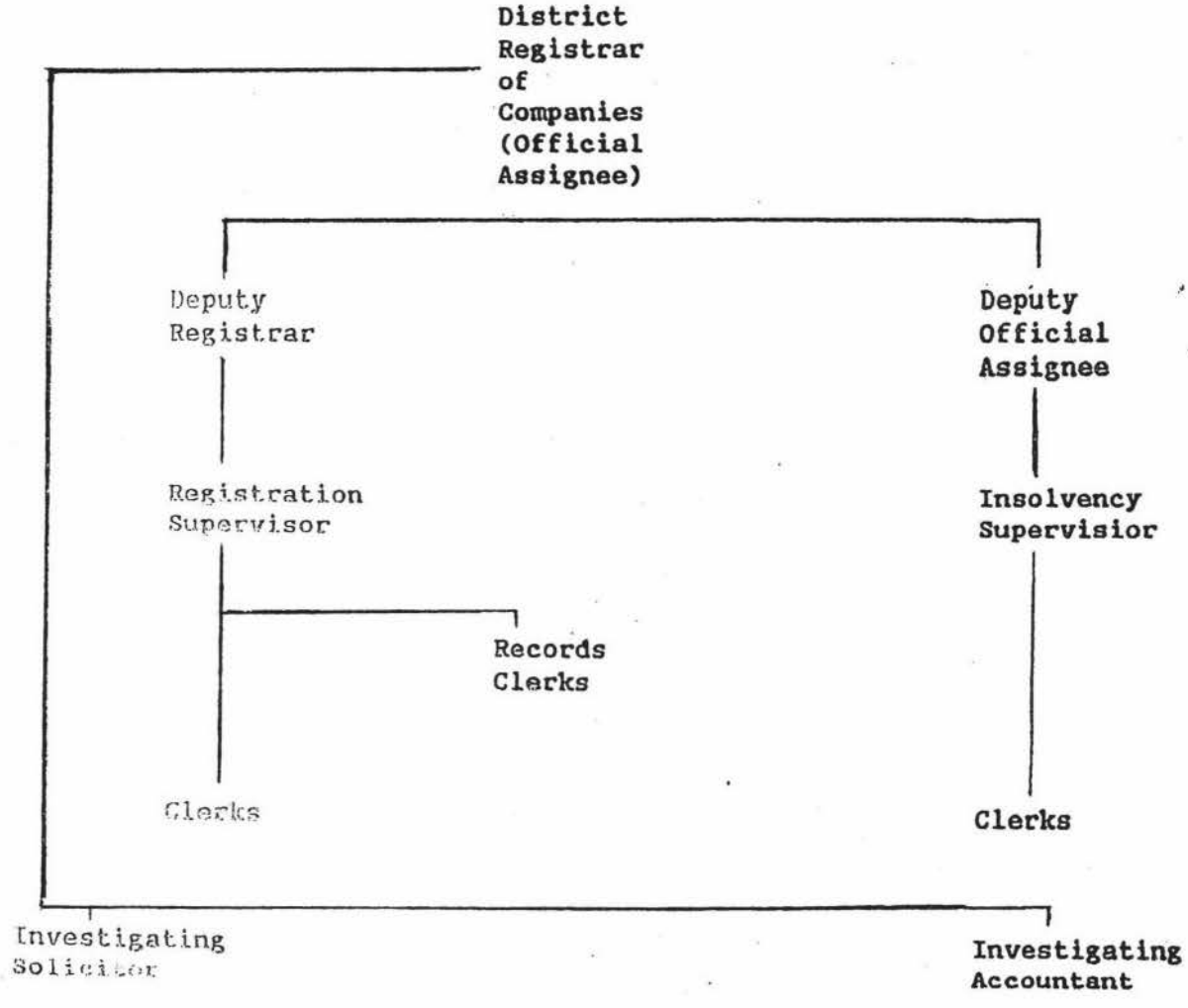


Source: Department of Justice

APPENDIX 9

COMMERCIAL AFFAIRS DIVISION

Typical Structure of a District Office



Source: Department of Justice

APPENDIX 10

JOB DESCRIPTION

Corporate Fraud Unit

Position: Senior Investigating Solicitor

Responsible To: Assistant Secretary (Commercial Affairs)

Directly Supervising: Support Staff + Accounting Professional Staff

Functional Relationships With:

1. District Registrar/Official Assignee
2. District professional staff
3. Chief Investigating Accountant (H.O.)
4. Senior Investigating Solicitor (H.O.)
5. Deputy Registrar of Companies
6. Crown Solicitor's Office

Duties:

(a) To carry out and report on complex inspections of the affairs of companies or issuers of securities as authorised in terms of the Companies or Securities Acts;

(b) To investigate, report on and provide legal advice on large liquidations where fraud or misappropriation of assets by officers of the company is suspected;

(c) To investigate substantial breaches of the Companies Act, particularly those of a fraudulent nature;

(d) To investigate, report on and, where appropriate, institute proceedings in relation to the conduct of delinquent directors;

(e) To investigate and prepare prosecution briefs for major breaches of the Companies or Securities Acts;

(f) To initiate, prepare and conduct legal proceedings where such is recommended as a consequence of the Investigation Unit's reports, including winding up petitions.

COMMERCIAL AFFAIRS DIVISION : AUCKLAND

SUMMARISED JOB DESCRIPTION

Investigating Accountant

1. To examine all books and records of bankrupts and companies in liquidation, for the purposes of ascertaining compliance with the law (e.g. keeping proper books of account), assisting in recovery of assets, recommending action against shareholders, directors, debtors and such like. To advise as to likely areas of litigation and the likelihood of success, e.g. voidable preferences, misappropriation, directors' loan account etc. This aspect of the work can involve the total reconstruction of the books if necessary.

2. To examine documents registered under the Companies Act such as annual returns with balance sheet, prospectuses, mergers, takeovers in order to ascertain compliance with the statute, whether or not accounting content is in any way misleading or basically incorrect. To determine on the basis of accounting information whether or not further inspection of the company's books and records is warranted.

3. Examination to recommend and carry out inspections under Section 9A, Companies Act to determine whether or not a company and/or its officers are and have been complying with statutory requirements and whether or not the Registrar should exercise any of his powers (e.g. to prosecute or petition to wind up etc).

4. To recommend what changes he considers should be made to the law governing the fields in which he is concerned.

JOB DESCRIPTION

Position:	Senior Investigating Accountant (Corporate Fraud Unit)
Responsible To:	Registrar of Companies/Official Assignee for Ne Zealand (Assistant Secretary Commercial Affairs
Directly Supervising:	Support Staff
Functional Relationship with:	1. District Registrar/Official Assignee, Auckland 2. Deputy Registrar of Companies 3. District Professional Staff 4. Chief Investigating Accountant 5. Senior Investigating Solicitor
Primary Objectives:	(a) To carry out and report on complex inspections of the affairs of companies or issuers of securities as authorised in ter of the Companies or Securities Act; (b) To investigate, report on and provide advi on large liquidations where fraud or misappropriation of assets by officers of the company is suspected; (c) To investigate sustantial breaches of the Companies Act, particularly those of a fraudulent nature; (d) To investigate, report on and, where appropriate, assist in proceedings in relation to the conduct of delinquent directors; (e) To prepare briefs of evidence and other material for litigation arising from the Unit's work; (f) To appear as a witness in any legal proceedings arising from inspections and reports; (g) To provide accounting advice on any matter referred by the Registrar.

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