The New Zealand
LAW JOURNAL

16 SEPTEMBER 1975 No 17

INTER ALIA

Adverse publicity

It must be a matter of concern that when a solicitor is charged with misappropriating trust funds, police prosecutors almost invariably tell the Court that "a number of elderly people have lost their life savings".

That this is inaccurate is, of course, so obvious to the Court that there can be no suggestion of any intention to mislead. Nor is it any part of the police prosecutor's brief to concern himself with the legal profession's public relations.

However one could expect newspaper editors, all of whom have run stories on the Fidelity Fund from time to time, to be aware of the error and to correct it in their reports. Hopefully the nadir was reached in *Truth* of 19 August 1975. On page 7 a police prosecutor was quoted as claiming losses of life savings while buried away on page 21 was an article on the Fidelity Fund. The two pieces should have been placed side by side.

In future where defalcations occur, the Law Society will have to consider issuing statements at a much earlier stage. Perhaps, too, it should be represented at Court hearings to ensure that damaging publicity (which the Fidelity Fund renders not merely needless but positively misleading) is avoided.

As well, newspaper editors could be educated as to the nature of defalcation charges. They might then eschew such headlines as "Solicitor stole $436,000" and perhaps even helpfully note that the actual amount unaccounted for is (as it almost invariably is) substantially less than that referred to in the charges.

Protecting community standards

The recent judgment of Mr Justice Wilson in *R v Rogers* (CURRENT LAW para 1082 has attracted widespread interest.

The appellant had bathed nude on a beach which for some years had been regularly used for such a purpose. He had been convicted on a charge of offensive behaviour. No one had been produced by the prosecution to say that they had been offended by the appellant's nudity.

In allowing the appeal his Honour noted that "The Court is required to apply an objective test, not whether any particular person was offended, but whether the behaviour was likely to offend representative members of the community in the time, place and circumstances of the behaviour".

Mr Justice Wilson, quoting from *Melser v Police* [1967] NZLR 437 in respect of disorderly behaviour, said that there should be no undue restriction on the actions of citizens who, for one reason or another, do not accept the values of orderly conduct which at the time are recognised by other members of the public. Further, that the act complained of must tend to annoy or insult sufficiently deeply or seriously as to warrant the interference of the criminal law.

Observing that apparently none of a large family group present on the beach had been offended, his Honour found it reasonable to draw the inference that those who went to the particular beach and stayed there "were representative of the community in relation to that time and place and those circumstances".

Wilson J concluded that he was "not prepared to accept the view that, because someone obviously complained to the police sergeant, that those complainants were more representative of the standard of conduct of the community than the persons who were there without, apparently, any objection whatsoever".

R v Rogers is significant in showing that the Courts will defend the right of minority groups to behave in an unconventional way provided they do so with discretion.

Furthermore, in the reference to "representatives of the community in relation to *that* time and place and *those* circumstances", there is an implied warning that individuals and organisations who seek out situations in order to complain are likely to be labelled "unrepresentative"—indeed, they would more aptly be termed intruders.

The *Rogers* approach seems to have been adopted by the police in declining to prosecute members of the cast of *Equus,* a moving and sincere play whose nude scene taken in context is so charged with pathos as to be the very reverse of erotic.

The judgment leaves it for sections of the community to decide for themselves what is, and what is not, acceptable. Accordingly, those who would promote "community standards" should reconsider the name of their organisation. It clearly labels the standards it wishes to promote as being those of the "community" —not as being those of its members.

Woman on the Bench

It is unfortunate that the appointment of Mrs G C P A Wallace as a Magistrate should occur in International Women's Year—unfortunate, as there was an immediate attempt to link the two and so unwittingly imply that the appointment was not, as it undoubtedly was, made simply on grounds of merit.

Coming from a busy South Auckland general practice with a large content of domestic work, Mrs Wallace has proved her ability over a wide range of professional activities, and her strong sense of community shows in her record of public service.

The media behaved predictably and Mrs Wallace revealed herself a formidable opponent as witnessed by her replies to a series of questions based on cliches. Would she be more emotional when sentencing? Reply: "I won't know until I've done some"; Would she take longer to come to decisions? "Try me". How would her husband (who has almost completed a law degree) feel about appearing in Court before her? Reply: "I don't know about him, but I'm rather looking forward to it".

Mrs Wallace takes her place on the Magisterial Bench with the good wishes and confident expectations of the profession. As she noted, with increasing numbers of women practitioners, the appointment of the first woman Magistrate was inevitable. However her appointment, and those that must follow, must encourage more women law graduates to engage in active practice.

Environmental Defence Society

EDS is a group of lawyers and technical experts. It includes scientists, town planners, engineers, and any expert with qualifications relevant to environmental issues, eg expertise in soil, water, or zoologists, biologists, etc.

EDS is an incorporated society with branches in Auckland and Wellington (so far). Directors, who include a number of lawyers, are appointed from both centres and aim to include all those interested as specific topics arise.

Membership inquiries should be addressed to: The Secretary, Environmental Defence Society, either PO Box 3838, Auckland, or PO Box 1250, Wellington. The annual subscription of $5 entitles members to receive newsletters and to have the opportunity of participating in projects.

Defending the environment

The publishers are happy to record in detail in this issue the proceedings of the Environmental Defence Society's recent conference on environmental law. Presenting an "overview", Mr Justice Cooke noted that he could not and would not join the society, and that those who would despoil the environment are as much entitled to justice as those who would preserve it.

However those attending must have been heartened by his Honour's subsequent decision in *Water Resources Council v Southland Skindivers Club Inc* (CURRENT LAW para 1033) wherein he upheld the status of the club to appeal under the Water and Soil Conservation Act 1967. "The effect of the allowance is remarkable," his Honour noted in his judgment, "In that this quite small club has secured a change in the classification of by far the greater part of the Southland coastal waters, including those waters lying off the Fiordland National Park".

EDS members could be forgiven the emission of a distinct purr.

The decision throws into relief once more the unsatisfactory nature of arguments over status which constantly recur in environmental matters. If the adversary system is designed to demonstrate truth by collision with error, such a process is not helped by denials of status and hence a denial of opponents.

JEREMY POPE

THE CONCEPT OF ENVIRONMENTAL LAW—THE NEW ZEALAND LAW—AN OVERVIEW

By the HON MR JUSTICE COOKE.

The title of this paper is compulsory and I would like to disclaim it. Obviously E D S does not stand for English Dictionary Society. The managers of the Society's affairs must be so absorbed by the aim of preserving the purity of the environment that they have no time to spare pity for the purity of the language. It is not even quite clear what the neologism "Overview" means. I interpret it, however, as combining two notions. One is that the paper should be a sort of general survey. The other is that it should be over fairly quickly.

To continue in a discourteous vein, it must be made plain that I am not a member of your Society and have no intention of seeking to become one. A Judge has no business espousing causes and should not become identified with particular organisations of this kind, however respectable or talented—and not even if they have a patron as eminent as the Ombudsman. Alleged spoliators of the environment are entitled to justice, too, and I hope that they receive it.

Next it may be better to admit to a skeleton in the cupboard. In Wellington there has been a controversy about the height of proposed new University buildings in Kelburn (a suburb apt to be classified as a good address). They are to be built on land acquired compulsorily by the Crown and they are to be paid for with the taxpayers' money. The Government and the University contend that they are entitled to the benefit of Crown immunity from local body bylaws and town planning ordinances. In a judgment delivered in the Supreme Court recently (*Wellington City Corporation v Victoria University of Wellington* [1975] 2 NZLR 301). Those contentions were held to be correct in law. It is purely coincidence that I have been sitting in Auckland since.

Lawyers can contribute to the rational defence of the environment in two main ways. The first, naturally enough, is by becoming versed in the existing law on the subject—some of which is exceedingly complex—and by helping to apply and develop it, whether in the capacity of an adviser, an advocate, a scrutiniser of pending legislation, or a judicial officer. Even as regards the judiciary I use the word "develop" advisedly. From time to time a case comes up when there is a choice of the path the law should follow. I would claim that, when confronted with such a choice, most Judges and Magistrates today are willing to give full weight to any relevant environmental considerations. Later I will mention some cases supporting this claim.

The second main way is in the work of Royal Commissions and Commissions of Inquiry. Again there are a variety of roles for lawyers to play here. The Manapouri Inquiry, where the Commission consisted of a retired Supreme Court Judge and two retired Magistrates, and where Queen's Counsel and other counsel of standing were engaged, is a good illustration: perhaps even an extreme one, but the unusual composition of the Commission reflected the unusual degree to which purely legal issues permeated that controversy. Conceivably such Commissions could sometimes be excuses for political temporising—I do not say, of course, that any particular one has been—but they can be valuable when a complicated issue invites patient and objective sifting of the facts. Currently a Commission on Abortion and allied topics is proposed. Without at all questioning its expediency, and recognising that it may yield useful data and analysis, one must have some doubt as to whether recommendations on matters so much coloured for many people by their own moral views or emotions are likely to change significantly the balance of public opinion, whatever that may be.

The South Island beech forest controversy is surely in a different category. As a citizen I have no firm views about it; I do not know enough. But presumably no one would seriously contend that large areas of attractive indigenous trees should be destroyed, in favour of monotonous pine forests, with various ecological side-effects, unless the proposal can be demonstrated beyond reasonable doubt to be sound both environmentally and economically. In his book *Rush to Destruction,* Mr Graham Searle asks for an independent Royal Commission. The Director-General of Forests has stated publicly that Mr Searle has got some of his facts wrong. There is an apparent suggestion that the author has jumped to conclusions too hastily. Who is right the general public has no means of knowing. But at least

the book points to an intricate web of factual issues. Their unravelling and appraisal would seem to call for evidence exposed to the test of cross-examination; and for something in the nature of a combined cost-benefit study and environmental impact assessment. In short, a Royal Commission.

I would like to say something about pigeonholes. To lead into it, the following passage may be quoted:

"59. In general the Crown is not bound by the Municipal Corporations Act or the Counties Act or the Town and Country Planning Act, and so cannot be compelled to comply with the subdivisional requirements or town planning ordinances of local authorities. Nor can Crown contractors be made to take out local authority permits, at any rate when working on Crown land: *Lower Hutt City v Attorney-General* [1965] NZLR 65; *Hutt Valley Electric Power Board v Porirua City* (1967) 3 NZTCPA 34. One exception to this general rule has already been created by statute. In 1957 section 2A was introduced into the Town and Country Planning Act 1953. Thereby, if the Minister of Works gives notice that he requires provision to be made in a district planning scheme for a development scheme under the Housing Act the former scheme—including presumably its code of ordinances—shall apply to the latter scheme. The effect appears to be that if the Minister elects to give notice that he proposes to establish a new State housing area within the local authority's territory the local authority must accept that requirement as part of its district scheme in the first instance, but may appeal to the Planning Appeal Board: see the proviso to section 25 (2) of the 1953 Act.

"60. The practical operation of the Crown's exemption is shown by the frank statement in evidence of the Housing Division spokesman that the division tends to take exception to the levy that some local bodies place on subdividers by demanding 10 percent of the value of the sections at the time they are first placed on the market. He said that as a matter of policy the division was not prepared to pay that price but was prepared to pay a cash contribution, based by and large on 20 percent of the purchase price or the value of the land in its undeveloped state. He also said that the division tended to prefer to make its contribution in land rather than in cash. From evidence we received from some of the local authorities it is plain that they are not always satisfied with the land that the division chooses to leave them.

"61. The Crown is the fountain of justice. In our respectful view, it is not consistent with the Crown's identification with the law that Your Excellency's Government and its agencies should claim exemption from the rules applying to the Crown's subjects in these matters. Such requirements are imposed for important social and environmental reasons, and we think that the Crown should lead and set an example, rather than declining to allow its case to be decided by the tribunals it has created. Trivial arguments about fees for permits should not be allowed to obscure the issue. Full rights of appeal there should be, as we have emphasised. Provided that these are available we see nothing inconsistent with the dignity of the Crown in making it amenable to local body requirements: if the local body is wrong or unreasonable, the appeal boards or the Courts will set the matter right. The special responsibility of the Crown to provide low-cost housing would not go unweighed.

"62. For these reasons we recommend that, subject to the provision of full rights of appeal, the Crown be bound by local authority subdivisional requirements and planning schemes."

That comes from the 1971 Report of the Commission of Inquiry into Housing. My colleagues and I made that and sundry other recommendations bearing on the environment. When the Report was first circulated it was in cyclostyled form, foolscap size, as weighty as a small tombstone. One of the newspapers commented wittily that at least it could not be pigeonholed. The comment overlooked the alternative solution of burial. One would not be justified in complaining simply that recommendations have not been implemented. After all they may be wrong-headed or impracticable. What is possibly disturbing, however, is that one does not know the reason, if any. Government departments give evidence before such a Commission—and most helpfully. Naturally, after the process of questioning and scrutiny, not all their evidence is always accepted. Can it be that if the result is not to their liking, they are then allowed to trump the Report by giving to the Government of the day advice or information which is not subjected to the same tests?

One other general thought. Like most

counsel of any length of practice at the Bar, I had experience of appearing both for and against environmentalists (for want of a better word) at different times. On the whole it may have been more often against than for. The experience brought home most of all the importance of homework and responsibility. The composition of this Society suggests, as does its record, that these factors are not likely to be overlooked. Sweeping accusations and passionate enthusiasm are a poor substitute for a thorough understanding of the available facts. The objector to the size of a building does well to know exactly where it is going to be put up.

New Zealand environmental Law: the background

Remedies available in the Courts to redress or prevent activities harmful to the environment depend either on common law (the "unwritten" law developed over the centuries by judicial decisions) or Acts of Parliament and delegated legislation. With the establishment of new statutory jurisdictions, the attention of persons concerned for the environment tends at present to be focussed mainly on statutory procedures for objection and their limitations or opportunities. But other avenues sometimes repay exploring.

In New Zealand the whole of the criminal law is basically statutory. There is the major general code, the Crimes Act 1961, and there are a host of particular Acts and Regulations creating a multitude of offences. Except where otherwise specifically provided, the right to lay an information for an offence is not confined to the Police or other officials. The Environmental Defence Society made enterprising use of the private prosecution procedure in the case reported in the Court of Appeal as *Huntly Borough v Williams* [1974] 1 NZLR 689. Reversing the initial decision in a Magistrate's Court, the Court of Appeal (Sir Richard Wild, Chief Justice, Sir Thaddeus McCarthy, President, and Mr Justice Speight) affirming the Supreme Court (Mr Justice Mahon) held that the Borough had committed an offence by continuing to discharge raw sewage into the Waikato River, Because a temporary permit was expressed to expire on a certain day and meant what it said. This case has brought to the fore the possibilities of private prosecution. No doubt organisations interested in this field will check proposed legislation, if they have opportunity and time to scrutinise it, lest when some new offence is to be created it should happen that—perhaps inadvertently—the right to prosecute has been restricted.

Public nuisance

On the other hand, purely common law remedies for damage to the environment seem to have been rather neglected in New Zealand in recent years. In part this is understandable. If a statute clearly covers the field, the common law will be excluded. But it would be a mistake to take it for granted that even the common law is past the age of child-bearing. (Victorian and Edwardian lawyers liked to think romantically of the common law as a lady, and of her sister, the more newly arrived Equity, as at least a woman; and, for different reasons of public policy, it may be wiser not to depart from the usage.) In particular she may respond to the suggestion of Public Nuisance.

In *Attorney-General v P Y A Quarries Ltd* [1975] 1 All ER 894, where an injunction was granted to restrain the defendants "from carrying on the business of quarrying in such a manner as to occasion a nuisance to Her Majesty's subjects by noise or vibration", Lord Justice Romer said by way of definition:

> "It is . . . clear, in my opinion, that any nuisance is public which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."

Not all important cases are reported in the law reports. In particular, cases turning almost solely on questions of fact are not supposed to be reported. Still, it is striking that no case on public nuisance has been included in the New Zealand Law Reports since 1949. In that year Mr Justice Callan decided that Remuera, where the plaintiffs lived, was a quiet suburb; that Auckland was nevertheless a large city; that broadsiding (by motor cycles) had become a sport for which large cities cater in some reasonably accessible place or places; that it is a noisy sport; and that the present age is a mechanical one, in which motor-engines abound. With the aid of this analysis of the facts the Judge granted an injunction placing

some restraint on the defendant's operations at Sarawai Park, Newmarket: *Bloodworth et ux v Cormack* [1949] NZLR 1058. In the same year a Court of Appeal of five Judges granted an injunction (suspended for a time) against stock and station agents, restraining them from permitting the use of land in Johnsonville as stock or cattle saleyards in an offensive or insanitary condition so as to occasion a nuisance to the residents: *Attorney-General on the relation of Johnsonville Town Board v Abraham & Williams Ltd* [1949] NZLR 461. This reversed the decision in the Court below, where the view had prevailed that an injunction should be refused because closing the yards would seriously impair the efficiency of the City abattoirs, 'an undertaking which vitally concerns the welfare of the public'. In the judgments there is much about such topics as offensive smells, stagnant excreta, flies, mosquitoes. The yards had been in use for upwards of 60 years, but Johnsonville was no longer a country village. It had a population of three or four thousand people, while 75,000 animals passed through the yards each year. At an Auckland Conference one should perhaps add that Johnsonville has now become even more civilised, its status symbols including a shopping mall, a licensing trust, and Kentucky Fried Chicken. The litigation accompanying this progress, however, has been mainly in the town planning and liquor licensing fields. The importance of the saleyards case may be that it shows how limited is the scope of a defence of "outweighing" public benefit. Nor was it regarded as a defence that the population could be said to have come to the nuisance, rather than vice versa.

The range of the concept of public nuisance may be illustrated by quoting a passage from the American textbook, *Prosser on Torts:*

> "The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public. It includes interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold."

A contemporary illustration is *Attorney-General for Ontario v Orange Productions Ltd* (1971) 21 DLR (3d) 25. An injunction was sought to prevent an outdoor "rock or music" festival. Earlier festivals had attracted 25,000 to 40,000 persons and were alleged to have included nude bathing; public sexual intercourse; open consumption of drugs and alcohol; noise, dust, and traffic congestion; trespass to private property; water shortage in the neighbourhood. Some of these complaints the Chief Justice of the High Court of Ontario thought exaggerated. To others his judgment exhibits an approach that might variously be described as liberal, tolerant, philosophic, or resigned. But he did grant an injunction prohibiting such festivals until the park had been equipped with sanitation facilities adequate for the numbers; and he did require some reasonable limit on the numbers.

Apart from the obvious necessity of proving a public nuisance in fact, there are two major hurdles which those alleging public nuisance are likely to have to negotiate at the present day. The first is the defence of statutory authority. If the activity is clearly authorised by statute and is carried on without negligence, the common law remedy may well be unavailable; though owners of property affected may be able to recover compensation under the Public Works Act 1928. The Courts are not lightly persuaded that there is statutory authority to commit a nuisance. In *Pride of Derby Angling Association v British Celanese Ltd* [1953] 1 All ER 179, fish were being killed in the Derwent by the combined operation of the discharge by the Derby Corporation of insufficiently treated sewage, the discharge by a commercial company of heated effluent, and the discharge by the British Electricity Authority of another kind of heated effluent. Injunctions were granted against all three defendants. As to the local authority, it was held that it was no defence that their works were satisfactorily completed under an Act of

1901 and had functioned so as to cause a nuisance merely because of a later increased of population over which the Corporation claimed to have no control. The Act contained an express prohibition against conducting the works so as to cause a nuisance; it was held that by pumping effluent into the river the Corporation were indeed creating a nuisance, so the statutory protection was exceeded irrespective of any question of fault.

The other hurdle is procedural. It did not arise in the *Derby* case, where the plaintiffs had suffered special damage, albeit recreational. In some of the other cases already mentioned the Attorney-General was a party. That was because a member of the public cannot sue in respect of a public nuisance unless he has suffered special damage over and above that suffered by the public generally, or unless his private rights have been infringed. Otherwise the action must be in the name of the Attorney-General. The Attorney-General may give his "fiat" (or permission) for an action to be brought in his name: which is called a relator action. Or he may proceed on his own initiative (or "ex officio"). The traditional view is that he has a complete discretion, not only to bring or refrain from bringing ex officio proceedings, but also to grant or withhold the fiat; and that the Courts are powerless to control his decision in the latter respect. If he does give his fiat—which in New Zealand is sought by application to the Crown Law Office, supported inter alia by a certificate from independent counsel that the case is a proper one—the proceedings are in practice conducted by the relator's legal advisers, though subject to the ultimate control of the Attorney-General. The relator must meet the costs.

The fact that the proceedings had not been brought in the name of the Attorney-General was one of the obstacles which defeated the claim in the 2, 4, 5-T case, *Environmental Defence Society v Agricultural Chemicals Board* [1973] 2 NZLR 758. The ground of Mr Justice Haslam's decision was that the Society did not have standing to bring the proceedings in its own name; but in any event the Judge did go on to say that after reading the documents he fully agreed with the decision of the Board, and that the Board had hitherto acted "with perfect propriety". On the question of standing he said:

> "In a society in which there has been a proliferation of such authorities, the private citizen is rarely given an alternative remedy to enforce the discharge of statutory functions. If the public interest impels him to act the general line of authority indicates that he must also establish breach of a concomitant duty owed to him as an individual. To an extent that cannot at this stage be predicted, there have been signs of a tendency to relax the earlies stringency in approach by the Courts, but it may be of passing interest that ss 2 to 16 of the Judicature Amendment Act 1972 create a more flexible single procedure for judicial review in respect of statutory powers, but preserve the former discretion to refuse relief, and do not purport to extend the scope of the historic remedies."

Because the point was not relevant in the case before him, the Judge was careful not to close the door to the possible application in New Zealand of certain suggestions made in the Court of Appeal in England in *Attorney-General on the relation of McWhirter v Independent Broadcasting Authority* [1973] 1 All ER 689. That case raised two questions about standing. First, whether in the absence of enough time to obtain the Attorney-General's fiat the Court will grant an interim injunction at the suit of a private individual. Second, whether if the Attorney-General refuses his consent to relator proceedings an aggrieved member of the public is entitled to bring an action in his own name.

Mr McWhirter, the owner of a television set, was minded to stop the Independent Broadcasting Authority from televising one evening an allegedly indecent film. The day before, he laid his complaint before the Attorney-General, who declined to act ex officio. Next day, claiming that there was not enough time for relator proceedings, Mr McWhirter issued a writ in his own name. A High Court Judge refused an interim injunction. But a majority of the Court of Appeal granted one; and they did so later on the same day, before the slotted time of 10.30 pm. (I use the adjective to show that the judiciary is in touch with the contemporary scene.) In the words of Lord Denning, Master of the Rolls:

> "If he waited until he obtained leave, it would be too late for the Court to take action; because by that time the film would have been shown and the damage would have been done. I think there is sufficient in his answer for us to anticipate that he may get leave and to act in advance of it. The obtaining of leave is just a matter of procedure. In these days we have to mould procedural requirements so as to see that

the duty which the statute ordains is fulfilled. At any rate, for the time being, even at the suit of Mr McWhirter, we have jurisdiction to grant an injunction if such be the only way of seeing that the statutory duty is fulfilled."

Lord Justice Cairns, while disapproving of the programme, disagreed about the law:

"In my view the fact that it has not been possible in the time available to persuade the Attorney-General to take action is no sufficient ground for saying that the private individual is to be allowed to enforce the matter of public interest."

But the third member of the Court, Lord Justice Lawton, was as ready as Lord Denning to give weight to "the changing condition of the modern world".

When the case came before the Court again, it was held that Mr McWhirter had under estimated the speed with which relator proceedings could have been issued. And it is true that in New Zealand, too, the fiat can be obtained very quickly if all goes well. Be that as it may, in the meantime the Attorney-General had given his consent. Any irregularity in the proceedings was then cured. Further, there was evidence that in the meantime also the Authority and their General Advisory Council had seen and passed the film. The Court had seen it as well. Although almost incredulous at the Authority's decision, they were not prepared to interfere. What is relevant for present purposes is that Lord Denning said:

". . . in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the Court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General if need be, as defendant. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizens of this country: so that they can see that those great powers and influence are exercised in accordance with law. I would not restrict the circumstances in which an individual may be held to have sufficient interest. . . . But this I would emphasise, is only in the last resort when there is no other remedy reasonably available to secure that the law is obeyed."

Whilst expressing no opinion about a hypothetical situation where the Attorney-General unreasonably refuses his fiat, Lord Justice Cairns stated:

"The requirement for the consent of the Attorney-General is a useful safeguard against merely cranky proceedings and against a multiplicity of proceedings. . . . The weapon of the interlocutory injunction is at all times a powerful one, the use of which involves risks . . . while it is a weapon that may well have its uses in relation to the protection of the public interest, I think it is right that it should not be immediately available for that purpose to any member of the public."

Lord Justice Lawton lent cautious support to Lord Denning, saying that if there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the Courts might have to intervene to ensure that the law was obeyed.

Let it be made clear that I am far from suggesting that the fiat would be unreasonably withheld in New Zealand. My own experience in private practice—going back to the days when the present Chief Justice was Solicitor-General, and somewhat beyond—was that the fiat was readily and promptly granted if the papers were in order and there was something akin to a prima facie case. I have no reason to doubt that the same applies today. The observations in *McWhirter's* case are no more than a possible insurance policy. Another possibility is that we might learn from the Federal Courts in the United States of America. At the recent Sixteenth Triennial New Zealand Law Conference, Judge Gesell of Washington DC presented a paper containing some fascinating insights into group or class actions in the Federal jurisdiction to enforce public responsibilities. The whole field is very much alive. Given responsible and careful legal advice—advice of the quality at the command of such an organisation as the Environmental Defence Society—the common law might prove to have some teeth to tackle environmental issues.

The statutes

Numerous Acts of Parliament are concerned with protection of the environment. To try to summarise even the main ones would be a superficial exercise, useless for a Conference such as this. Moreover, three or four major statutes—the Town and Country Planning Act 1953; the twin measures, the Soil Conservation and Rivers Control Act 1941 and the Water

and Soil Conservation Act 1967; and the Clean Air Act 1972—are part of the themes of special papers to be delivered at this Conference by Mr A R Turner SM, Mr D A R Williams, Professor F M Brookfield and Mr M G Thom. As well as those Acts, the Judges' Clerk in Wellington, Miss Frances Wilson (to whom I am indebted for assistance in preparing this paper) has listed, among topics which she suggests I might cover, the following:

Marine Pollution Act 1974
Health Act 1956, ss 29 to 35 and 42 to 52 (provisions for abatement of nuisances and closing of dwellinghouses unfit for human habitation).
Municipal Corporations Act 1954, ss 293 to 296 (fines for nuisances).
Radiation Protection Act 1965 (in force since 1 April 1973; licences to manufacture etc radioactive materials may be issued by the Director-General of Health; appeals to a Board of Appeal appointed by the Minister, to consist of a Magistrate and two assessors. Constitution of a Radiological Advisory Council. One wonders whether the strength of this Act is in any way commensurate with that of its subject-matter).
Nature Conservation Council Act 1962
Plant Act 1970
Noxious Weeds Act 1950
Native Plants Protection Act 1934
Reserves and Domains Act 1953
Wildlife Act 1953
Noxious Animals Act 1950
Traffic Regulations 1956, reg 22A (excessive smoke or visible vapour from motor vehicles).
Transport Act 1962, s 77 (1) (a); Traffic Regulations, reg 51F (exhausts and silencers). Note also that under reg 22B no person shall operate any vehicle which creates noise which, "having regard to all the circumstances is excessive".
Civil Aviation Act 1964
Government Railways Act 1949
Factories Act 1946 and Construction Act 1959
Hovercraft Act 1971 (not yet in force)
Harbours Act 1950, s 232 (42) (bylaws about nuisances from motor launches and boats).

A textbook on the Law of the Environment would deal with all these and more. It would also make mention of non-statutory bodies, having no legal power but some persuasive influence: such as the Commission for the Environment and the New Zealand Environmental Council. It would discuss the Ombudsman. His functions are investigatory and do not extend to administrative actions in respect of which there are on the merits rights of appeal, objection or review; but those limitations aside, no doubt his work is as valuable in relation to the environment as in other spheres. In any event we are fortunate that Sir Guy Powles himself is likely to tell us about his functions.

If drafting a skeleton for such a textbook is a temptation, it will have to be resisted. I will confine comments about the statutes to two general points.

The judicial approach

In interpreting such statutes the Courts have moved beyond the overriding concern for private property rights often associated with the nineteenth century. There has been sympathetic recognition of the public ends at which the statutes are aimed; coupled nonetheless with insistence that the administrative authorities do not take short-cuts. A key decision was that of the Court of Appeal in *Ideal Laundry Ltd v Petone Borough* [1957] NZLR 1038. There it was boldly argued that the town planning scheme of the Borough was wholly invalid. The grounds put forward included alleged unreasonableness and the reservation of various discretions to the local authority. It was held in effect that the Court's view about reasonableness could not be substituted for that of the local authority, and that *some* discretion had to be retained: not all planning matters can be governed by hard-and-fast rules. Consistently with that approach, a provision in a district scheme may be beyond the Council's powers if it purports to give a very wide discretion, from the exercise of which there is no appeal. Mr Justice McMullin so held in *Attorney-General v Mount Roskill Borough* [1971] NZLR 1030, a case concerned with dispensation from front yard requirements. A subsequent addition to the Act—s 21 (1A)—seems to embody some legislative acceptance of this principle. Another significant decision is that of Mr Justice Richmond in *Attorney-General v Birkenhead Borough* [1968] NZLR 383. The Judge held that if, before a district scheme had become operative, a change of use in the form of a block of flats detracted from the amenities of the neighbourhood by obstructing views, an individual suffering deprivation could obtain an injunction, even if not damages: the intervention of the Attorney-General would not be necessary. A similar con-

cern for the position of the citizen who might be called the small man is apparent from the decision of the Court of Appeal in *Wellington City Council v Cowie* [1971] NZLR 1089, a rubbish tip case. It will be revealing no professional secrets if I let fall that getting these cases through is apt to be particularly difficult from the point of view of the local Council: and in this instance a proposal was struck down, although probably known (with some forensic exaggeration) to every man, woman and child in Johnsonville, because the Court thought it had not been properly advertised. Johnsoville has indeed been a stronghold of public rights. Last under this head, it may be appropriate to add that, in cases of doubt, the Courts have leant towards a right to a hearing. The terms of the Act of Parliament tied judicial hands in *Rogers v Special Town and Country Planning Appeal Board* [1973] 1 NZLR 529 and *Highland Park Progressive Association v Barry-Martin* [1974] 1 NZLR 108, but a wide interpretation of the meaning in a planning context of "affected" appeared to be open and was adopted in *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd* [1974] 1 NZLR 295. And in the *Metekingi* case, to be cited shortly, it was thought reasonable to adopt a wide interpretation of the scope of "soil conservation". Similarly the right of recourse to the Courts is favoured. Thus in *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71, Mr Justice Macarthur held that the Water and Soil Conservation Act impliedly empowers Regional Water Boards to decide whether past uses of water, of which they have been given due notice, were or were not lawful. The Judge went on to say:

> "The question then arises whether the Legislature has evinced an intention to oust the jurisdiction of the Supreme Court as regards the determination of matters arising in respect of a notice under s 21 (2). It is a common law presumption of legislative intent that access to the Queen's Courts in respect of justiciable issues is not to be denied save by clear words in a statute: see de Smith's *Judicial Review of Administrative Action* (3rd ed), p 315. In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260; [1959] 3 All ER 1 Viscount Simonds said:
>
> " It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J called it in *Francis v Yiewsley and West Drayton Urban District Council* [1957] 2 QB 136, a "fundamental rule" from which I would not for my part sanction any departure' (ibid, 286; 6).
>
> "In my opinion the words of the Act in the present case do not confer exclusive original jurisdiction upon the Board as regards determination of the matters now under consideration; and there are no clear words showing that the Supreme Court does not retain its jurisdiction to determine those matters. I think that the owner in the present case could have brought and could still bring an action in this Court claiming a declaration with regard to its riparian rights; and any such declaration would prevail in the event of conflict with a decision of the Board. I can find nothing in the Act which would prevent that course being taken." ([1975] 2 NZLR 71, 88.)

He held also that the absence in such cases of a right of appeal to a Town and Country Planning Appeal Board reinforced his view as to Parliament's intention not to oust the jurisdiction of the Supreme Court.

An emerging trend?

The powers of the Courts as to the review of administrative action come from the general provisions of the common law, simplified by the Judicature Amendment Act 1972, and from appeal rights conferred by particular statutes. An appeal in the full sense is never available unless an Act of Parliament so provides. It is hard to find consistency in the New Zealand Parliament's approach to this question and to the associated question of rights of objection. The point may be illustrated by referring to three major statutes. Under the Town and Country Planning Act 1953 rights of objection are usually somewhat restricted; and there is an appeal from the Appeal Boards, on questions of law only, to the Administrative Division of the Supreme Court, with the opportunity of obtaining leave to appeal further to the Court of Appeal in cases of sufficient moment. There is no appeal on questions of fact. The borderline between law and fact is not always easy to discern. Under the Water and Soil Conservation Act 1967, as regards applications by the Crown in respect of natural water, rights of objection and consequential rights of appeal are limited to any Board, public authority or person which or who claims to be 'detrimentally affected'—an expression

necessarily somewhat restrictive. But, as regards other applications, *any* person may object on the ground that the grant of the application would prejudice his interests or the interests of the public generally; and again there is a right of appeal from the Appeal Board, and possibly further, on questions of law only. The initial right of objection is very wide under that statute—or at least so it was held in *Metekingi v Rangitikei-Wanganui Regional Water Board* [1975] 2 NZLR 150. Under the Clean Air Act 1972, in connection with licences for various processes with pollution potential, applicants and local authorities (though not members of the public) have a full right of appeal from the Director-General of Health to the Administrative Division. The Division may be augmented for such cases by non-lawyers with special qualifications, much as happens with land valuation appeals. The appeal is not restricted to questions of law and there is provision for leave to go to the Court of Appeal.

So far as any pattern can be said to emerge from that variety, it may be an increasingly closer approach by Parliament to recognising that, in the end, full rights of objection and appeal in environmental issues may be to the advantage of the administration as well as the individual. I hope so. Otherwise the law, which everyone is entitled to look on as an independent and unbiased safeguard, is in danger of being 'remaindered', as an overseas Judge has recently put it. Otherwise the law might be left to deal with criminal charges and miscellaneous issues of a basically private kind, while environmental issues and others of major importance to the community would be left to less open and less objective procedures.

PLANNING FOR ENVIRONMENTAL QUALITY

By MR A R TURNER, SM, *Chairman of the No 1 Town and Country Planning Appeal Board.*

First, it is necessary to define terms. The following are the dictionary definitions appropriate to the key words in the title to this paper.

Environment—the conditions or influences under which any person or thing lives or is developed.

Quality—the nature, kind or character (of something); hence, the degree or grade of excellence, etc. possessed by a thing.

To plan—to arrange beforehand, to define in advance.

It is stating the obvious to say that planning for environmental quality implies—

(a) the making of a judgment upon the quality of the environment as it now exists; and

(b) the definition of a better environment (in either general or specific terms).

And for the planning to be meaningful, the plan has to be capable of being implemented and must in fact be implemented in due course. The operation of the Town & Country Planning Act clearly imposes some regulation upon the charges made to our physical environment, but the forces imposing changes upon that environment are numerous, diverse and powerful—eg changes in technology, in methods of transport and communication, in the financial climate, in social attitudes and values. But there is a powerful constraint operating as well—what I call the "strait jacket" of existing development. The effect of the interaction of these forces (and the effect of any interference with their interaction) cannot be adequately predicted.

Now some generalisations are in order. By the Act, Town and Country Planning is made a function primarily of local Government. There is therefore diversity in the result. For some areas, because of anachronistic local body boundaries, there is a degree of inconsistency in approach and emphasis. The planning powers conferred on local government have only a limited effect upon the changes made to the physical environment by the Crown and other public agencies. They have significant effect upon the broad changes made to the physical environment by private persons. But they have little effect upon the detail of the changes made by private persons eg there is little control over architectural design, colours, landscaping. The Act is concerned principally with the public environment—ie the conditions enjoyed by land users collectively.

It has little effect upon the private environment, yet the interiors of our houses and of our places of work are a very important part of our personal environment.

To turn to some questions. Are we concerned only with physical conditions or does "environmental quality" include the quality of the social conditions and influences under which we live? If so, to what extent?

"Town planners say planning covers the whole physical and social framework of the city. The council planning division works closely with the council community advisers." (*New Zealand Herald,* 11 April 1975)

The case of *Osborn v Birkenhead Borough* (Decisions p 9922) concerned a proposal to build 54 flats on a 2¼ acre site. The appellant complained about the magnitude of the proposal, the impact of the project on the neighbourhood both in social terms and in terms of increased traffic and the likely undesirable social effects, particularly with transient tenants.

The case of *Salvation Army Trust Board v One Tree Hill Borough* (Decisions p A834) was concerned with a proposal to use a large dwellinghouse as a pre-release Hostel for rehabilitated alcoholics.

"By writing tough zoning ordinances, many of America's suburban towns and villages have curbed the construction of apartment buildings and required that each new house be built on a substantial plot of land. Zoning has thus had the effect—often by intent—of excluding low and moderate income families who cannot afford to buy or rent most available housing. It has also kept many towns lily white." (*Time* magazine, 7 April 1975)

Does this not occur in New Zealand too?

My second major question is: Who is to make the value judgment upon our existing environment and who is to determine what is better?

". . . Many people have fairly strong feelings against changing the character of local areas. Mr Evans has found that 'people regard what they have got as being very pleasant. In particular there is an adverse reaction to the construction of flats.' " (*New Zealand Herald,* 11 April 1975)

There are three statements in that quotation—what we have is good, we fear change, and we do not like flats. There is a resistance to change which is not entirely attributable to fear of the unknown.

Who then is to prepare the plan when there is a diversity of opinion, and how is it to be carried into effect? For whom do we plan—today's generation or tomorrow's?

At this point we must remind ourselves that the Act is concerned only incidentally with environmental quality. The general purpose of a regional scheme is defined in s 3 and that of a district scheme in s 18. Remember that the word "amenities" used in those sections has a statutory definition. (The word "environment" is used in that statutory definition. I believe that this is the sole use of the word in the Act.) The provisions of s 2B are also relevant for that section declares certain matters to be of a national importance and requires that they be recognised and provided for.

It will be seen from all those provisions that a district scheme is concerned with promoting:

(a) economic welfare and development,
(b) Convenience, economy and efficiency,
(c) health and safety,
(d) conservation of land resources,
(e) harmony and coherence between land uses,

as well as

(f) in general a pleasant environment, and in particular the natural character of the coastal environment.

We must also take account of the manner in which the controls authorised by the Act operate.

"Town planning in New Zealand is an attempt to *regulate the changes* made to the environment by anyone altering the use of a piece of land. Ideally perhaps this could be done by having the whole community decide on the changes as they are proposed, but this is obviously a cumbersome procedure. A town plan therefore is an attempt to set down in advance the conditions on which development will be accepted by the community. It is these conditions that form the basis of the district planning scheme.

"In New Zealand *these conditions take the form of limitations* on development. This is in contrast to other forms of planning where the future environment may be designed in detail and all development made to conform to a preconceived 'plan'." (Michael Pritchard in the *Auckland Star,* 21 March 1975—Emphasis added)

The local municipal or county council prepares the plan. It (or the Appeal Board) makes the value judgments and determines the objects of the plan. Those judgments are made on behalf of the district as a whole.

But a district scheme and its implementation

does not necessarily ensure or even promote environmental *quality*. And except to the extent that it authorises the taking of action against "objectionable elements" (see Section 34A) the Act does not affect the status quo. Section 36 protects "existing uses" and no one can be compelled to alter the use of his land.

It is perhaps unnecessary to emphasise before this audience that environmental quality is more than the mere absence of "objectionable elements". In relation to the physical environment, quality should be measured in terms of the positive values of harmony, coherence, pleasantness and good design and not merely by the absence or elimination of the undesirable consequences of human activity which affect pleasantness.

However the Act does enable action to be taken to eliminate or reduce those undesirable consequences, provided that they arise from a fixed source. For a consideration of the powers conferred by Section 34A, see *Firth Industries Ltd v Franklin County* 4 NZTPA 299. For an example of the use of those powers to compel the removal of a building (though the circumstances were somewhat unusual) see the decision in *Gleeson v Napier City* (p A1057).

One of the strengths of s 34A is that the offence consists in permitting or suffering the land use to continue without giving full effect to the requirements of the Notice served pursuant to the Section. The Court is not required to make a value judgment nor to determine any question of reasonableness. One of the weaknesses of the Section is that only the Council can initiate action in a particular case.

Furthermore, the Council can require the removal or reduction of an existing objectionable element on the extension of a present use, if that extension requires specific planning approval. See *Onehunga Timber Co v Rotorua City* 4 NZTPA 38 at p 41.

However, no effective position action can be taken under the Act to prevent, remove or reduce unpleasantness arising from a moving source—eg the noise and fumes arising from motor vehicles. In such cases, only defensive action can be taken. The implementation of Town Planning proposals can result in major changes in traffic patterns and thus major changes in the physical environment. Whether those changes are for good or for ill will depend upon your interest—whether you are a motorist, whether a householder in a street relieved of traffic or whether a householder in a street to which traffic has been diverted. Environmental quality can be enhanced through the closure of a street to through traffic. But for our examination of the legal difficulties involved in doing so, see *Re an Application by Auckland City Council* (Decisions p A1781).

How then can the positive values of harmony, coherence, pleasantness and good design be achieved through a system which fundamentally merely imposes limitations on development of a system in which the initiative in the preparation of the plan rests with the Council?

Environmental quality has been promoted through the exercise of rights of objection to and appeal against the scheme itself, and through objections and appeals by third parties against specific applications (where those rights apply). But much development is permitted as of right in terms of operative district schemes. Private developers have complete freedom within the limitations imposed by the scheme on predominant uses. And even in respect of conditional uses, the discretion to grant or refuse consent must be exercised having regard to the express provisions of the district scheme relevant to the particular use.

On the part of private developers there is a tendency to develop to the maximum permitted by the scheme. If that occurs on a large scale, dull uniformity and poor environmental quality can result, whereas the intention of the scheme may have been to encourage diversity.

Land values tend to be set according to the maximum intensity of use permitted by the scheme. The setting of values on that basis can tend to accelerate re-development and to raise anxieties over environmental quality.

Two trends can be discerned from the review of district schemes, and it seems that they have arisen because of the weaknesses just mentioned. One is for district schemes to become more detailed. The other is for more matters to be reserved to the discretion of the Council. But it should be noted that not all discretions give rise to the right of third party objection and appeal—only those which come within the definition of the term "conditional use" contained in the Act. And the extent to which a district scheme may reserve matters to the discretion of the Council (or of an officer) is not clear in the Act and has not been fully explored judicially.

The system does little to encourage the Crown and other public authorities to pursue

environmental excellence in the execution and maintenance of public works.

"It is plain that the extent to which designated works can be controlled under the planning legislation needs further clarification by Parliament." *Wellington City Corporation v Victoria University* [1975] 2 NZLR 301.)

Does the Appeal Board, on appeals relating to designations, have power to direct that conditions, prohibitions or restrictions be incorporated in the district scheme regulating the manner in which public works shall be executed and maintained on the designated land? Consider the decision of the Appeal Board in *Bay View Estate Ltd v Wellington Fire Board* 4 NZTPA 185.

In its effect on public works, the planning system cannot compel the expenditure of public moneys. To enable the greatest benefit to be gained the planning authority should also be the body having executive and financial responsibility for public works.

To a large degree the environmental quality of an urban area is determined by the pattern of land subdivision. Once that pattern has been laid down it is extremely difficult to make any significant alteration to it. District schemes control the right to subdivide, and may specify the general conditions upon which subdivision may occur. They do not control matters of subdivision, design and layout. Those matters are regulated under the specific legislation applying to the subdivision of land and speaking generally those matters are determined as between the subdivider and the council; third parties have no status to intervene. For that reason there have been attempts to write into district schemes provisions regulating those matters. The effectiveness of such provisions must be considered carefully because of the separate appeal rights which exist under the subdivision legislation. But again speaking generally, councils do not exercise sufficient influence over subdivision design and layout, and are not sufficiently aware of the powers available to them in that regard under that legislation. Consider the decisions of the Appeal Board in *Lewis v Mt Roskill Borough* 4 NZTPA 247 and *Smith v Tauranga County* 5 NZTPA 97.

Those cases were concerned with the definition of land to be set aside on subdivision as public reserves. Has the council the power to ensure a variety of lot sizes and shapes in a residential subdivision?

In conclusion, I summarise by saying that the actual quality of the environment is a consequence of community attitudes and priorities. To a large extent we get in environmental quality only what we have been prepared to pay for. The Act has done much to promote a sensitivity to environmental quality, but its emphasis is on the prevention of what is bad rather than on the promotion of good environmental quality. Its effectiveness in promoting the latter has been over-estimated by some sections of the community. Excellence in environmental quality depends just as much, or more, on example, education and public debate.

AIR QUALITY AND THE CLEAN AIR ACT 1972

By MR N G THOM, *Regional Air Pollution Control Officer, Department of Health, Auckland.*

1 Air pollution in New Zealand

The standard of air quality in this country generally is good. This no doubt results from favourable factors such as topography, climate, the relatively small population for the land area available and the absence of large industrial areas containing major sources of pollution.

Continuous monitoring for common air pollutants such as sulphur dioxide, smoke and particulate material show satisfactory levels in most areas particularly when results of such monitoring are compared with established standards such as the long term goals for air quality set by the World Health Organisation in 1972.

There are however specific areas of concern. Currently there are several localised situations where air pollution from particular industrial processes, is giving rise to public concern. Carbon monoxide levels experienced by the public in areas of congested traffic, particularly in Central Auckland are such that early action to achieve a reduction in these levels is desirable. In Christchurch winter levels of pollutants, particularly those of smoke and sulphur dioxide which are associated with

domestic heating, need to be reduced if acceptable standards of air quality are to be maintained.

The local situation should be reviewed from time to time in the light of results from research and investigations into effects, both direct and indirect of various pollutants and the necessary corrective action should be taken at the earliest possible stage. Recent experience with polyvinylchloride (PVC) is a good example.

Air pollution legislation in New Zealand, to be successful in the long term, should be able to cater for all the factors discussed above.

2 Types of air pollution legislation

Before examining the local Clean Air Act it is desirable that the salient features of various types of legislation be reviewed. Throughout the world in those countries which have specific legislation aimed at the control of air pollution, it is found that such legislation falls generally into one of two broad categories. These are:

(i) The "best practicable means" approach, and
(ii) The "air quality management approach".

In the best practicable means approach, the underlying philosophy is that the level of air quality to be maintained will be the best that can be achieved by applying to the sources practicable measures of control taking into account the state of relevant technology, the financial implications involved and local conditions and circumstances. It should be noted that while this approach may not necessarily bring about the reduction in the levels of air pollutants that may be desirable in a heavily polluted area, it does provide for practicable control of air pollution emissions even in areas where pollutant levels are "acceptable" when compared with established standards for air quality, and in this way act to prevent problems from developing.

The air quality management approach probably appears the more logical. Basically it implies that once standards for air quality have been established and the dispersion capabilities (ie meteorological characteristics and topography) of an area are known, the appropriate emission limits can be enforced on all sources of air pollution by legislation. For complete implementation however it requires the following:

(a) A complete inventory of air pollution emissions in the area concerned.
(b) Adequate meteorological and topographical data for that area.
(c) Established standards for air quality.
(d) Detailed land use plans both current and projected for the area.
(e) Established techniques of mathematical modelling which will reliably indicate from the above data emission standards which must be applied to the pollutant sources.

While significant progress is being made at the present time little of the above information is as generally available as would be required for the air quality management approach to be applied absolutely in the long term.

At this point of time it appears that legislation which generally requires the "best practicable means" to be adopted, but also incorporates many of the established principles of "air quality management" is that which is the most appropriate for the control of air pollution in this country. The Clean Air Act 1972 appears to meet these requirements very satisfactorily.

3 The Clean Air Act 1972

This Act is unusual in that, in s 7 (1) it lays down a moral responsibility on all persons in this country to control air pollution and thus conserve the essential resource of clean air. It is a moral responsibility only as, outside of a clean air zone (s 15), only the occupiers of industrial or trade premises commit an offence by not complying with this section of the Act (s 7 (2)).

Basically s 7 requires that the "best practicable means" shall be adopted to collect, contain and control the emission of air pollutants, and to render any air pollutant emitted from any premises harmless, and inoffensive. The definition of air pollutant (s 2) covers anything of harmful, odorous or offensive character which can be carried in the atmosphere.

The Act applies to all activities which may give rise to air pollution irrespective of whether the activities are carried out by private, local authority or Crown organisations. It only applies to domestic premises however if they are situated in a Clean Air zone (s 15). It also can be applied to aircraft and motor vehicles (s 19) and to ships (s 20).

The emission of dense smoke from any industrial or trade fuel burning equipment anywhere in the country is prohibited (s 10), however the method for formally observing such offences is prescribed in the Clean Air (smoke) Regulations 1975. It should be noted that the definition of fuel burning equipment (s 2) includes any part of a premises equipped, set

aside, or used on more than one occasion in any period of 12 months for burning in the open space. This means in effect that backyard bonfires and the like on these premises must comply with the provisions of the Act.

Clean Air zones may be created by the Governor-General by Order in Council (s 12) either on the request of the local authority through the Minister of Health, or from the Clean Air Council after consultation with the local authority concerned. Procedures are laid down for public notification and for objection to proposals to declare an area a clean air zone. All, including domestic premises, must comply with requirements of ss 7 (2), 9 and 10 of the Act in clean air zones and the emission of light smoke (s 2) is prohibited. There is also provision for the prohibiting of the acquisition and sale of unauthorised fuel in a clean air zone (s 17). It can be expected therefore that the problems of air pollution experienced in southern areas particularly will be tackled in future by the declaration of clean air zones in which domestic heating is done using approved appliances burning approved fuels.

Scheduled industries are required to be licensed (s 25). Those with the greater polluting potential (Part A of the Second Schedule) by the Department of Health, others by local authorities. The Licensing Authority may impose such conditions of licensing (s 26) as it sees fit for the purposes of the Clean Air Act or the Health Act 1956. The Clean Air (Licensing) Regulations 1973 give details of the licensing procedures, fees payable and forms of application both for licensing and for the prior approval provisions which are discussed below. There is also a system of prior approval for changes proposed by scheduled industries which may increase the emission of air pollutants (s 31).

It will be seen that the above provisions of the Act allow for the introduction of air quality management factors at least as far as scheduled industries are concerned.

Activities of scheduled industries must comply with relevant bylaws and the provisions of the Town and Country Planning Act 1953 and district schemes (s 29 (3)). The Crown is specifically included in this latter requirement (s 29 (9)).

Provision is made for appeals (ss 32 to 41), first to the Director-General of Health, then to the Supreme Court, and in certain cases to the Court of Appeal, in the event of a dispute involving the operator of a scheduled premises, a local authority or the Department of Health.

A Clean Air Council (s 6) is established with a general watch dog role, acting to keep the Minister of Health informed of action needed to maintain satisfactory air quality in this country. The Council also is a body which co-ordinates the activities of the various groups working in the field of air pollution and to which the public can go with complaints and suggestions. It may also be appointed by the Governor-General to be a Commission under the Commissions of Inquiry Act 1908 for matters subject to the provisions of the Clean Air Act. (Third Schedule (7)).

4 Conclusion

The Clean Air Act 1972 appears to give adequate legislative basis for the control of air pollution in this country. It does however assume that all people recognise that clean air is a finite resource and that there is a genuine desire for conservation.

With the co-operation of all groups in the community compliance with the Act should ensure that most of the more serious air pollution problems experienced overseas will be avoided in this country in the foreseeable future.

5 Acknowledgment

The permission of the Director-General of Health for the publication of this paper is gratefully acknowledged.

Useful precedent: The Christchurch *Press* recently carried the following: "Legal Secretary —Harassed partner in small noisy but cheerful law firm requires Secretary able to type from own shorthand and dictaphone. Must be able to operate in atmosphere of controlled panic and must be able to start by February 5. Previous experience in typing court proceedings desirable but not essential. Good salary for suitable applicant."

Assault on Magistrates?—Sir,—Our attention was drawn with some amusement to the recitation on the reverse side of a Police Charge Sheet recently in our possession: "Any objection to the taking of fingerprints should be made to the officer in charge of the station, who may then apply to a Magistrate's Court for an order to take the fingerprints and use such reasonable force as may be necessary for that purpose.— LANGLEYS, 34 Silver Street, Lincoln.

[A letter to the *Guardian Gazette*.]

THE CONVEYANCER, WATER RIGHTS AND THE ENVIRONMENT

Some effects and policy aspects of the Water and Soil Conservation Act

By PROFESSOR F M BROOKFIELD

In the times that preceded the Water and Soil Conservation Act 1967 the conveyancing solicitor called on to advise a purchaser of land as to any water rights(*a*) affecting it whether as a benefit or a burden had a task fairly simple to perform. In the course of his normal duty of searching the title to the land to be bought, he noted among the encumbrances any registered water easements to which the land was subject either for the discharge or for the taking of water. He saw to it that any water easements which in terms of the agreement for sale and purchase should be appurtenant to the land were in fact granted and registered. The conveyancer was, then, in the convenient basic classification of water rights into "natural" and "acquired", concerned with acquired rights only. Natural rights for the discharge or taking of water were usually not his concern in acting in the purchase, for his client would take the land with all such natural rights as benefited it and subject to any natural rights of neighbouring owners. But, if not then, the solicitor might some time later during his client's ownership of the land, when dispute as to the natural rights arose, have to advise what those rights were. In so advising, the solicitor would have to explain the rules of the common law on the use, allocation and disposal of water—part of the rudimentary common law of the environment(*b*).

A sufficient classification of water rights at common law, as they existed in New Zealand before the Act, is the following:

A. *Natural rights of landowner:* (1) (a) Right to take surface or underground percolating water in any quantities (with no liability for diminishing a neighbour's water supply): *Acton v Blundell* (1843) 12 M & W 324.

(b) Right of a riparian owner: (i) to take stream water in any quantities for "ordinary" purposes in use of riparian land (domestic purposes and for stock); (ii) to take stream water (subject to only returning it) in reasonable use of riparian land for "extraordinary" purposes (eg irrigation or industrial use); and (iii) to receive the unimpeded flow of stream water from higher riparian owners: *Attwood v Llay Main Collieries* [1926] Ch 444; *Cooke v Vancouver Corporation* [1914] AC 1077, 1082; *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71.

(2) (a) Right to discharge surface water on one's own land.

(b) Natural drainage servitude (at least outside towns), under which lower land of one owner must receive surface water naturally flowing or discharged from higher land of another, even if concentrated (within reason) in natural use of the higher land: *Bailey v Vile* [1930] NZLR 829; *Wilsher v Corban* [1955] NZLR 478.

B. *Acquired rights:* Rights acquired by grant of easement:

(1) to *take* water from a source on another's land;
(2) to *discharge* water on another's land;
(3) to *convey* water through another's land.

Behind this classification lies the policy of the common law in relation to water—a compromise policy based in part on the individualism long characteristic of much legal thinking and in part on more liberal notions of social control and benefit.

Water has never been subject to the ordinary rules of private property. Except when appropriated and taken into possession (say in a tank), it is incapable of being owned. Rights in respect of natural water have, thus, been rights of use not of ownership and in this respect the common law has recognized its public character—that it is, as a seventeenth century

(*a*) Ie, rights to take and use water and to discharge water, together with closely associated rights such as the right to convey water. The right to discharge waste into water is not covered by the present article.

(*b*) The common law as to the natural rights to take and use water is well discussed, as a background to water control legislation, in S D Clark and A J Myers, "Vesting and Divesting; the Victorian Groundwater Act 1969 (1969) 7 Melbourne University Law Review 237, 240 et seq and S D Clark and I A Renard, "The Riparian Doctrine and Australian Legislation" (1970) ibid 475. For natural rights to discharge water, see F M Brookfield, "Surface Waters: the Natural Rights of Drainage and Disposal" (1965) 1 NZULR 440. (Cited as "Brookfield, 'Surface Waters' ".)

Judge said(*c*), "necessary for the preservation of the commonwealth"; and hence that no man can have property in streams or rivers or surface waters. But such high sounding theory has been of little help to, for example, those who cannot use a particular stream because they have no lawful access to it.

Then the rights to use water have varied between the absolute and the limited, according to common law distinctions as to the type of water. Australian writers(*d*) have pointed to the contrast between the absolute rights of the landowner to percolating as to surface water, established by *Acton v Blundell* (1843) 12 M & W 324, and the more liberal rules controlling riparian owners in their right to use water in defined rivers and streams—rivers and streams having "bed, banks and water" in the established definition(*e*) (conveniently called "riparian" streams). The landowner's absolute right to surface and underground percolating water was exercisable without liability for loss to the neighbour whose water supply was diminished by its exercise. On the other hand, riparian rights gave unlimited use of stream water only for the ordinary purposes of the riparian land—in particular, domestic use and the watering of stock. Stream water taken for extraordinary purposes, such as irrigation or industrial purposes in connexion with that land, had to be returned to the stream undiminished and unaltered in quality. And, as against his upstream neighbours, the riparian owner was entitled to and bound to accept the unimpeded flow of the stream.

This principal distinction between percolating and surface waters on the one hand and riparian stream water on the other, so basic to the differing common law rules as to the taking and use of water, has been criticized as hydrologically unsound(*f*). It is perhaps satisfactory to note that the distinction has in effect been rejected in the New Zealand law governing the drainage and discharge, as distinct from the taking and use, of water that flows from higher to lower land. The owner of the lower land must receive not only water flowing in a riparian stream under the rules just mentioned, but also the flow of surface water under the natural servitude recognized in cases such as *Bailey v Vile* [1930] NZLR 829 and *Wilsher v Corban* [1955] NZLR 478. This natural servitude or right for the discharge of surface water from higher land to the lower land of another, even when concentrated in the natural use of the higher land, applies at least in rural areas. Some authorities(*g*) hold it does not apply in towns; where municipal drains should be expected to take the discharge. But the importance of the natural drainage servitude lies in the general principle on which it rests. Naturally flowing water, even if not in a riparian stream, should be permitted to flow and the lower land must receive the burden. This broad principle is not accepted in all common law jurisdictions (in some of which, as in Australia(*h*), surface water is treated as a common enemy which every landowner may repel and dam back to the land above him). But its general acceptance in this country is a strength of New Zealand law in so far as it accords better with modern notions of a regular and orderly disposal of flowing water than does an individualist rule allowing a substantial right to repel.

In what has been said so far, the complications and refinements of the material have been avoided. The rights described have been summarized as natural and acquired rights to take and to discharge water. How far does the Water and Soil Conservation Act 1967 affect them?(*i*)

Section 21 (1) takes and vests in the Crown certain rights as to "natural water" (comprehensively defined in s 2)(*j*), including the rights to take and use natural water and to discharge natural water into natural water. The subsection may be conveniently quoted in full:

> "(1) Except as expressly authorised by or under this Act, or as expressly authorised under the Mining Act 1926 by a mining privilege in respect of water granted after

---

(*c*) Doderidge J in *Sury v Pigot* (1626) Pop 166, 172; 79 ER 1263, 1268: cited by Clark and Renard, 7 Melb ULR at 477.

(*d*) Clark and Myers, 7 Melb ULR at 241-242.

(*e*) *Angell on Watercourses* (1854) 5th ed 3, cited by Windeyer J in *Gartner v Kidman* (1962) 108 CLR 12, 26.

(*f*) Clark and Myers 7 Melb ULR at 241 and note 25.

(*g*) *Spear v Newham* [1926] NZLR 897: *Spear v Newham (No 2)* [1936] GLR 310. See Brookfield, "Surface Waters", at 471-472. For the rule in Roman law, on which the distinction has been thought by some to rest, see now A Rodger, *Owners and Neighbours in Roman Law* (1972) Ch 5.

(*h*) See *Gartner v Kidman*, ante. For the divergent common enemy and civil law rules (the latter being the rule in New Zealand) see generally Brookfield, "Surface Waters".

(*i*) There was already some statutory effect on the matters discussed, before the 1967 Act. See especially the Land Drainage Act 1908 and the Underground Water Act 1953 (the latter now replaced by the Water and Soil Conservation Amendment Act 1973). This earlier legislation is not dealt with here.

the 9th day of September 1966, or as expressly authorised under any other Act by any right granted during the period commencing after the 9th day of September 1966 and ending not later than the 31st day of December 1968, or as expressly authorised by any other Act (whether before or after the passing of this Act) in respect of any specified natural water, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water, is hereby vested in the Crown subject to the provisions of this Act:

"Provided that nothing in this section shall restrict the right to divert, take, or use sea water:

"Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has any responsibility and for or in connection with fire-fighting purposes."

The right to convey water is not taken. Nor, apparently, is the right of the riparian owner to receive the unimpeded flow of the stream from his upstream neighbour—that is, a lower riparian owner may still be able to enjoin an upstream obstruction (other, of course, than a dam authorised under the Act). That is the view of Clark and Renard(*k*) on comparable Australian legislation, supported by dicta of Fullagar J in *Thorpes Ltd v Grant Pastoral Co* (1955) 92 CLR 317, 331; but there is admittedly contrary Australian authority which Clark and Renard fully discuss.

In the first article written on the 1967 Act, B H Davis(*l*) expressed the opinion that all rights to take and to discharge natural water, both natural and acquired, are taken by s 21 (1). The present writer differed in part from him(*m*). The right to take natural water, whether the natural right or a right acquired by easement, is indeed taken. But the right to discharge natural water is taken only when the discharge is into natural water—that is, where there is receiving natural water such as a stream, a lake or an artificial watercourse or a body of ground water. This surely is the precise effect of s 21 (1) in regard to the discharge of natural water. The right to discharge natural water at large on the land of another where there is no immediate receiving water seemed not to be affected by s 21 (1), whether the right existed under the natural servitude of higher land or had been acquired by grant of easement(*n*).

But one can see there could be hydrological difficulty about this distinction. Swinburne wrote that "even the weariest river winds somewhere safe to sea". That truth may no doubt be applied to discharged natural water. Unless it is evaporated or otherwise lost it must ultimately meet other water. The question is—can it be said to be *discharged into* that other water?—for "discharged into" implies a certain immediacy. The legislature has perhaps settled this difficulty, largely in Mr Davis's favour. But in the oddest possible way. The Legislature has not given the Act a general definition of "discharge into" but inserted one in and for the purpose of the offences section, s 34, to which subs (3) was added by the Water and Soil Conservation Amendment Act 1971 (No 2).

Section 34, so far as relevant, now provides as follows:

(*j*) " 'Natural water' means all forms of water, including fresh water, ground water, artesian water, sea water, geothermal steam, water vapour, ice, and snow that are within the outer limits of the territorial sea of New Zealand; but does not include water in any form while in any reservoir (not being an aquifer) under the control of a public authority and used mainly for the water supply purposes of that public authority, or in any pipe, tank, or cistern."

(*k*) 7 Melb ULR at 494 et seq.

(*l*) "New Control over Natural Water" [1968] NZLJ 105, 107.

(*m*) F M Brookfield, "Water Rights and the Water and Soil Conservation Act" [1968] NZLJ 441; "The Water and Soil Conservation Act 1967 and its Application: an Attempted Guide for the Practitioner" (1969) 2 Otago Law Review 21, 25.

(*n*) The possibility remains that the act of collecting and directing diffused or percolating water, which would (except in a merely passive exercise of a natural servitude) precede the discharge, is a "diversion" of natural water within the Water and Soil Conservation Act 1967, s 21 (1). But if "to divert" in s 21 (1) is to be so widely interpreted, the mere act of making and operating an open or piped drain to receive surface waters is a "diversion" of those waters. There is surely good reason to suppose that so wide an interpretation, which would cover the most innocuous operations of thousands and thousands of home gardeners, is not correct. Society may well have an interest in the act of discharging surface water but none generally in controlling the preceding process of merely collecting the water. Any circumstances where such control is desirable are sufficiently covered by the extended notion of "discharging" in s 34 (3). It is suggested that "to divert" in s 21 (1) means "to alter an existing defined course". Cf 2 Otago LR at 24-25. (The meaning of "to divert" in the subsection is briefly considered by No 1 Town and Country Planning Appeal Board in *Rotorua Conservancy Fishing and Shooting Federation v Bay of Plenty Catchment Commission* (1973) 4 NZTPA 427, 428.)

"(1) Every person commits an offence against this Act who, otherwise than as authorised by or under this Act or in accordance with an exception from the provisions of this Act—

"(a) Dams any river or stream; or

"(b) Diverts any natural water or discharges any natural water or waste into any natural water; or

"(c) Takes or uses any natural water; . . . .

"(3) For the purpose of this section a person shall be deemed to discharge natural water or waste into natural water if he places or causes to be placed any natural water or waste in a position where it is liable to fall or descend, or be washed or to percolate into or to be carried by wind, tide, or current, into any natural water."

Despite the opening words "for the purpose of this section" it seems impossible to read subs (3) otherwise than as in effect controlling the meaning of discharge into natural water for the purpose of s 21 (1) as well. This does not seem very satisfactory. Section 21 (1) is a provision taking property rights and as such is to be construed strictly. Surely Parliament should not attempt to clarify an ambiguity in it in this offhand way, merely by an addition to the offences section.

At all events it is at least clear from s 34 (3) that the passive exercise of the natural drainage servitude, the mere permitting of surface water to flow to the lower land of another, without active concentration by the higher owner, cannot be a right to discharge which is taken by s 21 (1).

On the other hand, nearly all other instances of discharging natural water on to land, whether one's own land or the land of another under natural servitude or by right acquired as an easement, is a discharge into natural water and therefore taken by s 21 (1). For even if there is no immediate body of receiving water, the discharge must nearly always be liable to percolate into receiving water, at least ultimately.

Summarising the effect of the Act, and referring to some sections which need not be examined in detail here, one may say that the substance of the rights taken and vested in the Crown can now be exercised by an owner only if—

(a) either of the provisos to s 21 (1), shortly to be discussed, applies; or

(b) the right as an existing right was duly saved either by the giving of notice to the Regional Water Board before 1 April 1970 or by the proviso to s 21 (2) making notice unnecessary in certain cases; or

(c) there is a sufficient general authorisation under s 22; or

(d) the right has been granted to the owner by the Regional Water Board or duly transferred to him.

In "owner" one must of course include one lawfully exercising the rights in question over the land of another.

Savings and provisos to s 21 (1)

It would be late in the day to describe now the procedure by which, in terms of s 21 (2), existing rights could be saved by notification to the Regional Water Board before 1 April 1970; though of course whether or not they have been so saved remains an important question to be answered if the substance of the rights is sought to be exercised(*o*).

Of the actual provisos to s 21 (1) the first, authorising the use of sea water, needs no comment. The second raises some difficulty. It will be noted that the proviso certainly preserves the substance of the riparian owner's right to take stream water for the "ordinary" purposes of domestic use and watering stock, and fire-fighting as a further ordinary purpose especially important in this country. The authority given by the proviso is however not limited to riparian water but extends to *any* natural water. This tends to suggest that "any person" mentioned in the proviso is also to be taken widely, to include not only any owner seeking to use natural water on his own land but anyone (for example, a neighbour) to whom he gives an easement or licence to convey the water. (That such an easement may be acquired compulsorily we shall shortly note.)

On a narrow interpretation(*p*) "any person" means only any owner in respect of his own land. More narrowly still, perhaps the proviso merely restores to the riparian owner the substance of his right to use riparian water for "ordinary" purposes taken from him under s 21 (1). The difficulty of interpretation has been mentioned by the No 1 Town and Country Planning Appeal Board in *Greensill v*

(*o*) As to the role of the Regional Water Board in determining questions of law in relation to the notification of rights, see *Glenmark Homestead Ltd v North Canterbury Catchment Commission* [1975] 2 NZLR 71.

(*p*) Formerly favoured by the present writer. See Goodall and Brookfield, *Conveyancing* (1972) 3rd ed 167, note (*z*).

Northland Catchment Commission (1971) 4 NZTPA 59, 62, as needing to be authoritatively determined. In a recent important decision on some aspects of the Act (not on the whole relevant to this article, except on the extent of common law riparian water rights), *Glenmark Homestead Ltd v North Canterbury Catchment Board,* Macarthur J referred to the proviso as "preserving one of the major common law rights of riparian owners" but it was unnecessary for him to consider whether the proviso goes further than that.

Nature of rights granted or authorised under the Act

They appear to be statutory licences(*q*), now transferable under s 24A added by the Water and Soil Conservation Amendment Act 1969. Where they are granted to someone other than the owner of the land over which they are granted or authorised they clearly encumber the title to that land. Thus, if the Regional Water Board grants A the right to discharge surface water into a watercourse on B's land or to take natural water from a source on B's land, the right so granted (which would have been an easement if granted before the Act between individuals) encumbers the title to the land once it can be effectively exercised. Surely there is no doubt such rights override the indefeasibility provisions of the Land Transfer Act. But in nearly all cases to give effect to a right under the Water and Soil Conservation Act to take natural water from, or to discharge natural water into natural water on, the land of another, the grantee needs an easement from the owner of the servient land to enable the water to be conveyed from the point of taking or to the point of discharge. (As we saw the right to convey water is not taken by s 21 (1) and may still be exercised by a landowner or granted by him, as an easement, to another person.)

Registration of an easement to convey water points to the possible existence of rights under the Act. But there must be some cases where an easement to convey is not necessary; for example, where the source of the water or the point of discharge into natural water is practically on the boundary of the servient land. It is a serious matter in such cases that nothing will appear on the Land Transfer register to indicate the existence of rights under the Act.

It is of great importance that an easement to convey water to enable effect to be given to a right under the Act can now be acquired compulsorily under s 24H added by the Water and Soil Conservation Amendment Act 1971. One may suppose the case where the Regional Water Board has granted A the right to take natural water from a source on B's land but B denies A the necessary easement to convey the water. Under s 24H, A may, through the Minister of Works and Development, use the provisions of the Public Works Act 1928 to acquire the easement he needs.

One should note, however, the proviso to s 24H (2):

> "Provided that the power conferred by this section shall not be exercised unless the taking is in the Minister's opinion in the national interest by reason of it enabling the better utilisation of the land of the applicant and the increase of the productivity of that land or of any industry or activity for which that land is used or to be used."

The subsection almost echoes the seventeenth century dictum referred to earlier, that water is "necessary for the preservation of the commonwealth". If, in terms of the proviso, the national interest requires it, the common use of water may be ensured compulsorily.

Priority between competing rights and interests

How are the competing interests of those having or seeking access to the same body of water and those likely to be affected by operations authorised under the Act reconciled? The problems have been usefully discussed by the No 1 Town and Country Planning Appeal Board in *Stanley v South Canterbury Catchment Board* (1971) 4 NZTPA 63, 68. Clearly the safeguard for one who considers he is in any way adversely affected by rights applied for under the Act is the right of objection and appeal under ss 24 and 25, although one may add that in matters not covered by the Act he should still have the same remedies as before the Act—such as, for example, the right to enjoin an upstream obstruction.

As the Board pointed out in the decision just mentioned, rights to take water granted or authorised under the Act carry no guarantee that water within the limits approved by the Board will in fact be available, and priority between competing takers will be fixed de facto by the relative positions (upstream or downstream) of the points of taking respectively authorised.

(*q*) See Brookfield, [1968] NZLJ at 443-445; 4 NZULR 131.

The changed duties of the conveyancer as they result from the Act

If acting for the purchaser of land, he needs to search the Regional Water Board's records (required to be kept under s 21 (4))—*First,* to ascertain if the rights to any use or discharge by the vendor of water on the land (if within the rights taken by s 21 (1)) have been preserved by notice or duly granted or otherwise authorised under the Act and, *Secondly,* to ascertain the existence and extent of any water rights over the land, granted or authorised under the Act for the benefit of the owner of other land or any other person.

He must see to it that any rights of the first class just mentioned, that is, for the use or discharge of natural water on the land to be purchased, are duly transferred. Provision for this may well be necessary in the agreement for sale and purchase(*r*). Where there is an unauthorised use or discharge of water by the vendor, the agreement for sale and purchase will (unless the purchaser is willing to discontinue the unauthorised practice) have to be conditional on the position being put in order by a proper grant by the Regional Water Board.

Finally and generally, in any arrangement for rights in relation to water, the conveyancer must ensure both that any necessary grant is made by the Board and that, as between the parties, the water easement is expressed in terms that are consistent with the Act(*s*).

(*r*) See Goodall and Brookfield, op cit, 80-81. The transfer must be notified to the Regional Water Board: Water and Soil Conservation Act 1967, s 24A (2).

(*s*) Goodall and Brookfield, op cit, 164-165, 167-168. As to note (*z*) at 167, see above in the present article.

WATER QUALITY AND THE WATER AND SOIL CONSERVATION ACT 1967

By MR D A R WILLIAMS, *an Auckland practitioner with wide experience in environmental law.*

Although New Zealand is generally favoured with abundant rainfall, the growing demand for water is tending to outrun the available supplies. Even where sufficient water is available to meet foreseeable demands, deterioration of water quality is a serious problem and in many areas public water supplies require significant improvement if they are to meet World Health Organisation standards(*a*). Public concern is mounting over the threat which pollution poses to recreational uses of water. For all these reasons it is clear that lawyers will be called upon to advise upon water resource problems to a much greater extent in the future(*b*).

The current transformation

The earliest efforts in New Zealand relating to water pollution were directed to the prevention of water borne disease. But gradually it came to be appreciated that a much more comprehensive approach to water pollution problems was required(*c*). At the present time, water law in New Zealand is undergoing a major transformation. Until the introduction of the Waters Pollution Act 1953 legislative intervention had been minimal. While there were a number of earlier statutes which contained provisions dealing with the use of water (for example, the Land Drainage Act 1908, the Public Works Act 1928, the Municipal Corporations Act 1954, and the Counties Act 1956) water law consisted primarily of principles laid down by the English Courts which governed the use of water by riparian owners and regulated the rights of competing land owners(*d*). Water law was basically a branch of private law, a special branch of the law of property. Rules were developed to determine how private rights to water were to be acquired,

(*a*) See generally *The New Zealand Environment* National Report to the UN Preparatory Committee for the 1972 Conference on the Human Environment, Stockholm.

(*b*) See Richard Bellamy, "About Water" (1974) No. 35 Town Planning Quarterly 17.

(*c*) See G A Knox, "Biology and Chemistry of Water" Paper given to 1970 Water Conference of NZ Institution of Engineers and Royal Society of NZ and printed in Proceedings Part III of that Conference p 55.1-55.27.

(*d*) On the nature of riparian rights in New Zealand and the effect thereon of the Water and Soil Conservation Act 1967, see the recent judgment of Macarthur J in *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71.

validated, and held or lost. Considerations of social utility, while not wholly absent, were taken into account only indirectly.

Not surprisingly, these traditional doctrines were found inadequate to deal with the complexity of modern water resource problems. Governmental regulation, at first somewhat unsophisticated and unrealistic (Waters Pollution Act 1953)(*e*), but subsequently of a more comprehensive nature (Water and Soil Conservation Act 1967 and amendments) inevitably followed. Before examining the principal features of the 1967 legislation, it is desirable to consider briefly some basic biological, chemical, and physical processes that affect water quality and to outline the major types of pollutants and the traditional methods of dealing with them.

Natural processes and water pollution—some basic concepts

The best short summary concerning natural water pollution is to be found in the First Annual Report of the Council on Environmental Quality:

> "Organic wastes decompose by bacterial action. Bacteria attack wastes dumped into rivers and lakes, using up oxygen in the process. Organic wastes are measured in units of biochemical oxygen demand (BOD), or chemical oxygen demand (COD), both measures of the amount of oxygen needed to decompose them. The COD measure is more inclusive than BOD, but BOD is much more commonly used. Fish and other aquatic life need oxygen. If the waste loads are so great that large amounts of oxygen are spent in their decomposition, certain types of fish can no longer live in that body of water. A pollution resistant, lower order of fish, such as carp, replace the original fish population. The amount of oxygen in a water body is therefore one of the best measures of its ecological health.
>
> "If all the oxygen is used, an anaerobic (without air) decomposition process is set in motion with a different mixture of bacteria. Rather than releasing carbon dioxide in the decomposition process, anaerobic decomposition releases methane or hydrogen sulfide. In these highly polluted situations, the river turns dark, and odors—often overwhelming—penetrate the environment.
>
> "Heated water discharged into lakes and rivers often harms aquatic life. Heat accelerates biological and chemical processes, which reduce the ability of a body of water to retain dissolved oxygen and other dissolved gases. Increases in temperature often disrupt the reproduction cycles of fish. By hastening biological processes, heat accelerates the growth of aquatic plants—often algae. Finally, the temperature level determines the types of fish and other aquatic life that can live in any particular body of water. Taken together, these effects of excess heat operate to change the ecology of an area—sometimes drastically and rapidly.
>
> "One of the most serious water pollution problems is eutrophication—the "dying of lakes". All lakes go through a natural cycle of eutrophication, but normally it takes thousands of years. In the first stage—the oligotrophic—lakes are deep and have little biological life. Lake Superior is a good example. Over time, nutrients and sediments are added: the lake becomes more biologically productive and shallower. This stage—the mesotrophic—has been reached by Lake Ontario. As nutrients continue to be added, large algal blooms grow, fish populations change, and the lake begins to take on undesirable characteristics. Lake Erie is now in this eutrophic stage. Over time, the lake becomes a swamp and finally a land area.
>
> "Man greatly accelerates this process of eutrophication when he adds nutrients to the water—detergents, fertilizers, and human wastes. He has done this in Lake Erie and countless other lakes. Man's action can, in decades, cause changes that would have taken nature thousands of years."(*f*)

Waste water treatment

Waste water treatment can be broken into three distinct stages which provide progressively increasing degrees of pollutant removal. Treatment costs generally increase with the addition of each stage and, for this reason, many communities in New Zealand have only primary treatment systems. The following analysis, based upon the US Environmental Protection Agency publication, *A Primer on Waste Water Treatment*(*g*) may be helpful:

1 *Primary Treatment*

Primary treatment consists of separating the water from solid matter by letting the solids

(*e*) On this Statute see *Huntly Borough v Williams* [1974] 1 NZLR 689 (CA).

(*f*) First Annual Report of the Council on Environmental Quality USA (1970) 30-31.

(*g*) Environmental Protection Agency USA, "Primer on Waste Water Treatment" (1971) reproduced in A W Reitze *Environmental Law* (2nd ed) (1972), pages Four-2-Four-4.

settle or removing any floating scum. This operation is normally carried out in a series of steps.

(1) *Screening*—Large floating objects are removed by passing the waste water through screens. Some plants use a device called a comminuter, which screens and grinds the material. The shredded or ground material remains in the water to be removed later in a settling tank.

(2) *Grit removal*—Sand, grit, cinders, and small stones are allowed to settle to the bottom of a grit chamber.

(3) *Sediment removal*—Sewage, even after removal of grit still contains suspended solids. These will settle in a sedimentation tank. The suspended solids settle out if the speed of sewage flow is reduced. This is accomplished in a sedimentation tank. The suspended solids settle out and the solid mass, called raw sludge, is collected for disposal.

Primary treatment is completed when the effluent, from which grit and sludge have been removed, is treated with a chlorine disinfectant before discharge into a stream or river.

2 *Secondary treatment*

Secondary treatment utilizes micro-organisms to break down organic matter which has passed unaffected through the primary stage. Two processes are currently available for secondary treatment: the trickling filter and activated sludge processes.

A trickling filter is simply a bed of stones and gravel 3 to 10 feet deep, through which the sewage passes slowly. Bacteria gather and multiply on the stones and gravel until they become numerous enough to consume most of the organic matter in the sewage. The water, after passing through the activated bed, trickles out through pipes in the bottom of the filter.

In the activated sludge process, the rate of bacterial action is increased by bringing air and bacteria-laden sludge into very intimate contact with the sewage. Sewage, air and activated sludge remain in contact for several hours in the aeration tank. During this time, the organic wastes are broken down by bacterial action.

The sewage flows from the aeration tank into another sedimentation tank, where the solids are removed. Chlorination completes the basic secondary treatment. The sludge, which contains the bacteria, can be used again by returning it to the aeration tank and mixing it with new sewage and air or pure oxygen.

3 *Advanced treatment*

Conventional biological treatment processes are unable to remove inorganic compounds and "biologically resistent" organic materials. Where a very high quality effluent is desired, it is necessary to remove these substances through a third treatment stage. Advanced treatment techniques under investigation range from extensions of biological processes capable of removing nitrogen and phosphorous nutrients, to physico-chemical separation techniques such as absorption, distillation, and reverse osmosis.

The Water and Soil Conservation Act 1967

The elimination of the old private water rights and the creation of a complicated administrative structure were the features of the Water and Soil Conservation Act 1967 which received closest attention from legal commentators.

On the first aspect, Mr B H Davis in his article "New Control Over Natural Water"(*h*) emphasised the radical changes that had been made. He said:

> "While the administrative aspect of the Act is important, it is submitted that perhaps the most important part of the Act is contained in ss 21-26, the sections which deal with the private use of water, and which, as suggested earlier, impose a kind of town planning control on water usage. The common law rules have been almost, if not entirely, superseded now by a statutory control, but before examining the statutory provisions, it may be useful to recall briefly the common law rights affected. It is possible to divide the common law rights relating to the use of water into two categories: (a) natural rights and (b) acquired rights.
>
> ". . . These then are the rights and duties removed by the Act. The Act applies to all kinds of natural water, however, and not merely to natural watercourses, or surface

(*h*) B H Davis, "New Control over National Water" [1968] NZLJ 105. But the analogy to town planning is dubious—a classification is not explicitly a goal—oriented water use plan. On this see E D Revington, "Classification of Water" Paper delivered to Conference of New Zealand Institution of Engineers, February 1975 and compare the very explicit targets contained in the Federal Water Pollution Control Act Amendments 1972 USA which provides that effluent limitations must require the application of "best practicable" control technology by 1 July 1977 and that by 1 July 1983 effluent limitations must require use of the "best available" technology.

water. For the purpose of the Act, natural water means "all forms of water, including fresh water, ground water, artesian water, sea water, geothermal steam, water vapour, ice and snow that are within the outer limits of the territorial sea of New Zealand; but it does not include water in any form while in any reservoir (not being an aquifer) used for water supply purposes of any public authority, or in any pipe, tank or cistern.

"From 1 April 1968, certain rights to use all natural water, except in this case sea water, will cease to be vested in the riparian landowners but except as expressly authorised by the Act or any other act, shall vest in the Crown. The rights affected are the rights (a) to dam any river or stream; (b) to divert or take natural water; (c) to discharge natural water (including sea water) or waste into any natural water; and (d) to use natural water (s 21 (1)). This latter seems to be a general provision which vests in the Crown all rights to use natural water, although ownership of river beds is not affected by the Act."

These views on the effect of the new Act were not completely accepted by Professor Brookfield(*i*) and I have no doubt that he will deal with some of these issues in his Paper on *Conveyancing Aspects of Water Rights* which is to follow.

On the second aspect, the administrative structure created by the Act, there has been considerable criticism concerning the complex bureaucratic structure created to administer the legislation. This is not the occasion to examine such criticism but readers are referred in particular to the well known address of Sir Guy Powles to the Physical Environment Conference in 1970(*j*).

The transformation of water law from a division of private law to a branch of public law is far from complete. The statute has been extensively altered and amended and the elusive nature of these amendments has been the subject of much adverse criticism. For a considerable period it was virtually impossible to even read the Act without extreme difficulty but, fortunately, it has now been reprinted. While it might be thought to be reaching a final form after the introduction of very important provisions in 1971, it is by no means the case that a settled body of law has emerged.

To underscore the existing uncertainties, one need only mention the existence of an ad hoc working party which is presently reviewing the Act and also refer to the sharp differences of opinion which have arisen in the *Southland*(*k*) and *Bay of Islands* (*l*) cases. In these cases the No 1 Town and Country Planning Appeal Board has adopted interpretations of the Act which apparently conflict with those of the Water Resources Council. Appeals to the Supreme Court are pending.

In this situation I do not propose to advance any final opinions as to the correct interpretation of the legislation. I will, however, refer to a number of decisions and endeavour to extract some tentative principles which appear to have gained a measure of acceptance and which may be important in practice.

The classification system

Under the Act a classification is required to be a declaration of the minimum standards of water quality at which the water in a particular place is to be maintained in order to promote, in the public interest, the conservation and best use of that water.

Stated simply, the objective of the classification system is to regulate the nature of the use of all natural water and to provide a broad blueprint against which the Regional Water Boards are required to discharge their responsibilities in granting water rights. However, the process of classification bristles with difficulties largely because of the way in which it is expected to satisfactorily reconcile the many conflicting claims relating to the use of natural water. The preamble to the Act mentions the diverse conflicting interests. It reads as follows:

"An Act to promote a national policy in respect of natural water, and to make better provision for the conservation, allocation, use, and quality of natural water, and for promoting soil conservation and preventing damage by flood and erosion and for promoting and controlling multiple uses of natural water and the drainge of land, and for ensuring that adequate account is taken

(*i*) F M Brookfield, "Water Rights and the Water and Soil Conservation Act" [1968] NZLJ 441 and F M Brookfield, "The Water and Soil Conservation Act 1967 and its Application: An attempted Guide for the Practitioner" (1969) 2 Otago Law Review 21.

(*j*) Sir Guy Powles, "Environmental Control: The Rights of the Individual Citizen" [1970] NZLJ 469.

(*k*) *Minister of Agriculture and Fisheries and Others v Water Resources Council,* decision of No 1 Town and Country Planning Appeal Board in Two Parts dated 14 June 1974 (Status to Appeal) and 26 July 1974 (Merits).

(*l*) *Bay of Islands County Council v Dalton and Others,* decision of No 1 Town and Country Planning Appeal Board in Two Parts dated 14 June 1974 (Status to Appeal) and 9 September 1974 (Merits).

of the needs of primary and secondary industry, water supplies of local authorities, fisheries, wildlife habitats and all recreational uses of natural water."

As might be expected, proponents of these clashing interests often adopt differing approaches to the question of pollution control and water use. Dr A R Bellamy has summed the arguments up well in the following extract from his recent article, "Water Classification"(*m*):

". . . the concept of an optimum level of pollution for the nation's waterways and the use of water as a waste disposal and transport mechanism is firmly established in the minds of many engineers and industrialists. However, increasingly, other groups such as planners, biologists and members of the public are now prepared to question and occasionally vigorously challenge the various assumptions on which such a concept is based. An increased awareness of environmental matters and the growth in water-based recreation has resulted in an increased public demand for the maintenance of high water quality and the abatement of existing pollution . . . . . there is reason to doubt that the classification standards detailed in the Act are sufficiently well defined to ensure that water of existing high quality is maintained in that state."

The Southland decision(*k*)

The decision was in two parts, the first relating to the status of the several appellants to appeal and the second dealing with substantive objections to specific parts of the final Southland Classification. I propose to deal with the latter first and because of the great importance of the Board's decision I will quote from it at some length.

The Board observed that classifications of water were formerly made pursuant to the Water Pollution Act 1953 and the Waters Pollution Regulations 1963. By the Water and Soil Conservation Amendment Act (No 2) 1971 the Waters Pollution Act 1953 was repealed and the regulations made thereunder revoked.

The Board noted that the Southland classification was the first to have been prepared and promulgated wholly under the new classification provisions introduced by the 1971 No 2 Amendment and it stated that it was "important that we examine and discuss the present requirements of the law concerning classification of water". Later in the judgment the Board reached the conclusion that the Water Resources Council, in preparing the classification, had not given sufficient weight to the changes which had been introduced by the new legislation.

The Board then recorded the basis of classification put forward by the Water Resources Council:

"4. Counsel for the respondent pointed to the fact that by s 26c the respondent is empowered, after considering any investigation carried out under s 26A into the quality of natural water, to classify that natural water; and that a classification must be in accordance with one of 4 specified classes (for inland waters) or in accordance with one of 5 specified classes (for coastal waters). He further pointed out that each of the classes specifies certain parameters indicative of water quality; that certain of the classes specified under the Waters Pollution Regulations were intended (by virtue of specific provisions in the Regulations) to permit a specific use of the waters so classified; and that the present legislation does not now specify the uses for the various classes of water. He informed us that the respondent, at its inaugural meeting (after the coming into force of the Water and Soil Conservation Amendment Act (No 2) 1971), resolved as follows:

" 'To adopt in general the previous criteria for water classification but to require that water of a higher natural standard and which is a significant scenic, recreational or other high quality use be classified at a standard higher than D."

"Thus, and to use his words, 'the basis of classification established by the (respondent) is one in which certain minimum standards such as Class D, class SD, and class SC are used for water where general uses of the water predominate with the higher minimum standards being used for those specific areas where the water use requires a higher standard'.

"It is also relevant to record the statement of Counsel for the respondent that: 'Classification is aimed at pollution control. The bringing down of a classification is the first step in achieving control of polluting discharge'." (at A 1362).

After referring to the objects and intent of the Act as summarized in the long title the Board proceeded to examine closely numerous

(*m*) Richard Bellamy, "Water classification" (1974) No 37 Town Planning Quarterly 18, 19.

provisions of the Act and then reached the crux of its decision in the following passage:

"11. Section 26H says expressly that a classification is a declaration of the *minimum standards of quality* at which the waters being classified shall be maintained in order to achieve the object mentioned in para 10 above.

"Therefore in our opinion it is not sufficient to say simply that: 'Classification is aimed at pollution control'. If pollution be defined as 'the use of natural water by mankind to carry away and dispose of waste', then one of the results of the classification of particular waters will be a better control of the pollution of those waters and possibly the reduction or termination of pollution thereof. The use of natural water to carry away and dispose of waste is recognised by the Act, but it is only one of the uses so recognised.

"12. Clearly, in the context of the Act as a whole, the classification of water is:

"(a) an aid to the preservation of those waters in good condition so that the waters may be used to the best advantage; and

"(b) a guide to the suitability of waters for particular purposes and functions (including, but extending beyond, their use and capacity for carrying away and disposing of waste).

A classification is essentially a declaration of a minimum desired water quality. That desired quality may be the actual present quality of the water being classified, or it may be a higher or a lower quality. If it is a higher quality, it must be a quality which is achievable by the control or abatement of pollution and/or by the regulation of the activities carried on upon the land in the catchments contributing to the volume of the water being classified. (For it seems that in fixing on a minimum desired water quality, some regard must be had to such existing and prospective activities).

"13. A classification will be of particular interest to those responsible for preparing and implementing water pollution control programmes, because one of the principal functions of such a programme is the control and abatement of waste discharges, present and future, in order that aesthetic, environmental and public health requirements shall be maintained and in order that waters are protected for multiple use. But a classification will be of interest to many other sections of the community as well."

Then in a crucial passage the Board stated:

"14. In our opinion the process of classification called for by the Act requires *first an inquiry into the existing quality of the water being classified.*

"*If the existing quality of the water is found to be high, then the classification should reflect that existing quality,* unless it is demonstrated that in the public interest there should be the freedom to lower the quality in the future in order that the water may be put to the best advantage, while still maintaining it in good condition.

"*If the existing quality of the water is found to be low, then an inquiry should be had into the cause of the low quality.* If the cause is found to be "pollution" and if the public interest requires that the quality of the water should be raised in order that the best use may be made of it, *then the classification should ideally reflect such higher desirable quality as is achievable* through the abatement or reduction of "pollution"; *but realistically it may have to reflect such quality as may be expedient in the foreseeable future* through such pollution control measures as are practicable." (at A 1365)

Having thus established the proper basis for classification, the Board decided that the principle inadequacy in the criteria adopted by the Water Resources Council was that it permitted the classification as Class D or Class SC or SD large bodies of water where general uses of the water predominated. Such an approach, said the Board, inferred that it was permissible in the future to reduce the actual quality of those waters to the minimum standards specified by the classification, even though the present actual quality of those waters might qualify them for a higher classification. The Board found that the criteria adopted permitted a classification to be given without there having been any prior examination of the question of whether there was likely to be any necessity to permit the lowering of the actual quality of those waters in the future.

The Board therefore concluded that the criteria adopted by the Water Resources Council were rooted in the Waters Pollution Act 1953 and the Waters Pollution Regulations 1963 and that the Water Resources Council had not fully appreciated the changes in the law effected by the 1971 (No 2) Amendment. In making this point, the Board noted that

under the Waters Pollution Regulations, classifications were based on the actual use being made of the water and were directed *only* toward the prevention or mitigation of pollution of water.

The Board then noted the introduction in 1971 of Class SE waters for coastal areas. No standards were specified for SE waters. The Board held that Class SE must be used only in exceptional or unusual situations and when the maintenance of the minimum standard of quality in the water so classified is not of public importance. However, the Board sounded a note of warning against an over-liberal use of Class SE. It pointed out that waters should be so classified only if the resulting degradation in their appearance *"will not be a public affront"*. One may sympathise with the administrators and engineers who will have to make sensitive judgments as to when a "public affront" is or is not created.

Having outlined the correct approach, the Board then considered the specific appeals lodged by the Southland Acclimatisation Society and the Southland Skindivers Club. The latter appeal was partially successful. The result of the appeals in these cases to the Supreme Court will be awaited with great interest but, irrespective of the outcome in the Supreme Court, it is clear that the public (and Parliament) will still have to decide what is to be the true basis of future water resources planning and whether the classification system, as it stands, has any prospect of achieving the goals outlined in The Water and Soil Conservation Act.

Having concluded this brief analysis of the classification system I now pass to consider the decisions relating to water rights.

Water rights

While the introduction of a statisfactory classification is of great importance, the role of the Regional Water Boards in determining applications for water rights is probably of equal significance. Mr I W Gunn, Senior Lecturer in Civil Engineering at Auckland University, has placed great stress on the importance of the grant of water rights by Regional Water Boards. In a recent article(*n*) he said:

> "The classification is but a plan for pollution prevention and the real task of accomplishing water quality improvement is in the control of effluent quality which is the responsibility of the Regional Water Boards."

The first reported decision is *North Canterbury Acclimatisation Society v North Canterbury Catchment Board* (1970) 3 NZTCPA 329. In that case the Ellesmere County Council, being desirous of constructing a sewage system to serve Leeston County Town, adopted a design prepared by its Engineer. The design required that during part of the winter when the oxidisation ponds could not be used effluent would be discharged from the ponds at a specified point into the Leeston Creek which flowed into Lake Ellesmere. The Board granted the County a right to discharge subject to certain conditions. The Acclimatisation Society appealed. The Board said that the proper approach was to balance the competing interests of the parties and decide accordingly. It said:

> "One of the demands made on natural water (recognised by s 21 (3) of the Act) is to use it as a means of conveying away waste. Therefore *this Board holds that its function on this appeal is to balance the interests of the County, which wishes to use Leeston Creek as the vehicle for conveying away some of the effluent from the Leeston oxidation ponds, and the public interest in protecting the creek and Lake Ellesmere from the effects of such waste.*
>
> "The Board finds that the environmental sanitation of Leeston which has a present population of approximately 800, is very poor due principally to the unsuitability of the surface soils to accept normal house drainage wastes and septic tank effluent. Because of the unsuitability of the surface soils, some wastes and effluent are taken below them into a water bearing stratum, from which water is taken for household supply. It is therefore in the public interest that the township should install a public sewage system. The system adopted by the County is estimated to cost approximately $200,000. The construction of storage tanks to hold effluent during periods when flood irrigation is impossible would cost from $7,000 (for one month's storage) to $16,000 (for 4 months' storage) with some slight increase in annual operating costs, and some residual right to discharge into the creek would be necessary to cope with emergency conditions. The cost of piping all effluent to a site approximately two miles away to a point where it could be disposed of all the year around by flood irrigation and the net additional land acquisition cost, was variously

(*n*) I W Gunn, *Auckland Star,* Tuesday, 6 August 1974.

estimated at between $15,000 and $40,000 and the extra operating costs as from $600 to $1,500 pa. It was proved to the Board that in the present state of knowledge the costs of the chemical processing of waste water for nutrient removal are such that it is not an available alternative in the present case.

"This Board returns now to consider the question whether the discharge of sewage effluent from the proposed Leeston outfall in the volume contemplated by the County will tend to bring about conditions which will lead to increased algal activity in the lake." (at p 330)

The Board was faced with the familiar problem of insufficient scientific evidence. It stated:

"The consensus of scientific opinion given to the Board in this case is that there is at present nowhere near sufficient data to determine when nuisance conditions or deoxygenation is likely to occur in Lake Ellesmere and that it would take several years' investigation to obtain all relevant data before any conclusions could be drawn.

". . . The Board *is not satisfied on the evidence that it can be said with any degree of scientific certainty that Lake Ellesmere is in a critical condition as alleged by the appellant;* the position however, is such that it calls for watchfulness and for continued urgent scientific investigation. The further nutrient enrichment of the lake may lead to conditions having far-reaching and disastrous consequences, but it cannot be said at the present time just when these conditions are likely to occur.

"In the meantime in view of the number of factors likely to contribute to conditions conducive to algal growth, the small quantity of nutrient likely to enter the lake from the proposed sewage outfall in relation to the total nutrients entering the lake, the steps being taken to dispose of the effluent by flood irrigation for the greater part of the year, the expense of providing year-round disposal by other means, the conditions imposed on the grant by the respondent and the limited term of the grant itself, this Board is of the opinion that, in this case, the grant appealed against should be upheld and the appeal dismissed.

". . . The Board thinks it desirable to record specifically that the scientific evidence placed before it was based on the present state of scientific knowledge; and to draw attention to the fact that the grant appealed against is for a term of 5 years." (at p 330-31)

In the North Canterbury case, involving the right to discharge waste into natural water, we see that the burden of uncertainly was imposed upon the objectors. Because they could not show with any degree of scientific certainty that Lake Ellesmere was in a critical condition, the Board apparently considered that the right had been properly granted. This, in effect appears to establish the principle that there is a prima facie entitlement to a water right in such cases because one of the demands made on natural water is to use it as a means of conveying away waste. This observation receives support from the next case *Henderson v Water Allocation Council* (1970) 3 NZTCPA 3 where the Board made it clear that the onus was on the objectors to show the possibility of detrimental effect. The Board also dealt there with another ground of appeal, namely that:

"(d) The grant of the right would be contrary to the intent and purpose of the Water and Soil Conservation Act 1967 in that:

"(i) There appears to be no policy, scheme or plan guiding the Council in its decision.

"(ii) No policy or direction having been set down to guide the future decisions of the Council and regional bodies relating to this area, a maximum level of discharge of effluent into this creek should have been prescribed in this decision.

"(iii) There are feasible alternatives to disposal of the sewage effluent from the subdivision into the creek which make better provision for the quality of natural water and take better account of the recreational uses of the natural water in the creek and near its mouth." (at p 327)

The Board said as to ground (d) that:

"Evidence was given that the respondent has found that it cannot adopt a uniform policy on the granting of rights to discharge waste, but has to deal with each case on its merits. Having considered the provisions of the Act, this Board can see no objection to that course in respect to applications for rights to discharge waste. The appellant's objection that no maximum level of discharge of effluent has been prescribed appears to be directed to the possibility that if and when further residential development occurs in

Pukerua Bay, an application to discharge more sewage effluent into the creek will be made. That may well be so, *but the granting of this application will not be a precedent for the granting of any further applications. Any such further applications will have be judged taking into account whatever rights then exist, and if the grant of new and additional rights is likely to bring about such a change in the quality of the receiving waters that undesirable effects will follow that may well be grounds for refusing the new and additional rights.*

The appellant asserted that there are other available methods of disposing of the sewage effluent. Counsel for the Hutt County Council argued that even if that is established it is not relevant to the considerations of this Board. The Board rejects the argument of the County Council. It appears to this Board that where it is found that a proposed discharge of waste is likely detrimentally to affect the receiving waters *the Act requires the responsible body considering the application to take into account, in balancing the competing interests referred to above, the possibility and cost of alternative methods of disposing of the waste in question or of abstracting it from the effluent prior to discharge.*

"The Board considers it desirable to record specifically that the scientific evidence placed before it was based on the present state of scientific knowledge, and to draw attention to the fact that the grant appealed against is for a term of 5 years." (at p 328)

The next case *Greensill v Northland Catchment Commission* (1971) 4 NZTPA 59 involved rights to take or divert natural water and the approach of the Board may be contrasted with that adopted in the *Henderson* and *North Canterbury* cases. Mr Greensill appealed against the refusal of the Commission to grant his application for the right to take 1.8 million gallons of water per annum from a lake for the irrigation of grassland and crop. The lake had some use for recreational purposes. The Board traversed a range of relevant considerations but was hampered by the lack of information, especially records as to water quantities. The Board laid down the following principles:

"(a) *Every applicant for the right to take natural water must show amongst other things the extent to which the use of the water applied for will be beneficial to him.* Only then will it be possible to judge what, in all the circumstances, will be the most beneficial use of the water.

"(b) Section 26 of the Act requires that every Regional Water Board shall have due regard to the recreational needs and the safeguarding of scenic and natural features, fisheries and wildlife habitat. *This subsection does not create a priority in favour of the factors there mentioned but does require that they be given specific consideration in every case,* the conservtion of water for those purposes being one of the specific objects of the Act." (at p 61)

Because the lake was a static and limited source of water, no new rights, the Board said, should be granted until it could be shown that the level of the lake would still be maintained. Mainly because of lack of recorded information this could not be done and therefore the appeal was dismissed. Thus it appears that, in relation to the right to take natural water the burden is in the reverse direction, and the applicant does not start with any presumption in his favour. The Board said:

"The circumstances of this case are unusual in that the appellant seeks to take water from what is at the present time a static and limited source, the lakes not having overflowed for 14 years. The Board is unable to determine from the evidence whether, taking into account the present volume of artifical draw-off, the lake level is maintaining a natural balance over a period of time. If it is not, then the volume of water in the lakes is being depleted and the volume of water sought by the appellant, small though it is, will increase the rate of depletion. It is the opinion of this Board that taking into account the functions and duties cast upon the respondent by the Act, *new rights to take water from the lakes should not be granted until it can be shown that the lake level will on the balance of probabilities maintain a natural balance over a sufficient period of time, notwithstanding all the demands already made and the new demands intended to be made upon the lakes as an artificial source of water;* and that the respondent should actively pursue the collection and recording of all information relevant to determining the behaviour of the lakes as a water reservoir." (at p 62)

Stanley v South Canterbury Catchments Board (1971) 4 NZTPA 63 is of great importance in showing the manner in which tradi-

tional riparian rights have been altered by the Act.

Appeals were brought against the decision of the Board acting as the Regional Water Board, granting to the Mackenzie County Council the right, pursuant to s. 21 (3) of the Act, to dam, divert and take water from the Fairlie Creek subject to certain conditions. There was a remote possibility that in a time of shortage, no water would flow over the dam and the stream downstream of it would dry up. The appellants in one appeal watered stock in the latter part of the stream, and those in the other appeal drew their water supply from it via a water race. The latter appeal was settled by consent on the appellants being satisfied that provision for alternative supply was now adequate.

The Board held that Section 21 (1) of the Act extinguished the right which riparian owners previously had at common law to take natural water, but certain rights to take natural water were at the same time conferred on them and others, in a different form.

The Board noted that a fundamental change had been brought about by the provisions of the Act. By authorising the grant of rights to divert or take natural water to persons and for purposes not recognised by the common law, riparian owners can no longer maintain their right to receive the flow of a stream substantially undiminished. No compensation is paid to those adversely affected by rights to take water pursuant to the Act, but they do have the right to object and appeal against the grant of rights under the Act.

The Board stated that a grantee of a right to take natural water given under s 21 (3) of the Act has no guarantee of a priority for receiving the quantity of water specified in his grant. The quantity may be diminished by other lawful takers. But the grantee does have the right to object to and appeal against the grant of further rights under the Act. From the practical point of view a form of priority is created by the points at which persons lawfully entitled to take water in fact draw from a particular stream or river.

After referring to various parts of the Act the Board was of the opinion that when granting the right to take water from a river or stream the grant should be in such a form that provision is reserved for the reasonable needs of those already lawfully entitled to take water from points lower down in the river or stream than the proposed point of taking; and that due regard should be given to such future demands upon the waters of that river or stream as are reasonably foreseeable.

This case is of great importance because it spells out the way in which the Act alters and amends the common law rights of riparian owners to take and use natural water but at the same time indicates that some regard will be given to the needs of existing users(*o*).

The case of *Mahuta and Environmental Defence Society Inc v National Water and Soil Conservation Authority and Minister of Electricity* (1973) 5 NZTPA 73 is notable for its holding that where the Crown seeks a water right under s 23, the same conditions will be imposed upon the right as would have been required if the application had been made by a private individual under s 21. The Board was there dealing with the likely effects of the discharge of substantial volumes of heated water into the Waikato River. In the course of its decision, the Board made the important point that, in dealing with the appeals against the National Water and Soil Conservation Authority's decision to grant the right to the Minister of Electricity, it was not limited to an inquiry into the detrimental effect which the decision might cause to the appellants and to an adjustment of their interests. The Board stated that, provided the appellants (or any one of them) established that they had status to appeal, all questions raised by the application were opened to review. Therefore the Board had to take into account the respective interests of the appellants and the Minister as well as the public interest in attaining the objects of the Act. Thus the crucial question was "in all the circumstances was the respondent's decision to grant the Minister's application, upon and subject to the terms and conditions specified, correct; should the application have been refused or should it have been granted subject to more stringent terms and conditions?" The appellants succeeded in having the conditions of the water right made more stringent.

In *Rangiora Borough Council v North Canterbury Catchment Board and Regional Water Board* (1974) 5 NZTPA 129 the Board made a number of important points. First, the Board stated that the Act specifically recognised the use of natural water for carrying away and disposing of waste, in that it authorised the grant of rights to discharge waste. Section 21 (3A) specifically safeguarded the quality of the receiving water. But otherwise the Act does not specify expressly matters to which regard must or may be had in deciding upon applica-

tions for rights to discharge waste. Regard must therefore be had to the objects of the Act as a whole; and provided an application is within those objects and provided the requirements of s 21 (3A) can be met, the application should be granted. However, because of the requirements of s 21 (3A) questions of priority could arise, either between several applicants or between a new applicant and holders of rights already granted.

Next the Board observed that there was nothing in the Act to empower a Regional Water Board to require that before waste is discharged it shall be treated by a particular method, or even that it shall be treated at all. The Act is concerned with consequences to receiving waters, not with methods of treating waste.

The Board also held that s 21 (3A) (b) does not require account to be taken of the effect of any unlawful discharges. It must be presumed that the requirements of the Act will be complied with by those who seek to discharge waste, and that the provisions of the Act will be enforced against any unlawful discharges. In view of the generally inadequate enforcement efforts of Regional Water Boards this holding, with respect, appears somewhat unrealistic.

The Board decided that there is nothing in the Act to prevent the granting of a right to take effect from a future date.

Then the Board passed to consider the requirement of s 21 (3A) that such terms and conditions shall be imposed on the water right as may be necessary to ensure the maintenance of certain standards. In this respect the Board held that subs (3A) itself does not require a consideration of the question whether, from the point of view of the person desiring to make the discharge, compliance with the terms and conditions is practicable or not.

Finally, the Board dealt with the provisions of s 24J (extension of effect of temporary permits issued under Waters Pollution Regulations 1963) and decided that they are intended to give legal right to an anomalous situation for a limited period of time only.

There are, of course, mumerous other cases which have been decided on water rights but those I have mentioned appear to delineate most clearly the emerging principles.

Status to object and appeal

The recurring question of standing is obviously a matter of great importance to practising lawyers. Different terminology is used in different sections of the Act and great care must be taken to distinguish between the wording which appears in various places.

(i) *Preliminary classification*—The Act does not limit those who may make objections to or submissions in respect of a preliminary classification. The right to do so is open to the public at large.

(ii) *Final classification*—It should first be noted that it is not a condition precedent to the right to appeal against a final classification that the appellant was an objector to the preliminary classification. However, in the *Southland* and *Bay of Islands* cases(*k*) the appeal Board interpreted the Act as imposing certain limitations on the persons or bodies who may object to final classifications.

In the *Southland* case the Board observed that status to appeal against the final classification is conferred by subs (1) of s 26G to "any body or person claiming to be affected". After lengthy consideration of this general language and a comparison of other parts of the Act dealing with standing, the Board concluded that the phrase "any body or person" did not include Boards or Public Authorities. The Board felt that such organisations were supposed to participate in the preparation of the classification and it would therefore be incongruous to permit them to appeal against a final classification.

It was argued by the Water Resources Council that the phrase "any body or person claiming to be affected" did not permit a body of persons whether corporate or unincorporate to appeal on behalf of its members and that it did not permit a "representative" or "class" appeal to be prosecuted in the name of the representative alone. The Board rejected this submission and said that there was nothing in the statute to indicate that the affection complained of in s 26G (1) must be that of the Body in its own right and could not be that of its members or some of them so long as the members had a common interest which would be affected and that common interest was different from that of the public at large. The Board said that in this respect there was a difference between the position of certain Bodies appealing against a final classification and the position of an objector appealing against the grant of a water right under s 23. Applying these principles, the Board held that the Ministry of Agriculture and Fisheries, The Otautau Town Council, the Southland Catchment Board, the Fiordland National Park Board, and the Southland Section of the Royal

Forest and Bird Protection Society had no status to appeal but that the Southland Acclimatisation Society and the Southland Catchment Board did in fact have status to appeal. These principles were followed in the *Bay of Islands* case(*l*).

(iii) *Ordinary water rights*—Section 24 (4) confers the right of objection (and consequently of appeal) against the grant of an application made under s 24 upon "any Council, Board, Public Authority or person" and provides that objection may be made "on the ground that the grant of the application would prejudice (the objector's) interests or the interests of the public generally". Clearly no problem of standing will arise for objectors in this area.

(iv) *Crown water rights*—In the *Huntly Power Station* case (supra) the Board held that the Environmental Defence Society did not have status to appeal against the grant of the water right. The Board held that under s 23 (5) to have status to maintain an appeal an appellant must demonstrate that the decision will detrimentally (ie adversely or prejudicially) affect him and that such detrimental effect will be appreciable. It is not sufficient that an appellant demonstrates that he will be affected in the same manner as the general public will be affected. Evidence was given for the Environmental Defence Society that of its 500 members, 15 lived in Hamilton and approximately 200 lived in or near Auckland: that a number of the members of the Society used the Waikato River for recreational purposes and fishing; that the Society had taken an active interest in improving the water quality in the Waikato River, especially in and around Huntly; and that the objects of the Society included the preservation, protection and defence of natural resources. In rejecting the claim of the Society to appeal the Board also held that on the question of status to appeal the interest of members of the Society were separate and distinct from the interests of the Society itself. It decided that the Society could not derive status to appeal by virtue of the fact that individual members of the Society might be detrimentally affected by the decision appealed against. It nevertheless decided on the evidence that it was not demonstrated that any members of the Society were, in fact, detrimentally affected by the decision.

However, the Board held that Mr Mahuta and his co-appellants including the Chiefs, Elders and Spokesmen and certain Waikato Tribes were detrimentally affected. Because of this fact and because Mr Mahuta adopted evidence and submissions of the Environmental Defence Society, the Society managed to overcome its procedural difficulties.

Some conclusions

The Water and Soil Conservation Act 1967, like several recently enacted statutes, attests to our new commitment to control the destructive aspects of modern technology. But it remains to be seen whether the purposes of this legislation will be fully attained. The desirable objectives of this law will not be achieved unless the statute is adequately administered and enforced. The most pressing need at present is to increase the financial and staffing resources of Regional Water Boards(*p*). But it is also true that the legal profession can make a significant contribution by becoming much more familiar with modern water law.

I would venture to suggest that before very long water law will become just as important to the practising lawyer as town planning law is today. In any event, it will often be difficult, if not impossible, to separate questions of land use and water use. This point has been graphically illustrated by the recent decision of Mr Justice Cooke in *Metekingi v Atihau Wanganui Regional Water Board* [1975] 2 NZLR 150(*q*). This case raised the very important question

---

(*o*) On this point see also *Report on Water Right Application 402 by Rodney County Council*, by Special Tribunal No 9 (established by Auckland Regional Authority as Auckland Regional Water Board) dated 12th March 1975, where existing and future agricultural uses of water were given priority over proposed use of water for sewage disposal scheme to serve seaside subdivision. See also *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71.

(*p*) As to which see J W Lello *Environmental Planning: the Case for Management* (1975) Master of Town Planning Thesis, University of Auckland.

(*q*) See also the Appeal Board Practice Note (1975) 5 NZTCPA 160 which is as follows:

"Where a development proposal requires both a consent under the Town and Country Planning Act 1953 (or an approval under the relevant legislation controlling subdivision) and the grant of a right under the Water and Soil Conservation Act 1967, the Boards suggest that applications for the consent (or approval) and the right should be made at the same time.

"In cases where the development proposal requires both a consent (or approval) and the grant of a right, the Boards, as a general practice, will not hear an appeal lodged under one Act until the result of the application under the other Act is known. If appeals follow under both Acts, all appeals will normally be dealt with together."

as to whether, on an application under the Water and Soil Conservation Act 1967 for water rights involving the diversion and damming of a stream, it is relevant to consider the loss for primary production purposes of the land proposed to be flooded by the dam. The No 1 Town and Country Planning Appeal Board answered the question in the negative holding that an attempt to reconcile a conflict of priorities as between land use and water use on an application for a right to dam would be beyond the letter and spirit of the Act. His Honour held that the Appeal Board was wrong and in a most interesting judgment held that the Appeal Board must weigh the loss of 700 acres of farmland against any advantages likely to result from the granting of the water rights which were to be used for the purpose of an electricity generating station.

THE CONFERENCE, THE LAW AND THE CITIZEN

By SIR GUY POWLES, *Patron of the Environmental Defence Society.*

I have, in my official duties, had practically nothing to do with the environment, which has been almost entirely outside my jurisdiction. However, if current trends are realized, that situation may not continue.

I would try in this "after view" to insert into some of the discussions and comments that we have had today some concepts relating to the rights and attitudes of the individual citizen. The relationship of the individual citizen to the common law and to these statutes which we have been talking about arises in two rather different stages and should be considered separately.

The law that we have been considering can be divided into two parts, first the principles of the common law, and second the New Zealand statutes which supplement and modify it. To recapitulate, the most important of these statutes are the Town and Country Planning Act 1953 (which has its origins in an earlier statute passed in 1926), the Water and Soil Conservation Act 1967 (whose predecessors seem to date back at least to 1948) and the Clean Air Act 1972 which contains some forerunners in certain provisions of the Health Act 1956 although these have been greatly expanded upon). Broadly one can say that these three statutes purport basically to regulate:

(a) the use of land,
(b) the pollution of the land and the use and pollution of water, and
(c) the pollution of the atmosphere.

Broadly also one can say of them that none of them is self-executing, and that all of them set up bodies whose function it is to give effect to certain general principles enunciated in the respective statutes, and to do so by way of imposing commands and prohibitions upon activities of citizens. In the case of land use as regulated by the Town and Country Planning Act the bodies in question are the planning committees of local authorities and on appeal from them the Town and Country Planning Appeal Boards; in the case of pollution of land and water and the use of water as regulated by the Water and Soil Conservation Act the appropriate bodies are the Regional Water Boards, the National Water and Soil Conservation Authority and the Water Resources Council; and in the case of pollution of the atmosphere the principal body responsible for the implementation of the provisions is the Clean Air Council.

It seems to me that the relationship of the citizen to the common law and to those statutes to which I have just been referring arises at two rather different stages and accordingly should be so considered.

In the first place there is the point of time at which the law is created and formulated—in the case of the common law this is the time when the decision of the Court is rendered; in the case of statutes of course it is the time when the statute is enacted by Parliament. The law is created and formulated in formal terms by bodies and persons other than the ordinary citizen, and the question must arise therefore whether at that stage the ordinary citizen should be completely as divorced from the process as the formal terminology suggests, and if not what his role should be.

In the second place there is the point of time when the law as formulated is put into effect. In the case of most of the common

law and much of statute law this is the stage at which it is applied and enforced by the Courts and the Police, but in the case of all the statutes relating to the environment to which I have referred other bodies are interposed to make decisions as to exactly how the general terms of the statute are to be applied in specific instances. Again the bodies applying the law are separated from the ordinary citizen, and the question arises once more as to what relationship the ordinary citizen has or should have to those bodies.

First as to the point of time when the law is being created and formed—what is the role of the citizen at that stage? To the extent that the law consists of the common law, that is to say principles of law evolved by the Courts in believed conformity with the established usages and practices accepted by the Courts of England, the ordinary citizen has a very insignificant role to play in any direct sense; for the Courts in New Zealand, like the Courts in England, have taken the basic view that the only persons who can appear and be heard in proceedings before them are those persons whose individual private rights are directly affected by those proceedings. There are two main exceptions to this which they have been prepared to accept. In his fascinating paper Mr Justice Cooke referred to the case of public nuisance, where the Courts have been prepared to allow persons who have suffered inconvenience or damage even without interference with their private rights to be heard, provided that the inconvenience or damage is greater than that sustained by other members of the public; and they have also been prepared to accept that the Attorney-General may appear on behalf of the public, although they have not imposed any duty upon him to do so, with the result that it is entirely a matter within his discretion as to whether or not he intervenes in this way in proceedings. Mr Justice Cooke believed that the Attorney-General could not reasonably refuse his fiat—but there still is this discretionary element. Then Mr Justice Cooke also says, "It is particularly important for a society such as this to think about what can be done by means of the Law. The whole field is very much alive. Given responsible and careful legal advice—advice of the quality at the command of such an organization as the EDS, the common law may prove to have some teeth to tackle environmental issues." He also mentioned the question of private prosecutions.

I would like to recall what was said by Mr David Williams when he spoke at the Law Conference. He said that imaginative counsel, doing plenty of homework, will have the opportunity to influence the Courts in new directions. In my own discussions at the Law Conference, with a senior member of the Judiciary in another jurisdiction, I gained a distinct impression of a willingness to explore the common law as a modern vehicle. There is much room for EDS activities in this field.

In the creation and formulation of statutory law such as the Acts relating to the environment which I have described already, the opportunities for an ordinary citizen to influence the actual shape and content of those laws are considerable in New Zealand, and we are in this respect fortunate. Direct access to individual members of Parliament is simple and unimpeded in this country, and direct access to Ministers of the Crown is also relatively easy and not obstructed by the impediments which tend to occur in political processes overseas. Many proposed statutes are placed before Select Committees to which interested parties can make representations and submit evidence, and this also provides an avenue of direct access. Moreover, the opportunities for indirectly influencing Members of Parliament and Ministers of the Crown through the media of the press, radio, and television are considerable here where we have a relatively small population informed by public media of communication whose representatives are under the new structure for radio and television to an ever-increasing extent, anxious to find and to publicize items of newsworthy interest, But it is always necessary to appreciate that with regard to any piece of legislation, in the final analysis the critical attitude is the attitude of the Minister in charge of it. And in forming his attitude the Minister will always have considered the views of his department.

Frequently it is the views of the department which are accepted by him and the opportunities of the ordinary citizen for influencing its views are not great. I would very much doubt that ordinary citizens did influence to any significant extent the content of the basic Acts which provide the foundations for the conservation of the environment in New Zealand at present. It is no use bewailing an opportunity that has been lost. I hope lessons have been learnt, but I doubt it.

One must not overlook the bylaw-making activities and other processes available in local government. These are particularly relevant in air pollution and local health measures gene-

rally. The citizen has a similar opportunity of influencing the formation of laws—perhaps in some cases greater, and in others less—here too, the ideal must be eternal vigilance.

Turning now to consider the law at the stage that it is actually implemented, so far as the implementation of the common law is concerned, basically the only members of the public who are heard at that stage and who are in any way able therefore to influence the decisions that are taken are those persons whose legal rights are affected. The advantage of such a restricted approach is that thereby the number of persons to be heard is reduced and the complexity of the issues and the length of the considerations and deliberations are likewise reduced, so that from these practical points of view the restricted approach has some advantages. It assumes however that the activities of men do not significantly affect the interests of other men whose legal rights are not affected, and I am not sure that this is a philosophy which today is entirely appropriate. It is essentially an individualistic philosophy assuming that each man is an island and that the activities of one man affect only a very small number of others, but today where a larger number of people are living in a smaller world it is not altogether a realistic one.

When we turn to the implementation of these statutes, we find great confusion of principle and no settled policy as to who shall have rights of approach to the bodies set up by these statutes. I quote from the judgment of Wild C J in *Highland Park Association v Barry-Martin* [1974] 1 NZLR 108, 110:

> "Section 23 (1) which was amended as recently as 1972, provides that *"Every owner and occupier of land affected* by a proposed district scheme . . . may object to the scheme . . ."

Section 24 (1), which was amended as recently as 1971, provides that "The Minister, the Council and *every local authority having jurisdiction* in . . . the area . . . *and every Regional Planning Authority and joint committee . . . and every organisation or society of persons engaged in any profession, calling or business, or of persons associated with the promotion of any sport or recreation, or associated for any other purpose of public benefit or utility, shall have similar rights of objection* . . . not only as an owner or occupier of land but also *on the ground of any public interest* . . ."

Section 28 (c), which was inserted in the statute in 1966 and amended in 1968, gives, "The Minister and *every person who, or body which, claims to be affected by the application* . . ." the right to object to the grant by a council of its consent to a conditional use of land.

Section 30B, which was inserted in 1961 and amended in 1971, gives a right to "The Minister and every Regional Planning Authority and local authority having jurisdiction in . . . the area . . . *and every person who or body that claims to be affected by the application* . . ." "to object to the grant by a council of consent to work contrary to a proposed change in a district scheme.

Section 35 (3), which has been amended several times and most recently in 1971, gives *a class defined in similar terms* the right to object to the grant by a council of consent to a specified departure from a scheme.

Section 38A, which was inserted in 1957 and has been amended several times and most recently in 1971, gives "The Minister, the applicant, every Regional Planning Authority and local authority having jurisdiction in . . . the area . . . *and every person who claims to be affected by the use*" the right to be heard by the council against the granting of consent to a use of land not of the same character as that which immediately preceded it.

The italics will serve to emphasise the different ways in which rights to object are conferred by these six sections. In view of Parliament's unrelenting revision of the Act it would be too much to say that a settled legislative policy is evidence. Nevertheless the number of amendments (eight in less than 20 years) itself makes obvious the degree of attention that has repeatedly been directed to the granting of rights of objection and, accordingly, to the classes of persons who are to be entitled to object.

It is obvious that there ought to be a settled policy, and that this should permit a wider right of hearing than that of only the personally detrimentally affected individual—but how much wider this Society might consider.

One ought to note the remarks of Mr Justice Cooke in concluding his judgment in the recent case of the *Wellington City Corporation v Victoria University* where he said "of one thing, however, I am sure. After listening to experienced counsel struggling for the best part of three days with the Town and Country Planning Act 1953, it is plain that the extent to which designated works can be controlled under the planning legislation needs further clarification by Parliament."

There is also the unsolved question of what influence the interest of the Crown *should* have, not *does* have, in these planning matters. Mr Justice Cooke emphasised this point but believed that his views had been buried, and Mr Turner refers to its constant difficulty. There is surely no justification for continuing today this outmoded relic of the doctrine of the divine right of kings—and we in Wellington feel this very keenly. Here is a case surely where bureaucracy overbears the citizen, proves too stubborn for Ministers to cope with, and buries Mr Justice Cooke's ably argued recommendations.

Most at the Law Conference were impressed by Judge Gesell, a Federal Judge of the United States, and his discussion of the development and use of class actions in his country. This was something quite beyond the capability of our present legal and judicial system—even if it were wholly desirable here—and yet it was something proved of great value to the public of the United States. But surely at least something is needed, even if only to prevent the necessity of relying upon the uncertain fiat of the Attorney-General.

To continue further in the discussion of legislative confusion over citizens' rights.

Under the Water and Soil Conservation Act 1967 applications in respect of natural water may be made by Councils, Water Boards, public authorities, etc, and a right of objection is given to any Council, Board, public authority or *person* on the ground that the grant of the application would prejudice its or his interests, or *the interest of the public generally* (s 24 (4)). Any applicant or objector may appeal from the Authority to the Town and Country Planning Appeal Board. By contrast, applications by the Crown in respect of rights to use water are decided directly by the Authority and without right of objection. The Authority's decision may be appealed to the Town and Country Planning Appeal Board by any Board, public authority or person which or *who claims to be detrimentally affected* (s 23) (this phrase would, I assume, be interpreted in the same way that a similar phrase in the Town and Country Planning Act was interpreted to mean that a mere claim to be affected is not enough, and that there must be an actual discernable detriment proved to the satisfaction of the authority to whom the application is made). Why should it be possible to object to non-Crown applications upon the ground of public interest generally and have a hearing before the Authority, and yet not to be able to object to Crown applications at all, and only to appeal on limited grounds which do not include the public interest? This is just another example of the unjust and unprincipled extension of an ancient and outmoded doctrine, which is so beloved of the bureaucrats. I may note further that under this Act (s 26D) the classification of water by the Water Resources Council is required to be notified to public authorities and to such persons as *the Council thinks* have an interest in the classification *that is greater than the interest of the public generally.* But there is no suggestion that the right of objection is so limited—apparently anyone at all may object. Curiously, only persons claiming to be affected may appeal.

The importance of the Town and Country Planning Appeal Board system in this whole structure is striking—both in actual city planning and in soil and water control generally. Are we perhaps in danger of overtaxing a system not really designed for this purpose? Are we not placing too much responsibility on an adversarial system, which has limited powers to survey the field? A single application will be judged on its merits, but what about other and better solutions to, say, a conservation problem, which do not and cannot come up for hearing?

Perhaps from Mr Turner's forceful exposition one might conclude I am going a bit far in saying this—but how do you get such evidence before the Courts? What would Mr Mahuta have done without the EDS? And who pays?

We are grateful to Mr Thom for his clear explanation of the Clean Air Act and of the evils it is designed to combat, but this Act embodies somewhat different principles. It is really a piece of departmental legislation, with administrative responsibility and control resting with the Minister and Department of Health. The Clean Air Council is an almost wholly advisory body. A right of objection is given to any person affected by a proposed clean air zone, but he is to object to the Minister, and what happens then is not said.

There would seem to be no provision for objections to or appeals against the granting of licences. However, where the interests of the Crown are involved, the only course is for the matter to be gently reported to the head of the Department and he is to employ the best practicable means to terminate the contravention of the Act (s 22 (6)).

The opportunities for the ordinary citizen to influence directly decisions made in the pro-

cess of implementing the law are accordingly slight.

One needs then to turn to the democratic right of influencing the creation and implementation of law by means of the ballot box, and consider how that applies here. In New Zealand the decisions of Courts are not subject to such control since Judges and Magistrates are appointed and not elected, and since such appointments, although made by an elected government, are generally made regardless of electoral considerations. Let me consider the various implementing bodies. Those which implement the town and country planning legislation are in the first instance the local authorities, or their committees who are, of course, freely elected, and subject to public influence, and in the ultimate directly responsible to the people. From them there are appeals to the Town and Country Appeal Boards, which are essentially appointive and judicial, and the ultimate appeal to the Administrative Division of the Supreme Court might be thought to sit, or stand over, the democratic process. This could be a hasty thought—it may well be that the concept of judicially controlled democracy has much to commend it. In any case it seems to offer more freshness and openness than is apparent in our control over land and water. In this planning control structure the local bodies have carried out their onerous duties with conspicuous honesty and fairmindedness.

The principal national body implementing the Water and Soil Conservation Act (and the Soil Conservation and Rivers Control Act) is the Water and Soil Conservation Authority. In 1970, at the Physical Environment Conference, when referring to this body (and the Soil Conservation and Rivers Control Council, the Pollution Advisory Council, and the Water Allocation Council, which all existed at that time) I noted that they contained 14 civil servants, 13 members representing, but only remotely, the public interest, 8 members representing interests which were active polluters of the environment, and 4 members representing conservation interests. I said "Where in this complex edifice does the right of the individual elector come in? . . . I warn that with this proliferation of these appointed semi-bureaucratic authorities the citizen may be, in effect, losing his control of his environment by means of the machinery designed to affect this control.

In 1971 the legislation was amended substituting the Water Resources Council for the Pollution Advisory Council and the Water Allocation Council, but retaining the same method of appointment of council members. Regional Water Boards now assume greater importance, and in many cases they may be democratically elected bodies. Appeals lie to the Town and Country Planning Appeal Board and may be brought by any applicant or any objector.

As to the body appointed under the Clean Air Act, this is the Clean Air Council, it is composed as follows:

"*Membership of Council* (1) The Clean Air Council shall conist of—

"(a) A person possessing an academic qualification in chemistry or chemical engineering;

"(b) A medical practitioner having special qualifications in public health;

"(c) A representative of industry;

"(d) A meteorologist or scientist having special knowledge of air pollution.

"(e) A representative of local authorities;

"(f) A person nominated by the Minister for the Environment;

"(g) A person having special knowledge in the field of energy resources;

"(h) Two other persons.

"(2) The members of the Council shall be appointed by the Minister, after consultation with such organizations, if any, as he sees fit to consult."

This seems to be somewhat of a technicians body, and properly so, because its functions are almost wholly advisory. The real power here lies with the Director-General of Health, and the Health Department.

I suggest that this whole system has serious defects from the point of view of the interests of citizens themselves.

I think the "authorities" may be uneasy. It has been announced that the National Water and Soil Conservation Authority has established a committee to consider submissions made for the review of the legislation—this is the process of revision which the Chief Justice described as "unrelenting". This committee consists of 4 present or former members of the staff of the Water and Soil Division of the Ministry of Works, 6 present or former engineers of Catchment Boards, 1 former Waterworks engineer, and 1 solicitor. This is supposed to be an 'expert' committee and, of course, no public interest could be expected to be represented, as such—*But* what of representation of Town and Country planning expertise, or the biological sciences, of ecological interests generally? What of the impact of

energy requirements? A really serious attempt to review the structure of environmental control must have regard to a wide and imginative range of considerations. Some of these points have been made in the Society's Newsletter. This leads to the thought that the Ministry of Works and Development is not the proper body to have this task. Its record in amending its own legislation is already unsurpassed.

To sum up then, the interests of individual citizens are likely to be overlooked or overridden in our legal and institutional structure for the protection or preservation of our environment. Does that mean therefore that we have adopted the principle that mass welfare is something different from and superior to the sum total of individual welfare? This is a matter of philosophy. I concede that for mere human survival on this crowded planet monolithic systems of government may have to be adopted, or may force themselves into being, and they will determine what is good for the citizen, and compel him to do it. But, at present, in our rather remote little New Zealand, with our still superb environment, we cannot do better than develop our already creditable participatory democracy—this might be our best contribution to the future.

To do this, society should examine ways and means

(a) Whereby public environmental interests can come before the Courts at the instance of individuals—the question of class actions, for example, and

(b) whereby public interests can be represented and heard in the environmental control structure, by the use of democratic representational processes, and

(c) whereby closer watch can be kept on the legislative processes both at national and local level.

NEW MAGISTRATES APPOINTED

Mr B J M Kerr SM

Mr B J M Kerr has been appointed a Stipendiary Magistrate. Born in 1934 at Thames and educated at the Palmerston North Boys' High School and Hastings High School, Mr Kerr graduated in law from the Victoria University of Wellington in 1960. He has been in practice for some 15 years, the past 12 years as a member of Buddle, Anderson, Kent & Co in Wellington. He has practised mainly in the Courts and common law field.

Mr Kerr's chief sporting interests have been cricket and golf. He was club captain of the University Cricket Club and obtained a cricket blue. He is now a member of the Karori Golf Club and also belongs to the Karori Lions Club. He serves on the Wellington District Law Society Legal Aid Committee and the Common Law Committee. He is married with five children.

Mrs G C P A Wallace SM

Mrs G C P A Wallace has been appointed the first woman Stipendiary Magistrate in New Zealand's history.

Mrs Wallace, a South Auckland lawyer, was educated at Howick School, Epsom Girls' Grammar School and Auckland University.

She graduated LLB from Auckland University in 1954, admitted to the Bar in 1954, and has been practising on her own account in South Auckland for the past 11 years. At present she is principal in the Papatoetoe law firm of Wallaces.

In 1955 she married a career Army officer, Mr N A Wallace, and accompanied him to Malaya where she taught English for a year in an Asian school there.

She later went to Britain when her husband attended a staff college there for a year. Mr Wallace retired from the Army several years ago with the rank of Lieutenant-Colonel, but is still active with the Territorial Force, of which he is the Auckland Battalion Commanding Officer.

Mr and Mrs Wallace have a daughter in the seventh form of the Anglican Diocesan School in Auckland.

Mrs Wallace has been extensively involved in school, church and community activities, including a term from 1971 to 1974 on the Papatoetoe City Council. She did not seek re-election to the council last year because her family had moved from Papatoetoe to their present home in Whitford.

While on the council, Mrs Wallace was a member of the Legal and Finance Committee. Her practice in Papatoetoe has afforded her broad experience in many facets of the law.

PLEA FOR PLAIN SPEAKING

DR RICHARD LAWSON *continues his Occasional Notes from Britain.*

That devastatingly honest writer, George Orwell, in *1984,* spoke of "doubleplusgood quackspeakers", by which he meant those who concealed their thoughts and meanings in a beakful of jargon.

Some such plague afflicts us now. Watching Wimbledon recently, I noticed how infrequently we were told of the score; rather, we were told of the "score situation". Recently, someone who ought to know better, referred to murder (or, more accurately, did *not* refer to murder) as "an escalated inter-personal conflict situation". It all reminds me of the ghastly phrase put about by Ehrlichman or Haldeman (probably by both): "I agree that what I said happened is at variance with what did happen". In short, I told a whopper.

Well, this malaise has hit us hard, most notably when it comes to divining the true nature of our current incomes policy. (If you haven't heard, pay rises may not exceed £6 per week.) This Labour government, in the plainest of terms, had vowed never, never, but never, to introduce a statutory pay policy. That was the beastly kind of thing unspeakable Tories did.

As you must know, things went from bad to worse; and when the Arabs started to pull their money out, something was called for.

It came in the form of a White Paper prescribing a limit for pay rises of £6 per week. This was the *hope* of the government, there was nothing mandatory in it. But the White Paper is now a Schedule to an Act giving Parliament the right to roll back increases over this limit and to free employers from any current obligation to exceed this limit.

All still quite voluntary, you see. But are there sanctions for ignoring the limit? Yes, sort of. For the Government has a Bill in mind giving itself reserve powers to deal with infractions of the limit. It refuses to publish the Bill since it hopes to heaven it will never have to activate it.

The truth of the matter is that no Bill can ever see the light of day. The Government, as the price of trades union co-operation, has accepted that no sanctions should attach to employees, only to the bosses. But no trick of drafting can prevent any employer seeking an injunction when industrial action by his workpeople seeks to extract more than £6 and thus put him in breach of the law. Disobedience to an injunction, of course, can mean jail: hence, we could be right back to the hated Industrial Relations Act.

Now you have all the facts, please tell me if this is a statutory policy or not. No, says the Government, our reserve Bill will be activated only if the voluntary £6 limit is breached. And in any case, its apologists have continued, a statutory policy is one which makes criminals of workers. This policy only makes criminals of bosses. That's not statutory, of course.

Let me twist the screw by telling you of the Crossman diaries, the saga of which is unfolding before the Lord Chief Justice of England. The Attorney-General seeks to prohibit publication of the Crossman diaries. He does not argue that publication breaks the law, for, in truth, no law is involved. But he does maintain that it is outside well-accepted "parameters". What, really, does he mean? George Orwell, come and see what we've done to the tongue of Shakespeare and Milton.

FIJIAN OATHS

There are now three Commissioners for Oaths for the Supreme Court of Fiji in Auckland—Messrs P D Ellis, R N Vialoux and Baldwin T March.

Plunge, not lunge—The *Australian Law Journal* at (1974) 48 ALJ 84 notes: "The mother and putative father were servants on the same farm, and the putative father on one previous occasion, had unsuccessfully attempted sexual intercourse with the mother." A footnote helpfully explains: "The reason why the attempt was unsuccessful was that the parties had fallen into a trough of sheep dip."

A rose by any other name?—The British Food Journal provides the following quote: "The Lady Chairman of West Bromwich Magistrates, at the close of a hearing against Mr Terrence Robert Burton charged by West Bromwich Corporation as a person whose act or default food had been sold which was unfit for human consumption, said 'This case stinks'."