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WHAT IS PERSONAL INJURY BY ACCIDENT?

The Chairman of the Accident Compensation Commission, Mr KL Sandford, recently published a commentary on the Accident Compensation Act entitled "Personal Injury By Accident". In a short prefatory note he stated "the absence of a comprehensive definition has enabled the Commission, the Appeal Authority and the Supreme Court to exercise judgments which, while they can be compared with features of previous New Zealand and overseas compensation case law, have a new character stemming from the humanitarian spirit as much as the letter of this far reaching legislation." However, one cannot help wondering whether the Chairman feels that humanitarian spirit has gone far enough for in the opening chapters he sets out to nail this comprehensive concept to a defined set of legal criteria that are narrower than even the previous compensation case law.

He cites what is described as "the classical definition of the word *accident* . . . supplied in the House of Lords case *Fenton v Thorley*, as follows —

> The expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap, or an untoward event, which is not expected or designed."

Seven requirements for eligibility are then outlined to cover the situation where there is injury from direct bodily contact with an external object or force. Two of these criteria emphasise that the *contact* must be undesigned and unexpected. In effect it is said that to be an accident the cause and not the consequence must be unexpected and that is certainly not predicated by the classical definition in *Fenton v Thorley*. In fact Lord Lindley in that case specifically said "the word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them."

However, our Accident Compensation Scheme should not be wedded to decisions of the past. Rather the Chairman's proposed approach should be assessed in terms of its contemporary consequences. An example is given. "A driver in a stock car race might well expect collisions, and may even deliberately cause them himself (not PIBA)." The driver might well expect collisions. That does not mean to say he expects to be injured. If an injury suffered by a stock car driver is not a personal injury by accident because he expected the collision then by the same token the bulk of the injuries suffered in contact sports such as rugby, soccer, judo and even cricket would not be compensatable.

There is an added dimension. The Accident Compensation Act is broadly based social legislation and social or public interest dimension should not be overlooked. That point is made in the preface and later in the text. "An exception is made, on the grounds of public policy, where a person fully expects some adverse occurrence, but nevertheless reasonably goes to the rescue of another." The example is given of a fireman entering a burning house to save a child even though he knows the roof is about to fall in. So lest the Chairman's requirements presage a retrenchment from the current approach to sporting injuries it should be emphasised that there is a public interest in the promotion and encouragement of sporting activities. That much is recognised by the existence of a Department of Recreation and Sport.

So as in the example of the fireman there is a case for saying that on the grounds of public policy sporting injuries should be accepted as personal injuries by accident, notwithstanding a degree of risk-taking. The concept is broad enough to cover them.

However, the object is not to quibble over the specific application of an unacceptably narrow formula — but rather to suggest that it would be more in keeping with the social purpose of the legislation not to tie the concept of a personal injury by accident to narrow, formal and legalistic criteria but to leave it free, flexible and adaptable to social needs.

Another topic that deserves mention is hypothermia or exposure. "Conditions which develop from exposure to the elements, such as hypothermia, are normally considered to be illness states, rather than injuries. . . . With no precipitating accidental cause, hypothermia (or other conditions due to exposure) is not PIBA." It is footnoted that the subject is not covered by authoritative decision or Commission policy which of itself suggests that hypothermia is infrequent and consequently to a degree unexpected. That the Chairman should be so positive in excluding hypothermia from personal injury by accident is surprising (unless of course, he fears he will be required to contribute to search and rescue costs as well as ambulance costs) and there are compelling reasons for disagreeing with his viewpoint. Firstly, it seems inconsistent to treat hypothermia as an illness-state while allowing, as the booklet later does, shock to be "compensated just as much as physical injury". Secondly, the description "conditions which develop from exposure to the elements" is wide enough to include frostbite (where flesh is frozen) and death, both of which have elements of irreversibility that should take them out of the category of illness-states. Thirdly, in the section dealing with "forces of nature" elemental forces of themselves are said to produce personal injury by accident only when of such a nature or severity as to be *unexpected*. As mentioned earlier expectation of the cause is too narrow a test. Expectation of the consequence and the social purpose of the legislation also has a place.

Coldness can produce results ranging from the common cold through pneumonia, mild hypothermia, severe hypothermia to death. There is a gradual progression from illness to injury in physical conditions ranging from chilly to bitter. Hypothermia is in the grey area between illness and injury, and between natural causes and accidents. Each case should depend on an overall assessment and there should be no blanket exclusion as in the booklet.

While on the subject of coldness, cramp from swimming in cold water is said not to be personal injury by accident. This topic too is not covered by authoritative decision or Commission policy. It is difficult to understand why cramp caused by normal activity should be treated differently from muscle injury caused by normal activity. The former is said positively to be not personal injury by accident. The latter at least falls into the grey area.

The booklet provides a useful guide to whether many other common injuries are likely to come within the category of personal injury by accident. It should, however, be treated as a guide and certainly not as a bible.

In the opening chapter the Chairman made the point that "the words 'injury' and 'accident' are not sufficiently precise to enable the Commission to escape having to apply definitions and tests, and these in turn lead to inevitable distinctions." The examples outlined above suggest the type of distinction that may result if there is a move from the general concept supplied by the legislature to the closer definition set out in the booklet. Sporting and outdoor activity injuries were deliberately selected. In the first place they provide situations not covered by previous decisions. A distinction may be observed between the Chairman's approach to hypothermia and the Commission's approach to shock; to the Chairman's approach to stock car racing and the Commission's approach to rugby. Secondly, it illustrates how the application of a definition can result in disregard for social factors. The social desirability of encouraging active use of leisure time is not reflected in the interpretation of the Act set out in the booklet. Overall, the absence of a comprehensive definition coupled with regard for the humanitarian spirit of the legislation produces what most would regard as more satisfactory results than the application of definitions and tests.

Tony Black

Ignorance of the law – "The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." *Evans v Bartlam* [1937] AC 473 per Lord Atkin.

HUMAN RIGHTS

THE HUMAN RIGHTS COMMISSION — EDUCATER OR ENFORCER

By MARGARET A WILSON, *Lecturer in law, Auckland University.*

The first of September 1979 saw the completion of the first year of operation of the Human Rights Commission Act 1977 (the Act). It would seem appropriate at this time to try and assess what effect if any the Act has had upon the promotion of human rights in New Zealand. Although it is accepted that a year is too short a period to expect any marked change in attitude or practice, it is nevertheless not unreasonable to examine what if any achievements have been made and what signs there are for the future effectiveness of the legislation.

Any assessment of the Act must begin with the Human Rights Commission (the Commission). The legislation is framed to give the Commission the major responsibility for the promotion and protection of human rights generally, and for the handling of individual complaints of discrimination. It is no exaggeration to state that the future of human rights has been placed squarely upon the shoulders of the Commission. It is for this reason that this comment will concentrate upon the activities of the Commission and in particular on the Annual Report of the Commission [1] as that sets out its activities during the first seven months of its life.

Upon reading the Commission's Report it is difficult not to feel disappointed at how little the Commission appears to have done and, more importantly, how it seems to have failed to understand some of the crucial issues facing human rights in this country. This criticism may seem unfair because the Commission had only been in operation for seven months when the Report was written, and it still has inadequate resources in terms of funding and personal. Given these factors however, the question still remains — what signs has the Commission given so far that it is a viable institution that understands the aspirations of those disadvantaged groups in society who are seeking through it the means by which to obtain equality of opportunity? And not only understands these aspirations but is prepared to promote them in practical action. The answer to this question is crucial to the future effectiveness of the Commission and the legislation.

The Human Rights Commission Act 1977 is, as stated in its Long Title, "An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights." It is definitely not in itself a charter for human rights. Nor does it give legal protection to human rights of all citizens. It was primarily concerned with the establishment of the institutions of the Human Rights Commission and the Equal Opportunities Tribunal, which would be responsible for hearing complaints from and providing remedies for persons who allege they have been denied equal opportunity in the circumstances recognised by the Act [2] because of their sex, marital status, religious or ethical belief, race, colour, ethnic or national origin. In addition the Act directs the Commission to promote and protect human rights through education, publicity and advice to Government. (For the purpose of completeness it is necessary to mention the Commission also has watchdog functions on matters relating to privacy [3] and internal trade union affairs, [4] which it is submitted seem inappropriate for the Commission but were politically necessary for the Government at the time the Act was passed.)

It would have been more accurate if the Act had been entitled the Anti-Discrimination Act, as in New South Wales, [5] or even the Equal Op-

[1] *Annual Report of the Human Rights Commission for the Year Ended 31 March 1979*, Government Printer, Wellington, 1979.

[2] Human Rights Commission Act 1977, Part II states that discrimination is unlawful in most forms of employment; some educational institutions and facilities; membership to industrial unions; and professional associations; access to public places; vehicles and facilities, obtaining qualifications for access to a profession, trade, or calling; access to provision of goods and services; dealings over land, housing, and accommodation, and the placing of advertisements.

[3] Ibid, Part V.

[4] Ibid, Part VI.

[5] Anti-Discrimination Act 1977 (NSW).

portunities Act. The Government had, however, promised human rights legislation in its election policy, and that was what was passed even if it was human rights legislation in name only. Precisely what the Government intended or the purpose of the Act, is best illustrated by reference to the Parliamentary debate on the Bill.

Before the activities of the Commission as described in its Annual Report are analysed, it is necessary to review breifly the functions of the Commission and the role it is expected to perform under the Act. This exercise is necessary because first, there is still some confusion as to the purpose of the Act, and secondly, the limitations placed upon the Commission may clarify why the Commission has a difficult task in fulfilling the expectations of those who seek social justice through it.

Mr Harrison who chaired the Select Committee hearing submissions on the Bill saw the legislation in the following terms:

> "Several people wanted a more explicit definition of the objects of the Bill, and some thought it should be more properly called the equal opportunity or anti-discrimination Bill. Those people apparently did not understand that it simply proposes the establishment of a Commission to promote equality of opportunity that is consistent with certain basic human rights, and to set up a tribunal to deal with cases where the Commission's attempts at conciliation fail." [6]

The Hon Dr AM Finlay, the Opposition spokesman on Justice summarised some of the misconceptions about the Bill when he stated:

> "What we have before us is dubbed a Human Rights Commission Bill, and it is significant that on one or two occasions, when we moved out of Wellington to hear evidence, the notice board directing people where they were to go referred to the "Human Rights Bill", and many people have thought of it as such a Bill; at best it might be called an equal opportunities Bill, because a tribunal of that name — an equal opportunities tribunal — is set up within the framework of it." [7]

The Hon David Thomson, the Minister of Justice, who introduced the Bill made it clear what the government intended when he replied to Dr Finlay's criticism in the following terms:

> "The member for Henderson said that this is not a human rights Bill, but more an equal opportunities Bill. The fact is that it is what it says it is — a Human Rights Commission Bill. It sets up a commission and gives it certain functions, particularly including the promotion of human rights, and a better understanding of human rights and of international covenants dealing with them. It does not pretend to cover the whole realm of human rights, nor to codify them." [8]

It appears then that the Government's attitude was a pragmatic one. There was to be no giant leap into the arena of human rights. In fact the Minister of Justice specifically advised against such an approach and warned "Too many people stumble by taking too big a step at the beginning." [9] There seems no fear of New Zealand making progress quickly in this area of social justice. The Government's policy of gradualism may be seen as fear to enshrine in the law social justice policy that does not have the acceptance of the majority of New Zealanders. Each inch forward is assessed in terms of public reaction. There may be some merit in this approach, but it does result in a government that is not prepared to lead but to be led, and it does make the existence of active, politically motivated pressure groups whose purpose it is to nudge the Government along from time to time, an essential ingredient in our political system.

The policy of gradualism displayed by the Government is one that has also been adopted by the Commission. On the basis of its Annual Report and the activities of the past twelve months, the Commission seems to have approached its task as the official watchdog of human rights with caution. The main emphasis throughout all its activities is upon educating the populace on what are the provisions of the legislation. How the Commission sees its role is revealed in the "Commissioners' Statement" which prefaces the Annual Report. The Commissioners State:

> "The Human Rights Commission Act has the broad purposes of promoting the advancement of human rights and protecting citizens from discrimination. Economic uncertainty and high levels of unemployment can create unstable social conditions which emphasise the need for human rights legislation. We believe that the proper functioning of an Act such as ours can be crucial to the preservation of a just society.
>
> "The complaints of individuals who

[6] New Zealand Parliamentary Debates, 1977, Vol 411, p 1245.
[7] Ibid, p 1248.
[8] Ibid, p 1250.
[9] Ibid, p 1250.

> feel they have been victims of prejudice and discrimination will be treated quickly and fairly. But even with the greatest goodwill and the most efficient of investigatory procedures, dealing with complaints can only be a stop-gap measure. It is like treating the symptoms of a disease rather than eradicating the cause. The commission has made the major decision to fight prejudice by promoting attitudinal change through education and publicity."[10]

The decision of the Commission to fight prejudice through education and publicity is in accordance with the first of its general functions laid down in s 5(1) of the Act. According to the Annual Report the Commission in an effort to fulfil this education function has held one seminar in Wellington, (the proceedings of which have been published), [11] produced a pamphlet entitled "Human Rights Are Your Rights", the department of Justice has published a pamphlet "Equal Opportunity", members of the Commission have participated on radio programmes, spoken to numerous groups, addressed two retail firms training courses, and released public statements on matters relating to human rights. Unfortunately the method of distribution of the pamphlets and the type of groups addressed are not stated so it is difficult to assess by whom the Commission's message is being received. [12]

To some extent the activities of the Commission have been limited by the resources available to it [13] and the "Commissioners' Statement" does make a plea to the Government for additional funds for education and publicity programmes. [14] The Commission according to the Annual Report had a staff of 12, one of whom was specifically responsible for education/publicity. So far it appears as though education is seen as pamphlets, and talking to groups. These activities are of course important but if the causes of the disease of discrimination are to be eradicated as the Commission intends, then programmes must be initiated in schools and television used more effectively.

It is also important to look closely at the content of the education programmes. One can but agree with the Commission when it states: "Clearly it is better that people should understand why discrimination is unlawful and avoid breaking the law". [15] Does this mean however, that people should be informed of the legal provisions so they can adjust their behaviour accordingly and avoid breaking the law without a change of attitude, or does it mean promoting understanding as to why every individual in our society is entitled to equality of opportunity, so the sanction of the law is very much the last resort of the intransigent offender. The Commission seems to be concerned with the latter yet the only pamplet they have produced and much of their publicity and talks are directed towards the former approach. This may be understandable at this early stage in the life of the Commission, but if it intends to see its priority as education then it is hoped the broader approach is taken in the future.

Although the Commission may see its first priority as education, many people see the Commission as a means to remedy specific instances of discrimination. Women in particular felt that they had tried to educate the public for some time on the justice of equal opportunity for women, and to some extent they have succeeded. Without their efforts it seems doubtful the Act would have been passed. [16] That women are impatient for some practical remedy to the discrimination they suffer is understandable when it is realised that life chances are lost because of lack of equal opportunity. It is difficult to see the education of society as the top priority when you are denied full access to a job, or when because you happen to be biologically capable of becoming pregnant employment opportunities are impaired.

It is with some concern then for persons who expected the Commission to vigorously pursue remedies on behalf of the discriminated to read:

". . . the commission places great emphasis on the role of education and publicity in its work. To effect social change by dealing only with individual complaints is unrealistic. It is also uneconomic." [17] This may be true, but it overlooks the educative quality of pursuing individual complaints throught to the Equal Op-

[10] Annual Report, supra, p 3.

[11] *Report of Seminar on Human Rights* Human Rights Commission, February, 1979.

[12] In future Reports the Commission may wish to consider following the format of the *Report of the Anti-Discrimination Board for the Year Ended 30 June 1978*, Government Printer, New South Wales, 1979, which in its Appendix lists the organisations addressed by the members of the Board and its staff.

[13] For one view on the type of research needed by the Commission see — JB ELkind, "Human Rights — How to Make It Work," [1978] NZLJ 189. The 1978-9 Estimates for the Justice Department included the figure of $191,000 for "Human Rights." The Annual Reports makes no specific reference to its funding.

[14] Annual Report, supra, p 3.

[15] Ibid, p7.

[16] Ibid, p 4 — The Commission acknowledges the important role the Women's movement played in the establishment of the Commission.

[17] Ibid, p 7.

portunity Tribunal, which after all, was expected to have given authoritative decisions upon which future action could be modelled. As yet not one complaint has been to a hearing before the Tribunal. This may be because there has been insufficient time to prepare a case, or it may indicate that the Commission has decided at least initially to err on the side of conciliation rather than utilise the arbitration powers of the Tribunal. Certainly the Commission does state that as a matter of policy it intends to carry out its ". . . functions through conciliation and co-operation rather than through confrontation. The Commission believes that in this legislation willing compliance is preferable to imposed obedience. The taking of proceedings before the Equal Opportunities Tribunal exists as a remedy of last resort." [18]

Although some sympathy may be felt for the Commission's need to establish priorities because of its limited resources, nevertheless the fact remains that many people saw the Commission as a means to pursue individual complaints. According to the Annual Report, in the first seven months 581 complaints were received by the Commission. [19] If nothing else this number would seem to vindicate the establishment of the Commission and prove the need for such an institution. Of the 581 complaints, 63 were found to be outside the jurisdiction of the Commission, 39 were of questionable jurisdiction, 64 related to matters other than complaints under Part II of the Act which deals with specific remedies for discriminatory behaviour. The remaining 415 indicate what those involved in the struggle to have this legislation implemented expected. Of the specific grounds of discrimination recognised by the Act, complaints based on sex discrimination numbered 340, while 47 complaints were laid on the ground of discrimination because of marital status. Of the remaing complaints 10 were based on religious or ethical belief discrimination, eight on race or colour grounds, and 10 on ethnic or national origin grounds.

The above statistics would indicate that discrimination on the grounds of sex or marital status has surfaced as the principle source of discontent. With due respect to the Commission, the reason for the early number of complaints has little to do with their education programme, but more to do with activity within the women's movement (which fought for this legislation) to utilise the remedies now available to women. Since many women had high expectations of the Commission and the legislation generally to provide them with remedies in specific instances of discrimination, it is to be hoped that the Commission in the future will show some signs of more positive action. There is a time for education and also a time for action. The Commission has the task of maintaining a balance between these two approaches to combatting discrimination.

What the Commission intends to focus upon in the future is outlined in the section of the Annual Report entitled Policy Initiatives. [20] The matters listed in this section seemed to the Commission, after its first seven months of operation, to require special attention. The areas isolated for special consideration are privacy, employment, advertising, employment advertising, superannuation, marital status, and religious freedom. It is difficult to know why these areas have been isolated for special consideration since they bear little relationship to the major areas of concern expressed by those who have complained to the Commission. Certainly complaints about sexist forms of advertising numbered 236 and therefore indicated a concern in this area that the Commission has properly recognised. The next largest number of complaints (119) however related to employment, yet there seems to be no special "policy initiative" in an area which is vital to so many people. After all it is well recognised that one's power and status in society is related to income, therefore it is surely crucial that the Commission ensures that the elimination of discrimination in this area is made a top priority. Yet it has not done so. Why?

In the areas for "Policy Initiatives" the Commission intends to invite representations from the public on the question of privacy and to conduct an inquiry into the issue. On employment advertising it intends to monitor such advertising, while on superannuation, where there are problems of implementation, it intends to have discussions and keep the matter under consideration. On the question of marital status, an acknowledged controversial area because the Government withdrew from the Bill a definition that included de facto relationships, the Commission has called for submissions from groups as to what they think the term means and from these submissions the Commission will presumably decide what the term means and will then judge all complaints on the basis of that definition. It is of some concern to see that several complaints have been delayed while this exercise takes place. Con-

[18] Ibid, pp 4-5.

[19] Ibid, Appendix C for a breakdown of the number and type of complaints received by the Commission.

[20] Ibid, pp8-10.

cern must be expressed at the way in which the Commission is delaying matters that may rightly be seen as the job of an arbitration body. On the question of religious freedom, the Aunnual Report notes there has been a small but steady flow of complaints (10 in seven months according to the statistical analysis) [21] so the Commission has decided to seek further advice and consideration on how to handle this matter.

While it is always easy to criticise from a distance, one must wonder at the choice of areas for future consideration and action by the Commission. It almost seems as though the Commission is avoiding those areas of controversy which of course are those areas where real social progress is needed and where injustice is most experienced. Perhaps the Commission's reluctance to confront the important issues is partially explained by how it sees its own function and role. To some extent this is laid down in the Annual Report under the section entitled "Principles of Interpretation." [22] This section is an indication of the principles that will be accepted by the Commission as governing its activities. The principles of intent are naturally broad in concept and tend to emphasise the role of the Commission as educator, publicist and facilitor. The Commission does not appear to see itself as advocate, initiator, leader. For example the Commission can quite rightly recognise that "Social justice demands social change" [23] and that ". . . people be treated as individuals in their own right". [24] Yet it advocates general programmes of education from which may or may not spring the urge to social change. It seems to see its strength lying in the role of persuader and conciliator.

This is not a role to be depreciated. For example it is important that some institution in New Zealand remind us of our international obligations. Under s 6 of the Act the Commission is specifically charged with the responsibility of advising the Prime Minister on the acceptance in New Zealand of international instruments on human rights. Just how important this role of the Commission will be in effecting changes to the domestic law may be seen from the result of the Gay Right Coalition submission to the Commission to recommend an amendment to the Act to provide that it is unlawful for a person to be discriminated against merely because of his or her sexual orientation. [25] It is perhaps significant that the Chief Commissioner, Mr PJ Downey, in his first major address to the seminar on human rights, emphasised the importance of a domestic commitment to international instruments. [26]

Upon a reading of the first Annual Report of the Commission the question does rise as to whether or not there is a conflict of interest between the Commission's role as educator and publicist, and that of enforcer of specific offences against the law. The conflict may not be one of allocation of limited resources only, or a setting of temporary priorities. It may in fact be that there is a basic flaw in our legislation which expects one institution to perform two conflicting tasks. The imposition of such an impossible task upon such an institution in New Zealand is not unprecedented. An obvious example is the Arbitration Court that has, in the past been given the task not only of arbitrator of individual industrial relations issues, but also of enforcer of Government economic policy. It may be too soon to decide whether the Commission can effectively fulfil all its statutory functions. Certainly the Chief Commissioner feels it can when he stated: "The power given to the Human Rights Commission to enforce the anti-discrimination law is therefore rightly placed within the wider context of promoting public understanding of the principles of human rights in general through the process of education." [27]

One can but hope that the Chief Commissioner's faith is justified. It has long been recognised that the task of enforcement of rights and obligations should not be made more difficult by the strain of a conflict of interest. Is it really fair that an individual's complaint be obstructed by the Commission having to balance the more general interest of promoting acceptance of the need not to behave in a discriminatory manner? One has sympathy with the sentiment of the Commission that ". . . willing compliance is preferable to imposed obediance." [28] If one's livelihood is at stake, however, the individual may prefer imposed obedience. At this stage all that can be done is wait and assess the future activities of the Commission. Time may yet prove correct those who advocate the Courts being given the jurisdiction to enforce the legal right to equality of opportunity.

[21] Ibid, Appendix C.
[22] Ibid, pp 4-5.
[23] Ibid, p 4.
[24] Ibid, p 4.
[25] The National Gay Rights Coalition is based on the fact that New Zealand has signed the International Covenant on Economic Social and Cultural Rights and therefore undertaken to bring New Zealand's domestic law into conformity with the Covenants.
[26] *Report of A Seminar on Human Rights*, supra, pp 8-21.
[27] Press Release made by the Commission on 1 January 1979.
[28] Annual Report, supra, p 5

ENVIRONMENT

ENVIRONMENTAL IMPACT REPORTING IN NEW ZEALAND: A STUDY OF GOVERNMENT POLICY IN A PERIOD OF TRANSITION — PART I

By Stephen J Mills *

Environmental impact reporting is a potential catalyst for reform — for better planning and policy making systems . . . . The environmental impact reporting process is really an important component in a new planning system . . . the purpose of (which) should be to detect and avoid single minded concentration on narrow objectives before irrevocable decisions are made or opinions are polarised *(a)*.

(1) Introduction:

Environmental impact reporting is a concept that is being used in an increasing number of countries as a central feature of efforts to reduce the adverse environmental effects of human activity. In essence the notion of environmental impact reporting is a simple one. While the precise form has varied from country to country the process essentially consists of the preparation of a detailed written report which analyses the impact of an activity on the environment, the need for the activity and the alternatives to it. In New Zealand the system of environmental impact reporting has its basis in a document entitled "Environmental Protection and Enhancement Procedures" *(b)*. This document, which was approved by Cabinet in 1973 *(c)*, has now been modified by a further Cabinet directive issued in May 1978. A general statement of the nature of the changes brought about and the reasons for them is contained in a statement from Mr I L Baumgart, the Commissioner for the Environment, dated 12 September 1978 *(d)*.

As yet (1979) the Environmental Protection and Enhancement Procedures have no legislative basis; their continued existence rests entirely on continued Cabinet support. They have no status which would enable compliance with them to be enforced in a Court of law. They are simply a statement of the principles which the government of the day will in general require to be applied to activities which fall within the scope of the Environmental Protection and Enhancement Procedures (hereinafter referred to as the Procedures). Neither is there any legislation which establishes the Commission for the Environment, the Government body with primary responsibility for the administration of the Procedures. The Commission also owes its birth and continued existence to Cabinet.

Formally brought into operation on 1 March 1974 as the result of a Cabinet directive, the introduction of the Procedures followed an earlier Cabinet decision of 7 August 1972 estab-

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I am particularly indebted to Valerie McCourt and Helen Wiley at Northwestern School of Law, Oregon (where I spent a semester as a visiting professor in 1979) for their cheerful assistance with the typing of several drafts of this paper.

(a) Lello, "Effects of Environmental Impact Reports on Planning"; a paper presented to a New Zealand Institute of Chemistry Symposium, "Understanding Impact Reports", Auckland University, 1976.

(b) Copies of the Procedures are available from the Commission for the Environment, PO Box 11-244, Wellington North.

(c) For an account of this early period see *A Guide to Environmental Law in New Zealand*, Commission for the Environment, Government Printer, 1976. Page 103, para 3 (b). See also the Report of the Commission for the Environment for the Year Ended 31 March 1974, pp 3-4. Draft procedures prepared essentially by the Commission for the Environment and the Officials Committee for the Environment were initially circulated for public comment during 1973. The final form of the procedures was essentially an application of the United States precedents "adapted to New Zealand conditions". Report of the Commission for the Environment for the year ended 31 March 1973, at p 6. The Officials Committee for the Environment consists of representatives of the Government departments with major environmental responsibilities. It is responsible to the Minister for the Environment and appears to serve largely as a sounding board for testing the attitudes of Government departments to changes which the Government is proposing in the environmental area. For a description of the Officials Committee and the other main environmental bodies in New Zealand see *A Guide to Environmental Law in New Zealand*, supra at p 102.

(d) Environmental Protection and Enhancement Operations.

lishing the Commission for the Environment. This in turn followed the creation of a new portfolio for the Environment. The Commission was charged with the function of advising the Minister for the Environment on the co-ordination of the environmental policies of the Government and dealing in depth with any environmental issues that called for detailed study. For administrative purposes the Commission was attached to the Prime Minister's office with the Minister for the Environment receiving limited administrative support through the Cabinet office. The first Commissioner for the Environment took up his position in February 1973, and one of the first functions of the Commission was the preparation of procedures for environmental impact reporting. In fact then, if not in name, the Commission is a Government department. It is not a Commission in the sense in which this is used, for instance, in relation to a Royal Commission of Inquiry; it is a permanent body servicing the impact reporting procedures and advising the Minister for the Environment. In recent years it has also conducted various enquiries into environmental matters. This appears to be a growing role *(e)*.

According to a recent report on this early period it was decided by the government of the day that the need to balance development activities with sound environmental administration did not require a new management authority in New Zealand. Rather the need was to strengthen and stimulate the environmental awareness of existing agencies, and to identify areas of current or potential concern which were not receiving the attention which they warranted *(f)*. The method of impact reporting chosen was seen in this context.

It is clear that there was considerable dissent amongst Government departments when the notion of introducing an environmental impact reporting system in New Zealand was first voiced, particularly over the issue of publishing the reports. Some of this boiled over into public debate when the Government's approval in principle for the procedures was announced. The Commissioner for Works, Mr N C McLeod, warned that:

> "(t)he intention to allow environmental impact reports and their subsequent audit to be published will lead to serious problems. [It would provide] any loudly vocal preservationist minority with a chance and ammunition to press further their narrow interests . . . . It would introduce public participation in the detailed planning of a proposal [whereas] environmental impact reporting was [intended] to be a means of presenting the environmental repercussions of a proposal to the decision-maker" *(g)*

In a strongly worded rebuke the then Commissioner for the Environment, Mr P J Brooks,

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(e) A comprehensive statement of the Commission's objectives is contained in the Report of the Commission for the Environment for the Year Ended 31 March 1977 at p 4:

"*Principal objectives*

"To preserve and enhance the quality of life by creating increasing awareness of the environmental implications of human actions and of natural processes, and by promoting coordinated social, economic, and environmental planning and management toward that end.

"*Subsidiary objectives*

"(1) To facilitate understanding of inter-relationships of resource use, waste disposal, population pressures and trends, social conditions, people's aspirations, and environmental quality; to identify the implications of these relationships for present and future generations.

"(2) To encourage people to give informed consideration to these relationships and to foster public participationin the formulation of national, regional, and local goals, and in the planning and implementation of projects arising from them.

"(3) To encourage the identification and characterisation of resources available to New Zealand, and the establishment of their limits; in the light of these findings to promote policies of wise resource use.

"(4) To stimulate the development of proposals most appropriate to the scale and characteristics of New Zealand's physical and social environment, and to draw attention to the limitations of projects considered environmentally inappropriate.

"(5) To provide information and advice to decision-makers on the environmental implications of their policies and operational proposals.

"(6) To foster coordinated research to provide information necessary to achieve these objectives.

"(7) To develop and continually operate procedures — both legal and administrative — towards improving the efficiency and effectiveness of management of the environment.

"(8) To undertake international responsibilities, and to participate in international activities toward improving the management of the global environment."

See also *Devonport Borough Council v Robbins* [1979] 1 NZLR 1, 7 per Cooke and Quilliam J J (CA).

(f) Report of the Commission for the Environment for the year ended 31 March 1976 at p 2. While this statement is directed specifically at the Commission for the Environment rather than at the environmental impact reporting procedures, the two issues were so interconnected that it provides a useful insight into the rationale behind the use of guidelines rather than legislation.

(g) "Environment Voice Plan Attacked", *The Auckland Star*, 20 September 1973.

emphasised that the adoption of impact reporting procedures was the result of long and detailed study. The purpose of the process was to place before the decision-making authority the relevant environmental implications of a proposal. These matters could then be weighed against other considerations. The views of the public would be of assistance in performing this evaulation *(h)*.

Government departments were not the only critics. Attention was directed to a failure to adequately integrate the impact reporting procedures with the Town and Country Planning Act of 1953. An editorial in the *Town Planning Quarterly (i)* expressed the view that any significant change in the status quo already required the equivalent of an environmental impact report under the Town and Country Planning Act, and that the only justification for impact reporting was the persistent refusal of the Crown to bind itself under the Town and Country Planning Act *(j)*.

In a report to the Government the Town and Country Planning Review Committee *(k)* noted its "extreme concern at the proposed procedures for environmental reporting and audit by the Commissioner for the Environment" *(l)*. The committee was "very critical that these proposals seem to have been devised in somewhat of a vacuum (with) no regard for existing legislation and procedures as are already embodied in the Town and Country Planning Act and other enactments" *(m)*. The Committee felt that "if there is to be a new and no doubt proper emphasis on the natural environment this should be clearly defined and then used to strengthen existing structures rather than (introducing) an entirely new system that can only create duplication and conflict" *(n)*.

To many New Zealand lawyers the whole concept of environmental impact reporting may be, at best, obscure. Indeed, in endeavouring to provide a lawyer with a working description of the New Zealand system there are very real difficulties. The non-statutory basis of the New Zealand system, allied with an increasing division between the text of the Procedures and actual practice (now bridged to some extent by the May 1978 Cabinet directive and subsequent statements by the Commissioner for the Environment) sometimes makes even a reasonable prediction of the operation of the system difficult.

It remains a fact, however, that although not required or prescribed by law, the use of environmental impact reports has become important for many activities where governmental approvals are involved *(o)*. Indeed, as the recent proposal to locate a PVC plant at Marsden Point demonstrates *(p)* the results of the impact reporting process can be pivotal.

This is a lesson of importance to not only those counsel who are charged with advocating changes to the status quo, but also for those retained to act on behalf of the increasing number of groups and individuals who are seeking legal assistance to challenge the assumptions borne of a time of less knowledge and less concern about the impact of man's activities on the environment.

This article has several aims. First, it endeavours to describe in detail the Environmental Protection and Enhancement Procedures,

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(h) "Public Servants Call for Secrecy Deplored", *The Auckland Star*, 21 September 1973.

(i) J R Dart, "Distributing the Status Quo", 32 Town Planning Quarterly 4.

(j) But see the Report of the Task Force on Economic and Social Planning: New Zealand at the Turning Point. At p 136 the Report concluded that:"[B]efore the establishment of the Commission for the Environment and the Environmental Council the protection of the environment or the concern with the impact of development was largely uncoordinated, apart from the way in which urban settlements [and to a lesser extent changes in the surrounding countryside] had been controlled under the provisions of the Town and Country Planning Act. But the ineffectiveness of this Act as a measure to protect the environment was a factor in the establishment of the Environmental Council and the Commission for the Environment.

(k) November 1973.

(l) At p 4.

(m) Id.

(n) Id. Compare this with the view expressed by Lello (supra 1, fn (a)) that: "the only possible justification for a separate environmental reporting system in addition to existing planning procedures is a recognition that existing systems are ineffective. More than integrating them is, therefore, required" (at p 24). Lello also comments that impact reports "have set a standard for planning reports where none existed before" (at p 26) and that "the ei (environmental impact) concept, even in its present embryonic form, has already concentrated much needed attention on planning issues in a manner never achieved by town and country planning" (at p 31).

(o) As recently as 1976 the possibility of some legislative basis being given to the system seemed a real one — discussion with W J Wendelken, Assistant Commissioner for the Environment, during the New Zealand Institute of Chemistry Symposium on "Understanding Impact Reports", referred to supra 1, fn (a). Mr Wendelken intimated that he favoured an Act, rather like a constitution, detailing the role of the Commission.

(p) See the impact report and audit on the Whangarei PVC Plant. The report was gazetted on 29 January 1976; the audit is dated 20 April 1976.

both as drafted and as they have been applied in practice. Second, an attempt has been made to assess the affect on the Procedures of the May 1978 Cabinet directive. Finally, wider issues raised by the direction of New Zealand policy in this area have been explored. In the belief that the approaches taken to environmental impact reporting by other countries provide a fruitful insight into the New Zealand system, extensive reference has at times been made to this material.

(2) Impact reporting — Its American origins:

The roots of the New Zealand Environmental Protection and Enhancement Procedures lie in the National Environmental Policy Act 1969, a United States federal statute signed into law by President Nixon on New Year's Day 1970 *(q)*. The fascinating results of this experiment with a new legal and political technique have been exhaustively documented elsewhere *(r)*. Only a brief survey is given here as a background to the New Zealand process.

When the National Environmental Policy Act was enacted, mandating the preparation of impact reports was not its sole aim; with the passage of time, however, this has clearly emerged as the central feature of the statute. In the years since the National Environmental Policy Act was passed the impact that the Act has had on federal agency decision-making has been profound. While the effect that it has had on the *quality* of agency decisions remains a matter of controversy *(s)*, of its impact on the *mechanics* of agency decision making there can be no doubt. Within three years of the Act's passage it had formed the basis of a cause of action in 149 separate law suits *(t)* and by 31 December 1972, the federal agencies had filed 3,635 environmental impact statements. This process has continued apace in the years since *(u)*. By the time official New Zealand inquiries into the environmental impact reporting process began, the broad outline of these events was well known, in particular the amount of litigation that had been engendered. It seems clear that the desire to avoid similar consequences in New Zealand was one of the main reasons for rejecting a statute and opting instead for a Cabinet directive that lacks enforceable legal status *(v)*.

(3) Significance for New Zealand of the United States experience:

To assume that a consequence of providing a statutory basis for environmental impact reporting in New Zealand would be levels of litigation comparable to those that have occurred in the United States would be facile. It is fundamental to a consideration of this issue to understand that when the National Environmental Policy Act 1969 was created, no federal agency was given responsibility for supervising the impact reporting process. Apparently Congress gave little thought to how the Act was to be enforced; Senator Jackson (the Senator responsible for the introduction of the Senate bill that preceded the National Environmental Policy Act) and Professor Caldwell (one of the architects of the impact reporting concept) apparently hoped that the Office of Management and Budget would be primarily responsible for supervising the process *(w)*, but as enacted the National Environmental Policy Act makes no provision for this.The only agency control provided was by the Council on Environmental Quality which has issued detailed guidelines to the various federal agencies to supplement the broad words of the National Environmental

(q) PL 91-190.

(r) See Anderson "Nepa in the Courts-A Legal Analysis of the Nepa", Resources for the Future, 1973. A more recent account is contained in Rodgers' *Environmental Law*. West Publ Co, 1977, chap 7. See also the excellent collection of materials produced by the Environmental Law Institute for a Conference on Nepa which it sponsored in 1978. The materials, entitled "The Environmental Impact Statement Process Under Nepa" are available from the Institute.

(s) For a very pessimistic view see Kreith, "Lack of Impact", 15 Environment 26. Anderson, Id, is more cautious in his conclusions; although he acknowledges that most commentary is decidedly pessimistic (at xi of the Preface) his final conclusions are guardedly optimistic (at 292). See also "Environmental Impact Statements-An Analysis of six Years Experience by Seventy Federal Agencies", Report of the Council on Environmental Quality, 1976.

(t) Anderson. Id at vii.

(u) The Ninth Annual Report of the Council on Environmental Quality (December 1978) at p 47 states:

"As of December 31, 1977, 938 Nepa cases had been filed against the federal agencies surveyed. Since Nepa's enactment eight years ago, more than 10,000 EIS's have been filed, and many times that number of environmental assessments have been made each year.

"The volume of Nepa litigation reached a peak in 1974, with 189 cases filed, and has declined each year thereafter. There were 152 cases filed in 1975 and 119 in 1976. The agencies which have been surveyed for 1977 report 108 new cases . . .

"As of December 31, 1977, 585 (62%) of the 938 Nepa cases had been completed . . . In 202 (35%) of the 938 cases, Courts issued Nepa-related injunctions which delayed the federal action or project at issue; in 92 of these cases a delay of longer than one year was reported."

(v) This conclusion cannot be documented. It is one that has been reached after discussions with various people who were involved in the introduction of the Environmental Protection and Enhancement Procedures.

(w) Anderson. Supra, fn (r) at p 11.

Policy Act *(x)*. But the Council has not played a formal role in scrutinising the quality of impact reports nor has it required the preparation of reports where agencies have disputed the need for this. In 1971 the Federal Environmental Protection Agency was given some limited authority to make written comments on the environmental impact of various actions *(y)*, but while this has provided a useful step towards establishing an institutional mechanism apart from the Courts for the scrutiny and enforcement of the impact reporting process, it has yet to be fully effective in playing a major role in this area *(z)*.

(x) This use of guidelines that has characterised the Council on Environmental Quality's NEPA rule making in the past has now been rejected in favour of regulations which became effective on 30 July 1979 (see 43 Fed Reg 55978, 1978).

The new regulations have made some significant and innovative changes to past procedures and the effect that they have on the quality of environmental decision-making in the United States warrants careful observation in New Zealand. Unlike the loose and ad hoc system that has characterised the New Zealand approach to environmental impact reporting there has been a careful attempt to spell out in detail the requirements of the law. No doubt this is partly a result of the fact that in the United States the whole environmental impact reporting system has a statutory base.

A few aspects of the regulations are particularly worth noting:

(1) The purpose of the environmental impact statement is clarified. It is described as an "action-forcing" device for ensuring that the policies and goals of NEPA are met (s 1502.1). It is not simply a full disclosure document (Id). The agencies are instructed to focus on significant environmental issues and alternatives and to reduce paperwork and the accumulation of extraneous background data (Id). In general there is a 150 page limit.

(2) A new process referred to as Scoping has been introduced in an effort to gain agreement at the outset on what it is that the impact report is to consider (s 1501.7). As soon as practicable after a decision to prepare an environmental impact statement the responsible agency is to give public notification of this decision. Affected and interested persons are to be invited to participate in determining the scope and the significant issues that are to be dealt with in the environmental impact statement (s 1501.7 (a), (1), (2)). At this stage page and time limits may also be set and procedures may be adopted for combining the scoping process with the environmental assessment process (s 1501.7 (b), (1), (2), (3)).

A similar process to this was suggested to the Commission for the Environment by the Environmental Defense Society, Inc in 1975 when it made submissions to the Commission on the future of the Environmental Protection and Enhancement Procedures. The suggestions were not adopted. (copy of the submissions on file with the author).

(3) The environmental impact statement is required to explain how alternatives (described as the "heart of the environmental impact statement") considered in it and decisions based on it will or will not achieve the requirements of NEPA and other environmental laws and policies (s 1502.2 (d)). The agency is also required to specify its preferred alternative (s 1502.13). And s 1505 requires the agency, at the time of making a decision, to identify the alternative(s) which were considered to be environmentally preferable and then to explain in detail why it chose the alternatives eventually selected. At the same time the agency is required to state whether it has taken all practical mitigation measures and if not, why not. This information is included in a formal record (s 1505.2).

The compilation of a record of this kind will obviously have great significance in any subsequent Court proceedings.

(4) On the troubling question of impact statements on legislation, the regulations have modified the previous position under which the impact statement requirement theoretically applied in the same way to legislative proposals as it did to other Federal actions. This was honoured more in the breach than in the observance. As a matter of definition legislation no longer includes requests for appropriations (s 1508.17) and while the regulations still require that an environmental impact statement be part of the formal process of transmitting a legislative proposal to Congress, the scoping process does not apply and in general only one impact statement is necessary. The draft-final impact statement requirement that generally applies is not applicable (s 1506.8).

(5) On the equally troubling question of whether an environmental impact statement is required on proposals and if so when, the regulations have made the following provision: Section 1508.23 defines a proposal "as existing at the stage when an agency has a goal and is actively preparing to make a decision on how to best attain that goal", provided the proposal can be meaningfully evaluated. Where proposals are so closely related that in effect they are a single course of action, they are to be treated in a single environmental impact statement (s 1502.4) and where programs are involved the regulations suggest that they should be analysed either geographically, generically or by the state of technological development (s 1502.4 (c)); (see also s 1508.25 defining "scope").

(6) Section 1503 requires the preparing agency to affirmatively solicit comments on the draft environmental impact statement from persons and organisations who may be interested or affected.

(7) The problem of "incomplete or unavailable information" also receives a rigorous treatment. Section 1502.22 requires the agency to make it clear in every case if there are gaps in the relevant information base. If the information is essential to a reasoned choice and the overall costs of obtaining it are not exorbitant then the information must be obtained and included. If the information is essential but the costs of obtaining it are exorbitant or the means of obtaining it are not known, then the need for the action must be weighed against the risk and severity of the possible adverse impacts. If the agency proceeds it is required to include a worst case analysis and an indication of the probability/improbability of the event occurring.

(y) Clean Air Act. 42 USC S 4701 et seq, s 309.

(z) For a fuller discussion of this provision, its legislative history and the subsequent judicial interpretation, see Anderson. Supra, fn (r), 229-234.

In this situation the Courts have provided the only effective means for reviewing compliance with the National Environmental Policy Act *(aa)*. Obviously a New Zealand Parliament could legislate in a way that would lead to similar results; but it need not do so. It could equally entrust the primary responsibility for the supervision of an impact reporting system to an administrative body with the Courts being involved only in accordance with the usual principles of administrative law *(ab)*.

(4) The New Zealand impact reporting procedures — General scheme:

As has been previously stated, in New Zealand there is no *statutory* obligation on anyone to prepare, obtain, or publish environmental impact reports. The New Zealand Procedures *oblige* no one in this regard; but this does not mean that it is *practically possible* for proposed activities which fall within the scope of the Environmental Protection and Enhancement Procedures to come to fruition without some such report being obtained first and made available. The policy — and it is as yet no more — of successive governments since 1973 has been to require assessments, reports and audits on Government related projects likely to have a significant effect on the environment, as a prerequisite to final project approvals.

Unfortunately, this categorical description of the operation of the Procedures must now be qualified. The extent to which it must be qualified is at the present time uncertain, but there is no doubt that the May 1978 Cabinet directive has made (or perhaps merely acknowledged) some changes to this system. Accordingly it will be useful to look again at this directive before dealing in detail with the 1973 Procedures. While the directive contains the specific statement by Cabinet that the Environmental Protection and Enhancement Procedures "have proved a useful basis for the report-audit system" and are confirmed *(ac)*, the confirmation is made subject to "the broad framework" set out in the Cabinet directive *(ad)*.

The precise meaning of this is not clear; in considering its implications, however, the following statements in the Cabinet directive are of particular relevance:

> "Circumstances vary greatly among departments and it would be impracticable to establish a detailed procedure common to all departments. To carry out this role the Commissioner for the Environment will, in consultation with the Permanent Heads of Government agencies, consider the effectiveness of the environmental enhancement policies and practices in each agency and report on them to the Permanent Head and to the Minister for the Environment *(ae)*.
>
> "The enviromental impacts of many projects will be considered under statutory procedures. There will also be projects or policies of high environmental significance which should be the subject of environmental impact reports and a public audit by the Commission. Examples are those with major public environmental concern, particularly those with wide interdepartmental scope, and those of foreseeable importance to future projects of similar type.
>
> "It is important that the process should be applied to the projects for which it is best suited and gives the greatest return in new information and effective balancing of options. It is desirable that . . . there should be mutual agreement between the Commissioner and the Permanent Head concerned as to the projects for which an environmental impact report should be prepared. It is unlikely, however, that full agreement will always be reached and the Commissioner will have the right to call for an environmental impact report when he considers it necessary *(af)*.

(aa) The best illustration of the general attitude that the Courts have exhibited in their interpretation of NEPA is *Calvert Cliffs' Co-ord Comm v Atomic Energy Comm* 449 F 2d 1109 (1971 DC Cir). The Supreme Court has recently criticised the way in which some federal Courts have been using NEPA to enlarge agency obligations in the conduct of informal rule making under the Administative Procedure Act. See: *Vermont Yankee Nuclear Power Corp v Natural Resources Defence Council* 98 S Ct 1197 (1978). Discussed in 91 Harv L Rev 1805, 1823, 1833.

(ab) For example, a modified version of the review and appeal procedures in the Accident Compensation Act 1972 might be suitable, with the Commission for the Environment performing the supervisory role. For an analysis of the approach taken in Australia see Kelly, "Commonwealth Legislation Relating to Environmental Impact Statements". 50 ALJ 498, 1976. The Canadian situation is analysed in McCallum, "Environmental Impact Assessment: A Comparative Analysis of the Federal Response in Canada and the United States". 13 Alberta Law Rev 377, 1975.

(ac) Statement of the Commissioner for the Environment, Environmental Protection and Enhancement Operations, para (d). Supra 1, fn (d).

(ad) Id.

(ae) Id para (c).

(af) Id para (d).

(ag) Id para (e).

(ah) Report of the Commission for the Environment for the year ended 31 March 1976, at p 8.

> "The wide range of different circumstances leading to environmental studies means that on occasions the formal Environmental Protection and Enhancement Procedures are inappropriate and especially tailored variations of those be followed" *(ag)*.

It would be premature to express a categorical view about the implications of these statements and of the Cabinet directive as a whole. It seems clear, however, that the earlier emphasis on the production of formal impact reports is being reduced. This is borne out by an examination of the Annual Reports of the Commission for the past three years. In the year ended 31 March 1976 the Commission audited 21 impact reports *(ah)*. In the following year it produced 12 audits *(ai)*. In the year ended 31 March 1978 the Commission prepared only five audits *(aj)*. In the Report of the Commission for the Environment for the year ended 31 March 1978 it is stated that the focus of the impact reporting process is now on major policies and projects of major environmental significance, public concern or of foreseeable importance to future similar developments *(ak)*. The Report states that those reports which are subject to audit should be limited by careful selection to those situations where it is the most appropriate and effective way of carrying out the environmental investigation required *(al)*.

According to this 1978 Annual Report the primary explanation for this reduction in the number of audits is the increased number of assessments which are being done, apparently the result of a joint decision between the Commission and the relevant Government departments *(am)*. A similar statement is to be found in the Report of the Commission for the Environment for the year ended 31 March 1977. There it is stated:

> "Written environmental impact assessments prepared in terms of the Procedures are now assuming increasing importance. In the first years of the operation of the procedures the primary function of an assessment was to serve as a basis for a decision on whether or not a full impact report was required. While continuing to meet this function, these documents are being given more status in their own right. The Commission has encouraged licensing and subsidy-paying departments to make detailed appraisals of assessments submitted to them.The Commission has made comments on these assessments and encouraged the departments concerned to involve the public in the process of policy formulation" *(an)*

While applauding this move on the ground that it has improved environmental scrutiny over a wider area of activity, the Commission acknowledges that the move to assessments has also led to confusion about the respective roles of impact reports and assessments *(ao)*.

In a further attempt to clarify the relationship between impact reports, assessments and other methods of evaulating environmental impacts, and the meaning of the May 1978 Cabinet directive, the Commission issued guidelines in April 1979 *(ap)*. The guidelines make the following key points:

1. As soon as project feasibility studies are completed a decision is to be made on the means of environmental evaluation which is to be used.

2. Four choices are open:
   (a) the preparation of an environmental impact report and its audit by the Commission for the Environment;
   (b) the preparation of an environmental impact assessment; a decision should also be made at this stage on the precise way in which this will be used;
   (c) the use of some combination of (a) and (b) that is specifically tailored for the particular project;
   (d) the incorporation of any environmental evaluation into later statutory procedures under the Town and Country Planning Act or the Water and Soil Conservation Act. Opting for this approach would require a finding that this would in fact provide for adequate environmental evaluation and public involvement *(aq)*

(ai) Report of the Commission for the Environment for the year ended 31 March 1977, at p 13.

(aj) Report of the Commission for the Environment for the year ended 31 March 1978, at p 13.

(ak) At p 4.

(al) Id, 11.

(am) Id, 10-11. The Commission also notes that the downturn in the economy has led to the deferral of a number of major projects and this has been a factor in the reduced number of audits.

(an) At pp 10-11.

(ao) Id.

(ap) Available from the Commission for the Environment, supra, fn (h).

(aq) Cf the Report of the Commission for the Environment for the year ended 31 March 1977 where the following statement appears: "The two functions (statutory procedures and the Environmental Protection and Enhance-

Despite this attempt at clarification the confusion is still not entirely resolved. Only consistent practice can achieve this. The proposed ammonia urea plant at Kapuni is seen by the Commission as a first opportunity for testing this new system.

At the present time the essence of the problem is this: the Environmental Protection and Enhancement Procedures make no provision for the use of assessments as documents in their own right unless the assessment determines that the likely environmental impact of a proposal will be essentially insignificant. As explained in greater detail later in this article, in the Procedures the primary function of an assessment is to determine whether an impact report is required. For any projects of environmental significance this is essentially the only function of an assessment. In contrast to what the Procedures require, the developing practice was for an assessment to assume a more formal role. This has now been confirmed by the May 1978 Cabinet directive and by the Commission's April 1979 guidelines. The role of the assessment is less formal than that of an impact report (the Commission does not audit it and the promoter of the project retains much greater control over the whole process than under the formal reporting process) but it is more structured than the role played by an assessment under the original 1973 Procedures.

This confusion over the whole process has arisen largely because practice was allowed to deviate substantially from the Procedures, without any formal change to the Procedures themselves.

The true explanation for these current changes in the operation of the Procedures can only be a matter of speculation. No doubt the Commission has felt the strain of preparing a large number of formal audits, many of them on relatively minor matters. It is also a fact, however, that there has been strong opposition among some Government departments and among some bureaucrats to the long reach of the Commission and to the way in which it has, on occasion with great effectiveness, concentrated public opposition to the projects of Government departments *(ar)*.

This has caused considerable embarassment to some departments and on occasion to the government of the day. It seems clear, for instance, that the Commission's highly critical audit of the Clutha hydro-electric scheme greatly angered some senior bureaucrats and politicians.

In these circumstances it is at least possible that one aim of the recent Cabinet directive is to reduce the number of impact reports which will in the future be prepared on Government projects and to increase the extent to which the preparation of impact reports is subject to consultation and agreement between the Commission and the departments concerned.

The precise impact of this change remains to be seen. A great deal of the Commission's strength and effectiveness has in the past been drawn from public support for its position. Previously it has been able to point with some precision to those circumstances where an impact report has been required under the Procedures. With the gloss imposed by the 1978 directive, however, this will no longer be possible. Essentially it appears that impact reports will be produced where they are "most suitable" *(as)*. There is at least the possibility that in the long term this may substantially weaken the position of the Commission and of the impact reporting process.

It is necessary to keep these developments in mind when considering the materials that follow. In at least some cases where impact reports have been called for in the past it is now clear that at the most an assessment will be required.

In the material that follows, unless it is specifically indicated to the contrary, the reference to the Procedures is to the 1973 Environmental Protection and Enhancement Procedures.

The first step under the Procedures is an environmental impact assessment *(at)*. An *assessment* is required whenever an activity coming within the scope of the Procedures *may* affect the environment *(au)*. The term "environment" is defined as including the human, physical and biological environment *(av)*.Under the Procedures this is envisaged as

ment Procedures) are quite distinct. The former requirements essentially involve an adversary process aimed at resolving competing interests within defined legal criteria . . . The environmental procedures are a means of providing an opportunity for wide public involvement in proposals with environmental implications and for furnishing advice to the Government on the issues involved". At p 10.

(ar) I am not aware of any evidence that the Commission for the Environment have ever succumbed to pressure of this kind. There have been occasions in the past, for instance, when ministerial pressure has been exerted in an effort to bring about changes in audit recommendations.

(as) Statement by the Commission for the Environment. Supra 1, fn (d).

(at) Procedures para 2.

(au) Para 2 (a), (b), (c) and (d).

(av) Para 12.

purely an internal document and amounts to no more than a balancing of the effects of the proposed activity pro and con. This kind of preliminary balancing is not unique to the environmental area. The impact assessment may be envisaged as the preliminary assessment by the proponent of a project, for its own information, of the environmental effects of its proposal.

If the assessment indicates that the proposed action is *likely to affect the environment significantly* an impact report is required *(aw)*. This is still prepared or produced by the interested party, the party proposing the activity. But at the next step — the impact audit — the quality of impartial investigation is introduced for the first time. This involves the examination of the report by the Commission for the Environment, with the object of insuring that the impact report has fully considered the environmental implications of a proposal and the alternatives to it.

While this interpretation of the text of the Procedures is not always the one that has been followed, particularly in situations where Government departments have been the promoters of the projects, it is clearly the correct interpretation of the Procedures. Now, of course, this must be read with the gloss placed on the Procedures by the 1978 Cabinet directive. The circumstances surrounding the proposed Waiau River irrigation scheme in the South Island provide a useful illustration of these issues. In the submissions on the Waiau River Irrigation Scheme Impact Report a letter from Mr P F Reynolds, the District Commissioner of Works for the Ministry of Works, to the Waiau River Action Committee is reproduced [at page D55]. The letter states:

> "Regarding terminology, the term environmental impact statement was cited incorrectly in my letter of 10 April. This term actually means a statement from an expert in some field regarding his particular interest. I should have used the term environmental impact assessment. [T]here is an opportunity to comment on an environmental impact report when they are published but it is not yet certain whether a report, in the official sense of the term, will be required for this scheme. The assessment being made now is probably as full as what would be required for an environmental impact report. If this assessment indicates that the environmental consequences are not very great, or that they have already been considered adequately by my department in consultation with experts in the appropriate field, and that there has been sufficient opportunity for public comment on sensitive issues, it is possible that an official report will not be needed."

The Ministry of Works subsequently endeavoured to elevate the status of their assessment to that of a report by the simple expedient of pasting a new label on the front of the document, a process which raised the ire of the Commission! As noted previously, under the 1973 Procedures the significance of whether an assessment or a report is required arises from the fact that only a report is subject to auditing *(ax)*, a matter of particular significance to some sensitive Government departments. In the *audit* which was eventually prepared on the Waiau River scheme the Commission stated:

> "An assessment is to determine whether a proposed action would have a significant effect and therefore require an environmental impact report. As assessment cannot be considered an adequate substitute unless it shows that a proposal is unlikely to have a significant effect on the environment" *(ay)*

The impact reporting procedures apply to five main spheres of activity; the common feature is a connection between the proposal and some form of Government action — either the necessity for Government or Crown authorisation of the proposal, or the provision of Government finance. These spheres of activity are:

(1) The works and management policies of all Government departments *(az)*.
(2) Actions other than those by Government departments which are financed wholly or partly by money appropriated by Parliament and included within a departmental vote *(ba)*.
(3) The works and management policies of all statutory boards, corporations, commissions etc which are subject to Cabinet Works Committee programming *(bb)*.
(4) Crown grants of licenses, authorisations, permits and privileges under any of seventeen listed statutes *(bc)*.

(aw) Para 4 (b) and 12.
(ax) Supra, para 4.
(ay) Waiau Plains Irrigation Scheme Audit. 14 April 1976. Pp 1-2.
(az) Para 2 (a).
(ba) Para 2 (b).
(bb) Para 2 (c).
(bc) Para 2 (d). The statutes are: the Coal Mines Act

(5) Provisions to be included in proposed legislation *(bd)*.

Three points in particular need to be made about these five areas:

1 Despite the reference to impact reports being required for certain "management policies", to date no impact reports have been prepared for policy level activities. In its Report for the year ended 31 March 1977 the Commission noted this fact and it appears that in the future more attention will be directed towards this area *(be)*.

2 The Procedures provide that other Acts can be added to the 17 initially included, by agreement between the Minister for the Environment and the Minister responsible for the relevant legislation.

3 Paragraph 2[e] of the Procedures (paraphrased as No 5, above) specifically refers to reclamation and empowering bills under the Harbours Act 1950; but it is clear that the scope of para 2[e] of the Procedures includes *any* legislation which may affect the environment. Apart from impact reports on reclamations under the Harbours Act, however, of which there have been several, this provision has been ignored *(bf)*.

(5) The environmental impact assessment:

As noted previously, an assessment is required for any project falling within the scope of the Procedures which *may* affect the environment *(bg)*. The approach required in performing this step is defined as "a conscious and systematic assessment of the environmental implications of the choice between options which may be open to the decision-maker" *(bh)*. The meaning of the words "the decision-maker" in this context is crucial and their interpretation raises one of the most vexing problems which one confronts in dealing with the Procedures; what weight is to be attached to "guidelines" which have no statutory force and which in several respects lack drafting precision? How precisely are such guidelines to be interpreted?

In the present case there may well be situations where there are alternatives, but they are not open to the immediate proponent of a project. Is the immediate proponent the "decision-maker" referred to in the Procedures, or is the reference to some other individual or body? The significance of this is well illustrated by the United States Court of Appeal's decision in *NRDC v MORTON (bi)* where the decision-maker was held to be Congress and the President, thus widening the range of alternatives which had to be considered on a proposal to grant oil and gas leases on the Outer Continental Shelf, beyond those which were open to the Department of Interior, the more immediate proponent *(bj)*.

In this situation the following comment is offered: the more significant the impact (and the more controversial the issue) the more widely the meaning of "options open to the decision-maker" is likely to be construed. In most cases, however, it is clear that the decision-maker is at the least any Government department finally responsible. For example, in its audit on the Kanieri Gold Dredge — Grey River proposals *(bk)* (a relatively localised impact) the Commission clearly saw the range of options as being related to the department ultimately responsible, rather than the more immediate proponent of the activity. The Commission commented that

> "a profit oriented public company would not reasonably be expected to consider an unprofitable alternative. The

1925, the Fisheries Act 1908, the Forests Act 1969, the Harbours Act 1950, the Health Act 1956, the Iron and Steel Industry Act 1959, the Land Act 1948, the Maori Affairs Act 1953, the Maori Reserved Land Act 1955, the Mining Act 1971, the National Parks Act 1952, the Noxious Animals Act 1956, the Petroleum Act 1937, the Reserves and Domains Act 1953, the Urban Renewal and Housing Improvement Act 1945, the Wildlife Act 1953, and Part iv of the Electricity Act 1968.

(bd) Para 2 (e).

(be) See p 11. The Report actually states that "the former provision (works and management policies) has been only *rarely* applied . . ." (emphasis added). However the author has been unable to identify *any* circumstances where an environmental impact report has been prepared on management policies. For a discussion of this issue in relation to the NEPA see Edmonds "The National Environmental Policy Act Applied to Policy-Level Decision Making", 3 Ecology LQ 799, 1973.

(bf) Letter to the author from J M K Hill, then Assistant Commissioner for the Environment, dated 8 September 1977. Copy on file with the author. For a discussion of this issue in relation to NEPA see: "Impact Statements on Legislative Proposals: Enforcing the Neglected Half of Nepa's Mandate", 7 ELR 10145. See also fn (x), supra, for discussion of the changes brought about by the new CEQ regulations.

(bg) Supra, para 4.

(bh) Procedures para 3.

(bi) 458 F 2d 827 (DC cir 1972).

(bj) For a useful discussion of this issue and the question of alternatives generally, see Jordan, "Alternatives Under Nepa, Towards an Accommodation", 3 Ecology LQ 705, 1973, Note "The Least adverse alternative approach to substantive review under Nepa", 88 Harv L Rev 735, 1975, Note "Implementation of the Environmental Impact Statement", 88 Yale LJ 596 1979.

(bk) 11 October 1974.

> Mines Department, however, should have considered mining alternatives and investigated different proposals to insure extraction of as much gold as possible from the ore deposit to promote good resource management and minimize the environmental impact" *(bl)*.

One method that has been adopted in an effort to deal with the difficulties posed by this issue has been to call for public comment *before* the preparation of the impact report in order to ascertain what is generally expected. This was apparently done, for example, with the Mt Davy Colliery impact report *(bm)*. The advantage of this is that it appears that the Commission's attitude toward the acceptability of an impact report is significantly affected by the public comments it receives on the impact report. If the project proponent ascertains the views of the public and deals with those that raise reasonable issues, the resulting impact report is also likely to satisfy the Commission unless significant new developments occur in the interim.

And in the final analysis, the Commission for the Environment has been willing to give advice prior to the preparation of the assessment and report. In the impact report on the Maui development, for instance, it is acknowledged that the Commission gave advice and guidance during the preparation of the report, without prejudice to the audit *(bn)*. A cautionary note must be added, however. In its audit on the impact report on proposed sites for the Auckland Thermal Number One Power Station *(bo)*, the Commission recommended that further sites be investigated in the South Manukau area. This led to the selection of the Waiau Pa site. In its later audit of the impact report on this site the Commission was critical both of certain aspects of the site and, more widely, of the use of gas for electricity generation *(bp)*. This issue had not been raised by the Commission in its earlier audit.

In the last analysis then, the responsibility for compliance with the Procedures lies with the project proponent. Any contact with the Commission is on an advisory basis only.

The process of environmental assessment is conceived as an on-going one which should begin at the inception of a proposal. In the event of disagreement over the necessity for preparing an impact report the assessment may be subject to scrutiny by the Commission. Paragraph 13 of the Procedures states:

> "Where it is not proposed to prepare an impact report but the Commission for the Environment considers that one should be forthcoming the matter is referred to the Minister for the Environment who may direct that the report be prepared."

Paragraph 15 of the Procedures seems to anticipate that the information gathered in the assessment will also form the basis of the written summary of potential impact which must be forwarded to the Commission for the Environment in the event of a decision to prepare an impact report *(bq)*.

It follows from this, of course, that while the assessment may be no more than a mental reflection on the situation where it is a simple project that is involved, "[d]ecisions of greater complexity having the possibility of greater environmental impact would justify a more rigorous examination backed by appropriate documentation" *(br)*.

As noted previously, the primary aim of the assessment under the 1973 Procedures is to determine whether there is likely to be a significant impact on the environment *(bs)*; however, the early stage of project planning in which the assessment occurs is also the most flexible

(bl) Id 6-7.

(bm) Gazetted 17 July 1975.

(bn) In his paper on the "Use of Environmental Impact Reports" presented to the New Zealand Institute of Chemistry Symposium referred to supra, fn (a) the Assistant Commissioner for the Environment, W J Wendelken, indicated that such consultation was a usual feature of the impact reporting process. He described the Commission's function at this stage as "to help ensure all environmental aspects are described, the various options have been considered and are explained with reasons why a particular alternative is chosen, and a discussion of the impacts of the proposal is included" (at p 5 of his paper). Apparently it is also the normal practice for the Commission to see a draft impact report before publication. But this is not mandatory. Id.

(bo) 6 January 1975.

(bp) Audit para 2.5 at p 3.

(bq) Para 15 states: "When a government organisation . . . decides to prepare . . . an environmental impact report . . . it is to notify the Commissioner for the Environment in writing giving a short description of the proposal concerned and its initial assessment of the environmental impact of the proposal and the date by which the impact report is likely to be completed. The initial assessment is to be in sufficient detail to enable the Commission to judge whether or not, in its view, an impact report is required".

(br) Para 3.

(bs) While para 4 of the Procedures refers to "whether . . . the . . . actions being considered *would* affect the environment significantly and would require the preparation of an environmental impact report", para 12 states that "*impact reports are required* for all actions or legislative proposals as defined . . . where (these are) *likely* to have a significant effect . . ." The latter is the criterion which the Commission applies. See the discussion of this, supra, 17.

stage in any search for options, the key stage for determining whether no action is the best action. And in this regard it is important to note that the "do nothing" option is specifically referred to as one of the alternatives which must be evaulated *(bt)*. Furthermore, regardless of whether an impact report is ever prepared, the promoter is required to consider courses of action which improve the environment and minimize damage to it *(bu)*. Again, it seems clear that the steps which must be taken are related to the potential significance of the impact. By definition, if only an assessment is required the environmental impact is likely to be relatively minor; accordingly no great expense in reducing environmental impact would be required. Nonetheless, if an alternative with less impact is available and it involves no extra expense or difficulty it seems clear that this alternative must be taken. It is difficult to see what sanction applies in the event of a failure to do this, however.

When the assessment process is considered under both the 1973 Procedures and under the developing practice that has been sanctified by the May 1978 Cabinet directive, two conclusions can be drawn:

1. Where an impact report is required the assessment performs the functions outlined above. Its essential purpose is to determine whether there is the likelihood of a significant impact; if there is, an impact report must be prepared. With reasonable confidence it can be stated that the use of the assessment for this purpose is declining; this conclusion follows from the fact that impact reports themselves are in the decline. In cases of particular public controversy or potentially major impact, however, this is the procedure that will generally be adopted and applied.

2. In an increasing number of cases it appears that the assessment will perform a function in its own right. In this case the Commission does not play a formal role. No audit is prepared and the assessment is not intended as the precursor to a report. Instead the promoter of the project will prepare an assessment, seek public comment, appraise the assessment in the light of these comments and then proceed with the project with any modifications that it chooses to make. This is essentially the scheme that was set out in the *proposed* 1975 Procedures. These are discussed briefly at para 21.

(6) Activities falling within the scope of the Procedures:

In most cases the fact that a proposal falls within the scope of the Procedures will be quite clear. There have been some cases, however, where the connection with Government action has been extremely tenuous. The Baigent's Refiner Groundwood Pulp Mill Scheme, for example, fell within the impact reporting procedures not because the scheme itself required Government approval, but because it required the allocation of a substantial block of electricity and the construction of a transmission line deviation and sub-station by the New Zealand Electricity Department *(bv)*. Examples can also be found of impact reports being required by decision-making authorities prior to their reaching a decision. The impact report on the Mt Tauhara TV Transmitter *(bw)* resulted from a request by the Chief Judge of the Maori Land Court, Judge K Gillanders-Scott, to the NZBC for a report and audit to assist the Court in reaching a decision on whether the Maori reserve status of the land should be lifted *(bx)*. In some cases this could raise interesting legal questions about the ability of an authority to require a promoter to prepare and pay for a report as a condition precedent to exercising a discretion. On occasion proponents have also agreed to voluntarily comply with the impact reporting process. This is illustrated by the decision of the Featherston County Council to prepare an impact report on its proposed solid waste disposal site *(by)*. This is an approach which the Commission is specifically seeking to encourage in the case of local authorities *(bz)*.

Regardless of how tenuously a project is connected to Government approval, it is clear that once a proposal does fall within the ambit

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(bt) Procedures, para 3.

(bu) Id para 4.

(bv) Baigent's Refiner Ground Wood Pulp Mill audit. 23 January 1975. At p 1 the audit states: "The Procedures include within their scope proposals requiring Cabinet Works Committee approval. Baigent & Sons' proposal requires allocation of a substantial block of electricity and the construction by the New Zealand Electricity Department of a 220 KV transmission line deviation and substation. Before this work could be approved by the Cabinet Works Committee *it was necessary to insure that the environmental impact of the whole proposal be adequately examined*" (emphasis added).

(bw) Gazetted 1 November 1973.

(bx) Supra, para 1.

(by) Featherston County Solid Waste Disposal Sites Environmental Impact Report. Gazetted 25 March 1976.

(bz) See the Report of the Commission for the Environment for the year ended 31 March 1976 at p 3.

of the Procedures it can be required to comply fully with the impact reporting process. When the Eastbourne Borough Council sought to locate a reservoir in the Muritai Reserve by arranging an exchange of land with the Department of Lands and Survey, the Commission for the Environment advised the Council that while it was acknowledged that the only reason for an impact report was the use of Muritai Park, nonetheless: "once undertaken . . . the impact reporting procedure gives the proposer, interested members of the public, and the Commission the opportunity to assess the environmental consequences not only of a proposed action but also of the alternatives" *(ca)*.

(ca) Muritai Reservoir-Eastbourne Borough Council Audit at p 1, 26 July 1976.

CASE AND COMMENT

Maintenance after divorce

In *Davis v Davis*, (Supreme Court, Auckland. 31 July 1979 No D 637/77. Thorp J. The wife applied, at the request of the Social Welfare Department, for maintenance for herself and her two children. She was on emergency benefit and received family benefit for the two children. She told the Court that, on the determination of her application, her emergency benefit would, according to her understanding, be converted to a Domestic Purposes Benefit of $94.78 per week, but that whereas any income earned by her would result in an equivalent deduction from her emergency benefit, when she was transferred to the Domestic Purposes Benefit she could earn up to $1,000 a year without reduction of benefit. She had not been energetic in attempting to get employment and Thorp J took it as unrealistic to assume she would be wholly unable to get some part-time employment and indicated that he would consider the matter accordingly for the purposes of s 43(f) of the Matrimonial Proceedings Act 1963.

The husband had married again and a dairy had been purchased by him and his second wife necessitating repayment of interest to the first debenture holder at the rate of $115.40 per week. This sum was payable until March 1981. Though improving, this business was not doing quite as well as had been hoped and there was unexpected strong competition from a nearby business. His Honour accepted the *Lindsay v Lindsay* [1972] NZLR 184 (CA) approach, and the "gloss" on the "hard line" therein established as effected by, eg, *Gasper v Gasper* [1972] NZLR 174, but thought the wife and children were entitled to some award having regard to the husband's earning capacity. Unless the present basis of financing the purchase of the business could be amended, it looked as if the husband could not pay much more than the $15 he was already paying weekly to the Social Wefare Department towards the wife's rent.

Thorp J felt he could not accept that the wife and children should get nothing because of the husband's acceptance of obligations to repay purchase money for new assets. He regarded as "even more fatal" to any prospects of reasonable maintenance payments the husband's effecting his stated intention of putting aside about $50 extra per week to pay off second and third debenture holders in April 1918 — even if he could manage it. He saw two possible alternatives, viz, (a) the husband's getting a deferment of the period of repayment to the first debenture holder, refinancing the remaining indebtedness in 1981, and paying maintenance at a significant rate now and at a better rate still in 1981; (b) award $60 per week maintenance now, thus compelling a sale of the business now, thus leaving open the questions whether a satisfactory sale could be obtained in the current economic climate and whether the husband and his second wife would obtain satisfactory jobs. His Honour essentially opted for (a), affected by the knowledge that the second wife was content to have all her capital and income brought into account in considering what sum could be found to assist the first wife and her children. He accordingly awarded $10 weekly to each of the wife and her two children on the basis that the wife should be free to seek reconsideration of these figures at the end of two years or at such earlier time as the dairy might be sold.

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"Extraordinary circumstances" rendering equal sharing "repugnant to justice"

It must surely have been inevitable that another matrimonial property case should arise within the context s 14 of the Matrimonial Property Act 1976 almost as soon as the ink was drying on the judgments of Woodhouse, Cooke and Richardson JJ in *Martin v Martin* [1979] 1 NZLR 97 (CA), *Dalton v Dalton* [1979] 1 NZLR 113 (CA) and *Williams v Williams* [1979] 1 NZLR 122 (CA). From these cases we now know that the tests in s 14 are "stringent", and that, to put it at its lowest, a gross disparity in contributions can bring a case within that section. To put it at its highest, as Woodhouse J has done, if a disparity in contributions by itself can ever give rise to the exception to equal sharing which is to be found in the section, then the disproportion must be gross indeed.

Johnson v Johnson is a decision of Speight J (judgment was delivered on 12 June last) reached in the light of these three Court of Appeal cases. The parties married in 1960, the applicant husband being a successful 47 year-old surgeon and the respondent wife being 19 years old. It was her first marriage and the husband's second. The wife had no assets and no job qualification. The marriage lasted 17 years until the parties parted in 1977. There were two teenage children of the marriage for whom nothing was apparently asked in terms of s 26 of the 1976 Act. To put it mildly, in the terms of the judgment of the Court, there was "a most unusual imbalance between the financial contributions made by the parties." To cut a long financial tale short, the assets brought to the marriage by the husband, (viz the home now worth $174,000, the contents worth $14,000, silver and a Goldie painting worth $11,000, a yacht worth $20,000, life insurance worth $10,000 and shares worth $42,000), totalled $270,000. In addition, over the 17 years, his net professional income totalled $220,000. Unhappily, however, severe ill-health had since caused his income from his practice to fall away to little or nothing, though if his health were to improve this situation might be partially restored. There was no evidence that the wife assisted in the way some doctors' wives do beyond doing some insignificant washing. The marriage also benefitted by approximately $81,000 net under the terms of the husband's father's will. Since 1960, the husband's assets diminished in value. First, "he was lavish almost to the point of recklessness" in gifts he made to his wife, of money and jewellery particularly. The value of the latter was quite $30,000, but impossible to determine accurately as the wife had "carelessly lost several of the most valuable items". The husband set up the wife in a health and beauty business in which she earned some $60 per week for part, if not all, of the three and three-quarter years it lasted before disastrously failing and leading to a net loss of $40,000. A venture in the New Hebrides funded for them both by the husband proved a total loss. There were contingent debts and Speight J put the loss on this venture at about $50,000.

His Honour considered also that at least $100,000 had been spent on the wife's various pleasures as distinct from family ventures. He also found that most of the assets in the form of the house, contents and replaced yacht were still in existence as the matrimonial home and family chattels. He found that, owing to the vicissitudes above outlined, the husband now possessed assets worth about $260,000 and owed about $15,000. The unusual net result obtained that, despite professional success and private means, this husband (and so the couple) were worse off at the end of the day than they were when they married.

The Court accordingly had to decide whether the husband had made out a case (for the onus lay on him) for bringing the home and the chattels within s 14. To do this, Speight J reviewed some of the evidence and attempted to resolve the matters in conflict thus:

(i) the wife had been inadequate in the domestic field, an "unenthusiastic housekeeper" and had rendered little or no support, either secretarial or social, in the husband's practice.

(ii) the husband had had to spend substantially more for help in the home than would have been necessary had the wife's domestic performance been nearer to that of the average New Zealand housewife.

(iii) the wife had been unfaithful, but there was no evidence of her not being a good mother.

(iv) there was evidence that the husband had been "a drunkard given to cruelty, bad temper and boorishness". This last quality may have discourged the wife's domestic efforts from a very early stage.

(v) Apart from the parties "common role as parents", there "was not much by way of common effort or support, certainly in the last ten years if not longer."

He concluded that the attitude and lack of co-operation of each spouse "towards the other

and towards the marriage" was "relevant obviously" on the questions before him.

His Honour then turned to the three Court of Appeal cases and drew these four conclusions from them:

"1 Financial inequality is not common and is not to be regarded as out of the ordinary in many marriages but may be so remarkable as to warrant inclusion in the factors to be considered.

"2 Gross disparity of contributions (whether financial or otherwise) when incurred as a whole, may so require recognition but one must be vigilant for counterbalancing considerations.

"3 Loyal family service and support by a wife (as *Martin v Martin*) or by the husband (*Williams v Williams*) even if of no more than normal standard (*Dalton v Dalton*) can not easily be displaced by financial disparity — especially if such service has been of long duration.

"4 Given disparity of such a nature as to be extraordinary all other factors of the marriage "fabric" must be considered. A Section 14 order is only justified if totality of merit assessed would make equality repugnant to public concept of justice."

He then proceeded to analyse the facts of the *Williams* and *Martin* cases, and in particular drew attention to the fact that, in the *Martin* case, Cooke J had "introduced a helpful concept when he asked whether the circumstances are such as to *demand* displacement of the equality rule" (see [1979] 1 NZLR at p 107; the italics are those of Speight J).

Speight J found that *Dalton* case to be of "particular interest" to him "in the present context". He said that the wife in that case had

> "brought to the marriage the matrimonial home and during its currency she expended *some* (but not all) of her considerable separate funds in increasing the matrimonial assets. At the same time she also built up her separate property to a very substantial degree. The only balancing factor was that the husband had worked in the wife's family business and had paid her a housekeeping allowance throughout the marriage and had made the "not insignificant contribution" of 25 years as a husband and father. In the view of Cooke J the case came near the borderline."

His Honour then said he found substantial crystallisation of "my present problems" when he (Cooke J.) said (see [1979] 1 NZLR at p 118):

> "The contributions are not to be compared in any refined way. I think, too, that the mere fact that one party has paid for the matrimonial home out of separate property is certainly not in itself automatically an extraordinary circumstance; it is envisaged by various provisions of the Act and is obviously not uncommon. But when the over-whelming predominance of the wife's financial contributions here are added to the more normal predominance of her contributions in the home and marriage as wife and mother, and note is taken also of the way in which she and her family helped the husband's business career during the marriage, I think that this is a case quite out of the ordinary and that many people would regard it as repugnant to justice that he should share the value of the home equally. If the Judge in the Supreme Court had addressed himself to the question and had so found, I would not have differed from his opinion on appeal."

Speight J then drew up a list of factors which, taken cumulatively, he considered to be enough to entitle him to distinguish the *Dalton* case and hold that s 14 applied. These were:

(i) The very high value of the original assets brought to the marriage exclusively by the applicant husband.

(ii) The somewhat unusual circumstance that almost all the assets in dispute fell within s 11, ie the husband's entire fortune had not produced any significant assets other than those in the family group and he had not built up assets other than of the domestic variety.

(iii) The wife had received very large benefits during the marriage worth, at the minimum, $100,000 and the health and beauty business and jewellery had been lost.

(iv) $80,000 in capital and income had been largely spent on the wife without any contribution on her part.

(v) Unlike many marriages, the assets now available were less — not greater — than at the time of the marriage, and this was largely due to expenditure on the wife.

(vi) The "absence of any evidence of domestic capability bringing benefits to the marriage other than the upbringing of the two children" and her failure to make "any contribution to assisting [her husband] in the advancement of his profession".

(vii) The wife was now only 38 years

old, in good health and able to obtain employment even if she had no skills.

(viii) The wife had had so much lavished on her and she brought nothing to the marriage and had contributed little.

(ix) The husband was now 66 years old and in poor health.

(x) It would not be right to give the wife $125,000 as being half the home and family chattels for:

> "One does not assess these matters on financial contribution alone, but where there has been so little real partnership in the best sense to a prospering or successful marriage, it is of relevance to pay some regard to finances. When one considers his considerable generosity it would be repugnant to justice for this man, now in poor health with little prospoect of earning capacity left to him, albeit party because of his own folly in liquor and improvidence, that he should be left with such a comparatively small remainder after contributing assets and money in excess of half a million dollars during the period of the marriage. It therefore falls to the Court to assess and to make a division taking into account the contribution of each to the partnership. I give consideration to all those matters set out in Section 18, dealing individually with each item in
> "(a) Care of the children has been nothing other than normal.
> "(b) The management of the household and the performance of household duties has been less than average.
> "(c) The provision of the money has been all on one side and in very large amounts.
> "(d) There has been no significant acquisition or creation of matrimonial property, indeed to the contrary.
> "(e) For the same reason there has been no payment of money which has resulted in maintenance or increase of the valuation, again to the contrary.
> "(f) Performance of work or services in respect of matrimonial property has been one-sided.
> "(g) There has been no forgoing of a high standard of living, again to the contrary.
> "(h) There has been no assistance by way of supporting the spouse's occupation."

Speight J assessed the respective entitlement on partition to be two-thirds to the husband and one-third to the wife. It is respectfully submitted that this decision must surely meet with the highly strict desideratum of Woodhouse J let alone the somewhat looser requirements of Cooke and Richardson JJ.

One cannot now help but wonder what would have happened had the *Dalton* case been taken on appeal to the Privy Council. It is a matter of record that an appeal to that Court was lodged. The appeal was withdrawn, and it is within the writer's personal knowledge that a settlement took place between the spouses in that case.

Certainly the decision of Speight J bears out what the writer at any rate feels are the best descriptions of the drift of s 14, namely that of Casey J in *Rhodes v Rhodes* [1979] NZ RecentLaw 84, at p 85: "In my opinion the Court may interfere with the equal division so clearly intended by the Act only when to carry it out would seriously upset one's sense of the fitness of things," and that of Somers J in *Symonds v Symonds* [1978] NZ Recent Law 349 to the effect that the words of s 14 conveyed overall "the notion of occurrences or events so far removed from ordinary expectation or experience that to divide equally would be quite clearly unjust . . . It is not enough that [equal] division may be thought unjust. The repugnancy must flow from the extraordinary character of the circumstances . . . No doubt it can be cogently, dialectically and philologically argued that that which is unjust is repugnant to justice. In s 14 I think the legislature means something more than simply 'unjust'. The expression conveys to me an injustice arising from the extraordinary circumstances which is patent or compels or requires recognition."

It is thought that there may well be a number of cases which will now have to be looked at with circumspection in so far as disparity of contribution may have been thought to attract s 14. Some were mentioned by Cooke J in his judgment in the *Dalton* case: see [1979] 1 NZLR at p 116. One asks, too, if *Godfrey v Godfrey* [1979] NZ Recent Law 22 can still stand, and if it would still be correct for White J to say to-day what he said in *Foss v Foss* [1977] 2 NZLR 185, at p 190, viz that, where the basic asset was a farm property owned and brought into the matrimonial property by the husband, it would be rare for a wife to be able to claim half. In *Fraser v Fraser* (1979, unreported) the husband brought in eleven times as much as

the wife and successfully invoked s 14, but would he be able to do so now? In *Finny v Finny* (1979, unreported) the wife had contributed $10,000 as against her husband's mere $600. Again one asks oneself whether this disparity could be regarded as gross enough to attract the section. On the other hand, there is one pre-Court of Appeal case on s 14 which one hopes will still survive, viz *Jerome v Jerome* [1978] NZ Recent Law 192, where McMullin J held that s 14 could successfully be invoked to prevent an applicant from being doubly rewarded.

Perhaps what all lawyers and law students should try to remember it that there is a very definite distinction between mere unfairness to a spouse and extraordinary circumstances which are enough to attract s 14. This is shown only too clearly in *Wensor v Wensor* [1978] NZ Recent Law 111. There, the husband had left his wife after 13 years' marriage and there were considerable mortgage and rate arrears on the home. The parties' separation agreement provided for the wife's assumption of responsibility for the mortgage and the husband undertook to pay the rates and insurance. The wife's efforts alone avoided a mortgagee's sale. The husband paid no rates or insurance. McMullin J observed that equal sharing of the home might well be unfair to the wife, she having largely borne the responsibility for the children and struggled to keep up the payments on the home. Nevertheless he also held that unfairness was not enough for him to invoke s 14.

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CORRESPONDENCE

Dear Sir,

Re Unjustified Dismissal and Union Membership

I disagree with Professor Szakats whose article appeared at [1979] NZLJ 321.

Professor Szakats has for some time been arguing that a change to the Industrial Relations Act is required to give all workers the Personal Grievance right contained in Awards by virtue of s 117 of the Industrial Relations Act. While I agree with Professor Szakats that *Muir's* case means that a worker must be a member of a Union to be able to claim the benefit of the Personal Grievance procedure, I do not agree with his interpretation of *NZ Insurance Guild Union of Workers v The Insurance Council of New Zealand* (1976) Industrial Court 173. I was counsel in that case. In the judgment the Court has managed to give the impression that it was a necessary part of the reasoning that it hold that the worker, Mr Estall, was not entitled to rely on the Grievance procedure; in fact while the matter was discussed in a desultory fashion, it was not a necessary part of the argument and I believe it could be quite easily sustained that the remarks by the Court are merely obita dicta.

Of course, knowing as one does from that statement that the Court is inclined to take the view that the worker who is not covered by an Award has no such right it would be very difficult to substain a contention to the opposite effect. However, I believe that in the appropriate case, it would be possible to do so.

In my view, the essential points necessary are that the worker must have once been covered by an Award containing s 117 Personal Grievance procedure and that he have been promoted and that he have been promoted without any statement by his employer of a change in the conditions of his employment affecting that right.

Estall's case shows that the Arbitration Court has jurisdiction to consider the terms of employment of a person who is not subject to an Award or agreement. It has power to settle any dispute of rights (s 48 (1) (b)). Dispute of rights includes a personal grievance (s 2) while dispute is in argument between employer and one or more Unions or associations of workers in relation to "industrial matters" (s 2).

Accordingly it is only necessary that the worker involved be a member of the Union — the further requirement mentioned by Professor Szakats in my view, is not yet part of our law and hopefully will never be. The appropriate case has yet to be heard but it seems to me that the justice of the matter is such that as long as the facts of the particular case do not positively militate against a finding in favour of the worker it should be possible for an above Award worker to succeed with a personal grievance.

Yours faithfully

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Smoking – "A Sydney Stipendiary Magistrate has convicted a person who blew cigarette smoke into the face of another person of assault. The complainant in the case was the local President of the Non-Smokers Rights Movement." (1978) 4 Commonwealth Law Bulletin 705.