HENRY NAUTA

THE NATIONAL DEVELOPMENT ACT 1979

Research Paper for Energy and Environmental Law

LL.M (LAWS 543)

Law Faculty

Victoria University of Wellington

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I. INTRODUCTION

The concept of streamlining planning procedures in relation to major developmental works has only received serious consideration in recent years in New Zealand, mainly in response to the way in which the country was affected by the energy crisis. The commitment of Government to certain 'Think Big' energy projects and its desire to avoid the delays inherent in the established procedures resulted in the passage of the National Development Act 1979.

Unlike many pieces of New Zealand legislation, this statute was drafted without reference to pre-existing law elsewhere in the world and in this regard it is considered to be unique. However, it is virtually certain now, following the election to power of the Labour Government on 14 July 1984, that the days of the National Development Act 1979 are numbered. In spite of this the importance of the Act cannot be denied in that it created for the first time in statutory form a streamlined decision-making procedure from which valuable experience has been gained and which should provide a basis for any future attempts to cut through the quagmire of normal planning procedures.

In this paper it is proposed to analyse and comment critically on the scheme and content of the National Development Act and how it has worked to date followed by some conjecture as to reform.

II. BACKGROUND

The impetus for the former National Government's 'Think Big' policy in relation to energy development can be traced back to the energy crisis which confronted New Zealand in the early 1970's. New Zealand has always been heavily dependent on imported fuels and it was recognised that this source of energy would become less reliable and more expensive. An important Government objective, therefore, became to achieve greater self-sufficiency in the production of energy in particular and other resources in general.

New Zealand's hydro-electrical potential was obvious and the Maui gasfield had been discovered in 1969. It was the Government's urgent desire to ensure that certain projects aimed at utilising Maui gas would be able to proceed without undue delay that directly led to the decision to provide for a fast-track planning procedure for major works.

Following numerous attempts at drafting it, the National Development Bill was introduced into Parliament on Friday, October 5, 1979, by the then Minister of National Development The Hon. W.F. Birch. Addressing Parliament on the likelihood of New Zealand seeing a number of major energy developments, he stated:[1]

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1. N.Z. Parliamentary Debates Vol.426, 1979, 3352

> Long delays in obtaining consents and approvals for such projects are a real possibility under present procedures, and such delays could not only be extremely costly, but could also undermine the viability of the project. Although the Government is conscious of the serious risk of unaffordable delays, it does not want to have large-scale proposals rushed through without proper public scrutiny. The new system provided in the Bill simply shortens the time taken, and eliminates the potential delay inherent in a large number of separate procedures by consolidating the examination of the proposal and the issuing of appropriate consents into one procedure.

The major concern of the Government appears to have been the potential under the existing procedures for delays resulting from hearings at council and tribunal level followed by proceedings in the High Court, the Court of Appeal and possibly even the Privy Council. In particular, prominent Government parliamentarians repeatedly referred to the delays associated with the approvals for the Clyde dam and the Kariori pulpmill.

Following its introduction, the National Development Bill was hotly, and at times angrily, debated in Parliament. At times constructive debate on the issues was lost sight of with Government members accusing the Labour Opposition of being against development while the latter argued that the Bill, amongst other things, allowed the Minister to play God.

Opposition to the Bill did result in substantial amendment to it, perhaps most importantly in allowing for judicial review.

The National Development Act was passed into law on 14 December 1979. It is noteworthy that the Act is not confined to energy-related projects - these are not specifically referred to in the long title which reads:

> "An Act to provide for the prompt consideration of proposed works of national importance by the direct referral of the proposals to the Planning Tribunal for an inquiry and report and by providing for such works to receive the necessary consents."

To date there has been one amendment to the Act (the National Development Amendment Act 1981), three Orders in Council pursuant to section 3(3) of the Act have been made (which relate to the Petralgas Chemicals NZ Ltd methanol plant at Waitara, the NZ Synthetic Fuels Corporation Ltd synthetic petroleum plant at Motonui and the South Pacific Aluminium Ltd aluminium smelter and associated facilities at Aramoana) and two Orders in Council pursuant to section 11 have been made, namely the National Development (Petralgas Chemicals NZ Ltd) Order 1981 and the National Development (NZ Synthetic Fuels Corporation Ltd) Order 1982. The Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983 came into force on 22 November 1983.

III. THE NATIONAL DEVELOPMENT ACT 1979

A. Scheme of the Act

It is considered desirable to outline the way in which the Act works before proceeding to its provisions in more depth.

Any person may apply for the provisions of the Act to be applied to a contemplated work. If the Governor-General in Council considers that the work meets certain criteria, the provisions of the Act may be applied to the work or any part of it. The Minister refers the application to the Planning Tribunal for an inquiry, report and recommendation and gives public notice that he has done so. The Minister sends copies of the application to various authorities and any person is entitled at that stage to obtain a copy of the application from the Tribunal.

As soon as practicable after applying, the applicant forwards an environmental impact report to the Commissioner for the Environment who makes it available to the public and calls for submissions. After considering the latter, he gives his opinion on the environmental implications of the work in the form of an audit which is made available to the public. Copies of the application are also sent to every statutory authority which would normally grant any consent set out in the application. These authorities carry out the appropriate investigations and make recommendations to the Tribunal which conducts a public inquiry.

Once the inquiry is completed, the Tribunal prepares and submits to the Minister, and makes publicly available, a reasoned report and recommendation. After taking into account the Tribunal's report and recommendation and again considering the section 3(3) criteria, the Governor-General in Council may declare the work to be one of national importance and grant such of the consents set out in the application, and on such terms as he thinks fit. This Order in Council must be laid before Parliament within fourteen days. If it differs from the Tribunal's recommendations, the Minister must lay before Parliament a written statement of the reasons for the difference. However, the consents take effect from the date when the Order in Council comes into force.

B. The Application

1. Who may apply under the Act?

Pursuant to section 3(1) any person may apply to the Minister of National Development for the Act to be applied to any Government or private work. Although the word 'person' is not expressly defined in the Act, it clearly refers to both natural and artificial persons. However, section 2(1) defines "applicant" as firstly, in respect of a Government work, the Minister of National Development, and secondly, in respect of a private work, the person proposing to construct, undertake or operate the work or cause the work to be constructed, undertaken or operated. In view of the fact that the Act contemplates major works of national importance, it was hardly envisaged that a natural person would have the wherewithal to establish such a work, but nevertheless such a person is not excluded from applying.

Section 3(1) specifically refers to any "Government work" or "private work". Does this mean that a proposed joint venture between the Government and a non-Government corporation is excluded from the application of the Act? It is submitted that such a work must be considered partly a Government work and partly a private work. "Government work" is defined in section 2(1) as a work constructed or intended to be constructed by or on behalf of Her Majesty the Queen or the Government of New Zealand or any Minister of the Crown and includes the construction, undertaking, and operation of the work.

On the other hand "private work" is defined as a work constructed or intended to be constructed by or on behalf of any person or body other than Her Majesty the Queen or the Government of New Zealand or any Minister of the Crown and includes the construction, undertaking and operation of the work.

A literal interpretation of section 3(1) results in the Act only being applicable to one or the other type of work. On this ground, it is conceivable that the decision to apply the Act to a joint Government/private work might be impugned.

Alternatively, such a work might be viewed as primarily a Government work with a degree of private assistance in which case an application by the Minister of Works and Development could be acceptable for the purposes of section 3; or the work might be seen as essentially a private work involving Government assistance which would necessitate the corporation applying.

To date there has been no application made for the Act to be applied to a strictly Government work, although Government involvement has been clearly apparent in two of the applications made to date. Fiftyone percent of the shares of Petralgas Chemicals N.Z. Limited are held by the Petroleum Corporation of New Zealand Limited which in turn is wholly owned by the Government, although registered as a private limited liability company. The remaining shares in Petralgas Chemicals N.Z. Ltd are held by the Government's partner, Alberta Gas Chemicals Ltd. Similarly, although N.Z. Synthetic Fuels Corporation Ltd is registered as a private limited liability company, it is seventyfive percent Government-owned (in the form of NZ Liquid Fuels Investment Ltd) while Mobil Petroleum Company Incorporated holds the remainder of the shares, bar one. The only other applicant under the National Development Act, South Pacific Aluminium Ltd, does not have Government involvement.

2. What must the application contain?

Twenty copies of the application to have the Act applied to a work must be submitted to the Minister.[2]

Section 3(2) provides:

> Every such application shall -
>
> (a) Specify the reasons why the applicant considers the work meets or will meet the criteria set out in subsection (3) of this section:
>
> (b) Describe the land on which it is proposed to construct the work, and the reasons why the site is preferred to other practicable sites:

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2. National Development Act 1979, s.3(1)

(c) Give such particulars as would be required if an application for the consent were made in the normal way:

(d) Be accompanied by such plans as will generally describe the proposed work and by a plant of its proposed location on the site:

(e) Specify every consent that he wishes to have granted to him under this Act, the specific statutory provision under which the consent would normally be granted (being a statutory provision in an Act, or in force under an Act, specified in the Schedule to this Act), and the statutory authority which would normally grant it:

(f) Be accompanied by a statement of the economic, social and environmental effects of the proposed work:

(g) Be supplemented by such other reports, plans, statements, or information (including amplification of any of the matters referred to in paragraphs (a) to (f) in this subsection) as the Minister notifies the applicant he considers necessary.

Clearly the requirements listed above are mandatory and should there exist any omissions and/or irregularities of a serious nature, then the application could be rendered void. This point was considered by the Court of Appeal in CREEDNZ Inc. v. Governor-General.[3] In that case the plaintiffs[4] (the environmental group known as the Coalition for Rational Economic and Environmental Development in New Zealand Inc and Mr G.J. Holden) challenged the validity of an Order in Council

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3. [1981] 1 NZLR 172

4. Although technically the applicants in the proceedings, CREEDNZ and G.J. Holden are referred to herein (as they were by the Court) as the plaintiffs to avoid confusion with the respondents in the proceedings (who were the applicants under the Act).

applying the Act to an aluminium smelter and associated works contemplated by the third and fourth respondents (South Pacific Aluminium Ltd and the Otago Harbour Board) at Aramoana.

Counsel for the plaintiffs submitted firstly that the application of the respondents failed to comply with section 3(2)(c) in that the scheme plan of subdivisions which accompanied the application did not comply with the provisions of the Local Government Act.[5]

Before considering this submission, Cooke J. observed that counsel for the plaintiffs did not argue that these omissions would in themselves nullify the whole application. Cooke J. appears to be insinuating that he might not have even considered the point raised on this ground. Nevertheless, since the issue did in fact arise he proceeded to deal with it as follows:[6]

> It is not necessary to go into details of the omissions. Applying the approach taken by this Court in such cases as New Zealand Institute of Agricultural Science v. Ellesmere County [1976] 1 NZLR 630; Wybrow v. Chief Electoral Officer [1980] 1 NZLR 147, 160-161; and A.J. Burr Ltd v. Blenheim Borough Council [1980] 2 NZLR 1, I am satisfied that the irregularities are not so serious as to nullify the part of the application relating

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5. One of the consents sought was approval of the scheme plan for subdivisions. Under normal planning procedures the respondents would have been required to apply to the local county council under Part XX of the Local Government Act 1974.

6. Supra. n.3 at 175

to subdivision. Both the County Council, in carrying out investigations under s.6(1) of the National Development Act with a view to deciding on a recommendation to the Tribunal, and the Tribunal itself in its inquiry will be able to require any further particulars needed.

Secondly, counsel for the plaintiffs contended that the statement required by section 3(2)(f) in the respondents' application was inadequate as to economic and environmental effects. Cooke J. was of the contrary opinion finding that these matters were dealt with sufficiently fully to satisfy section 3(2)(f). In arriving at this conclusion, he simply stated that portions of this part of the application claimed "in some detail advantages for the national economy, particularly in the major expansion of exports and employment opportunities" while environmental effects were dealt with "reasonably fully ... The question must be one of degree: it would be impossible to state all the economic, social and environmental effects."[7]

From the somewhat cursory fashion in which Cooke J. rejected the plaintiff's allegations of defects in the respondents' application, certain conclusions might be made. Firstly, that any omissions and/or irregularities in an application would have to be of a considerably serious nature to invalidate an application; secondly, that the Court does not see its role as being one of determining the merits of the contents of an application (which is really an Executive decision) but simply

7. Supra n.3 at 176

to ensure that the requirements of the Act are complied with; thirdly, that applications are unlikely in practice to be struck down on this ground unless substantially defective.

3. The preliminary decision under s.3(3)

(a) Section 3(3) generally

In respect of an application made under section 3(1), subsection (3) provides that the Governor-General in Council may apply the provisions of the Act to a proposed Government or private work (or any part of it) after taking into account the following considerations: firstly, that the work is "a major work that is likely to be in the national interest"; and secondly, that the work is "essential for the purposes of: (i) the orderly production, development or utilisation of New Zealand's resources; or (ii) the development of New Zealand's self-sufficiency in energy...;[8] or (iii) the major expansion of exports or of import substitution; or (iv) the development of significant opportunities for employment"; and finally, that it is "essential a decision be made promptly as to whether or not the consents sought should be granted."

Clearly the decision to apply the provisions of the Act to a work is in the nature of a preliminary decision which effectively sets the wheels of the Act in motion. In theory, the decision has no bearing on the eventual outcome of whether or not the consents sought in the application will be granted. However, it is generally acknowledged in practice that the decision to apply the Act to a proposed work is the activation of Government policy which will more than likely result ultimately in the granting by the Governor-General of the

8. This excludes atomic energy as defined in s.2 of the Atomic Energy Act 1945

consents sought pursuant to section 11.

Before the Order in Council is made pursuant to section 3(3), the Minister has an obligation to consult the united or regional council within whose district it is proposed that the work be situated and such other statutory authorities as he considers appropriate.[9] The extent of this consultation is not outlined in the Act. It is submitted that all the Minister need do to comply with this requirement would be to simply seek advice or information from the appropriate council. Although for practical purposes this might simply result in the council feeling that it is not being completely bypassed at this early stage of the proceedings, consultation may have the additional advantage of forestalling any potential local problems arising or backlash from that quarter at a later stage.

Since the Act was passed, only three Orders in Council have been made pursuant to section 3(3). The first was the National Development Order 1980 made in relation to the application by Petralgas Chemicals NZ Ltd in respect of the methanol plant at Waitara and associated works. The second was the National Development Order 1981 which relates to New Zealand Synthetic Fuels Corporation Ltd's application regarding the synthetic petroleum plant at Motonui and associated facilities. Thirdly, the National Development Order (No. 2) 1981 relating to the application by South Pacific Aluminium Ltd in respect of a proposed aluminium smelter at Aramoana and associated facilities. This third Order in Council

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9. National Development Act 1979, s.3(4)

was the subject of four sets of proceedings, three of which were brought by the Environmental Defence Society Inc and one by CREEDNZ Inc.

Before turning to the important issues raised in those cases, it is appropriate at this stage to consider the nature of the authority which is given the power to make the decision under section 3(3), the nature of that power and what constitutes a major work.

(b) The Governor-General in Council

The Governor-General in Council is vested with the power to apply the Act to a proposed work under section 3(3). What role does the Governor-General have in the decision-making process? It is clear from the definition of "Governor" and "Governor-General" in section 4 of the Acts Interpretation Act 1924 that he acts by and with the advice and consent of the Executive Council. But without going into this question in any depth it is as well to remember that the office of Governor-General is constituted by paragraph 1 of the Letters Patent of 1917 of George V while paragraph V provides:[10]

> In the execution of the powers and authorities vested in him, the Governor-General shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without

10. New Zealand Gazette, 1919, p.1213

delay, with the reasons for his so acting.

In theory, at any rate, it seems that if the Governor-General "sees sufficient cause" he may reject the advice of the other members of the Executive Council.[11] Whether this is likely to occur in practice is another matter; indeed, the Governor General's presence is not even necessary at the meeting of the Executive Council whereat its advice and consent is signified.[12] If any one person is to be identified as being responsible for the decision taken under section 3(3), it is the Minister of National Development. After all, it is he who:

> "... after seeking the opinion of his colleagues and taking such departmental and other advise as he considers necessary, presents to Cabinet, and, formally, to the Executive Council, such measures as may require the Governor-General's consent."[13]

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11. Refer Dr F.M. Brookfield, "No Nodding Automation: A Study of the Governor-General's Powers and Functions" 1978 NZLJ 491

12. Acts Interpretation Act 1924, s.23(1)

13. CREEDNZ v. GOVERNOR-GENERAL [1981] 1 NZLR 172 at 188

(c) The nature of the power exercised by the Governor-General in Council

Although it is not expressly stated, the decision taken by the Governor-General in Council is by Order in Council, which is clear from the provisions of the Acts Interpretation Act 1924 and section 17(3) of the National Development Act and which experience to date has shown.

The questions arise as to whether this function is legislative or administrative in nature, and whether this distinction has any practical effect. As to the first question, there can be little doubt that an Order in Council is legislative in form, being delegated to the Governor-General by the empowering statute. But it can also be viewed as an administrative action. Whatever label is used to characterise the Order in Council made pursuant to section 3(3) there can be little doubt that it may be impugned on the grounds such as breach of natural justice and that the Executive Council acted ultra vires.

(d) What is a "major work"?

The first of the criteria which the Governor-General in Council must take into consideration is whether or not the proposed work is a "major work". No attempt has been made to define this phrase in the Act or in the decisions of the Court of Appeal.

Some attempts, however, have been made by the American Courts to define the phrase "major federal action" expressed in section 102(2)(c) of the U.S. National Environmental Policy Act. In a paper by D.A.R. Williams[14] two of these American cases are referred to in this context. In the first, the Court held that "major federal action ... refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it ..."[15] while in the second it stated that a major federal action "requires substantial planning, time, resources, or expenditure."[16]

In the New Zealand context, the phrase "major work" is qualified by the words "likely to be in the natural interest" which makes definition even more difficult. Whether a work is of a substantial scale to be a "major work" is a question of fact in each individual case to be determined by a value judgement.

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14. D.A.R. Williams "Legal Developments in Approval Processes - The National Development Act 1979 of New Zealand" in Energy Law in Asia and the Pacific (1982) p.391

15. Hanley v. Mitchell (1972) 460 F.2d 640, 644; 4 E.R.C. 1152, 1155 (U.S. Court of Appeals, Second Circuit)

16. Natural Resources Defence Council v. Grant (1972) 341 F.Supp.356; 3 E.R.C. 1883, 1890 (U.S. District Court, Eastern District, North Carolina).

(e) Judicial review of the section 3(3) decision

When it was first introduced into Parliament, the National Development Bill excluded the judicial review of Orders in Council. However, when the Bill was reported back from the Lands and Agriculture Select Committee, this aspect was removed. With the obstacle overcome and the insertion into section 3(3) of the list of criteria to be considered by the Governor-General in Council, it was clear from the outset that judicial review would be available in respect of an Order in Council made pursuant to the subsection.

Following enactment, but prior to any challenge of any Order in Council made, well founded doubts were expressed as to the potential for success of an application for judicial review of a decision to apply the Act under section 3(3). For example:[17]

> ... given the nature and context of the statute it is hard to see how an application for review (or declaration) might succeed, in the absence of quite bizarre behaviour by the Governor-General or his Ministers. First, in relation to the decision to apply the Act, it must be noted that this is a mere preliminary decision which swings the Act's procedures into operation. In such cases, courts have been reluctant to review, and especially reluctant to review on the basis that anyone other than the applicant ought rightly to be heard. Secondly, and this is a consideration which applies to both section 3(3) and section 11 decisions, the subject matter of the Act seems more closely allied with the national emergency situation than with the

17. John Hannan "The National Development Act 1979" 9 NZULR 200 at 203

mundane business of peace-time administration; in the former area the courts again have tended to be reluctant to review. On the other hand, with such a lengthy list of criteria to be considered it may be that there is scope for argument about whether the Governor-General has in a particular case exercised his power for a purpose within the statute, or whether he could reasonably have considered that exercise of the power in this case would be within the purposes of the statute; the Reade v. Smith [1959] N.Z.L.R.996 approach.

This approach may be especially relevant to attempts to challenge the final section 11 decision, but there are difficulties. As to the "natural interest" criteria, note that the work must only be considered to be "likely" to be in the national interest; a doubly subjective empowering clause. And what court would not shrink from considering the parameters of the "national interest" in such an overt fashion? More hope is offered by the criteria in section 3(3)(a) and (b). Yet while we at least have a list of criteria, or purposes, under paragraph (a) (lists always give the appearance of precision), all of the matters in that paragraph raise very large issues of economic philosophy and analysis, which would be justiciable only with great difficulty, if they are justiciable at all. The problem of justiciablility arises, it is submitted, even if the test involved is one of

> whether a reasonable decider could have formed the view that a particular decision would be for the purposes of the Act.
>
> Given the status of the decision-maker here and given the problematic nature of the section 3(3) criteria, it would seem more likely that review would proceed on the basis of a failure to consider relevant matters and/or consideration of irrelevant matters, or possibly of a fettering of discretion (as by some declaration of an absolutely unshakeable commitment to a particular development even before the Act has been applied). In an area of decision-making fraught with political pressures it may not be too difficult to raise such arguments, although obtaining the information necessary to substantiate them may be a different matter.

The first judgement delivered by the Court of Appeal in respect of the National Development Act, Environmental Defence Society Inc v. South Pacific Aluminium Ltd[18] the plaintiffs (the Environmental Defence Society Inc and the Royal Forest and Bird Protection Society of New Zealand Inc) challenged the Order in Council made pursuant to section 3(3) and sought discovery of documents from, and leave to administer interrogatories to, the respondents (South Pacific Aluminium Ltd, the Otago Harbour Board, the Minister of National Development and the Governor-General).

18. [1981] 1 N.Z.L.R. 146

As against the Minister and the Governor-General, the proceedings were against the Crown; thus the first issue to be decided by the Court was whether or not it had jurisdiction to order discovery and interrogatories against the Crown.

For the plaintiffs it was argued that, pursuant to section 17(6) of the National Development Act, section 10 of the Judicature Amendment Act 1972 applied to the proceedings before the Court, thus giving it power to require any party to make discovery of documents or to permit any party to administer interrogatories. Moreover, they pointed to section 27 of the Crown Proceedings Act 1950 which allows interrogatories and discovery against the Crown in any "civil proceedings".

For the Crown, the Solicitor-General contended that the proceedings before the Court did not fall within the definition of "civil proceedings" in section 2(1) of the Crown Proceedings Act 1950 (which excludes "proceedings by way of an application for review under Part I of the Judicature Amendment Act 1972 to the extent that any relief sought in the application is in the nature of mandamus, prohibition or certiorari.")

The Court held as a matter of fact that declarations were the primary relief sought by the plaintiffs. Since the Declaratory Judgments Act 1908 was made binding on the Crown by section 5(2) of the Crown Proceedings Act 1950, and recognising that discovery is a valuable adjunct to proceedings for a declaration, the Court considered that it had jurisdiction to order discovery and interrogatories against the Crown.

Since the jurisdiction under section 10 of the Judicature Amendment Act 1972 is discretionary, it remained to be decided whether interrogatories and discovery would be allowed. In respect of the interrogatories sought to be administered, the Court held that these were fishing interrogatories and oppressive, and were disallowed in toto.

Discovery, however, was seen as a different matter:[19]

> If parties such as the present plaintiffs were denied all access to the respondents' documents it could in practice be virtually impossible to challenge an Order in Council under the National Development Act on any grounds going to the reasons for the Order. The Act itself recognises, however, that such Orders in Council should be subject to judicial review. There are limits to the scope of judicial review ... but we do not think that it would accord with the intention of Parliament, embodied in the Act, if the Court were to shackle itself by denying access to highly relevant evidence. These cases are of major public importance. Public confidence in the administration of the Act and in judicial safeguards would be shaken if the Court were to confine the scope of review so narrowly as to invite suggestions of rubber-stamping.

Adopting a common-sense approach, the Court, in allowing discovery, limited it to documents of cardinal importance in view of the large number of documents. The documents of

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19. Ibid at 150

cardinal importance, in the Court's view, were those considered by the Executive Council or Cabinet on or about the day on which they decided to advise the Governor-General to apply the Act, including any documents referred to therein and those recording any decision or advice determined by the Council or Cabinet.

The case is important in showing how far the Court of Appeal is prepared to go in realising its responsibilities under the Act. Indeed, the Court was even disposed to the opinion that the Minister ought to have given oral evidence at the hearing and made himself available for cross-examination. The Crown did not agree and, although it did make an affidavit of documents in compliance with the Court order, objected to the production of the relevant documents.

Annexed to the affidavit was a direction from the Deputy Prime Minister that the Clerk of the Executive Council object to the production of the relevant documents and not to produce them unless the Court decided otherwise. It was claimed that discovery was contrary to the public interest because the documents "... relate to consideration at the highest levels of the Executive of matters connected with policies of the Government; that such consideration should be able to be given on the basis of free and frank advice; and that the possibility of such documents having to be made public is likely to inhibit the giving of such advice."[20] With specific reference to the Cabinet paper and advice sheet tendered to the Governor-General (both of which were contained in the affidavit's schedule) the direction reasoned that discovery

20. EDS Inc v. South Pacific Aluminium Ltd (No.2) [1981] 1 NZLR 153 at 155.

was inappropriate since the documents were concerned with the implementation of current Government policies and could present an incomplete picture of the reasons for the advice given to the Governor-General; furthermore, it was argued that discovery would effectively contravene the obligation of secrecy between Councillors in respect of matters discussed in Council and thus prejudice the effectiveness of Government business.

These arguments and the criteria set out in section 3(3) of the Act (which were not alluded to by the Deputy Prime Minister) were considered by the Court of Appeal in Environmental Defence Society Inc. v. South Pacific Aluminium Ltd (No. 2)[21] following a motion by the plaintiffs (the Environmental Defence Society Inc and the Royal Forest and Bird Protection Society of New Zealand Inc) for production of the documents listed in the schedule to the Clerk's affidavit. The Court unanimously rejected the claim of Crown privilege. The Court was in no doubt as to its jurisdiction to inspect the documents itself or to order production for inspection by the plaintiffs in spite of the Minister's objection. Cooke J. relied solely on the House of Lords decision in Burmah Oil Co. Ltd v. Bank of England[22] and the decision of the High Court of Australia in Sankey v. Whitlam[23] while both Richardson and McMullin JJ also reviewed other recent decisions,[24] all of which reflect a

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21. Idem

22. [1980] A.C. 1090; [1979] 3 All E.R. 700

23. (1978) 142 CLR 1

24. For example, Conway v. Rimmer [1968] A.C. 910; [1968] 1 All E.R. 874 and Elston v. State Services Commission [1979] 1 NZLR 193

trend against according immunity from disclosure to Executive documents merely on the grounds that they relate to government policies at the highest levels. However, the Court recognised that the jurisdiction is discretionary and, with respect to Cabinet or Executive Council documents, should be sparingly exercised.

In finding that there was good reason to order inspection, Cooke J. looked to the "unusually strict"[25] criteria or tests of section 3(3) of the Act noting the use of the strong word "essential" twice and the special procedure for judicial review provided in section 17. He considered that the latter section was contemplated by Parliament as complementing the special powers conferred on the Governor-General in Council and that the Court's role in safeguarding against stretching of the Act beyond its true scope necessarily included the power to order the inspection of documents.

The Court arrived at the conclusion that although the Order in Council appeared regular on its face, the terms of the Deputy Prime Minister's direction raised a substantial doubt as to whether Goernment policy, rather than the criteria provided in section 3(3), had predominated when the decision pursuant to that section was taken. What role did the Court consider policy might play with respect to a decision made pursuant to section 3(3)? Cooke J. stated:[26]

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25. EDS v. South Pacific Aluminium (No.2) supra at 157

26. Idem

> Policy must be involved to some extent in a decision under s.(3)(3). For instance, it is necessarily involved in considering whether a work is "likely to be in the national interest". But to a large extent the Act states the policy and empowers the Governor-General in Council to decide whether the work or a decision is essential for the purposes of that policy. For instance, the Act recognises that the major expansion of exports and the development of significant opportunities for employment are desirable goals or policies. The decision whether a work is essential for those purposes must be essentially a decision of fact and discretion in the particular case, even if policy elements also enter into it. Again, the question whether a decision be made promptly as to whether or not the consents sought should be granted calls for a value judgment. In some cases, no doubt, policy may have to be taken into account in arriving at that judgment, but the question poses a specific and strong test turning on much more than policy.

Richardson and McMullin JJ agreed that section 3(3) allowed room for consideration of policy questions but that did not mean a decision could be made on that basis without consideration of the prescribed criteria.

One is forced to the conclusion that, had the Deputy Prime Minister's direction alluded to the fact that the Cabinet paper did in fact disclose that the criteria outlined in section 3(3)

received due consideration, the Court may well have exercised its discretion differently. In any event, the Court ordered that the documents in question be produced for its inspection before reaching a conclusion as to whether their production should be ordered to the parties. After carrying out inspection, the Court refused disclosure of the contents of the documents to the plaintiffs.

Thus, although the plaintiffs eventually succeeded in their actions against the Crown they were denied access to the documents they so keenly sought to support their challenge to the validity of the Order in Council applying the Act to the smelter project. It is a matter of conjecture whether or not the documents would have assisted the plaintiffs in their later substantive claim. As it happened, the CREEDNZ Inc case (which attacked the same Order in Council) came before the Court first and thus the plaintiffs in the earlier two cases relied on somewhat different grounds in their "third round" in the Court of Appeal.

The issues which were dealt with in CREEDNZ Inc v. Governor-General had an even greater impact on administrative law in New Zealand and it is clearly the leading case on section 3 of the National Development Act.

As has already been discussed, the Court rejected the allegation of the plaintiffs that the Order in Council was invalid because of defects said to exist in the application itself. The Court was also quick to dismiss the allegation of fraudulent misrepresentations said to have been made by the third

respondent (South Pacific Aluminium Ltd) to the Governor-General in Council.

The first significant contention of the plaintiffs was whether the property owners affected were entitled to see the application and a reasonable opportunity of making written submissions on it to the Executive Council before the Council decided to advise the Governor-General to make the Order in Council applying the Act to the proposed works. In other words, does anyone affected by a decision made pursuant to section 3(3) have the right to be heard before the decision is taken? The issue is one of statutory interpretation. The Act does not expressly require compliance with the principles of natural justice at this stage of the procedure, but neither does it expressly exclude compliance. Therefore, the Court had to consider whether or not the Act implied the right to a hearing before the section 3(3) decision.

The Court of Appeal saw no need to restate the well-settled general principles in this area of administrative law, which had been done the previous year by the same court in Daganayasi v. Minister of Immigration.[27] However, it was noted by Richardson J. that in applying those general principles it must be remembered that in deciding whether a natural justice obligation should be imported there are no hard and fast rules and will depend on all the circumstances of the particular case.[28]

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27. [1980] 2 NZLR 130 at 141

28. CREEDNZ Inc v. Governor-General supra n.3 at 186-7

Taking into account the uniqueness of the legislation before it, the Court decided that it would be inconsistent with the scheme of the Act to imply in it, or engraft on to it, the right to a hearing before the preliminary decision was taken in terms of section 3(3). Cooke J. stated:[29]

> ... it has to be remembered that a streamlining of procedures is the very purpose of the National Development Act. It is only to be expected that some rights will be done away with in the process. In my opinion the points made by the plaintiffs about the loss of rights by property owners fall far short of showing that Parliament could have contemplated that the Executive Council or Cabinet would be obliged to afford some preliminary opportunity of a "hearing". Such an obligation could not be engrafted without doing violence to the scheme of the Act.

It is clear that the Act is a code and as such provides other safeguards (such as the stringent compliance with section 3(3), the prior requirement of Ministerial consultation with the relevant united or regional council and the various provisions for public notice) and the right of full participation at the later Planning Tribunal hearing.

Other reasons were given by the Court for holding as it did on this issue and taking them all into account it is difficult to argue with their conclusion.

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29. Ibid at 177

The second major issue considered was whether the decision to apply the provisions of the Act to the work was invalid by reason of bias or predetermination. It was anticipated[30] that this could provide a ground for impugning the preliminary decision of the Governor-General in Council made pursuant to section 3(3) owing to the mandatory consideration of the criteria listed in that subsection.

In the CREEDNZ Inc case, the plaintiffs specifically alleged that the Executive Council was biased in favour of the applicants in arriving at its decision. In support of their claim, the plaintiffs referred to public statements made by certain Ministers which were alleged to show that the Executive Council had made up its mind in advance. Although the Court of Appeal did not take up the point, there does appear to be a distinction between bias and predetermination. In Franklin v. Minister of Town and Country Planning[31] Lord Thankerton pointed out that bias occurs when a person in judicial or quasi-judicial office departs from the standard of even-handed justice. Following that case the allegation of bias in CREEDNZ might have been determined on the basis that the Executive Council acted neither in a judicial nor quasi-judicial capacity in making its decision to apply the Act to the work in question.

However, the Court concentrated on the allegation of predetermination. Cooke J. was of the opinion that whether or not there was a real probability of suspicion of predetermination

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30. See, for example, J. Hannan, supra at 203

31. 1948 A.C.87, 103-4

or bias was irrelevant to a decision of this nature at this governmental level. He stated[32]:

> Realism compels recognition that before the end of July 1980 the Government had decided that a smelter project by the company in the South Island was likely to be in the national interest and ... that from an early stage the Government had favoured using the National Development Act for it .... It would be naive to suppose that Parliament can have meant Ministers to refrain from forming and expressing even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.

In determining what amounts to impermissable predetermination, the Court considered that the only relevant question was whether at the Executive Council meeting the members genuinely addressed themselves to the criteria in section 3(3) and considered that those criteria were satisfied. Thus, if the Executive Council meeting was merely a "rubber stamping" of Government Commitment to the smelter project, then it could only be concluded that the members' minds were closed to any alternative other than to apply the Act to the work and that would render the Order in Council invalid. The Court was convinced, however, that the Ministers did in fact turn their minds to the merits of the application and that neither the terms of the Order in Council nor the newspaper reports of Ministerial statements disclosed that the Ministers' minds were closed at the time of advising the making of the Order in Council.

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32. Supra n.28 at 179

Two points may be taken from the Court's decision on the issue of predetermination. The first is the extent to which the minds of the Ministers must be closed before the Court will declare a decision of the Governor-General in Council pursuant to section 3(3) invalid. The CREEDNZ case strongly reflects the Court's stance in favour of the presumption of regularity of Executive action. It seems that it would need to be shown that the Ministers were totally committed to the project to the extent that little if any consideration was given to the section 3(3) criteria at the time of advising the Governor-General. As Richardson J. stated:

> It would be unrealistic to expect Ministers to have completely open minds as to the criteria set out in s.3(3) of the National Development Act or as to the desirability in the public interest of a proposed work.[33]

The second point is the apparently impossible burden faced by a potential challenger of the decision of proving that the Minister's minds were so foreclosed that no genuine consideration was given to the section 3(3) criteria. Given the fact situation in CREEDNZ and the realistic approach taken by the Court of Appeal in that case, it is difficult to envisage how a party could possibly establish that the Minister's minds were not open to persuasion or that the Order in Council was made after simply having gone through the motions of considering the criteria of section 3(3).

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33. Ibid at 194

A further ground on which the section 3(3) decision might be impugned is by establishing that relevant considerations had not been taken into account by the Executive Council. It was this issue which gave the Court of Appeal in CREEDNZ the greatest difficulty and the one which the plaintiffs came close to succeeding with. The plaintiffs alleged that the Governor-General failed to take into account seven matters which, had he done so, could not have justified the making of the Order in Council. Although the plaintiffs submitted strong arguments in their favour based on detailed affidavits of experts and the Crown chose not to have the Minister of National Development give oral evidence as suggested by the Court, the Executive Council's decision was again saved by the presumption of its having acted properly and the inability of the plaintiffs to discharge the requisite burden of proof.

Each member of the Court of Appeal referred to the principle stated by Lord Greene MR in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation:[34]

> The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

34. [1948] 1 KB 223, 228

The Court recognised its duty to inquire into whether or not the Executive Council directed itself properly in law and took into account the criteria set out in section 3(3). However, the burden was on the plaintiffs to prove on the balance of probabilities that their allegations showed that section 3(3) could not have been complied with. The Court noted that it is more difficult to discharge the burden of proving that something has not been taken into account which ought to have been, than proving that something has been taken into account which ought not to have been. Furthermore, Richardson J. added a further restriction on reviewability when he pointed out that the larger the policy content then the less inclined will the Court be to weigh the considerations involved.

The considerations alleged to have been so all-important by the plaintiffs were not the only considerations, nor did the plaintiffs show that the Ministers were not alive to them. The Court did not consider itself qualified to define the precise content of the national interest or the other criteria set out in section 3(3)(a). This is understandable given that these considerations must often necessitate a political value judgment by Cabinet on the facts presented to them by their departmental and other advisors.

Even though the criteria listed in section 3(3)(a) must meet the exacting test of essentiality, it is still difficult to see how a decision of the Executive Council could be impugned.

The Court did appreciate that the word "essential" is a strong one and connotes a high degree of necessity, but it is for the Executive Council to make the value judgment on the basis of circumstances as they exist at the time as to whether the particular work would make an essential contribution to the goals identified in section 3(3)(a).

The first criterion which the Executive Council must consider before applying the provisions of the Act to a work is whether a prompt decision is "essential". The Court of Appeal considered whether section 3(3)(b) had been properly applied in EDS Inc v. South Pacific Aluminium (No.3).[35] The plaintiffs provided evidence that the consents sought in the application would have taken a similar length of time by normal procedures as for National Development Act proceedings. This was contradicted by evidence from the first respondent company. However, the Court did not consider this argument by the plaintiffs had any merit, stating that the issue was irrelevant. In the opinion of Cooke J.:[36]

> [The Governor-General in Council] is not required to consider whether the National Development Act will enable a prompter decision than normal procedures. The Act has been passed in the expectation or hope that it will; whether the Act is likely to work as intended to achieve that purpose is not a question to which the Governor-General in Council is bound to have regard.

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35. [1981] 1 NZLR 216

36. Ibid at 219

With respect, the learned Judge's interpretation appears unnecessarily restrictive. Certainly, a literal approach to paragraph (b) can lead to the Court's conclusion but, when the intention of Parliament in passing the Act is considered, surely it was anticipated that the consents sought would be more promptly granted by utilising the Act instead of the normal procedures. Since the Act sacrifices certain existing rights under the normal planning procedures in its objective to have proposed works decided upon promptly, one might at least have expected the Court to weigh up the evidence presented and come to a conclusion as to whether the object of the Act was likely to be attained in this case.

Furthermore, although the Court did note that the word "essential" in section 3(3)(b) was a strong one, the impression one is left with is that only lip-service was paid to it. The Court declared:[37]

> Whether it is essential that prompt decisions be made in relation to major, long-term projects of this kind must be in fact a question of degree and value judgment ....[I]t was a reasonably tenable view that the advantages in exports and increased employment claimed in the application were so important for New Zealand that it was essential to try to obtain them at the earliest possible date. There is nothing in the [Cabinet] paper or any other evidence to suggest that the strength of "essential" was lost on the Ministers.

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37. Ibid at 220

In using the words "at the earliest possible date" Cooke J. seems to contradict what he had stated earlier about the irrelevance of whether or not the Act might enable a prompter decision than otherwise might have been the case. However, it cannot be doubted that in deciding the issue relating to section 3(3)(b) the Court showed itself to be consistent in its approach to the section 3(3) criteria. One is inevitably led to the conclusion that so long as at the time of advising the making of the Order in Council the Minsters address themselves to the criteria and do not omit anything obviously material, then the decision to apply the Act is virtually unshakeable.

C. The Role of the Planning Tribunal

1. Introduction

The Planning Tribunal is established as a Court of record under section 128 of the Town and Country Planning Act 1977 and for the purposes of conducting an inquiry under the National Development Act the Tribunal has all the powers, privileges and immunities conferred on it by Part VIII of the former statute.[38] To assist it in its objective of enabling the prompt consideration of proposed works of national importance and the granting of the requisite consents, the National Development Act provides for a "one-stop" planning hearing to be conducted by the Tribunal.

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38. National Development Act 1979, s.7(2)

Once the decision to apply the Act to a proposed work has been made, the Minister of National Development is required to refer the application forthwith to the Tribunal for an inquiry, report and recommendation.[39] Before doing so, however, the Minister may delete any consent sought in the application if he considers that it should be applied for in the normal way; on the other hand, the Minister has the power to add any consent not specified in the application.[40]

2. The Planning Tribunal inquiry

The time at which the Tribunal is directed to conduct its inquiry is "as soon as practicable" after receiving the certificate of completion of the audit from the Commissioner for the Environment. The Act specifies that every inquiry shall be held in public and that the holding of the inquiry, and the making of a report and recommendation, shall have priority over every other matter before the Tribunal (except any other application before it under the Act).[41] The time saved by this provision would be minimal, if not illusory, in that the Tribunal is hardly likely to set the matter down for hearing immediately or vacate other matters which have already been allocated a hearing date. However, in giving National Development Act hearings priority the Tribunal's report and recommendation might be submitted more quickly.

Either one or two assessors, by virtue of their skills or qualifications or of their knowledge of the area in which it is proposed to construct the work, may be appointed to assist

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39. Ibid, s.4(1)
40. Ibid, s.4(2)
41. Ibid, s.7(6) and (7)

the Tribunal in conducting the inquiry and making the report and recommendation.[42] In the hearings which have been conducted this has not been deemed necessary. Instead, the Special Division of theTribunal which sat at the hearings comprised two Judges and four lay members.

The Tribunal is given the power to waive any omission from or delay or inaccuracy in any information, report, recommendation or step required or direct them to be remedied if it is satisfied that no party to the inquiry will be prejudiced thereby;[43] furthermore, the Tribunal is vested with the power to award reasonable costs if it thinks fit.[44]

The Act clearly sets out those persons and bodies entitled to be heard and those required to be represented.[45] This will be more fully considered infra.

What of the matters to be taken into account by the Tribunal in conducting its inquiry? Section 9(1) provides that they are the same as those that would have been taken into account if the applicant had followed the normal procedure of applying for planning consents. However, subsection 2 provides that the Tribunal shall not have regard to the criteria set out in section 3(3) of the Act except to such extent as is necessary

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42. Ibid, s.7(9)
43. Ibid, s.7(7A)
44. Ibid, s.7(13)
45. Ibid, s.8

in order to comply with section 9(1). Thus, the Tribunal is precluded from having regard to whether the work is a major one that is likely to be in the national interest or whether the work is essential for the purposes stated in section 3(3)(a) or whether a prompt decision is essential; but this part of section 9(2) is expressly made subject to the extent to which it is necessary for the Tribunal to take into account those matters that would have been taken into account had the applicant applied for the consents in the normal way.

An important issue which arises is whether, if consents are sought under the Town and Country Planning Act 1977, the Tribunal is in fact free to have regard to the question of the national interest in relation to the work by virtue of section 3(1) of that Act?

Section 3(1) of the 1977 Act sets out the matters of national importance to be provided for in the preparation, implementation and administration of regional, district and maritime schemes. These matters include "the wise use and management of New Zealand's resources" and much the same phrase appears in section 4 of that Act as part of the general purpose of planning schemes. The second part of section 9(2) of the National Development Act seems to imply that the Tribunal may have regard to whether the work is for the wise use and management of New Zealand's resources.

The question was considered in Re application by Petralgas Chemicals NZ Ltd[46] where the Tribunal was called upon to

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46. (1981) 8 NZTPA 106

inquire into the wisdom of using natural gas for the manufacture of methanol for export. The Tribunal ruled that the question was not a relevant consideration, one reason being that section 9(2) provides that the Tribunal shall not be concerned to inquire into the criteria of section 3(3). It is unfortunate that the Tribunal did notsee fit to attempt a fuller consideration of section 9(2) and its relationship with section 9(1). It is clear from the case that the Tribunal did see its role as including the consideration of the provisions in section 3(1) of the Town and Country Planning Act but not to the extent of contradicting the policy decision of the Governor-General in Council pursuant to section 3(3) of the National Development Act. In considering the suitability of the site for the proposed work, however, the Tribunal did recognise that it had a duty to pay heed to the matters of national importance set forth in section 3(1) of the Town and Country Planning Act. Although the Tribunal appreciated that the site chosen appeared prima facie to contravene certain of the criteria in section 3(1) it did not view itself as a planning authority, and, in the absence of any specific opposition from expert witnesses to the choice of site the Tribunal found that it was suitable for the proposed use subject to the work meeting certain environmental standards.

The more cogent reason given by the Tribunal for finding that an inquiry into the wisdom of using natural gas for the manufacture of methanol was irrelevant was that the Town and Country Planning Act creates control over the use and development

of land only; the Tribunal determined that the powers conferred on it by the latter Act cannot be used to direct how resources shall be used once they are no longer part of real property. In defining the scope of planning powers the Tribunal pointed out the three broad aspects to a decision to manufacture a particular product: the first is the decision to commit a particular raw material to a specific purpose (which is not subject to planning control); the second and third aspects relate to choice of site and environmental consequences respectively (which are subject to planning control).

Similarly, in Re an application by N.Z. Synthetic Fuels Corporation Ltd[47] the Tribunal confirmed that although it was not precluded from applying section 3(1) of the Town and Country Planning Act it was not to have regard to the criteria set out in section 3(3) of the National Development Act by virtue of section 9(2). In his opening remarks, the Chairman of the Tribunal, Judge Treadwell, stated:[48]

> The Town and Country Planning Act 1977 enables the Tribunal to embark upon an inquiry into matters covered by that Act. That inquiry does not include an adjudication upon whether the production of synthetic petrol is a proper use of New Zealand's natural gas resources. The expression contained in s.3 concerning the wise use of resources is confined to matters which can be considered under that Act. Broadly speaking we must consider the appropriate placing of enterprises which wish to make

47. (1981) 8 NZTPA 138

48. Ibid at 142

> use of a resource which is of importance but we are not concerned with how that resource shall be used ... We will not enter into the controversy surrounding the desirability of the manufacture of synthetic petrol ....
> I would also record that the Minister by exercising his powers under the National Development Act has placed this manufacture of synthetic petrol in the field of national importance and as far as this Tribunal is concerned that is an end of that matter.

It must be remembered that when the applications by Petralgas Chemicals NZ Ltd and NZ Synthetic Fuels Corporation Ltd came before the Tribunal section 9(2) of the National Development Act simply read as follows: "The Tribunal shall not be concerned to inquire into the criteria set out in section 3(3) of the Act." The words "... except to such extent as is necessary in order to comply with subsection (1) of this section" were added by section 6 of the 1981 amendment Act. Although the effect of those additional words have not received judicial consideration, it is submitted that they merely attempt to give statutory effect to the approach taken by the Tribunal in the NZ Synthetic Fuels Corporation Ltd hearing where it was stated:[49]

> What is to be done if one of the criteria set out in s.3(3) of the Act refers to a matter which would have been taken into account if the applicant had applied in the normal way? The section must be read so that it is a consistent whole, and that can be attained by

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49. Ibid at 151-2

> giving full effect to the word "criteria". A criterion is defined as a "principle or standard that a thing is judged by," and that is how the four classes of objectives mentioned in para (a) of s.3(3) are used - that is, for the Governor-General in Council to judge whether or not the provisions of the National Development Act should be applied to a particular work. Therefore we interpret s.9(2) to mean that it is not the Tribunal's function to inquire whether or not the criteria are met or fulfilled, in the sense that they are prerequisites to the issue of the Order in Council under s.3. In other words, the Tribunal need not go beyond the Order in Council as a foundation for its jurisdiction to conduct its inquiry. (That interpretation is consistent with the language of s.7(1) of the Act). However, to the extent that any of the criteria set out in s.3(3) refers to a matter which would have been taken into account if the applicant had applied in the normal way, the Tribunal should take it into account - not as a criterion for the application of the provisions ofthe National Development Act, but as a consideration in determining whether planning consent should be recommended.

It is submitted that the Tribunal had no alternative but to resolve the apparent conflict between the two subsections of section 9 in the way it did, thus pre-empting the amendment to section 9(2).

In conducting its inquiry the Tribunal is hardly more restricted than when it conducts a hearing in respect of a matter which comes before it under normal planning procedures. This is apparent from the way the Tribunal viewed its role in the N.Z. Synthetic Fuels Corporation Ltd inquiry. In that case consent was sought for a specified departure from the district scheme pursuant to section 74(2) of the Town and Country Planning Act and, although the limitations defined in section 74(2) were not met, the Tribunal considered it had authority under section 69(2) to allow a specified departure if it found that it was warranted in the public interest in the particular circumstances of the case. The special reasons given by the Tribunal for invoking section 69(2) were firstly, that the nature of the work was extraordinary (being one to which the National Development Act had been applied and for which general provision could not be expected to have been made in the district scheme) and secondly, that the Executive Council's declaration that it was essential that a decision be made promptly precluded the more leisurely procedure of changing the district scheme. The Tribunal's stance was upheld in the Court of Appeal in North Taranaki Environment Proection Association Inc. v. Governor-General[50] where the Court stated that "It would be strange if a result of words used in [section 9(1) of the National Development] Act was to give the Planning Tribunal less power than that same Tribunal would have if considering the question of consent under ordinary procedures."[51]

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50. [1982] 1 NZLR 312

51. Ibid at 314

Therefore the Court rejected the submission that the Tribunal, when acting under the National Development Act, was limited in its jurisdiction to those matters that would normally have been taken into account by the Council at first instance. Had matters been proceeded with in the normal way, an appeal to the Tribunal would have been inevitable and the same result achieved.

In North Taranaki Environment Protection Association Inc. v. Governor-General[52] the Court considered the plaintiff's submission that the Tribunal had no power to recommend consent to a water right[53] in a modified form. Because section 21(3) of the Water and Soil Conservation Act 1967 gives a Regional Water Board jurisdiction to grant the right to discharge waste into any natural water "on such terms as it may specify" the Court had no hesitation in ruling that the Tribunal had jurisdiction to recommend as it did.

It is interesting to note that after the Tribunal had conducted its inquiry, but before submitting its report and recommendation the National Development Amendment Act 1981 was passed which provided in section 7(2A) that "Every such report shall recommend whether each consent set out in the application referred to the Tribunal should be granted, granted in a modified form, or not granted." Legislative recognition was thus given to the Tribunal's recommendation, although the Court of Appeal evidently saw no need to so much as mention it.

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52. Ibid at 316

53. To discharge treated effluent from an outfall pipeline into the Tasman Sea

Although the National Development Act confines the Tribunal's role to conducting an inquiry and reporting and recommending to the Minister[54] (instead of its usual role of actually making the first decision as to the granting of consents) neither the Tribunal itself nor the Court view the jurisdiction of the Tribunal as being fettered in any way by the Act except to the extent outlined in section 9(2).

D. The Ultimate Decision under Section 11

The final decision in terms of section 11 is vested in the Governor-General in Council who, after taking into account the report and recommendation of the Tribunal and further considering the criteria set out in section 3(3), may declare the work to be one of national importance, grant such of the consents set out in the Tribunal's report as he thinks fit, and shall -

(a) Grant each consent for such term or period of time as he thinks fit; and

(b) Impose such conditions, restrictions and prohibitions as he thinks fit in respect of each such consent -

as if the consent had been granted in the normal way.[55]

Since section 11 does not expressly provide for refusing the declaration and consent one might be forgiven for gaining the impression that the decision is, in effect, a "rubber-stamping" of the earlier section 3(3) decision. However, the Court of

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54. National Development Act 1979, s.10(1)

55. Ibid, s.11

Appeal has recognised that "... it is clear as a matter of statutory interpretation that the Governor-General in Council is not bound to grant what is sought."[56] Furthermore, section 11(1) clearly requires the Governor-General in Council to "take into account" the Tribunal's report and recommendation and "further consider" the section 3(3) criteria. That much at least is mandatory. However, the fact remains that the Governor-General in Council can ignore the criteria, purposes and policy of the statutes requiring consents, which are matters the Tribunal must take into account pursuant to section 9(1). No doubt the Governor-General in Council will be influenced by the Tribunal's report and recommendation but nothing compels him to be persuaded by their findings. Even if the Governor-General disagrees with findings of fact by the Tribunal, it is submitted that this will not provide a ground for impugning the section 11 decision as long as it cannot be shown that either the Tribunal's report and recommendation were not "taken into account" (which is a far cry from meaning they were relied on) or that the section 3(3) criteria were not again considered.

Section 13 of the Act provides that when the Order in Council made under section 11 comes into force, every consent granted by it is deemed to have the same force and effect as if it had been granted in the normal way and the statute under which each consent would normally have been granted is to apply in respect of that consent as if it had been granted under that statute so far as is practical and with the necessary modifications.

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56. CREEDNZ Inc v. Governor-General, supra at 175

E. Parliamentary Consideration of Orders in Council

After the Order in Council under section 11 is made, it must be laid before Parliament within fourteen days if Parliament is in session and, if not, within fourteen days after the date of commencement of the next ensuing session.[57] Although Parliamentary debate on the Order in Council is thereby assured the procedure is irreversible and nothing will be altered unless the Government so desires. However, if the provisions of the Order in Council differ from the Tribunal's recommendation the Minister of National Development must provide Parliament with written reasons for the difference.[58]

F. Further Applications under the Act

Section 14 provides that once the section 11 decision has been affirmatively made the applicant may apply for a further consent to the Minister who in turn refers the matter to the Tribunal and the matter then proceeds as if application had been made under section 3.

Similarly, where a consent has been granted under section 11 the applicant and the statutory authority which would normally have granted the consent may apply to the Minister for the variation or cancellation of any condition, restriction or prohibition imposed in respect of the consent or for the imposition of a new condition, restriction or prohibition.[59] Such an application is referred to the Tribunal

57. Supra n.54, s.12(1)
58. Ibid, s.12(2)
59. Ibid, s.15(1)

which may consider that a full inquiry is justified in which case the standard procedures of the Act will swing into operation. If the Tribunal considers that a full inquiry is not warranted then the matter will be dealt with by written submissions.

G. Participation by Other Bodies and the Public

1. Participation by statutory bodies

Virtually from the outset of the National Development Act procedure certain statutory bodies are involved. Before the decision to apply the Act to a work, the Minister is compelled to consult the united or regional council concerned and such other statutory authorities as he considers appropriate.[60] Once the decision is made the Minister must forthwith forward a copy of the application together with all documents and plans which accompanied it to the united or regional council, the territorial authority, the appropriate Regional Water Board, the National Water and Soil Conservation Authority, the Commissioner for the Environment, every statutory authority which would normally grant the consents set out in the application and finally, the Minister of Works and Development if the proposed work is a private one.[61] Furthermore, section 6 requires every statutory authority which would normally grant any consent set out in the application to carry out such investigations as it thinks appropriate and forward to the Tribunal its recommendation in respect of the consent, although any such recommendation is not to be regarded as evidence. These

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60. Ibid s.15(1)

61. Ibid s.4(3)

statutory authorities are specifically advised of the place and date of the Tribunal's inquiry[62] and must be represented and adduce evidence at it.[63] The Minister of Works and Development (where the subject matter of the inquiry is a private work), the appropriate local authority, the Commissioner for the Environment and any body affected by the proposed work are all entitled to be heard at the Tribunal's inquiry.[64]

It is clear that the Act provides for a relatively high degree of involvement by appropriate statutory bodies. Of particular importance is the role of the Commissioner for the Environment which calls for more detailed consideration.

2. The Commissioner for the Environment

The main role of the Commissioner for the Environment in the National Development Act procedure is set out in section 5. It provides that as soon as practicable after making an application under section 3, the applicant must forward to the Commissioner an environmental impact report on the proposed work. The Commissioner then makes the document available for public inspection, gives notice of this and calls for submissions in respect of it. After considering any submissions received he is required to audit the report by examining and giving his opinion on the accuracy and adequacy of it in so far as it relates to the proposed work and must forward a certificate that it has been completed to the Tribunal.

62. Ibid s.7(3)
63. Ibid s.8(3)
64. Ibid s.8(1)

Although the Act thus gave statutory recognition to the Commissioner for the Environment for the first time, it is evident that the legislation raised more doubts that it had intended to resolve. For example, nowhere in the Act is "environmental impact report" defined nor is the exact nature, purpose and effect of the report and the Commissioner's audit detailed. These and other issues require consideration.

Although no reference is made in the Act to the Environmental Protection and Enhancement Procedures issued by the Commission for the Environment in 1974 (and revised in 1981), Woodhouse P. in delivering the judgment of the Court of Appeal in Environmental Defence Society Inc v. South Pacific Aluminium Ltd (No. 4)[65] was guided by the Procedures which defines an environmental impact report as "a written statement describing the ways of meeting a certain objective or objectives and the environmental consequences of so doing."[66] In that case the Court was called upon to decide the adequacy of the applicant's environmental impact report which the plaintiff claimed was so defective as to be a mullity for the purposes of section 5. In determining whether the report need only concern itself with the direct environmental consequences referrable to the immediate site of the proposed work or whether it ought to include secondary and indirect consequences, the Court stated there must be a real and sufficient link between the less direct effects likely to flow

65. [1981] 1 NZLR 530

66. Commission for the Environment Environmental Protection and Enhancement Procedures (1981 Revision) para 8, p.4

from the projected works if they are to be regarded as relevant. In deciding whether or not an environmental impact report is adequate the Court was of the opinion that it was a question of fact and degree in the particular case. In the case before it the Court held that the applicants were not required to include the secondary implications of the proposed work in their report, although it was noted that the case was a marginal one. In any event the report "sufficiently signposted those secondary implications and ... it cannot be said that it is so deficient in that regard as not to constitute an environmental impact report for the purposes of the legislation."[67]

In the course of its judgment the Court clarified a number of matters left unsaid in the National Development Act. Recognition was given to, and assistance gained from, the Commission's Procedures . The Court also emphasised the important role played by the environmental impact report which it saw as including "... adequate and reliable reference to every matter that is significant and relevant and so provide a coherent and sufficient basis for consideration by the public and by those local authorities and individuals who may be affected and by the Commissioner himself as a starting point for the important audit he must make."[68] Furthermore the Court did not see Parliament's intention as limiting every environmental impact report to site-specific environmental considerations.

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67. supra n.65 at 536

68. Ibid at 534

But what about the Commissioner's audit? The Act does not provide for the possibility of the Commissioner referring an inadequate environmental impact report to the applicant and his role has been seen as simply "... confined to dispensing information to the public, and the time limits he must operate within may render even this activity of limited value."[69] However, in Environmental Defence Society Inc v. South Pacific Aluminium Ltd (No. 4) the Court of Appeal saw the matter differently:[70]

> It is said that the report provided by an applicant is merely a starting-point and that any remedy in the event of an inadequate report must be at the next stage, when the Commissioner for the Environment is to embark upon his audit. It would of course be extraordinary if he were to feel inhibited in the discharge of his own responsibility by the absence of reference in a report to some relevant matter. That consideration is reinforced by the requirement of s.5(3) that the Commissioner consider the environmental implications of the work - rather than confine himself to an assessment of the environmental impact report.

However, the Government reacted by amending section 5(3) in section 2 of the 1981 Amendment Act which requires the Commissioner to "audit the environmental impact report by examining and giving his opinion on the adequacy and accuracy of the report in so far as it relates to the proposed work."

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69. J. Hannan "The National Development Act 1979" 9 NZULR 200 at 208

70. Supra n.65 at 535

In spite of this, the Commissioner considers that his power to audit is largely unaffected by the amendment[71] and that his discretion to consider matters outside the environmental impact report remains very broad. After all, he may take into account any submissions received within the permitted time period and these submissions would be of little significance if they related only to the report and not the environmental implications of the work itself. Furthermore, since the subsection calls upon the Commissioner to give his opinion on the "adequacy" of the report he must inevitably consider the totality of environmental impacts.

3. Participation by interested bodies and the public

The National Development Act confers considerable rights in so far as public notification and access to informationis concerned. For example, at the time the Minister refers the application to the Tribunal he must give public notice of the fact and any person may obtain a copy of the application on payment of such reasonable fee as may be fixed, although certain affected persons are required to be either served with notice, or with a copy, of the application.[72] Also, public notice is given of the availability for inspection of the environmental impact report on its receipt by the Commissioner for the Environment, a copy of the report may be obtained for a fee and submissions may be made in respect of it.[73]

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71. Refer S. Kendadine "The Commission for the Environment - Some Insights" (1982) NZLJ 290.

72. National Development Act s.4(3),(4),(5) and (6)

73. Ibid s.5(2)

Public notice is given of the place and date of the Planning Tribunal's inquiry[74] and any body or person affected by the proposed work or representing some relevant aspect of the public interest has the right to be present and be heard at the Tribunal's inquiry.[75] Those intending to be present or represented at the inquiry must notify the Tribunal and the applicant in writing of that intention and will thereafter receive a copy of the further particulars required to be filed by the applicant.[76] The Tribunal's report and recommendation are made available for publication and copies thereof are forwarded to those who attended the inquiry.[77] A copy of every plan referred to in the section 11 Order in Council must also be made available for public inspection.[78]

It is submitted that although adequate provision for public participation is made in the Act, the practical benefit therefrom may be seen as somewhat illusory. Persons or bodies who may wish to challenge decisions taken are given precious little time in which to prepare for the decision as to whether to take proceedings. Furthermore, those who have made written submissions to the Commissioner for the Environment are not given written notice of the Tribunal's inquiry date. It is unfortunate that in its desire for speed in having the consents granted the Government clearly overlooked some fundamental practical matters.

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74. Ibid s.7(3)
75. Ibid s.8(1)
76. Ibid ss.8(4) and 7(5)
77. Ibid s.10(2)
78. Ibid s.11(2)

IV. CONCLUSION

Although the National Development Act 1979 has been the subject of a great deal of controversy and criticism (not all of which has been unjustified) few will deny the need for a streamlining of planning procedures, particularly in respect of major works of national importance. Many fears have been allayed by the limited use to which the Act has been put. The major advantages envisaged in the Act - the provision of a single procedure for having the various consents granted for a project, the greater certainty in respect of the time in which a project could proceed and the retention of the final decision in the Government as to whether or not a project would proceed - were achieved while acknowledging the important role to be played by the Court of Appeal. For their part, the Planning Tribunal and Court of Appeal have acted responsibly and competently in the matters which have come before them, giving effect to the legislative intent and at the same time recognising and clarifying inbuilt statutory safeguards.

As to whether consents sought might be more rapidly granted under the National Development procedure then under normal planning procedures is a moot point. Certainly the former procedure is much more efficient and it could not be outstripped by the latter procedures. Practice has shown that perhaps the greatest time-saving has been achieved by the direct referral of challenges and appeals to the Court of Appeal, thus leap-frogging the first stage (the High Court) in the normal appeal process.

It is appreciated that the recently elected Labour Government is committed in policy to repealing the Act. In spite of this the new Government acknowledges the advantages of a single hearing procedure in planning matters and future restructuring will no doubt be greatly assisted by experience gained from the National Development Act.

V. PROPOSALS FOR REFORM

Where reform is to be restricted to encompass only a limited number of major works of national importance (as was envisaged with the National Development Act) then it is anticipated that the Labour Government would look favourably on simply enacting special statutes to deal separately with each project, as was done in relation to the Manapouri scheme. This was the alternative proposed by the Labour Opposition at the time the National Development Bill was being aired in Parliament in 1979. It is submitted that this approach bypasses to a large extent the local element (which is so much a feature of our planning processes) and is hardly a substitute for sound planning legislation.

At thetime of writing the whole area is in limbo. The National Development Act remains for the time being and it is a matter of conjecture as to precisely what, if anything, will take its place following its repeal. The Labour Party Official Policy Release 1984 states that a comprehensive review and consolidation of all planning and environmental legislation will be initiated. It is proposed to make it easier for applications under the Town and County Planning Act, the Water and Soil Conservation Act and the Clean Air Act to be considered at one hearing before the Planning Tribunal and dispensing with the initial local authority hearing if all of the parties agree. Whether this will be accomplished by specific amendments to those statutes or by separate empowering legislation remains to be seen. The former approach is more likely in view of the fact that the policy release

envisages the review of all planning and environmental legislation, the amendment of the Town and Country Planning Act to allow the Minister of National Development to advise the Planning Tribunal that a particular issue is of national importance and to be given priority, and the revision and consolidation of the Water and Soil Conservation and Rivers Control Acts.

At present no Government Department has been specifically charged with the task of carrying out the groundwork in anticipation of amending existing, or drafting alternative, legislation to give effect to existing policy (it is of course, possible that existing policy may change). However, there has been in existence for well over a year a draft proposal to reform existing planning procedures, prepared by a working party of the Energy Advisory Committee. Numerous comments have been received by the Committee from various sources and many of these comments have been incorporated in a separate document with the proposal for reference to the Secretary of Energy in the near future. It is anticipated that the document will be circulated amongst the pertinent Ministers of the Crown. The Committee's proposal may or may not be acted upon and no doubt there will be others.

In essence the Committee's suggestion involves the classification by the applicant of his proposal as having either national, regional or local significance which application, if of

national significance, is filed with the Minister of Works and Development. The application is then advertised and interested persons may notify their interest and be entitled to further details. At this stage an informal public meeting is held if requested by the applicant or if required by the relevant authority. Following a report by the relevant authority, the applicant would be required (if appropriate) to forward an environmental impact report to the Commission for the Environment for audit. This is seen as a progressive step from the National Development Act procedure wherein the report comes at a relatively late stage.

Persons who had notified an interest could then object or accept the proposal. If objections are received, an informal conciliation conference is held. Whether this should form a part of planning procedures is a debateable issue. Although the joint purposes of attempting to achieve compromise and defining the issues in dispute are obvious, should not planning procedures be beyond compromise?

An Order (granting of consents applied for?) could then be made if all parties were in agreement and the authority considered that it was in the public interest. Otherwise a hearing would be held; in the case of an application of national interest this would be by the Planning Tribunal. The draft proposal is unclear as to whether the Tribunal makes the decision to grant the consent(s) or simply makes a recommendation to the Minister of Works and Development. An appeal on points of law might be made to the High Court

sitting with not less than three judges. The draft proposal is silent as to whether a further appeal to the Court of Appeal is possible. If so, valuable experience gained from the National Development Act has gone unheeded.

Although the Commission's proposal gives greater satisfaction to interested parties, the question remains as to whether its effect is much different from that of the National Development Act procedure if the final decision lies with the Minister.

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