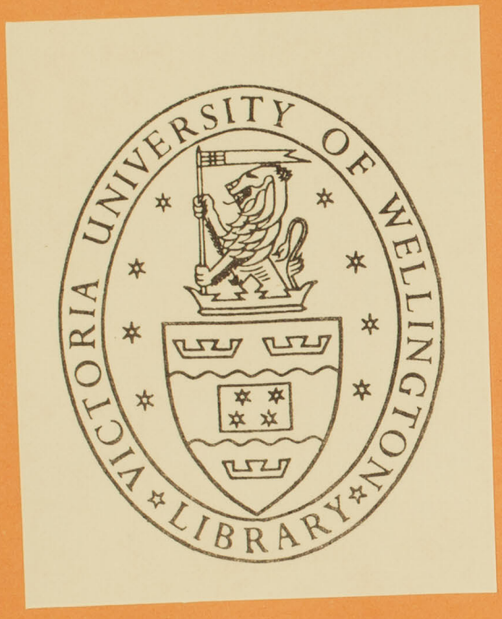
SEVEN YEARS ON——

THE CLEAN AIR ACT 1972.

R. J. BROAD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SEVEN YEARS ON - THE CLEAN AIR ACT 1972

Research Paper for ADMINISTRATIVE LAW LL.M. (Laws 501)

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INTRODUCTION

The Clean Air Act 1972[1] has been in force just over seven years and this paper looks at some of the more salient features of the Act and what has happened in those seven years.

Not all of the Act is covered in this paper, just those areas relevant to administrative law. The main topics covered in this paper are :

(1) The Clean Air Council
(2) Licensing
(3) Appeals
(4) Defences
(5) Regulations
(6) Delegation

In all these areas the relevant parts of the Act will be discussed then the reality of the situations promoted by the Act then the need for change or reform of the Act will be covered.

Unfortunately there is a real lack of written information in the area this paper is covering and subsequently some discussion is rather hazy and incomplete.

The Clean Air Act 1972 was chosen because it does have some unique administrative features and at the same time other features of the Act are quite common and so while some of the discussion only goes to the Act itself other discussion can be seen as relevant to general aspects of administrative law.

Environmental legislation is still a relatively new area for Government to be entering into and in no way is the Act perfect but it's mere existence is an indication of the responsibility the Government is now taking in New Zealand's environment. Others may view the Act as unnecessary and just more bureaucratic red tape but whatever view is taken the Act is worth examining and evaluating.

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[1] Hereinafter referred to as "the Act" .

LEGISLATIVE HISTORY -

In the early 1950's there was widespread air pollution in the Westfield-South Auckland area. This prompted the formation of a Royal Commission and the appointment of an overseas expert to advise the Government of legislation needed to control air pollution existing at the time. This resulted in the Damon Report and the extension of the Health Act 1956 to include requirements for the control of air pollution.[1] Regulations were passed under the Health Act 1956 and other Acts to control air pollution but there was haphazard enforcement.[2]

Mr B.P. MacDonell, Labour Member of Parliament for Dunedin Central, in 1967 and in 1968 introduced two Private Members Bills into Parliament to provide for an advisory council for air pollution and generally for the prevention and reduction of air pollution. Neither survived the second reading.

In 1968 an air pollution sub-committee of the Board of Health was set up to review legislation and standards of control applied. In considering its order of reference, the Committee agreed that its main task was to provide recommendations that dealt with three basic issues :

(a) to recommend the criteria by which suitable air quality control objectives should be set;

(b) to recommend measures which will effectively and economically achieve these objectives;

(c) to recommend the form of organisation believed to be the most practicable for the administration of these measures.[3]

In 1970 the Committee published its report.[4]

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1 Part V of the Health Act 1956.

2 Regulation 22 (a) of the Traffic Regulations 1956, Smoke Restriction Regulations 1964, Town and Country Planning legislation.

3 NZ Board of Health, Air Pollution. (Report Series No.15) Wellington, 1970. para. 1.3.

4 ibid.

On August 4 1972 Mr MacDonell introduced another Private Members Clean Air Bill. His reasons for doing so were because he was tired of waiting for the Government to move on the matter. It had been two years since the Committee's report which recommended a Clean Air Act and nothing had happened so Mr MacDonell thought he would take the matter into his own hands and prompt the Government into action.

On August 16 1972 Mr MacDonell moved that his Clean Air Bill be discharged and referred to the State Services Committee as agreed to with the Minister of Health if the Government introduced its own Clean Air Bill, which it had done earlier in the day. David Thomson (the Acting Minister of Health) introduced the Clean Air (No.2) Bill on August 16 1972 and on the same day the Bill was read for a first time and referred to the Social Services Committee.

The Bill was passed by Parliament on October 20 1972 and came into force on April 1 1973.

The Act is modelled on the United Kingdom Clean Air Act 1956 and the Queensland Clean Air Act 1963.[1] The purpose of the Act is stated to be :

> " to promote the conservation of the air and the abatement of pollution thereof."

The Act adopts the best practicable means (b.p.m.) approach to air pollution control but at the same time it incorporates many of the established principles of air quality management.[2]

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[1] More discussion later of the U.K. and Queensland Acts.

[2] See Appendix No.1

THE CLEAN AIR COUNCIL :

FUNCTIONS - POWERS AND ROLE -

(i) The Clean Air Council is a statutory board established in accordance with Section 6 (1) of the Clean Air Act 1972. The Council has two principal functions.

(a) "To make recommendations to the Minister (of Health) on matters relating to the prevention and control of air pollution and on questions relating to the administration of this Act or to the scope and content of any regulations proposed to be made under this Act, as it thinks fit; and

(b) To make recommendations to the Minister on such matters relating to the performance of the functions conferred on him by this Act, as may be referred to it by the Minister :" [1]

The Act also confers on the Council the following additional functions, which it exercises under the Minister's general direction and control :

(a) "To advise the Director-General (of Health) on the exercise of any powers conferred on him by this Act.

(b) To advise local authorities on the discharge of their functions under this Act.

(c) To co-ordinate the activities of the local authorities with the activities of voluntary associations and of the Department of Health in relation to the prevention and control of air pollution.

(d) To promote researches, investigations, and evaluation of equipment in relation to the prevention and control of air pollution.

(e) To publish reports, information, and advice concerning the prevention and control of air pollution.

(f) To receive and consider suggestions, complaints, and representations from any person; and to take such action (if any) thereon, within the scope of its functions, as it thinks fit." [2]

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[1] Section 6 (2)

[2] Section 6 (3)

Section 6 (4) provides that "The Council shall have such other functions as are imposed on it by this Act or by any other enactment."

Section 14 of the Act empowers the Council to intervene in situations where it believes it would be expedient to abate air pollution by creating a clean air zone in the whole or part of the district of a local authority and where the local authority has not exercised or has insufficiently exercised its powers under Section 12 of the Act.

"The Council under its terms of reference in the Act considers that it has a watch-dog role on behalf of the general public and of industry. Decisions made by the Department of Health and local authorities on the prevention and control of air pollution affect these groups. The Council is an independent body which collectively has the expertise to co-ordinate and advise organisations implementing air pollution prevention and control measures. It can also judge the reasonableness of the measures adopted by the control authorities. In spite of the slowness of action so far met in the implementation of its advice the Council is convinced that a truly independent body is a necessary part of the air pollution prevention and control hierarchy."[1]

In spite of some disappointment in the past the Council firmly believes that it has an important watch-dog role to play as a body independent of Government departments, local authorities, and industry.

In performing this role it is able to tender impartial advice directly to the Minister of Health. This ability should become increasingly important as industrialisation accelerates to meet the needs of a central policy of minimising national dependency on oil imports with all speed. In this climate of urgency, political and entrepreneurial thought and action tend to be preoccupied with economic expectations. In providing for a "fast track" for the investments intended to realise these expectations there is a danger that the social costs which are the other side of the heavy industry coin will not be adequately considered.

To secure the future well-being of affected communities, decision-makers long before committing themselves to a project, need the advice of those who are specially qualified to identify and evaluate such injurious side-effects of industrial processes

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[1] 1979 Annual Report of the Clean Air Council p.5.

as air pollution and to comment on available measures for their containment or abatement. Above all, such side-effects should be taken into account at the earliest possible stage of project evaluation. Delay in considering their control may limit provision for their abatement to the status of making the best of a bad job. Justification of the urgent implementation of such projects as being in the public interest is admissible only when time has been found to conduct an adequate examination of the consequences for affected communities and the environment".[1]

Besides the functions given to the Council by the Act it does appear that the Council does have a role not specifically mentioned in the legislation. The Council sees itself as an independent watch-dog; more of a pressure group than a Government body.

The Council is an important link between the public and the Government and does encourage the public to participate in the work of the Council.[2]

(ii) MEMBERSHIP -

Clause 1 (1) of the Third Schedule of the Act provides that the membership of the Council shall consist of :-

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

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

(c) A representative of industry.

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

(e) A representative of local authorities.

(f) A person nominated by the Minister for the Environment.

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

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1 1980 Annual Report of the Clean Air Council p. 3-4.

2 See the section of the Paper on Public Participation.

(h) Two other persons.

The present membership of the Council is :

J.F. de Lisle, formerly Director, New Zealand Meteorological Service - Chairman.

J.E.Fitzgerald, Borough Engineer, Mt. Wellington Borough Council - Deputy-Chairman .

M.L.Allen Senior Lecturer in Chemical Engineering, Auckland University.

C.M. Collins, Director of Public Health Division, Department of Health, Wellington.

M.L.Allen, Senior Lecturer in Chemical Engineering, Auckland University.

C.M. Collins, Director of Public Health Division, Department of Health, Wellington.

L. Evans, formerly Reader in Transport Economics, Victoria University of Wellington.

P.J. Graham, Assistant Secretary, Ministry of Energy, Wellington.

A.J.W.Lamb, County Engineer, Waimairi County Council, Christchurch.

N.J. Peet, Senior Lecturer in Chemical Engineering, University of Canterbury.

Mrs S. Ross, Auckland. Executive member of the National Council of Women (Auckland Branch), representative for the International Council of Women, Environment and Habitat Committee, board member of the Auckland Civic Trust.

The members of the Council are appointed by the Minister of Health[1] for a term of three (3) years.[2] Any member may be reappointed or removed from office by the Minister for such cause as he thinks sufficient.[3]

The board of Health Committee report suggested that advice from such organisations as the New Zealand Counties Association, Municipal Association of New Zealand, Board of Health, New Zealand Federation of Industries, New Zealand Institute of Chemistry, New Zealand Institute of Engineers, the Universities Vice-Chancellors Committee, the Council of the Royal Society of New Zealand and the Royal Society of Health (New Zealand Branch) should be sought in making nominations for the Council[4].

This was not adopted in the Act and clause 1 (2) of the Third Schedule places

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1 Clause 1 (2)

2 Clause 1 (3)

3 ibid.

4 para . 7.28

no mandatory duty on the Minister to consult with anyone before making appointments to the Council.

The Committee must have had good reasons for recommending the system of appointment whereby the Minister seeks the advice of the aforementioned bodies before appointing the members of the Council. The Council would be more independent and no cry of "political appointments" would be heard if there was a different system of appointment. Under the present system appointments are entirely in the Minister of Health's hands and there is potential for abuse on his part, by "stacking" the Council, or simply not appointing the best or most appropriate persons.

While the Committee recommended the Minister should seek advice from various bodies the final decision as to the actual members of the Council would still be up to the Minister, which could still lead to abuse.

Perhaps a better system would be that provided in the National Parks Bill 1980 for the appointment of members of the National Parks and Reserves Authority. Clause 16 of the Bill provides that the Minister of Lands is to appoint members after consultation with various interested bodies - for example Clause 16 (2) (a) "One person appointed by the Minister after consultation with the Royal Society of New Zealand".

Clause 16 (2) (e) of the National Parks Bill provides for four persons to be appointed by the Minister following public notice under Clause 16 (3). This public notice has to state the number of appointments intended to be made and has to call for nominations to be sent to the Minister. The Minister must keep nominations open for a minimum of 28 days after the notice and the notice must be published at least twice in a daily newspaper circulating in each of Auckland, Hamilton, Wellington, Christchurch and Dunedin and in such other newspapers and publications as the Minister may direct.

Clause 16 does allow interested bodies to have more of a say in the membership of the Authority and there is less opportunity for abuse or inept members being appointed. While the Minister only has to consult with the various bodies he would in most circumstances appoint the person recommended by the particular body. He is obliged under Clause 16 to appoint someone after consultation with the body and this would imply some kind of agreement being reached before the Minister made the appointment.

Clause 16 (2) (e) allows any members of the public the opportunity to be nominated for appointment to the Authority. While no criteria are laid down for

the Minister to follow in making his appointments from the public nominations it is still an admirable provision to allow for public involvement in the Authority.

The similar provision in relation to the Clean Air Council membership is Clause 1 (1) (h) of the Third Schedule of the Act which allows the Minister of Health to appoint "Two other persons" to the Council. Clause 16 2 (e) of the National Parks Bill does allow for more public participation and more varied and independent appointments whereas under the Clean Air Act the Minister of Health can appoint who he wishes and can control the Council indirectly if he desires to.

If the method of appointment was changed for the Clean Air Council to be more like that proposed for the National Parks and Reserves Authority then the Council could maintain a more independent status and interested groups and the public would be more satisfied with the membership of the Council. In reality the Minister of Health may well consult with various organisations before making appointments to the Council, which would be a desirable thing, but he is under no obligation to do so and he could use this power of appointment for political ends. By making it mandatory that the Minister does consult with various bodies before appointing the members of the Council a more independent, acceptable and adept Council would be ensured.

If a Clause 16 (2) (e) type approach was adopted for the " Two other persons in the Council's membership then the public could become more involved in the Council and other interested groups not previously consulted could provide a member of the Council and get their views more readily heard. The only problem with this approach is that the actual appointments from the nominations is completely at the discretion of the Minister and perhaps some criteria should be provided to limit the Minister's discretion.

An even more independent system could be devised whereby instead of the bodies being consulted they actually appoint the members of the Council themselves and there is no interference from the Minister of Health. The appointment of the "Two other persons" could remain the same as above. The only problem with this system of appointment, which would ensure a really independent Council, is that

It would seriously impair the principle of accountability of Ministers to Parliament. The Minister of Health is responsible to Parliament for the Clean Air Council and he could hardly remain so if the members of the Council were appointed by various independent organisations. The Council would be too independent and no control could be exerted over it and no one would be seen as responsible for it. For these reasons this approach to appointments goes too far and the system of consultation and public nomination, as envisaged by Clause 16 of the National Parks Bill 1980, is a sensible and desirable approach. This system is in line with the recommendation of the Committee report and does allow for a more independent and acceptable Council.

The Committee report[1] suggested that the Council should be balanced in membership containing persons of eminence in disciplines related to air pollution control and clause 1 (1) of the Third Schedule of the Act seems to have taken up this suggestion. Perhaps the most obvious omission in the balancing of the Council is representation from environmental groups. While such groups may have a representative appointed under clause 1 (1) (h) of the Third Schedule of the Act there is no mandatory provision for such a person. Environmental groups may appear too radical and disruptive for the Government to recognise them by appointing a representative on the Council. If the Council is to be a real balance of interests then environmental groups should be represented on the Council so they can get their views across more persuasively than by simply making submissions to the Council. While the environment groups are radical in their proposals about environmental matters and are often strongly opposed to Government policy they should have a representative on the Council so all possibilities and interests are explored by the Council and more acceptable decisions are achieved. One member of the Council being a representative of environmental groups would hardly sway the whole Council into radical proposals and hard-line opposition to the Government but it would ensure that a very important group of interests are represented.

Even without specific mention of a representative of environment groups being provided for in the membership of the Council a Clause 16 (2) (e) of the National

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[1] Paragraphs 7.28 and 7.34

Parks Bill 1980 approach to appointment would allow the environment groups to put forward nominations to the Minister of Health so they do get representation on the Council. There is no guarantee under this approach that the Minister will appoint those people nominated who belong to environment groups but there is more opportunity for representation under this system of appointment than the present system.

This balancing of interests in air pollution control bodies has been criticised. "It could be argued that the laws establishing the membership of State Air Pollution Control Boards are neither a surrender of these boards to interests nor an attempt to establish through the allocation of positions a balance of interests. Rather by creating boards representing different interests, the laws could be establishing a framework for bargaining between interests".[1] While there is this threat of bargaining the balancing of interests is the only real way to represent those groups affected by air pollution and its control and with the Council having public submissions before important decisions the threat of bargaining is even further reduced.

Clause 1 (3) of the Third Schedule of the Act gives the Minister of Health the power to remove from office any member at any time for such cause as he thinks sufficient. This power of the Minister also cuts into the independence of the Council and makes the Council membership subject to political whim. It would be more desirable for particular grounds to be listed on which the Minister must remove a member from the Council. The Minister would have to point to one of these grounds as the reason for the removal and show evidence to support the ground of removal.

COMMITTEES OF THE COUNCIL -

Under Clause 7 of the Third Schedule of the Act the Council can appoint committees and four such committees now exist :

(1) Clean Air Zones and Domestic Heating Committee
(2) Motor Vehicle Committee
(3) Rural Pollution Committee
(4) Planning Co-ordination Working Group

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[1] Vaughn R., (1971) 24 OKLA. L.R. 25, 41.

By appointing these Committees the Council can concentrate its work and fulfill its functions more adequately. Also members of these Committees do not all have to be members of the Council so outside expertise can be brought into the work of the Committees. It appears that these Committees do most of the work of the Council and produce most of the recommendations of the Council. Without these committees the Council would not be able to fulfill its functions and to tender well considered and expert advice and recommendations to the Government.

ANNUAL REPORT -

Pursuant to Clause 5 of the Third Schedule of the Act the Council shall furnish to the Minister of Health a report of its operations and proceedings during the previous year. A copy of the report has to be laid before Parliament as soon as practicable after its receipt by the Minister. All reports so far have followed the same basic format. Membership and functions of the Council are set out and are then followed by the report itself from the Chairman of the Council. The report itself goes into the operations of the Council and its committees and any findings or important issues affecting air pollution control. After the report the membership of the committees is listed and then there are several appendices containing the recommendations of the committees. The 1980 Annual Report was only twelve pages long with previous reports being twice this length.

The reports are one of the few sources of readily available information on air pollution control and only in the committee stages[1] was there provision made for an annual report to be made by the Council.

There is no easily ascertainable reason why the 1980 report was only half the size of all the previous reports but one reason could be that the Council is running out of steam and there is not much to report on after the initial work had been done by the Council.

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[1] See the section of the paper on Legislative History of the Clean Air Act 1972.

The reports are necessary to give the public an idea of the Council's operations and of air pollution control generally. Also by making this report the Council has to justify its existence to the politicians and keep Parliament informed of its activities.

After much discussion in the Commons it was decided that the United Kingdom Clean Air Council did not have to report annually to Parliament as it would erode the accountability of the Government but there was assurances given that the Council would provide reports from time to time but without any statutory compulsion.[1]

Originally the Queensland Council did not have to make a report but in 1970 Section 16 of the Clean Air Act 1963 was amended and a new subsection 2 was added so the Council now has to report annually to the Minister for Local Government and Main Roads.

PUBLIC PARTICIPATION -

"The terms of reference of the Clean Air Council enabled the Council to receive and consider suggestions, complaints, and representations from any person and to take such action within the scope of its functions as it sees fit.

. . . . . The ability of members of the public and citizen groups to make their views known and to participate in Government decision making on the environment is regarded by the Council as being important. Often private individuals and organisations can contribute data and insight beyond the expertise and knowledge of the Council itself.

Public participation cannot, of course, provide a substitute for the assumption of responsibility by the Council. Nor can it provide the mechanism to resolve the many policy issues the Council has to face. The Council recognises, however, that public participation can provide a highly potent monitoring system.

For all these reasons the Council, since its inception, has been at pains to ensure that the public is kept fully informed of its activities. The Motor Vehicle

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[1] Parliamentary Debates, Commons, 1955-56, Vol. 551, 47-67.

Committee, which is considering the need for motor vehicle emission standards, took the step of advertising in all the main metropolitan newspapers advising of its forthcoming deliberations and inviting submissions. Fourty-four (44) detailed written submissions were received, all of which were of considerable value to the Committee.

The Council has also decided that where it has reached tentative conclusions on important proposals relating to air pollution it will ensure that all interested parties including manufacturers, industrial organisations, and environmental groups are given an opportunity to comment."[1]

It is encouraging to see the Council take this positive approach to public participation and involve the public in its work. The Council made the above statement about public participation in Government decision making in 1974 before the Council had encountered any real problems with Government inaction.[2] It could now be said that the public are not really participating in Government decision making at all by making submissions to the Council as the Council's advice and recommendations are by and large being ignored by Government.

The Council still provides a good sounding-board for public views and just because of the inaction by Government the participation by the public should not be discouraged. The real effectiveness of having the public's views heard may be limited but opportunities should be available for the public to be heard so an overall view can be ascertained and so the public do not feel completely alienated by the bureaucratic machinery of the Government.

The emphasis the Council places on public participation illustrates other functions of the Council. The Council can be used to monitor public feeling on environmental issues concerned with air pollution. The Council is a good sounding-board of ideas about air pollution control and is a vital link between the Government and the public. While the Council is a creation of Government it appears to be serving the interests of the public and to be more of a pressure group trying to influence Government agencies with the understanding of the public behind it.

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[1] 1974 Annual Report of the Clean Air Council p.15

[2] See the section in the paper on the relationship between the Council and Government.

THE COUNCIL'S RELATIONSHIP WITH THE GOVERNMENT -

The Council for several years now has expressed disappointment at the lack of implementation by the Government :

(a) "As an advisory body the Council has found that year to be a disappointing one, primarily because its intended audience has been, understandably but frustratingly, preoccupied with disturbing economic events. The magnitude of New Zealand's world trade deficit, to which sharply increased prices for imported crude oil and petroleum products have significantly contributed, has tended, in the Council's view, to induce decision makers to postpone the introduction of two important but innovatory clean air control measures. The Council believes that these proposed measures may have been seen as amenities the enjoyment of which should be postponed until prosperity returns. Whatever the reason, the delay is unfortunate because air pollution is a symptom of inefficiency and therefore its adequate control should be pursued as a highly relevant objective whatever the economic climate."[1]

(b) "Subsequent experience has demonstrated that the specialist field on which the Council is required to advise, represents a peripheral activity for the Government agencies to which the Council looks for implementation of that advice. Consequently while many of the Council's recommendations have been acceptable to Government, their subsequent translation into action has seemed to the Council, with its special interest, tardy".[2]

(c) "This report echoes previous reports in expressing the disappointment and frustration felt by the Council in the lack of progress and, at times even of apparent interest, in the implementation of its recommendations."[3]

(d) "For some years the annual reports of the Council have expressed the feeling of disappointment and frustration felt because of the lack of progress in implementation of its recommendations and the apparent lack of interest in its activities. This has led the Council to look

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[1] 1975 Annual Report of the Clean Air Council p.5.

[2] 1976 Annual Report of the Clean Air Council p.4.

[3] 1977 Annual Report of the Clean Air Council p.3.

critically at its role in the air pollution control scene in New Zealand."[1]

(e) "Although its advice has largely been accepted, implementation of agreed measures has in many cases been slow".[2]

This lack of implementation and action by government agencies of the recommendations of the Council appears to be disheartening to the Council and to be causing it to look critically at its own position. The Council should realise that it is basically only an advisory body and it should not see its functions as extending to the implementation of its recommendations by the Government. While the Council is in a special situation and can see good reasons for immediate implementation of its recommendations the Government has much wider factors to consider and evaluate, especially economic factors, before making any decisions in relation to air pollution control. At the same time it would be hard to ignore the fact that many government agencies take little notice of the Council and this is undermining the role of the Council in air pollution contol in New Zealand. It could be that the Government by setting up the Council is just playing lip service to environmental concerns and by ignoring the Council is doing what it originally intended to do; ignore the control of air pollution.

It should not necessarily be assumed that all the Council's recommendations are reasonable and feasible, they may well be unreasonable and quite unworkable. The blame for the lack of action on the Government side may in part be due to the Council itself.

The Council seems to be aware and fulfilling its roles and functions quite adeq uately but there is still the problem of lack of action by Government. Under the Act the Council can only recommend, advise and play the "watch-dog" and while the Council is performing these functions well they appear somewhat fruit-less if Government is apathetic to air pollution matters. The Government is answerable to the public once every three years and the Ministers of the concerned Departments are responsible and answerable to Parliament so if the Council could make people more aware of the Government's inaction then perhaps implementation would be quicker in coming.

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1 1979 Annual Report of the Clean Air Council, p.5.

2 1980 Annual Report of the Clean Air Council, p.3.

It must be the same with any advisory body that its real effectiveness is in the hands of those who have the power. The effectiveness of the Council must be seen to be more than the adequate performance of its functions and a true gauge of how effective the Council really is would be to look at the actual consideration and implementation its recommendations are given.

There is a fine balance that should be maintained between the Council and Government. It would not be wise for any Government to immediately take up and implement all the Council's advice and recommendations but at the same time it would be equally unwise to completely ignore the Council.

The Council should not alienate itself from the Government as it is necessary for the Council to liaise with Government departments and agencies and to seek their co-operation. If the Council became too anti-government then the Government would clam up and see the Council as a body in opposition to it not worthy of being cooperated with. At the same time the Council should not be lulled into agreeing with everything the Government does or says. The Council should retain its independent status and should not become a mere mouth-piece for Government policy in the air pollution control area. The Government has a monopoly on information in this country and it is the Government who has the power of implementation so the Council should work in with Government agencies while still being independent.

THE UNITED KINGDOM CLEAN AIR COUNCIL -

In November 1954 the Committee on Air Pollution presented its report.[1] This report is commonly known as the Beaver Report, named as such after the Chairman of the Committee. Pursuant to this Report the Clean Air Act 1956 was passed.

The Clean Air Bill was presented and had its first reading on July 26 1955. It had its second reading and was committed to Standing Committee pursuant to Standing Order No.38 (Committal of Bills) on November 3 1955. Up to this stage the Bill had no provisions for a Clean Air Council although the Beaver Report had strongly recommended that a Clean Air Council should be appointed.[2] When the Standing Committee reported back to Parliament (House of Commons)[3] there were several new clauses added to the

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[1] Parliament Paper Cmd. 4322

[2] Para.119

[3] On April 10, 1956.

Bill one of them providing for a Clean Air Council. The main reason given for the delay of provisions relating to the Clean Air Council in the Bill was that it was thought better to hear the views of the Standing Committee before any decision was made as to the form the Council should take. There was some heated debate in the Commons over reporting from the Council and other matters of its form before the clause was read a second time and added to the Bill. On April 10 1956 the Bill was read a third time and the Queen's Consent was signified. On July 4 1956 the Lords Amendments were considered and on July 5 1956 the Bill received Royal Assent.

Section 23 of the Clean Air Act deals with the Clean Air Council. There are only two main parts to the Section :

(a) " for the purposes of :-

(i) Keeping under review the progress made (whether under this Act or otherwise) in abating the pollution of the air in England and Wales and

(ii) Obtaining the advice of persons having special knowledge, experience or responsibility in regard to prevention of pollution of the air;

the Minister of Housing and Local Government shall appoint a consultative Council, to be called the Clean Air Council, of which he shall be the Chairman."[1]

(b) "The Minister of Housing and Local Government may by order make provision with respect to the constitution and procedure of the said Council, and any such order may be varied by a subsequent order."[2]

This is all the Act itself has to say in regard to the Clean Air Council but subsequent orders made by the Minister do provide the membership procedure and constitution of the Council. So far three such orders have been made :

(1) The Clean Air Council Order, 1957[3] , provides that the Council shall consist of the Chairman (the Minister), two Vice-Chairmen and not more than thirty members appointed by the Minister. The rest of the Order provides procedural details.

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1 Section 23 (1)

2 Section 23 (2)

3 S.I. 1957 No. 766.

(2) The Clean Air Council (Variation) Order, 1962[1] increases the Vice-Chairmen to three and amends the procedure of the Council accordingly.

(3) The Clean Air Council (Second Variation) Order 1965[2] adds another Vice-Chairman to the Council.

The United Kingdom Clean Air Council is a lot less independent than the New Zealand Clean Air Council. There is a Minister (since 1974 the Minister for the Environment) as Chairman and the Vice-Chairmen are all Parliamentary Secretaries. There are no provisions for who shall be the remaining members of the Council and the Minister appoints the members of the Council. The Minister may determine the term of office for the members as long as it does not exceed three years. There is no mandatory duty for the Council to provide an annual report to Parliament.

One of the reasons given for the involvement of the Minister in the Council is that it would reduce the usefulness of the Council to the Government in pushing forward its policies if the Minister principally concerned could not be a member of the Council.[3]

The Clean Air Council in the United Kingdom is seen more as a body of Government and less as an advisory body with a certain amount of independence.

It is useful to compare the British Council with the New Zealand Council to see alternative approaches to Clean Air Councils and also to see the features of the New Zealand Council more clearly.

THE QUEENSLAND CLEAN AIR COUNCIL -

Sections 8 to 17 inclusive of the Queensland Clean Air Act 1963 sets up the Air Pollution Council of Queensland. Membership is determined now by the Clean Air Amendment Act (No.2) 1976 and besides appointments from various Government Departments the remaining members are representatives of concerned bodies, i.e. Section 3 (2) (d) "two representatives of occupiers of scheduled premises, nominated by the Queensland Confederation of Industry Ltd." The Director of Air Pollution

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1 S.I. 1962. No. 128

2 S.I. 1965. No. 1274

3 Parliamentary Debates, Commons, 1955-56, Vol.551,49.

Control is the Chairman of the Council.

The Council has similar investigatory and advisory functions as the New Zealand Council but the Queensland Council does all the licensing of scheduled processes and can prosecute under the Act. The Queensland Council has all the powers that Licensing Authorities and the Health Department have in New Zealand with respect to air pollution control.

The Queensland Council appears to be more independent than the New Zealand Council. It has a lot more powers and does not have to wait for other Government agencies to implement policies. Queensland does have a more co-ordinated approach to air pollution as all authority is concentrated in one body.

THE FUTURE OF THE CLEAN AIR COUNCIL -

The future of the Council could be along one of three main avenues :-

(i) The Council could be strengthened.
(ii) The Council could be weakened or dissolved
(iii) The Council could remain much the same.

(i) The Air Pollution Committee of the Board of Health in its report[1] gave considerable thought as to whether the Council should exercise advisory powers only, or should exercise executive functions such as the Queensland Council and the New Zealand (water) Pollution Advisory Council. This would give the Council "teeth" or would merely allow the endorsement of decisions reached by a specialist executive. The main disadvantage the Committee saw was that this system of administration diluted responsibility. The Committee hoped that the administration of the Act would be kept as direct and as simple as possible with executive responsibility delegated to the lowest competent administrative level, with minimal reference to higher authority.

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[1] N.Z.Board of Health, Air Pollution (Report Series No.15) para. 7.30.

It is difficult to fathom what the Committee is getting at here but it appears to be saying that if the New Zealand Council was given powers similar to the Queensland Council then responsibility, authority and effectiveness would be lost in the administration of the Act.

This argument put forward by the Committee is somewhat invalid and cannot be seen as a good reason for not giving the Council executive powers. If the Council was given executive powers then it would simply being doing the work of the Minister and Department of Health and the local authorities. Responsibility would not be diluted as the same people would be doing the same job with the same responsibility but for a different boss, the Council.

If the Council took over full administration of the Act then there would be a unified central approach to air pollution control in New Zealand. Membership of the Council would have to be full-time and the Council would need power to appoint officers similar to the Queensland Council. The present Department of Health officers could simply be transferred to the Council.

If the Council did the licensing then a more direct and coordinated approach to air pollution control could be achieved instead of the "hotch-potch" local authority type licensing system. All applications for a licence could be sent directly to the Council and its officers would tend to the details of licensing.

The Minister of Health would retain overall control of the Council, and the Council would retain its present functions but otherwise the Council would be on its own strategically directing a unified system of air pollution control.

The problems with strengthening the Council in this way is that it would lose some of the advantages it has at present. The Council would now be seen as the bureaucratic machine that is to be overcome and it would be hard for the Council to remain as an independent watch-dog for the public.

Some of the advantages of giving the Council more power could be achieved under the present system under the Act. The Department of Health could co-ordinate the approach to control just as much as the Council could.

The strengthening of the Council does have some good aspects and some countries have found it desirable to give their Clean Air Councils wider powers than New Zealand's.

It is a possibility which should be seriously looked at but the final decision is in the hands of the politicians, if they want to give the Council more powers. The present system seems to be working adequately and change for change's sake is not always a good thing.

(ii) Any weakening of the Council would disable it from being an independent body and it could not then perform its functions and roles adequately. No real purpose could be served in weakening the Council but the complete dissolution of the Council could be a step taken in the future.

While the Council is performing well within its functions and is keeping an independent watch on air pollution control is it really performing any worthwhile function and would it not therefore be better to get rid of the Council ? Could some other body take over the Council's work or no body at all ?

It is essential that any body doing the work of the Council to remain independent so as to encourage public participation and to tender uninhibited advice and recommendations. The only viable reason for another body to take over the work of the Council would be if this body would be an independent body with the function of unifying advice and recommendations on the environment and pollution.

The Council already exists and has built up a body of knowledge and expertise which it would be foolish to do away with. If a larger body took over the work of the Council then effectiveness would be diluted. So the Council should retain its work but is there really any need for a Clean Air Council ?

Air pollution is not serious in this country yet and the Council is only a creation of a Government who pays lip-service to the environmentalists to catch votes. It did not do the National Government much good in 1972 to pass the Clean Air Act as they lost the election one month after the Act was passed. It would appear that only a few staunch environmentalists, who can make a lot of noise, really care about the quality of our air and that the general public do not care at all. Air pollution could still be controlled without the Council. The Council can advise and recommend but it can do no practical good and the Council is only there so the Government is not bothered by the public as they go to the Council to air their grievances.

It is true that air pollution is not yet serious in New Zealand but as the Council have noted[1] there is increasing industrialisation going on especially in the energy area and it is far better to have a body already set up that can prevent and limit air pollution rather than having no body and letting the situation become serious before anything is done.

Even if the Council is continually ignored by Government it is still doing a useful job and the Government is the one to criticise over the inaction, not the Council. Without the Council the Government would have too much of a "free-rein" and could cover up the air pollution control area. Also industry even under the licensing system (which is controlled by the Department of Health and Local Authorities) could more easily pollute without the watchful eyes of the Council.

The public would have nowhere to go and complain and contribute and this would lead to a more dissatisfied public. There would be no expert body for the Government to obtain advice from in the air pollution control area and the country could well develop a serious air pollution problem.

The Council is necessary and its existence should continue and its functions cannot really be given to another body.

(iii) The report of the Air Pollution Committee of the Board of Health, which led to the Clean Air Act 1972, recommended that the Council should have advisory powers only and the functions of the Council recommended by the report were substantially followed through in the Act. The Committee saw good reasons for setting up the Council and giving it only advisory powers.

The Council has been in existence for just over seven years and seems to be doing a very worthwhile and constructive job considering its allowable range of activities. It is a relatively new body and is just being recognised and is building up a certain knowledge and expertise. To change the Council would be to put back to square one, all the work that has been done so far. The main problem with the Council is the lack of attention it receives from the government agenices. This is not really the fault of the Council and to change the Council would not solve the problem.

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[1] 1980 Annual Report of Clean Air Council p.3 - 5.

The Council itself seems satisfied with the Council's structure and powers and definitely sees the value of an independent, advisory, watch-dog body in the air pollution control area, and they of all people would know what structure the Council should have.

Enough time has not elapsed to fully evaluate any changes that may be necessary in the Council.

At present the future of the Council would best be directed to remain as is. No one knows what the future holds and some changes may be necessary to the Council but as of now no changes to the Council are really necessary at all. The Council could be made more independent in a number of small ways[1] but this would hardly affect the Council seriously.

More publicity is needed of the Council's activities and the public need to be made more aware of the air pollution problem and the Government's inaction in the area.

The Council is a necessary and useful apparatus in air pollution control and should continue to function and operate in its present form. Little advantage can really be gained from dissolving the Council. While strengthening the Council does have some advantages it is not really vital to strengthen the Council and upset the present workable system. Countries with Councils that have executive powers would need to be fully questioned to see how workable their systems are and there would have to be a real need present before the New Zealand Clean Air Council would be given executive powers.

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[1] See the section in the paper on membership.

LICENSING -

Sections 23 to 31 of the Act deal with the licensing of scheduled processes. The processes that have to be licensed are found in the Second Schedule of the Act. The processes are divided into three parts each having a different licensing procedure :

(1) Part A processes are subject to licensing by the Department of Health after application to the local authority within whose district the process is carried on or is proposed to be carried on.[1]

(2) Part B type processes are subject to licensing by local authorities[2].

(3) Part C processes require notification to local authorities and are subject to licensing if the local authority has any bylaws for such a purpose.[3]

It is an offence for every person who carries on a scheduled process in or on any premises unless he is for the time being licensed under the Act to carry on the process.[4] The penalties for this offence are provided in Section 52 (2).

Under Section 23 (4) the fee that shall accompany every application for a licence is $60 for part A processes, $30 for Part B processes and $15 maximum for Part C processes if there are bylaws existent under Section 24.[5]

Section 23 (6) provides that "every applicant for a licence shall furnish such information and particulars as may be prescribed or as the licensing authority may in any particular case require."

Failure of an applicant to comply with this does not render him liable to an offence under Section 23 but Section 42 puts a duty on occupiers of premises to furnish information and it is an offence not to do so. If the applicant refuses to supply information the licensing authority can simply withhold the licence which is a more exacting punishment than a fine.

Section 25 goes into the details of the licence itself and under Section 25 (1) a licensing authority may consult with the Clean Air Council and other licensing

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1 Section 23 (3)
2 Section 23 (2)
3 Section 24
4 Section 23 (1)
5 The Clean Air (licensing) Regulations 1973 (1973/303), - regulation 10.

authorities before issuing the licence.

Section 26 is one of the most important sections in the Act as it provides that "every licence shall be subject to such conditions, if any, as the licensing authority sees fit to impose for the purposes of this Act and the Health Act 1956".[1] Section 26 (2) lists conditions that may be imposed but it does not limit the generality of Section 26 (1). The imposing of conditions on the scheduled processes is the means by which the best practicable means (b.p.m.) is applied to each process. That is why the processes are licenced so the conditions can be applied to limit air pollution by the b.p.m.

A licensing authority may vary, add or delete any conditions during the currency of a licence[2] and it is an offence to fail to comply with any condition attached to a licence.[3]

Every licensing authority keeps a register of licences issued by it[4] and it is open for inspection by the public[5].

Section 28 provides for the renewal and transfer of licences and Section 29 provides the instances where a licensing authority may refuse a licence. "A licensing authority shall, in any case where he or it refuses to issue or renew or transfer a licence, give the reasons for his or its refusal".[6]

Section 31 restricts work on scheduled premises and prohibits certain work without licensing authority approval.

There are some interesting aspects of the licensing procedure, described above, which will now be discussed.

ANNUAL LICENSES -

Section 25 (3) provides that " every licence shall, unless previously cancelled under this Act, or unless some earlier expiry date is specified therein, expire in the year following the year in which it is issued on such date as the licensing authority may appoint, but may from time to time be renewed pursuant to this Act." Most

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1 Section 26 (1)

2 Section 26 (3)

3 Section 26 (9)

4 Section 27 (1)

5 Section 27 (5)

licences are issued annually (Part A and Part B processes only that is, because once Part C processes have notified to the local authority they are perpetual subject to Section 24 and any bylaws) and it is suggested that this annual renewal of licences is a waste of time, money and effort.

The only real reason for annual licensing is to review the process every year and to see if the conditions should be changed and the licence continued. Section 28 (5) specifically states that when a licence is renewed it is for a period of one y ear.

Another subsiduary reason for annual renewal is that of revenue. Every year Part A processes pay $60 for a renewal of licence and Part B processes pay $30. If the licences were perpetual then less money would be coming in. Every year at the same time the licensing authorities are inundated with paper work as it is licensing time for the scheduled processes. This also puts an unnecessary burden on the person who operates the process as every year he has to fill out renewal forms and send the appropriate fee to the licensing authority.

Instead of licences being annual they could just as easily be perpetual. There would be no rush every year by industry and the licensing authorities to get licences renewed. The reviewing of licences could still continue throughout the year with changes being made pursuant to Section 26 at any time. An annual fee could still be paid without the necessity of annual renewal. Licences could still be cancelled under Section 53 and perpetual licences would not inhibit this provision.

Therefore there seems to be very valid reasons for making the licences perpetual and there are no problems at all in doing so.

Some local authorities have made bylaws pursuant to Section 24, merely to obtain annual revenue of the Part C processes in their districts. This should be discouraged and is not the kind of thing Section 24 was designed for.

RELATIONSHIP BETWEEN INDUSTRY AND THE LICENSING AUTHORITIES -

The licensing process itself appears to operate very smoothly with industry and the licensing authorities working well together. Most industries cooperate well with the licensing authorities and in turn the authorities help the industries and are reasonable and helpful. In New Zealand there is not the air of conflict between industry and the authorities which appears in other more industrialised nations.

Industries realise that the licensing authorities have the power to prosecute and the power to refuse or cancel licences so the industries cooperate with the licensing authorities as the licence is necessary for the industry to continue to operate.

The b.p.m. (best practicable means) approach to air pollution control allows individual assessment of each process and its circumstances and what conditions should be imposed. The b.p.m. approach also allows a co-operative spirit to prevail because of the flexibility of the approach, the willingness of industry to recognise the need for air pollution control, and the enlightened and realistic approach to licensing by the authorities.

PART C PROCESSES -

Once Part C processes are notified to local authorities they are only subject to any bylaws the local authority may have passed. Otherwise Part C processes are only subject to the general provisions of Sections 7, 8, 9 and 10 and Sections 25, 26, 27, 28, 29 do not affect them as they are not licensed.

Section 7 places a general obligation on the occupiers of premises to adopt the best practicable means. Section 7 (2) provides offences but the occupier of the premises must knowingly commit an offence. Section 7 (2) was used recently to prosecute an occupier of premises but the prosecution failed. While the employees of the company being prosecuted knowingly committed an offence the actual occupiers of the premises, the company and its directions, did not know of the offence. The Magistrate held that knowingly means actual knowledge by the occupier of the premises; the company did not know because its directors did not know, so the prosecution failed.[1]

It would be desirable to change Section 7 (2) and delete the word knowingly or change the knowledge necessary to constructive knowledge so as to give the section the power it was intended to have. Otherwise Section 7 (2) is all but useless as it would be very hard to prove that the occupier of the premises actually knew he was committing an offence.[2]

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1 Department of Health v Rohem Hass Ltd., unreported, Auckland Magistrates Court, 1979.

2 The word "knowingly" was only added to the Bill in the Committee stages and it must have been considered important enough by the Social Services Committee for them to add the word to Section 7 (2) .

Section 8 provides that standards of air pollutants are not to be exceeded and Section 9 gives the Director-General of Health the power to require an occupier to adopt the b.p.m. Section 10 prohibits the emission of dense smoke.

A few local authorities have made bylaws pursuant to Section 24 for the Part C processes in their districts but most Part C processes in the country are only subject to the abovementioned sections of the Act. The reason for this is that Part C processes are not considered as important sources of air pollution and do not have to be as rigorously watched as do Part A and Part B processes.

RELATIONSHIP BETWEEN THE LICENSING AUTHORITIES, THE DIRECTOR-GENERAL OF HEALTH AND THE CLEAN AIR COUNCIL -

Section 9 conveys powers of control only to the Director-General of Health. The local authorities have no such powers but can easily work through the Director-General to ensure that an occupier does adopt the best practicable means.

Under Section 25 (1) a licensing authority can consult with various other bodies and under Section 6 (3) (b) the Clean Air Council can advise local authorities on the discharge of their functions. There is a great deal of cooperation between the local authorities and the Department of Health. The Wellington City Corporation, for example, has all of its licensing done by the Wellington District Health Office Air Pollution Control Officers mainly because of the lack of staff and expertise that the Corporation has. The Wellington City Corporation receives applications then sends them on to the District Health Office. Section 25 only allows for consultation to occur and if the system developed in Wellington is allowable under the Act is open to debate but it is administratively desirable and expedient as the City Corporation simply cannot cope with the licensing.

The local authorities are often going to the Department of Health for information, advice and guidance and cannot be expected to be experts in the air pollution control area.

Little information is available as to how much cooperation goes on between the Council and the licensing authorities and there appears to be little contact between the two bodies.

LOCAL AUTHORITIES OWNING SCHEDULED PROCESSES -

Problems may arise where local authorities licence their own scheduled processes. No problem arises as to Part A processes but Part B and C processes could cause some problems. A local authority may well place relaxed conditions on their own Part B processes and it would be difficult indeed for the local authority to prosecute itself for an offence related to Part B or C processes.

To remove this problem it would be desirable for the Director-General of Health to be the licensing authority for local authority scheduled processes, in the same way as for Part A processes. This would remove any chance of abuse by local authorities.

SECTION 26 -

In Joseph Lucas (N.Z.) Ltd. v Health Department :[1] the Court of Appeal held that a condition imposed by the Health Department pursuant to Section 26 was invalid because the wide discretion given to the Health Department did not extend to permitting it to control a situation by the imposition of a condition which Parliament had expressly decided should not be the subject of control until a later date. The Court of Appeal[2] asked the question if the ambit of a general discretion given to a licensing authority to impose conditions upon a licence can be extended to a subject matter which has been dealt with in express terms by the statute itself. The Court held that the licensing authority could not do this.

Therefore Section 26 is limited by this case and the discretion to impose conditions is not as wide as a reading of the section suggests.

Section 10 (1) of the Act provides that after the 31st day of March 1975 if dense smoke is emitted from any fuel burning equipment in or on any industrial or trade premises, the occupier of the premises commits an offence. In June 1974 Lucas was issued a licence with a condition that dense smoke should not be emitted for more than four minutes in any sixty minute period. Officers of the Health Department on three occasions observed dense smoke from Lucas's premises in breach of the condition of the licence. The Court of Appeal said that because the Act did not intend there to be any restriction on the emission of dense smoke until after 31st March 1975 the

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1 [1978] 2 NZLR 247.
2 Supra at 252.

conditions restricting dense smoke before that date was invalid.

It is contended that the Court of Appeal was wrong and that the condition imposed by the Health Department pursuant to Section 26 was valid. Section 10 (1) begins with the words "Subject to the provisions of this Act, if on any day after the 31st....." One of the provisions of this Act is the discretionary power that licensing authorities have under Section 26 to impose conditions on licences. Section 10 (1) is therefore subordinate to Section 26 and the condition the Health Department imposed on Lucas's licence was valid.

The only limits Section 26 has is that the conditions must be for the purposes of the Clean Air Act 1972 or of the Health Act 1956. One of the purposes of the Clean Air Act 1972 is that there should be no prohibition on dense smoke until 31st March 1975. So there does appear to be some conflict between Section 26 and Section 10 but if Section 19 (1) is made subject to the other provisions of the Act then Section 26 should prevail.

It can easily be seen that the Legislature intended no prohibition on dense smoke before the date specified but limited this to the other provisions of the Act so if the situation arose where it was necessary to prohibit dense smoke before the date it could be done. No other reason can be seen for limiting Section 10 (1) in this way.

Therefore it is submitted that the Court of Appeal judgment is incorrect and it should have held that the condition was valid.

While Section 26 (2) says that it does not prejudice the generality of Section 26 (1), can it ? Section 26 (2) was enacted for two reasons :

(1) To provide specific examples of the most likely conditions to be imposed so there would be no doubt that they were for the purposes of the Act and the Health Act 1956.

(2) To provide a guide to local authorities in applying conditions to licences.

It would appear, from the wording of Section 26 (2), that conditions will still be valid if made pursuant to Section 26 (1).

APPEALS -

"Safeguards are essential but the Committee intend that these shall be provided by rights of appeal to an independent tribunal at all levels of decision as at present."[1]

The Act, however, adopts a different system of appeal which is covered in Sections 32 to 41.

APPEALS TO THE DIRECTOR-GENERAL -

Any decision made by a local authority affecting a Part B or Part C process may be appealed to the Director-General of Health; who after giving the parties an opportunity to be heard may confirm, vary or reverse the decision.[2]

Appeals are directed to the Director-General from only B and C part processes presumably because he is independent from the decision originally reached by the local authority. This appears to be a sensible and fair provision and follows from the fact the Part A processes, where decisions are made by the Director-General, cannot appeal to him.

The only disturbing factor of this system is that quite often local authorities make de isions after close consultation with the Health Department. The Director-General has wide powers to delegate[3] and the situation may well occur where the same person who was consulted by the local authority hears the appeal. Every effort should be made to ensure that this does not occur and that no hint of bias appears.

Any person who is dissatisfied with the decision of the Director-General may appeal to the High Court but those persons specified under Section 32 must first appeal to the Director-General before going to the High Court.

APPEALS TO THE HIGH COURT -

Section 33 (1) lists those persons who may appeal to the High Court. Section 33 (2) provides the instances where a local authority may appeal to the High Court.

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1 Board of Health Committee report on Air Pollution, para. 7.30.

2 Sections 32 and 33

3 Section 4.

Section 33 is subject to Section 34 and both subsections of Section 33 are exhaustive.

Section33 (1) deals only with people who have been directly concerned either as licencees, occupiers, applicants or holders. "There is little provision in the apellate structure for giving persons affected, other than the polluter, a right to appeal".[1]

ADDITIONAL MEMBERS -

Section 35 of the Act provides that for each appeal there shall be two (2) additional members of the Administrative Division of the High Court (not being Judges of the High Court) who shall be appointed by a Judge of the High Court from a list of persons maintained by the Secretary for Justice. The names entered on the list are the names of persons approved for the purpose by the Minister of Justice after consultation with the Minister of Health[2] and no member or officer of any local authority, the Council, the Board of Health or the Department of Health shall be qualified to have his name on the list.[3] The present list of nominated persons is :

Mr G.W. Pyer, Technical Manager, B.P. Oil Co. Ltd.

Professor R.L.Earle, B.E. (Chem.), B.Sc.Ph.D., Biotechnology Department, Massey University.

Dr F. de Hamel, M.O., M.R.C.S., L.R.C.P., D.P.H., D.I.H., Department of Preventitive and Social Medicine, Otago Medical School.

Professor S. Hickling, M.D., D.P.H., Department of Preventitive and Social Medicine, Otago Medical School.

Mr L.M. Larson, B.Sc., A.R.E.I.N.Z. F.R.Ae.S.,M.I.D., Legion of Merit (U.S.), Auckland.

Mr I.R.C. McDonald, M.Sc., F.N.Z.I.C., A.R.I.C., Chemistry Division, D.S.I.R.

Mr C.A. Martin, M.Sc., M.N.Z.I.C., I. Chem. E., N.Z.I.E., M.Inst.F., Christchurch.

Mr P.M. Outwaite, Wellington.

Mr W.E. Russell, Group Technical Manager, N.Z.Farmers Fertiliser Co. Ltd.

Mr B.W. Spooner, B.E., F.N.Z.I.E., F.I.C.E., Wellington.

Mr D.M. Walter, M.Sc., Foxton.

1 P.A. Le Page "Fire Without Smoke" LL.B.(hons.) legal writing, V.U.W., 29.
2 Section 35 (3)
3 Section 35 (5)

From the membership of the list it would appear that the appointment of the two (2) additional members are to give the High Court some expertise in the air pollution control area. On the list there is an abundance of scientifically qualified persons, two representatives of Industry, and some persons whose reasons for being on the list is not obvious. While Section 35 (5) excludes many experts the list maintains the existence of experts in hearing appeals. An additional reason for having the two (2) additional members could be to put a lay or public approach to the appeal but with a predominance of scientific experts on the list the appeal may become too technical and not that fair for the parties of the appeal.

PROCEEDINGS AND DECISIONS OF THE HIGH COURT -

Section 37 provides the proceedings the High Court shall follow in an appeal. Under Section 37 (1), the High Court shall hear the evidence of other persons" if the Court considers it relevant to the subject matter of the appeal so people affected but outside section 33 may have a limited right to be heard.

A Quorum of the Court is a Judge of the Administrative Division and at least one (1) additional member.[1] Section 38 (2) provides that if members are equally divided in opinion, the decision of the Judge or of a majority of the Judges shall be the decision of the Court. If the Court cannot decide a question before it the question shall be referred to the Court of Appeal. The Court has a wide discretion in its decision[2] and a Judge of the Administrative Division sitting alone has jurisdiction to make certain orders[3]. These orders that can be made by the Judge Alone do not limit the use and effectiveness of appointing additional members of the Court under Section 35.

Section 39 (1) provides that the Minister of Health for the purpose of protecting the public health may direct that the decision of a local authority or of the Director-General shall have effect notwithstanding that an appeal to the High Court is pending or available. Otherwise, decisions shall not have effect until the time for appealing has expired or until an appeal, if instituted, is determined.

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1 Section 38 (1)
2 Section 38 (4)
3 Section 38 (5)

Sections 40 and 41 give a limited right of appeal to the Court of Appeal.

CHANGING THE APPEAL SYSTEM UNDER THE ACT -

There has never been an appeal to the High Court under the Act and it is doubtful if there will ever be one. Either the licensing system is working so well that nobody has cause to appeal or the system of appeal set out in the Act is inappropriate.

The licensing system and other ancillary matters may well be running smoothly as far as the local authorities, the Director-General of Health and the industries are concerned and there may be no need to appeal. It is not known how many appeals have successfully been resolved by the Director-General under Section 32 but this may also account for the lack of appeals to the High Court.

Perhaps the licensing system is not working so well but the system of appeal is inhibiting aggrieved persons. Apparently it is not the licensing authorities who feel inhibited by going to Court but industries and occupiers of premises. A certain stigma is attached to Court appearances by industry and they are reluctant to appeal. This is felt to be a real problem by some officers of the Department of Health and an alternative appeal system is being investigated.

The Board of Health Committee report recommended rights of appeal to an independent tribunal as existed before the Act.[1] This would have been an appeal to a Board of Appeal under Section 124 of the Health Act 1956. A Board of Appeal under Section 124 consists of a District Court Judge, who is the Chairman of the Board, and two (2) assessors appointed by the Minister of Health. The assessors cannot be members of the Board of Health or officers of the Department of Health[2] so as to assure an unbiased decision. Appeals under the Act could easily be heard pursuant to Section 124 and this would remove the problems of the present system.

With the District Court Judge being the Chairman a judicial element would remain in the proceedings and the assessors could just as easily be appointed from the

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[1] Para 7.30

[2] S. 124 (3)

list of persons under Section 35. This different appeal system would remove the stigma of the Courts while retaining a semi-formal judicial air in the proceedings.

Section 124 (5) provides that a decision of a Board of Appeal is final whereas the appeal system under the Clean Air Act allows for further limited appeals to the Court of Appeal. If a further right of appeal should be available beyond section 124 is doubtful but possibly some appeal rights from the Board of Appeal decision could be made available for those who feel the decision is wrong.

With the Section 124 Boards of Appeal system already in existence it is hard to see why the Legislature decided to take a different approach to appeals under the Clean Air Act. It may have done so to ensure that there was available a full and fair appeal procedure but it appears that this has not occurred at all with no appeals to the High Court yet.

It is a more costly system to go to the High Court which may further inhibit industry to appeal. A Board of Appeal seems to be a more workable appeal system than that which is currently available and it does not have any real difficulties in implementing whereas the present system does have some quite important drawbacks.

Of course it is always hoped that matters can be resolved between the parties without one or the other having to go on appeal, but when one party wishes to appeal a just, simple and non-inhibiting procedure should be available.

EXTENDING SECTION 33 -

Section 33 could be extended so as to give a wider class of persons a right to appeal. At present the general public and those affected by decisions taken by licensing authorities cannot challenge those decisions by appeal. If Section 33 was extended to give a right of appeal to any aggrieved party then more publically accepted standards of air pollution could be reached.

There would be a problem here as to definition of "aggrieved party" so as to calculate if one person did or did not have a right of appeal. The rules of locus standi could help the Court hearing an appeal if the parties had a right to appeal.[1]

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[1] See the section in the paper on Locus Standi

There is of course the inevitable "flood-gates" argument against this widening of Section 33. The rules on locus standi would be enough to rule out those not affected and the professional litigant, while those who have a genuine grievance can be heard.

If a licensing authority imposes conditions on a sechedule process under Section 26 and a nearby resident still finds the air pollutants from the process unacceptable he should have the right to appeal so the decision as to the conditions can be looked at.

ALTERNATIVES TO APPEAL -

Even if the appeal system is left as is there are various other avenues open to people to complain about a decision under the Act. With these other avenues open it is perhaps not so desirable to extend the right of appeal under Section 33. Complaints to the Department of Health or local authorities could easily solve a problem, so could complaints to the industry involved or the Clean Air Council. The media is always willing to fight for people's rights and Members of Parliament always have an ear for constituents' grievances. The law also provides avenues for people who are aggrieved by decisions and problems in the air pollution area :

(1) Common Law Remedies :

Four possible causes of action exist in tort, namely :-

(a) an action for negligence,

(b) an action against the occupier of premises for the escape of a dangerous thing - i.e. Rylands v Fletcher [1] doctrine.

(c) An action in private nuisance.

(d) An action in public nuisance.

Until the latter half of this century the only form of redress available, in respect of air pollution, in most countries was an action at common law. Various factors combine to make common law action as unsatisfactory as a means of controlling air pollution but the common law action is the only type of action which seeks directly to compensate the victims for injury suffered, and the remedy of an injunction is very applicable in the air pollution control area.

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[1] (1868) L.R. 3H.L. 330.

(2) Instead of appealing an occupier of a scheduled process can ignore a condition of his licence and either the licensing authority will ignore this or prosecute the occupier. In defence the occupier could plead that the condition imposed was unlawful and thus indirectly the decision of the licensing authority has been challenged.[1] This is a very limited way of challenging decisions and the Courts can only view the decision in a very narrow sense and cannot as easily vary or reverse the decision as it could if the decision was appealed.

(3) Judicial Review :

Judicial review, under the Judicature Amendment Act 1972, is available but is limited by the present locus standi rules. Rather than extend the right of appeal under the Act it could be more desirable to extend locus standi for judicial review so more people could challenge administrative decisions in this way.

LOCUS STANDI -

The Public and Administrative Law Reform Committee Eleventh Report on Standing on Administrative Law is an excellent summary of the law regarding locus standi.

The majority of the Committee propose that there should be provided a general rule in the Judicature Act 1908 for the guidance of the High Court in determing whether a person has standing. The proposal reads that the High Court "in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates".[2]

The minority of the Committee contend that the above proposal will magnify the present problems as to standing.[3] The minority also say that "the future of the development of the law of standing would become unpredictable"[4] if the majority's proposals were adopted. One of the main reasons the minority see for their dissent

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1 See Joseph Lucas (N.Z.) Ltd. v Department of Health [1978] 2 NZLR 279.

2 P.33 of the Report. Clause 56 D. (1)

3 P. 35 para. 2.

4 P.36. para. 5.

"Is that under the majority proposal some bodies that certainly deserve to achieve standing will not necessarily be granted it "[1]. The minority seem to be especially concerned about the standing of environmentalist groups and they say that such a group under the majority proposal will not be likely to get standing but under the minority proposals "it will virtually be certain that such a group will obtain standing".[2]

The main features of the minority proposal are :-

(i) An initial application for consent to the Attorney-General

(ii) The conferment of a new power in the Courts to make a " Standing Order" notwithstanding that the Attorney-Gemeral has declined his consent.

(iii) The settling of standing problems at a preliminary stage.

(iv) Provisions to avoid multiple applications for review.

(v) " The Court's function, upon application being made to it for a Standing Order would be as follows :

If the Court is satisfied upon the hearing of an application for a Standing Order:-

(a) that the person claiming to represent the public interest genuinely represents the interests of the public; and

(b) that the public or as the case may be, that section of the public has or may reasonably consider that it has, a cause of complaint in relation to the exercise, refusal to exercise, or proposed or purported exercise, or proposed or purported exercise of the statutory power in question (whether or not relief under this Act is likely to be granted); and

(c) that in all circumstances, having regard to the nature of the statutory power in question, and the number of persons who are or may be affected thereby, it is appropriate that the person claiming to represent the public interest should be permitted to commence an application for review:

The Court shall make a Standing Order " [3]

These proposals benefit only those claiming to represent the public interest and those specifically affected by a decision will continue to be able to commence an

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1 P. 37. para 6.

2 ibid.

3 P. 38 para. 7 (5)

application for review without being obliged to seek a Standing Order.

The majority argued " that any attempt to define in precise terms the nature of the standing would run the risk of imposing an undesirable rigidity ".[1] The majority consider the minority propsal " as cumbersome, confusing and time consuming for litigants. Moreover if adopted, it might deprive some litigants of the direct access to the Courts they now enjoy and in other cases involve them in unacceptable delays.[2]

If the appeal provisions in the Act remain as is then standing as to review should be as wide as possible to allow those affected to get to Court.

Which of the proposals of the Public and Administrative Law Reform Committee would be best to do this is open to debate but the minority proposal does appear to be very aware of environmental groups.

With environmental groups and individuals more certain as to their chances as to standing for review there would be more and better control of air pollution and more supervision of those who make the decisions under the Clean Air Act.

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1 P. 29. Para 51

2 P. 1. Para. 3

DEFENCES -

SECTION 51 :

Under Section 51 of the Act there are four defences provided for offences under Sections 8, 10 and 16 of the Act. A number of propositions can be stated from the inclusion of these defences :

(i) If the defences are available to certain offences other offences cannot use the defences in Section 51.

(ii) Under Sections 8, 10 and 16 these are the only defences available.

(iii) The other offences in the Act are strict liability because no defences are available to them under the Act.

(iv) Section 51 is merely a list of some of the available defences to offences under Sections 8, 10 and 16 and this does not exclude other offences using these defences.

By Section 51 mentioning only some offences it is a matter of interpretation that the other offences shall not avail themselves of the defences under Section 51. If Section 51 removes all other defences for offences under Sections 8, 10, and 16 is less likely. Section 51 can be seen as an exhaustive list but if any statute removes the common law defences it should do so explicitly not implicitly. Other offences under the Act while not having the defences under Section 51 still have other defences available which Section 51 does not remove these defences.

Section 16 (3) provides a defence for the offence of emission of light smoke in a clean air zone without limiting the application of Section 51.

There has been some adverse comment about the defences, that they are too wide and make it too easy for an offender to "get off". The Department of Health likes to prosecute only if it is reasonably sure of winning its case. The width of the defences available under Section 51 makes a prosecution under Sections 8, 10 and 16 less sure of success. Section 51 (d) is especially wide and should be restricted so as to give more muscle to offences under the Act so air pollution really can be controlled.

REGULATIONS -

Section 55 provides that the Governor-General may, by Order-in-Council, make regulations for all or any of the purposes listed.

So far the Governor-General has made two sets of regulations :

(1) The Clean Air (Licensing Regulations[1] set out the details and form of licensing under the Act and the form and details of applications under Section 31.

(2) The Clean Air (Smoke) Regulations[2] are made pursuant to Section 55 without restricting Section 10 of the Act (see Section 10 (2) and prescribe minimum periods of observation in respect of emissions of smoke.

Under Section 55 the Governor-General may make regulations prescribing conditions to which licences shall be subject.[3] If the Governor-General made regulations under this provision for that purpose then they would be in conflict with the discretion given to licensing authorities by Parliament under Section 26. It would be desirable to remove this conflict by removing the Governor-General's power to make regulations prescribing conditions to which licences shall be subject.

Under Section 55 (1) (O) the Governor-General may make regulations for the purpose of "regulating the procedure of the Council" . This power should also be removed to ensure that the Council are as independent and as free as possible from political whim. While Section 55 states it is the Governor-General who makes the regulations it is in reality the Government.

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1 1973/303

2 1975/52

3 Section 55 (1) (b)

DELEGATION -

Under Section 4 of the Act the Director-General of Health may delegate all or any of his powers under the Act to persons employed in the Department of Health. This delegation has been done extensively with various officers of the Department exercising most if not all the powers given to the Director-General under the Act.

While this delegation is administratively sensible the Director-General is given a lot of power under the Act and all such delegation should only be done after much thought and only where really necessary.

APPENDIX I

TWO TYPES OF AIR POLLUTION CONTROL LEGISLATION -

(i) Best practicable means (b.p.m.) legislation is best evidenced in Britain. The principle behind this is that air pollution must be prevented as is practicable without necessarily tying the performance of the process to air quality guides or standards. Practicable implies the best available and economically feasible control technology.

(ii) Air quality management type legislation is best seen in the U.S.A. The control requirements are based on the desired standard of air quality to be achieved.