LEGISLATION NOTES

ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992

The Accident Rehabilitation and Compensation Insurance Act 1992 (the "Act") has been enacted to establish an insurance-based scheme to rehabilitate and compensate, in an equitable and financially affordable manner, those persons who suffer personal injury. Despite the fact that New Zealand's accident compensation scheme, established in 1974, has been regarded as innovative and comprehensive, the long title to the new Act clearly reflects the comments of the Honourable Bill Birch in the Accident Compensation Supplement to the 1991 Budget. His view at that time was that the scheme had become unfair and subject to a significant level of abuse, and that the costs of the scheme were not shared equitably. Reflecting the National Government's commitment to change, the Act repeals the Accident Compensation Act 1982 ("the 1982 Act") and makes significant alterations to the previous accident compensation scheme. The major provisions of the Act came into force on 1 July 1992.

The scheme of the Act provides that cover shall extend to personal injury caused by an accident to the person concerned, by employment-related disease or infection, by medical misadventure or by the consequences of treatment for personal injury.[1] Unlike the 1982 Act, which relied on a broad definition of "personal injury by accident", the Act defines "accident", "personal injury" and "medical misadventure".

"Accident"

Section 3 contains a lengthy and specific definition of "accident", which extends to include:

> A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process, and the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event or series of events.

The definition also contains specific paragraphs pertaining to the inhalation or ingestion of certain objects, exposure to the elements, burns and absorption of chemicals through the skin.

There is potential for uncertainty in relation to the interpretation of the words "application", "force" and "resistance", which to date have not been considered in a statutory context. However, regardless of that uncertainty, the definition of "accident" will clearly exclude certain cases allowed under previous legislation where there is no specific external event. For example, in *Wallbutton v ACC*[2] a

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1 Section 8(2).

2 [1983] NZACR 629.

woman suffered acute back pain after bending over to pick up some milk bottles, and was subsequently off work for nine months. Davison CJ held that an ordinary action, such as bending down, which resulted in a misfortune she did not intend, may well constitute an accident and upheld the appeal.

The need to show any external factor, even an ordinary one, has recently been considered by the Court of Appeal under the 1982 Act. In *ACC v Mitchell*[3] a four-month-old baby suffered severe cerebral damage, resulting in profound handicap, following a near-miss cot death. There was no evidence of any incident, physical action, disease or infection that might have precipitated the attack. In considering the meaning of "accident" and the need to identify a specific event external to the body, however ordinary, which might have triggered the injury, Gault J considered previous judicial interpretation and concluded:

> Once it is accepted, as it has been, that they extend to unexpected injury suffered in the course of normal activity with no need to identify any employment connection (i.e. a causative accident is not required) there is no logical reason to require an external event or incident.

Gault J further considered that if there was to be such a requirement, it should be imposed not as a matter of interpretation but as a matter of policy.

That policy is now clearly reflected in the new Act by the restricted definition of "accident" in s 3. Since the new definition does not reflect previous judicial interpretation, there is the potential for uncertainty and for the possibility of litigation in those circumstances where the event in question clearly falls outside the new definition of "accident".

"Personal Injury"

The definition of "personal injury" restricts cover to death or physical injuries including mental injuries arising as an outcome of those physical injuries.[4]

The definition pays little regard to established case law under the 1982 Act including recent Court of Appeal decisions which allowed cover for mental injuries suffered independently of any physical injuries. For example, in *ACC v E*[5] Gault J, although mindful of the need to avoid opening the floodgates, stated that it would be a strange situation if cover under the 1982 Act for a person suffering serious mental consequences caused by an accident were to depend on whether or not some physical injury, however slight, is also sustained. His Honour further stated that if the application of established principles was to be constrained on policy grounds, that was a matter for the legislature to determine.

The new Act clearly embodies a change of policy in this area. Claims for

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[3] [1992] 2 NZLR 436 (CA). This case was followed by *Philpott v ACC* [1991] 9 NZAR 331, in which an infant who died as a result of cot death was held to have suffered personal injury by accident.

[4] Section 4(1).

[5] [1992] 2 NZLR 426 (CA). A woman suffered a psychiatric breakdown while on a particularly stressful management course. She subsequently suffered depressive symptoms and was persuaded to leave her employment for health reasons.

mental injury in the absence of physical injury are now excluded from compensation under the Act. Thus the "strange situation" alluded to by Gault J has become a reality.

The definition of "personal injury" also appears to outlaw the extension of personal injury to mental consequences suffered by third parties.[6] Persons who were previously entitled to cover for mental consequences, although not themselves victims of accident or medical misadventure, may now become entitled to a claim at common law.[7]

"Medical Misadventure"

Due to substantial alterations to the Bill in the Select Committee, the Act does not allow a return to common law claims against negligent health professionals. Although there is some divergence of opinion as to the number of medical misadventure claims likely to succeed under the new Act,[8] it does appear that entitlement to cover is more restrictive than it previously was.

Medical misadventure is defined as "personal injury resulting from medical error or medical mishap".[9]

(a) "Medical error" is defined as:

> ... the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances. It is not medical error solely because desired results are not achieved or because subsequent events show that different decisions might have produced better results.

Thus, while the long title refers to an "insurance-based scheme", it is relevant to note that there is no automatic insurance against the outcome of a treatment.

(b) "Medical mishap" is defined as:

> ... an adverse consequence of treatment by a registered health professional, properly given, if: –
> (a) The likelihood of the adverse consequence of the treatment is rare; and
> (b) The adverse consequence of the treatment is severe.

Rarity

Section 5(2) provides that a consequence shall be rare only if the probability is not more than one per cent. However, an attempt to define rarity of events by reference to a mathematical formula is extremely problematic. Determination of

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6 Unlike *McLoughlin v O'Brien* [1983] 1 AC 410 (HL), which allows cover for third parties in the United Kingdom jurisdictions.

7 See for example, *Cogan v ACC* [1990] 8 NZAR 145, and *FG v ACC* [1990] 8 NZAR 155.

8 See for example, *Sunday Star*, 29 March 1992: medical lawyer David Collins (see Books Received, infra at p 246) believes the number of admissible medical misadventure claims will shrink "substantially", while Dr Alister Scott, Chairman of the NZ Medical Association, anticipates a possible four-fold increase.

9 Section 5(1).

the absolute incidence of a particular consequence is very difficult to achieve. In addition, the frequency of an adverse event may vary due to a number of factors including the population in which it is measured, geographical location and socio-economic standards. Difficulties relating to establishing both rarity, and the chain of association between the originating event and the complication, may exclude cases such as *Viggars v ACC* from cover under the new Act.[10]

Section 5(3) provides that where the likelihood of an injury was known to a person, it shall not be medical mishap. This qualification has the undesirable effect of prejudicing the right to compensation where people at greater risk are informed of the likelihood of an adverse outcome, and it does not encourage the dissemination of information between doctor and patient.

For the purpose of medical mishap, s 5(4) defines adverse consequences as severe only if they result in either death, or hospitalisation for more than 14 days, or significant disability for more than 28 days, or qualification for an independence allowance under s 54.[11]

Disability will be determined by reference to the *American Medical Association Guides to the Evaluation of Permanent Impairment (Second Edition).* These guides were originally developed for work or motor vehicle accidents and are not necessarily a suitable measure for all injuries in New Zealand. Furthermore, they are not readily available and are subject to copyright restrictions.

Section 5(5) restricts medical misadventure to injuries which occur at the time of the procedure and excludes abnormal reactions or later complications. Medical misadventure does not include non-negligent failure to obtain informed consent,[12] nor non-negligent failure to diagnose or treat.[13] This provision differs from the interpretation of medical misadventure in *Green v Matheson*[14] and effectively overrules the decision of *Polansky v ACC*.[15] In that case Holland J held, inter alia, that the test for medical misadventure did not depend on a breach of fiduciary duty

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10 (1986) 6 NZAR 235. Tompkins J held that a patient who suffered a stroke while undergoing a carotid arteriogram was entitled to cover for medical misadventure under the 1982 Act on the basis that the unsatisfactory outcome was outside the normal range of medical failure. Expert evidence by a neurologist and a radiologist estimated the risk of stroke occurring at 2% or 3%, and 1% respectively. The particular technique used at the hospital concerned was also a factor in assessing the likelihood of the complication. There was also a divergence of medical opinion as to whether it occurred spontaneously, given the patient's history of two transient cerebral ischaemic attacks.

11 Section 54 provides for an independence allowance where injury results in a degree of disability of 10% or more.

12 Section 5(6).

13 Section 5(7).

14 [1989] 3 NZLR 564 (CA).

15 [1990] 8 NZAR 481. The appellant was diagnosed as having extensive gastric cancer. Treatment consisted of surgical removal of the entire stomach, distal oesophagus, spleen and half the pancreas. Subsequent tissue report showed no evidence of malignancy but the presence of a gastric ulcer, which could have been treated medically. The surgeon's decision to operate was considered to be "what any prudent surgeon would have done". The appellant was awarded compensation for medical misadventure despite the absence of medical negligence.

or negligence. Any personal injury resulting from any drug trial or clinical trial is excluded from the definition of medical misadventure where consent to participate has been obtained in writing.[16] In the event that an injury occurs, this exclusion could have adverse consequences for organisations conducting such trials, and for pharmaceutical companies.

The innovative provision contained in s 5(10), empowering the Corporation to refer any negligence or inappropriate action to the relevant disciplinary body may, in conjunction with proposed reforms to medical disciplinary procedures, arguably improve accountability within the medical profession.

The Act also contains other fundamental changes to the provision of accident compensation in New Zealand, outlined as follows.

Occupational Disease

Section 7 provides compensation for personal injury caused by gradual process, disease or infection arising out of or in the course of employment. However, unlike under the 1982 Act, the provision is qualified by specific criteria which may be difficult for a worker to prove. Therefore the possibility of litigation is increased for workers who do not qualify under the Act. Injury due to air-conditioning systems[17] and passive smoking[18] is specifically excluded.

Compensation

One area where the cost-cutting objective is clearly manifested is in relation to the abolishment of cover for non-economic loss. Previously lump-sum compensation was available to an upper level of $17,000 for non-economic loss related to permanent impairment of bodily function, and to $10,000 for other non-economic loss including loss of enjoyment of life and nervous shock. The new Act merely provides for a weekly independence allowance.[19] The amount of the allowance is $40 per week for persons with 100 per cent disability, reducing proportionately for those with lesser degrees of disability. The allowance does not commence until thirteen weeks after the date of the injury.

Funding

In a major departure from previous legislation, the Act provides for funding to be paid by four groups: employers, motor vehicle owners, earners and health professionals. Provision is also made for experience rating for all groups of premium payers, whereby the premium paid may be adjusted according to the actual cost of the injuries. The system may include no-claims bonuses, increased premiums or claim thresholds.

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16 Section 5(8).
17 Section 7(3)(a).
18 Section 7(3)(b).
19 Supra at note 11.

Section 105 provides for exempt employers, who will then assume direct responsibility in respect of employees.[20]

Rehabilitation

The proposed health sector reforms place future responsibility for medical rehabilitation with Regional Health Authorities. As a result, clear statutory provisions for vocational and social rehabilitation are made in the new Act, with the aim of preventing claimants seeking health care under the guise of vocational or social rehabilitation.

Conclusion

In line with the Government's objective of constraining the financial cost of the accident compensation scheme, the Act introduces significant changes to accident compensation in New Zealand. The changes restrict the rights of certain claimants and in some cases diverge markedly from the principles established in the case law relating to previous legislation.

The uncertainty and the accompanying potential for increased litigation may result in a lack of adequate protection for a claimant, depending on the individual's financial ability to take legal action. To this end, it is desirable that the legislation be amended to clarify the scope of common law claims available, rather than leaving this to future litigation.

Susan Keppel

THE RESOURCE MANAGEMENT ACT 1991

The Resource Management Act 1991 (the "RMA" or "the Act") has replaced the entire spectrum of previous New Zealand planning law, taken parts from the Local Government Act 1974, and repealed and replaced age-old environmental offence statutes such as the Water and Soil Conservation Act 1967 with one, potentially far-reaching, liability regime for environmental offences. In addition to this, the complementary Crown Minerals Act 1991 has repealed and replaced previous mining legislation.

The RMA introduces so many new concepts and potential difficulties that it would be impossible to canvass with suitable depth all the issues raised by its various provisions.[1] Accordingly it is proposed to focus attention on a few key areas of reform, namely Part II of the Act (the purpose and principles sections), the

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[20] Section 106.

[1] For such a commentary, the review by Fisher, "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" (in Brooker & Friend, *Resource Management* (1991) Vol 1) is recommended.

change the Act has wrought to planning law, its enforcement provisions, and liability issues pertaining to the offence sections.

Purposes and Principles

Part II of the RMA, which lays down the purpose of the Act and sets out the matters that all persons exercising functions under it must consider, is undoubtedly the most important part of the Act. The meaning of these sections (which is by no means an easy task to fathom) will no doubt dictate the role of the RMA in aiding or restricting development, or in promoting conservation or "green" environmentalism in New Zealand.

Part II introduces both a purpose clause and some other "principles" of the Act. By s 5(1) the purpose of the Act is stated to be to "promote the sustainable management of natural and physical resources". The meaning of the term "sustainable management" is defined in s 5(2) as:

> Managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

This purpose is said to represent two distinct functions. The first, represented by the opening paragraph, is the "management" function of the Act. The second, represented by the enumerated matters (a), (b) and (c), is said to be the "ecological" function of the Act. How these potentially conflicting purposes will be balanced, and what emphasis is placed on the word "promote" in s 5(1), are matters that will eventually be established by the courts. The potential ambiguity in s 5(2), which turns on the meaning of the word "while", has already been referred to by one author.[2]

The extent to which the purpose of the Act truly reflects an ethos of "sustainable management" could be questioned. Because the term is specifically defined in s 5(2) in relation to the purpose of the Act (which is to "promote" such an objective), an argument could easily be formulated that would see the "use and development" aspects of management of resources given emphasis over the "protection" aspect of this purpose.

It is significant that the purpose of the Act is not just to manage natural and physical resources in a sustainable way, but to "promote" this objective. The purpose of the Act is connected intimately with the initiation, advancement, encouragement or active support of the concept of "sustainable management" of resources. There is not simply a passive obligation on people exercising powers under the Act, but an active one.

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[2] Ibid, 12-13.

Sections 6, 7 and 8 have, it is contended, clearly subsidiary roles to this purpose. Due to the careful wording of the obligations imposed in each section, they also have an internal weighting and priority among themselves.

Section 6 establishes that certain matters of national importance, similar to those in s 3(1) of the previous Town and Country Planning Act 1977, shall be "recognise[d] and provide[d] for". These matters include the preservation of the natural character of the coastal environment[3] from "inappropriate" subdivision, use, and development; the protection of outstanding natural features and landscapes from similarly "inappropriate" subdivision, use, and development; and other matters such as the protection of areas of "significant" indigenous vegetation and habitats of indigenous fauna, the maintenance and enhancement of public access to and along coastal areas, and the cultural and traditional relationship of Maori with their ancestral lands.

A number of points arise from these matters of national importance. What is meant by, and who determines whether a use is "inappropriate" or not?[4] Who makes the decision as to whether an area of indigenous vegetation or fauna is "significant" enough to warrant protection as a matter of national importance? By its wording, the section clearly envisages developments of some sort even in natural coastal areas or areas of outstanding natural features and landscapes. However, are there some environments that, because of their special characteristics, warrant a prohibition on use or development no matter how appropriate this may be?[5] To what extent does the obligation to "protect" these environments conflict with the purpose of the Act to "promote" the use and development of natural resources in a way which enables people to provide for their social, economic, and cultural wellbeing?

Section 7 lists "other matters". Persons exercising their functions under the Act are required to "have particular regard" to a number of matters enumerated at s 7(a)–(h). Among these matters are the interesting and no doubt important concepts of "intrinsic values of ecosystems", and "kaitiakitanga" (this concept, as we are informed by s 2, means the "exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself").[6]

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3 See *EDS v Mangonui County Council* [1989] 3 NZLR 257 (CA).

4 This term is different from the term "unnecessary" used in similar parts of the Town and Country planning legislation. The distinction, it is submitted, clearly envisages a recognition that development constrained merely by "need" factors is not the goal of the RMA. Rather, the focus is a consideration of "effects", and the appropriateness or suitability of any particular activity to the environment of which it is part. The "need" for an activity is an element of this, but not the *sine qua non* of it. There are other factors to consider.

5 See in context of the Mining Act 1971, *Re an Application by Amoco Minerals NZ Ltd* (1983) 9 NZTPA 260.

6 As to the appropriateness of Maori terms being used in the Act, submissions were made to the Select Committee that considered the first reading of the Bill in 1990. See their published report, *Report of the Committee on the Resource Management Bill* (1990) para 6.4.

Section 8 imposes an obligation on decision-makers to "take into account" the principles of the Treaty of Waitangi. Strangely enough, the hierarchy of the Act results in this obligation ranking below those contained in the foregoing provisions.

As the Bill progressed into an Act, this obligation became more and more narrowly focused and restricted. On the first reading, the duty was to consider the Treaty of Waitangi itself. Following Select Committee recommendations, the obligation was altered to one of requiring that the "special relationship between the Crown and te iwi Maori" be taken into account. The final legislation returned to the familiar ground of the "principles of the Treaty". But does this offer more protection to Maori interests or less, and how does s 8 relate to the more specific, national interest-based obligation embodied in s 6?

It is apparent that the task of adhering to the purpose of the Act, while at the same time recognising and providing for matters of national importance, including the principles of the Treaty of Waitangi, is a mammoth and perhaps overwhelming one.

Planning Law

One of the major reforms introduced by the RMA is the supposed streamlining of planning law in New Zealand. The established Town and Country Planning legislation has been repealed and replaced by an "effects-based" planning regime that has introduced a wide range of new philosophies, ideas and expressions in relation to land use.

One of the most basic reforms to land use policies is the change from a default position under the Town and Country Planning Act 1977 (the "TCPA") of prohibiting a land use, to the RMA where, unless regulated, a land use is permitted.[7] This change has resulted in some transitional provisions, and future RMA planning reviews should see some interesting decisions on "blanket prohibition" clauses.

Loosely speaking, the RMA represents, in many ways, both a traditional "effects-based" legal approach to environmental and planning issues,[8] as well as a more innovative policy-sourced structure. The previous planning law regime was not "effects-based". It looked more to the classification of uses or activities, and then assigned different planning tests to these uses in each particular zoned area.[9]

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7 See s 9.

8 See United Nations, *Our Common Future: World Commission on Environment and Development* (1987) (Brundtland Report) 310-311.

9 For example, a proposal that fell to be determined as a conditional use was subject to a test under s 72 of the TCPA, which related to site suitability, and effects on neighbourhood amenities, health, safety, convenience and the economic, social, cultural and general welfare of the people of the district. On the other hand, an activity that fell into the "specified departure" category was assessed on a test of public interest, town and country planning significance, and the integrity of the scheme concerned.

Apart from the new terminologies adopted, the RMA is very similar. There is one fundamental difference, however, and that is in the RMA's new stress on "effects" of environmental activity. This test, be it for positive or negative effects, is the fundamental baseline for environmental activity, regardless of planning classification.

A prime example is the test contained in s 105 for evaluating the new "non-complying activity" (very broadly similar to the TCPA's specified departure procedure). Although there is a presumption that an application will not satisfy this test by virtue of the wording of s 105(2), the application may be granted at the discretion of the decision-making body if it is satisfied that the environmental effect of the proposed activity is minor or that the proposed activity will not be contrary to the policies or objectives of the plans concerned. In this case, both an effects-based and a policy-based decision are disjunctively linked, and form alternative grounds (apparently) for considering[10] a non-complying activity in an area.

Just what is meant in the RMA by an effect, or an adverse effect, is an area ripe for future debate. Already the ease with which a non-complying activity can be granted, provided it has minor effects on the environment, has been raised in resource consent applications. Whether the "or" in s 105(2)(b) was meant to be an "or" or should have been an "and" is a matter that will undoubtedly arise before too long. Looking closer at an "effect" under the RMA, however, it becomes clear that the concept is not a simple one.

"Effect" is defined in s 3 to include any positive or adverse effect, any temporary or permanent effect, and past, present, or future effects, or any cumulative effect that arises over time with other effects. All this applies, it should be noted, without regard to the scale, duration, or frequency of the effect.

When considering these effects, we are looking at the effects of an activity on "natural and physical resources". This term is defined in s 2 as including land, water, air, soil, minerals and energy, all forms of plants and animals (native and introduced), and all structures. A "structure" is defined as any building, equipment or device made by people and fixed to land.

The RMA leaves us with a wealth of considerations to weigh in relation to any particular activity. Not only present, but past and future effects are to be considered, be they large or small, positive or negative. What, one may ask, will be the "effect" of all this? Surely it can be nothing short of a confused local body and an overworked Planning Tribunal.

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[10] *Batchelor v Tauranga District Council*, Planning Tribunal, Auckland, 6 July 1992 A64/92, where the Planning Tribunal refused to compare the RMA to its TCPA counterpart on the grounds that the RMA was a reform measure. The Planning Tribunal held that the alternatives in s 105(2)(b) are conditions and not tests. The fulfilment of one of these conditions enables the Consent Authority to move to the next step and consider the application under s 104.

Enforcement and Liability Under RMA

Apart from the offence provisions which will be discussed shortly, there are a number of mechanisms for enforcing the duties and restrictions of the RMA. Apart from a declaration from the Planning Tribunal on questions of rights or duties under the RMA, the enforcement order and the abatement notice are the primary means by which the obligations in the RMA are enforced. These will be discussed in turn.

An enforcement order is made under s 319 of the Act by the Planning Tribunal and orders a person to do something one is required to do, or not to do something that one is prohibited from doing by the Act, a rule in a plan, a resource consent, a designation, or a heritage order. In short, it is an omnibus order that gives substance to the numerous duties imposed on people by the Act, or by rules, consents, or orders made under the Act.

Perhaps the most interesting thing about the enforcement order is that, despite the prohibition on trade competitors objecting to consent applications under s 104, there have already been cases where enforcement orders have been obtained to maintain a trade advantage – at least until the prohibited activity can be consented to in formal resource consent hearing.[11]

The abatement notice is the means by which the environmental "police" of a local authority may compel compliance with the Act's standards, or can prevent or abate a noxious, dangerous, or offensive activity.

For the time being, the most that many people will see of such powers is when noise control officers impound a noisy stereo at a party[12] (the power to do this is contained in ss 323 and 328 of the RMA[13]). Apart from this, however, the abatement notice procedure and the consequences of non-compliance with such a notice (namely, criminal liability under s 338(1) or (2)) form an effective mechanism to ensure compliance with the Act.

Of all the provisions of the RMA, it is perhaps only four sections that have sparked the greatest commercial concern, debate and respect. These provisions are the criminal offences sections, ss 338-341.

Basically, it is an offence to contravene the duties and restrictions imposed by Part III of the RMA.[14] These restrictions usually require a resource consent issued by a relevant consent authority, or a rule in a plan, before they are permitted. The restrictions relate to a whole range of resource uses; land, water, coastal marine

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[11] See *Rangiora New World Ltd v Barry* (1992) 1 NZRMA 133; and *Kawarau Jet Services Ltd v Pro Jet Adventures Ltd* (1991) 1 NZRMA 1.

[12] A failure to comply with duties under s 16, or even an abatement notice issued under s 322(1)(c) is not subject to criminal penalties under s 338(1), but rather s 338(2). As a result, offenders are subject to lesser fines (maximum $10,000), and are not subject to imprisonment. Excessive noise is dealt with, apart from the abatement process, under ss 326-328.

[13] As to return of impounded equipment, see s 336.

[14] Section 338(1)(a) makes it an offence to contravene or permit a contravention of ss 9-15.

areas, rivers and lakes, and discharges of contaminants. Offences under Part III of the Act are ones of strict liability,[15] carrying hefty fines and even imprisonment.[16]

The section with the potential to cause the greatest concern is s 340. This section imposes liability on persons other than the criminal wrongdoer in two circumstances.

First, and there is nothing unusual about this provision, s 339 imposes liability on an employer or principal for the acts of an employee or agent as if the employer or principal had itself committed the offence. However, problems may arise when an independent contractor is responsible for the offence; for example, by spilling toxic waste and killing wildlife.

Second, in some circumstances directors or "persons concerned with the management" of a company that commits an offence can be deemed guilty of the offence by virtue of s 340(3). This section has the potential to expand liability for environmental disasters, not only to directors of convicted companies but also to banks and lenders to those companies if they can be said to be "concerned in the management of the company".

In this latter regard, New Zealand environmental law has adopted a very similar approach to that of the United States and Canada. In both jurisdictions, a "deep-pocket" liability regime has forced corporations and their bankers to look hard at environmental liability issues.[17] It is uncertain whether there has been any notable decrease in environmentally irresponsible behaviour as a result of these policies and potential liabilities. Certainly the magnitude of the problems faced overseas is, from a New Zealand perspective, unimaginable. However, it is encouraging to note that the existence and use of such sanctions has sparked much greater concern over the environment than previously seen.

Conclusions

The RMA has certainly brought a major change to the whole basis of New Zealand environmental law. It is a "new start" for New Zealand environmental standards and law, which will cause many problems and interpretational difficulties in its initial years. For such time as the the older enactments remain current, due to the transitional provisions of the RMA, the impact on planning and environmental law will be hardly noticeable. However, as the RMA slowly becomes the governing statute for all natural resources, its comprehensive nature and its vision of "sustainable management" of resources will become more obvious. Meanwhile, "sustainable management" is a concept which will continue to concern practition-

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15 Section 341. Whether this encompasses a *Mackenzie* total absence of fault defence is as yet undetermined. The wording of s 18 may, in fact, mean that only the statutory defences in s 341 can be raised to a s 338 prosecution.

16 Section 339.

17 For a brief introduction, see Berry, "Who pays to clean up the world" *NBR Weekly Magazine*, 21 September 1990, 18.

ers and academics alike. Other elements of the RMA have come into common usage already. A prime example is the enforcement notice provisions which are being utilised by a wide range of people, including trade competitors. On the offences front, large fines, fewer defences, and widened liability provisions give the RMA some bite that previous environmental statutes have not had.

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THE HUMAN RIGHTS COMMISSION AMENDMENT ACT 1992

The Human Rights Commission Amendment Bill 1990 (the "1990 Bill") was the first stage in a review of the Human Rights Commission Act 1977 (the "principal Act").[1] The intention[2] of the review was to amend, inter alia, Part II of the principal Act by increasing the number of grounds of unlawful discrimination. The most notable additions[3] were to be health status, age, sexual orientation, pregnancy, family status and identity of a partner or relative. However, the subsequent Human Rights Commission Amendment Act 1992 ("the Act") was only successful in making it unlawful to discriminate in employment on the basis of age. The Act is less worthy of comment for what it has achieved than for what it has failed to achieve. In evaluating this it is necessary to "go beyond what the law is said to be and explore what it is".[4]

Aims of the 1992 Amendment

Employment practices are influenced by cultural constructs. In New Zealand the focus of most discrimination in employment is against our aging population (a projected 62 per cent increase of 40 to 59-year-olds by 2031).[5] It is apparently less attractive to be older; old age seems seldom considered a proxy for wisdom.[6] As in most cases of prejudice the perceived reality of a situation conflicts with its

1 See Report to the Minister of Justice by the Human Rights Commission, *Review of the Human Rights Commission Act 1977*, 1.
2 [1990] Industrial Law Bulletin 83.
3 Previous grounds for discrimination were: race, colour, ethnic or national origins, sex, marital status, religious belief and ethical belief.
4 Murray & Wright, Editors' Note, (1991) 6 AULR.
5 State Services Commission, *Age Discrimination and Equal Employment Opportunities: A Review of the Literature and Bibliography* (1992) 2.
6 It is acknowledged that the tangata whenua and Pacific Island cultures often accord more status to elders.

objective truth.[7] The Act works in the following ways to redress prejudice and to protect employees.

Employment

The Act came into effect on 1 April 1992. Section 3 amends the principal Act, altering section 15(1)(a)-(c), so that it is now unlawful for employers to dismiss, hire, or confer terms and conditions of work (including fringe benefits and promotions), or opportunities for promotion or transfer, on the basis of age. Furthermore, s 15(1)(d) makes it unlawful to require or cause any person to retire because of this or her age. The Act, however, also provides modifications and exceptions to the above.

New sections 15A-C are inserted. Section 15A(1)-(4) states that the law does not apply if age is a bona fide requirement of the job, the job involves domestic work in a private home, or the employment is "to be performed wholly or mainly outside New Zealand". Section 15A also allows for youth rates and preferential treatment to be given to under 20-year-olds. Sections 15B and 15C relate to the Employment Contracts Act 1991[8] and to what the Act defines as its ceiling age. The Amendments apply to people between the school leaving age (currently 15 and in 1993, 16) and the now incremental age for national superannuation eligibility. It also affects all employment contracts in force on 1 April 1992, making it unlawful, regardless of express terms or employers' policy, to retire employees before they have reached their "age of entitlement". However, s 15C(2) allows the parties by mutual consent to contract out of the Act's "non-retirement" provisions. It is therefore questionable, when contracting in today's competitive employment market with the reduced bargaining strength of employees, how much weight will be given to the Act's ceiling age.

Section 5 prevents the Act applying to employment in the armed forces or to sworn members of the police or traffic safety service. Exemption is also given to pilots and air traffic controllers under s 6. Finally, it is also unlawful to use job application "particulars" regarding age to discriminate. It is not, however, illegal to ask such information (s 7).

Advertising

As from 1 June 1992, s 14 makes it unlawful to advertise a job in a way that discriminates on the basis of age. It will be wrong to include either a specified age or terms and conditions which denote an age preference for a job.[9] For example: "the preferred age is 23-30 years", "[i]f you are 23 years or older" and "[g]raduates 25-30 years with a minimum of 2 yrs work experience"[10] all discriminate against

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7 Supra at note 5, at 7-9.

8 Similar age discrimination provisions have been added to the Employment Contracts Act 1991.

9 Human Rights Commission, *Age Discrimination in Employment* (1992).

10 All examples taken from *New Zealand Herald*, 18 May 1992, section 3, 4-5, 7.

applicants young and old. However, sometimes it may be difficult to decide just when an advertisement is discriminatory. For example (depending on the job), it might be lawful, as a bona fide requirement, to advertise a requisite number of years of experience or state that it is for a "senior" or a "junior" position. To avoid uncertainty, advertisements should preferably specify skills and abilities rather than conditions that may single people out on the grounds of age. The care with which advertisements should be worded is especially important to those publishing them as they would share liability (as in defamation) if discrimination is found.

Other Areas of the Amendment

The Act also affects other areas of the principal Act. Sections 9, 10 and 11 make it unlawful for unions and professional and trade associations, qualifying bodies and vocational training bodies to discriminate in membership on the grounds of age. However, s 10(2A)(1)(b) allows bodies conferring qualifications to set a minimum qualifying age. Furthermore, under s 8, partnerships[11] may not discriminate against other partners on the grounds of age unless they have a restricted capacity or require special conditions.

Although existing superannuation schemes are not affected, after 1 January 1993 it will be unlawful to require people wishing to join a scheme to have reached a particular age. The Superannuation Schemes Act 1989 is also amended. Section 21 allows a provision to be implied into the trust deeds of registered schemes, whereby people who continue in employment after their expected retirement date can leave their superannuation benefits in that scheme until actual retirement.

Finally, after successful lobbying by the Human Rights Commission, the restrictive damages provision (s 40(1)(c)) has been removed by s 15 of the Amendment. Previously the Equal Opportunities Tribunal was limited to a maximum award of $2,000 for the "humiliation, loss of dignity, and injury to the aggrieved person". It was felt that in many instances this figure could not accurately reflect the actual injury suffered. The quantum of damages is now set by the Tribunal or the District Court without statutory restriction.

Positive Discrimination

Section 29(1)(a)-(b) of the principal Act is amended to include age as a "group" whereby positive discrimination in their favour ("in good faith") does not constitute a breach (s 13(1)-(2)).

Comment on the Act

The addition of age under the Act raises important issues of what age discrimination in employment is and how it should be countered. Blatant discrimination is

[11] Defined in s 19 of the principal Act as those having six or more members.

easily identified but the more indirect[12] forms will require careful consideration. For instance, it has been found that while the ability to learn new skills does not change with age the need to keep practising them does.[13] Moreover, younger managers are more likely to require training in interpersonal skills, while older workers may need their technical skills updated.[14] Omitting to provide, or providing inadequate, training or educational programmes to cater for the normal aging process, is potentially discriminatory.[15] This is likely as the Human Rights Commission and the Equal Opportunities Tribunal have, in past applications of the principal Act, taken a "fair, large, and liberal"[16] approach. For example, in other countries discrimination against pregnancy is a separate ground, whereas in New Zealand in Part II of the principal Act it has been included as discrimination against sex.

Aside from the Act's potential applications, its timing and design are also noteworthy. There is no doubt that New Zealand had a real need for age discrimination legislation.[17] However, viewed with healthy cynicism, ulterior motives can be found in the passing of this Act, while the other proposed additions in the 1990 Bill were left in the legislative wastelands. In times of high unemployment, especially amongst many middle-aged people, the National Government's removal of lawful age discrimination can be seen as providing a conciliatory alternative to its free market approach to employment.[18] Furthermore, one effect of passing a separate "age Act" is that it has the attraction of presenting a "personalised" legislative package, which gives one less grievance, to those approaching their "age of entitlement". The protests by disgruntled superannuitants and older-aged workers in the latter half of 1991 can be seen to have altered unpopular National Government policies elsewhere.

Not the Human Rights Commission Amendment Act 1992

Significant by their omission are the areas of discrimination left out of the Act. First, the Act is only concerned with employment. Areas of age discrimination not addressed include the provision of goods and services (for example, gaining credit or insurance), and obtaining accommodation. The latter is especially applicable to young people. Secondly, some important provisions contained in the 1990 Bill

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12 Indirect discrimination is termed "subterfuge" under the principal Act: s 27.

13 Supra at note 5, at 9.

14 Lewis & McLaverty, "Facing Up to the Needs of the Older Manager" (1991) Personnel Management 23(1), 32, 34

15 This situation would be analogous to the recognised bias of culturally insensitive school examinations: a problem only recently being addressed.

16 Acts Interpretation Act 1924, s 5(j).

17 It should be noted also that similar legislation exists in the USA, Canada, Great Britain, and South Australia.

18 In particular the Employments Contracts Act 1991 and the Government's reluctance to engage in "short term" employment creation strategies.

were omitted. These included:

> 14F. **Prohibited grounds of discrimination** – (1) ...
> (h) Health status, which means –
> (i) Physical, mental, intellectual or psychological illness or disability or impairment; or
> (ii) Having in the body organisms that might cause disease: ...
> (j) sexual orientation, which –
> (i) Means a heterosexual, homosexual, or bi-sexual orientation; and
> (ii) Includes the condition of being trans-sexual, transvestite, or hermaphroditic; but
> (iii) Does not include a paedophilic orientation.

That so many grounds of discrimination proposed in the 1990 Bill were dropped demonstrates a major problem with passing wholesale human rights legislation. Essentially, when there are several minority groups opposing different parts of a bill, it is considered politically safer to separate and pass only its less controversial components. From the 1990 Bill the age provisions were probably the most politically advantageous. The problems associated with passing the sexual orientation provisions can be gauged from initial parliamentary debate on the Bill. Paul East (National MP for Rotorua) stated[19] that while he and most New Zealanders considered that homosexuality should not be a criminal offence, his concerns were with the person with young children who might have a family home with a flat attached. "That person would consider it a great infringement on his or her rights if he or she was unable to refuse tenancy to a homosexual couple."[20] Unfortunately, Paul East's misguided views were shared by other parliamentarians[21] who decided to favour what they perceived as a "moral majority" over an "immoral" minority. Their concerns make even less sense when it is remembered that the 1990 Bill specifically excluded a paedophilic orientation from the definition of sexual orientation.

The health status provisions, and especially the section referring to "organisms that might cause death" were generally welcomed in the House. However, this section was dropped at the Select Committee stage due largely to protests from "disabled" groups. They objected to being associated, in the legislation, with those with AIDS or the HIV virus. Essentially they sought to avoid what was perceived as public prejudice against people with AIDS or HIV.

Conclusion

What the Act does and does not do calls for two conclusions. First, as a means of countering agism in the workforce it places the Human Rights Commission as a public "watchdog" and the Equal Opportunities Tribunal as an enforcement agency. Although the Act will have an immediate effect on advertising (1 June 1992) and on employers' overt conduct, the altering of longstanding prejudices and stereotypes has to be a long term goal.

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19 510 NZPD 4346, (6 September 1990).
20 Ibid.
21 Including the then Minister of Justice, the Hon W. P. Jeffries, who introduced the Bill.

Secondly, it is ironic that the manner and circumstances by which the 1990 Bill's sexual orientation and health status components were discarded can be seen as showing a compelling need to address prejudice on these issues. And finally, the separate passing of the age amendment may make it much harder to motivate Government to pass what it sees as other more politically sensitive components. This would be especially so if other grounds, for example "health status", "family status" or "identity of a partner or relative" were also separately enacted.

Grant Williams

PRIVACY COMMISSIONER ACT 1991

The Privacy Commissioner Act 1991 (the "Act") together with its originating Bill, the monolithic Privacy of Information Bill 1991 (the "Bill") are a move towards a privacy law for New Zealand. The Act's general purpose is to provide for the appointment of a Privacy Commissioner and to define his or her functions and powers. However, it is more truly an Act designed to prevent abuse of the Social Welfare system. Although this is not necessarily a bad thing, it should not be cloaked in the guise of privacy law. The Act does not create a law of privacy for it does not encompass the abstract ideal of a right to privacy. It does not even incorporate the information privacy principles laid out in the Bill, limited though they may be.[1]

The Bill is far broader in scope than the Act. It would, for example, allow the Privacy Commissioner to investigate complaints.[2] It sets out information matching guidelines which limit the circumstances in which information matching will be allowed,[3] and also regulates the activities of public and private sector agencies in this field.[4] Part VII of the Bill deals with complaints and sets up procedures by which a complaint can be made, investigated, and taken before the Human Rights Tribunal, which is given the power to award damages.

The Act has been lifted out of the Bill, as suggested by the Office of the Ombudsman. The ostensible reason for this is to allow the Privacy Commissioner to consult with the community and decide what is needed in a Privacy Act.[5] The functions of the Commissioner are more limited than they were in the original Bill. The Act's main concern is with information matching, which is not dealt with as fully as in the Bill. It merely regulates the activities of eight public sector agencies.

Part III of the Act creates the position of the Privacy Commissioner. The Commissioner has an important public role to play, informing people of matters

1 Privacy of Information Bill 1991, clause 8.
2 Clause 12(l).
3 Clause 94.
4 Refer to the definition of "agency" in clause 2.
5 NZPD 5512, (21 November 1991).

affecting personal privacy[6] and consulting and cooperating with organisations concerned with privacy.[7] He or she has a responsibility to the government to monitor compliance with the Act,[8] examine proposed legislation,[9] and report to the Prime Minister.[10] In effect, he or she is a privacy watch-dog. However, the Privacy Commissioner does not have any power of investigation. He or she may not investigate complaints made by people whose privacy may have been subject to interference, but the fact that a complaint has been made does not prevent the Commissioner from making general inquiries.[11] He or she has not been given a power of advocacy on behalf of a person who wishes to seek redress for an invasion of privacy. These inadequacies indicate that a general law of privacy has not been created.

The Privacy Commissioner will not have any power of investigation unless and until Part VII of the Bill is passed with clause 63 in its entirety. Until then, all the Commissioner may do is take up the matter informally with the agency involved, or take it to the Ombudsman who may take up the matter formally.[12] This, coupled with a lack of any criminal liability on the part of the agencies, means the Privacy Commissioner will not be particularly effective if an agency does abuse its power. Thus our "privacy watch-dog" is toothless. The most effective way to regulate agencies in this situation would be to allow the Privacy Commissioner or the Proceedings Commissioner attached to the Human Rights Tribunal[13] to take them before the Human Rights Tribunal or to court and claim damages on behalf of aggrieved parties. At present the Bill limits damages to $50,000.[14] There should be no such limit.

Part III of the Act sets out the provisions for information matching. It provides that no personal information held by any agency shall be disclosed to any other agency for the purposes of an information matching programme except pursuant to a written agreement.[15] There are three features worthy of note.

Firstly, the definition of "personal information" is any "information about an identifiable individual",[16] which is so broad as to be unworkable. Information about an identifiable individual includes information which is readily available, such as physical features; information which is readily obtainable, such as living place and occupation; and truly personal information, such as sexual preference, medical history, and financial affairs. This type of information is only shared with a few

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6 Section 5(1)(d).
7 Section 5(1)(e).
8 Section 5(l)(a).
9 Section 5(1)(g).
10 Section 5(1)(h) and (i).
11 Section 5(3).
12 NZPD 5601, 26 November 1991.
13 The Equal Opportunities Tribunal is renamed by cl 143 of the Privacy of Information Bill 1991.
14 Clause 76(2).
15 Section 14(1).
16 Section 2.

other people, largely on a voluntary basis. It seems illogical to protect information as "private" if it is something that any passer-by in the street can see for himself or herself. It makes more sense to concentrate on information which has to be solicited from the individual concerned or from people who know that individual. This may have little practical effect, but its implications do not appear to have been considered.

Secondly, only eight information collection agencies are included in the definition of "agency". They are the Accident Compensation Corporation, the Customs Department, the Department of Justice, the Department of Social Welfare, the Inland Revenue Department, the Ministry of Education, and the Registrar under the Births and Deaths Registration Act 1951.[17] The private sector, the remainder of the public sector, and the media are all ignored. Increasingly, the line between the public and private sectors is becoming blurred, especially with the government policy of privatisation of state-owned enterprises. As the boundaries between the private and public sectors meld, there is a danger that the rights of individuals might be pushed aside. The Act only regulates information matching between these eight agencies. It makes no provision for matching between these agencies and other governmental or private sector agencies, so information matching between two such agencies may not be regulated by the Act.

Although the Act is designed to regulate and possibly limit the use of information collected about individuals, the very definition of "information matching programmes" would seem to allow "fishing expeditions". A programme may be used to produce or verify information held about an identifiable individual. If used to verify information, it would seem to be motivated by suspicion, but a programme used to produce information could be used even if there were no reasonable grounds to believe a fraud was occurring. Information matching under the Act is potentially a powerful weapon for maintaining social control:[18]

> [T]he intersection of two disparate data, each unremarkable in itself, may be all that is required to single out a particular individual for special attention or corrective action.

The information matching rules set out in the Second Schedule are to be followed in an indirect manner: the written agreement must incorporate provisions reflecting the rules or provisions that are no less onerous. There is no obligation to follow the rules to the letter. Even if the agency fails to comply with the rules, no liability follows.

Thirdly, the rules themselves are not absolute, for they may be waived if compliance would affect the success of the programme. Take as an example Rule 2. It states that unique identifiers, such as a combination of numbers and characters used to identify an individual, shall not be used unless their use is essential to the success of the programme. Given the nature of the participating agencies and the underlying purpose of prevention of fraud, this begs the question whether unique

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17 Ibid.

18 Rule, *Private Lives and Public Surveillance* (1973) 310.

identifiers will normally be necessary for a successful programme.

The agency is not obliged to inform individuals that information held about them is to be subject to an information matching programme, if it would be likely to frustrate the objective of the programme. Again, this condition may be used with alarming regularity to avoid informing individuals, simply because of the potential administrative delays.

The detailed list of technical standards to be maintained by agencies refers to integrity of information with reference to relevance, timeliness and completeness, but does not refer at any stage to accuracy. At best, this may be inferred from the context. Given the lack of investigative power, inaccuracies may not be found until after adverse action has been taken.

Rule 5 in the Second Schedule states that agencies shall establish reasonable procedures for confirming the validity of discrepancies, but not if there are reasonable grounds for believing that the results are unlikely to be in error. This is a matter for great concern, given that there is no power of investigation vested in the Privacy Commissioner. Should an agency simply cut corners, with the effect that a person is wrongfully put under investigation, there will be no recourse to justice as there will not be a formal investigation. For many people, initiating a privacy suit where the status of privacy law is uncertain is too costly and risky.

Section 15 provides that an agency may take adverse action against an individual on the basis of a discrepancy produced by an information matching programme. This is the heart of the Act. A person's privacy will be subject to intrusions of which they are not aware, sanctioned by law. One positive point is contained in s 16(1) where information must be destroyed within sixty working days. There are, of course, exceptions. Theoretically at least, information will not be stockpiled.

The Commissioner's powers are extensive in one matter: when conducting an inquiry she or he may demand answers despite any statutory duty to keep secrecy, and compliance with this will not breach the relevant obligation.[19] This is a valuable extension of the Commissioner's powers, especially when s 28 is considered, for it excludes public interest immunity. The effects of this could be far-reaching, and could even have important future repercussions for the medical and legal professions, traditional bastions of confidentiality.

The guidelines set out in clause 94 of the Bill have been left behind. These would have given the Privacy Commissioner power to approve an information matching programme if it met certain requirements. The guidelines ensure that information matching is not lightly undertaken: there must be a matter of significant public importance; no other means of achieving the objective; the public interest in allowing the programme must outweigh the public interest in upholding

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[19] Section 26(2).

the information privacy principles; and the information matching must not be excessive.

A major problem with the Act is that it depends on people to make complaints. The duty to inform individuals of action to be taken can be negated fairly easily. This means people will rarely, if ever, know what is being done with information held about them. The Privacy Commissioner cannot reasonably know everything agencies do, so he or she will, to an extent, rely on being informed by individuals. How can they inform if they do not know what the situation is either? Even if people find out that a programme has been undertaken, they may not have the confidence to take on government bureaucracy. Not everyone is sufficiently educated or sufficiently articulate to demand their rights. They may not have the necessary time or money. This is why an advocate such as the Privacy Commissioner could be a very useful figure.

The Act makes no provision for liability of agencies in the event that their information is incorrect or has been wrongfully disseminated. The Privacy Commissioner should be able to make an investigation and, if necessary, sue for damages on behalf of the injured person. Agencies should be subject to more than internal disciplinary procedures because their activities have a far-reaching public effect.

The defamation rules are not well-equipped to deal with this issue. Often the disputed information will be true, but that does not justify pushing it into the public arena. With the new inroads into personal privacy, provision should be made to help the general public. This includes an alternative to litigation in the courts, which is costly, time-consuming and traumatic. Another forum should be used, and the Privacy Commissioner as an enforcement agent should be able to seek damages and injunctions.

Sarah Kerkin