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THE ACCIDENT COMPENSATION ACT 1972:
SOME ADMINISTRATIVE LAW IMPLICATIONS

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INTRODUCTION

The Accident Compensation Scheme came into operation on 1 April 1974. The scheme is established by the Accident Compensation Act 1972.[1] In addition to making provision for safety and accident prevention, the Act establishes various schemes under which rehabilitation assistance may be provided and compensation paid to persons who suffer personal injury by accident in respect of which they have cover under the Act. The Accident Compensation Commission[2] is created by the Act to administer the scheme.

The purpose of this paper is to consider some of the administrative law implications of the Act. Particular consideration is given to Part VII of the Act which provides a procedure whereby decisions of the Commission may be the subject of review and appeal, initially by the Commission itself (or a person appointed by the Commission) and thereafter by an independent appeal authority and the courts.

The paper is divided into four parts:

Part I considers the nature of the Commission's powers when considering claims under the Act and when carrying out various other functions vested in the Commission by the Act. Consideration is also given to the question "Why is a review and appeal procedure necessary?"

Part II is concerned with applications for review.

Part III considers the nature and powers of the Accident Compensation Appeal Authority[3] and discusses appeal rights beyond the Appeal Authority.

Part IV examines the possibility of obtaining a remedy other than a remedy provided under Part VII of the Act.

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1. Hereinafter referred to as "the Act".
2. Hereinafter referred to as "the Commission".
3. Hereinafter referred to as "the Appeal Authority".

In general, emphasis will be placed upon the aspects of "cover"[4] under the Act and the entitlement to compensation or rehabilitation assistance. However, Part VII of the Act has application to matters relating to liability for the payment of the levies (or the amount of levy payable) which, in part, fund the Accident Compensation Scheme. It also has application to decisions by the Commission to revoke the appointment of an agent[5] to which it has statutory authority to delegate certain of its functions and powers[6].

4. As defined in S.2

5. Pursuant to S.25 (2).

6. Pursuant to S.29.

PART I

THE INITIAL DECISION MAKING POWERS AND PROCEDURE OF THE COMMISSION

It is essential to the efficient administration of the Accident Compensation Scheme that there be a simple procedure for processing claims lodged under the Act[7]. While the Commission may accept a claim on the basis of the information supplied in a claim form, it may require a claimant to verify that information by a statutory declaration.[8] The Commission also has power, if it thinks fit, to "call for such other evidence as it may require from the claimant or any other person" before allowing a claim[9]. The Commission may withold or discontinue the provision of rehabilitation assistance or the payment of compensation if such evidence is not supplied[10].

The existence of these powers points to the investigatory nature of the Commission's role in considering claims under the Act. The Act[11] confers certain additional powers on the Commission which are contained in the Commissions of Inquiry Act 1908, although these have greater relevance when the Commission, or a Hearing Officer appointed by the Commission, is conducting the hearing of an application for review. The Appeal Authority has recently described the Commission's functions in respect of claims lodged under the Act in the following terms:

> "The Commission's primary task (apart from its obligation to undertake preventative work) is to ascertain firstly whether the claimant has had an accident, and secondly if this is established, such rehabilitation help and monetary compensation that the Act allows for. This involves, of course, the assessment of the physcial injury and the resulting financial consequences ....." [12]

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7. 130,235 claims were received during the year ended 31 March 1977: "Report of the Accident Compensation Commission for the year ended 31 March 1977" (the 1977 Annual Report").

8. S.146(2)

9. S.146(3)

10. S.146(4)

11. S.19(2)

12. Decision no. 59

In the exercise of its initial decision making powers in respect of claims under the Act, the only statutory obligations on the Commission are to give a claimant written notice of its decision if that decision may be the subject of an application for review, and to give that decision "as soon as practicable"[13] after a claim has been lodged with the Commission. There is no obligation on the Commission to observe the rules of natural justice in making a decision as to whether to accept or reject a claim under the Act: a claimant is not entitled to a hearing, nor is he entitled as of right to have disclosed to him any information in the possession of the Commission which may be prejudicial to his claim even although the Commission may intend to rely upon that information in reaching its decision.

The nature of the initial decision-making procedure in respect of claims under the Act would appear to be similar to that under the National Insurance (Industrial Injuries) Act 1946 (U.K.)[14]. Discussing the procedure provided by that Act for determining the validity of claims, in R. v Deputy Industrial Commissioner, ex parte Moore,[15] Diplock L.J. stated:

> "Section 45 of the Act of 1946 requires that all claims to benefit shall be submitted to an insurance officer, a civil servant appointed by the Minister. His duties are administrative only; he exercises no quasi-judicial functions for there is, at this stage, no other person between whose contentions and those of the claimant he can adjudicate. He must form his own opinion as to the validity of the claim, and for this purpose he may make whatever inquiries he thinks fit. If he is satisfied that the claim ought to be allowed in whole, he may allow it, and his decision is final; but if he disallows it in whole or in part, he must give his reasons in writing, and the claimant has a right of appeal ...." [16]

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13. S.151(1)

14. See now The National Insurance (Industrial Injuries) Act 1965 (UK)

15. [1965] 1 Q.B. 456

16. Ibid, at 486

That at the initial decision-making stage a claimant should not have any rights under the Act, except the right to a prompt written decision in respect of a claim where a review of the Commission's decision may be sought, is consistent with the requirement that the Commission should deal with a large number of claims as expeditiously as possible. However, the fact that a claimant may not be fully informed of the reasons why the Commission has reached its decision, or that the Commission may have acted on undisclosed information which is prejudicial to a claim under the Act, means it may be difficult for a claimant to determine whether or not he should avail himself of the right to seek a review of the Commission's decision. It also means the effectiveness of the right to seek a review of the Commission's decision will depend upon the claimant being advised of the reasons why the Commission has reached its decision, or with regard to what information it has reached its decision, either before or at the review hearing.

Subject to the provisions of Part VII of the Act, the Commission has exclusive jurisdiction to determine whether a person has "cover" under the Act[17] and once such a determination has been made, it represents conclusive evidence as to whether or not that person has cover[18]. Where in proceedings before a court a question arises as to whether any person has cover under the Act, the Court is required to refer that question to the Commission for determination[19]. The Commission is also empowered to make such a determination on the application of any person who is a party to proceedings, or contemplated proceedings, before a court.[20]

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17. S.5(5)

18. S.5(7). for a consideration of the question of whether there is a conflict between this provision and S.5(5), see D.J. Cochrane "How Far Does the Jurisdiction of the A.C.C. Extend?",[1977] N.Z.L.J. 74.

19. Supra n 17. The requirement was not averted to in G. v Auckland Hospital Board [1976] 1 N.Z.L.R. 638.

20. S.5(6)

A question as to the existence of cover under the Act in respect of a person may arise where the affirmative defence is raised by the defendant in civil proceedings that the plaintiff is barred from bringing these proceedings by section 5(1) of the Act. That provision prohibits proceedings for damages arising directly or indirectly out of personal injury by accident from being brought in any court in New Zealand in two situations. The first is where the proceedings are in respect of personal injury by accident suffered in New Zealand. The second is where personal injury by accident is suffered outside New Zealand in circumstances in which the injured person has cover under the Act.

A determination as to whether a person has cover under the Act must be made having regard to section 4 of the Act, subsections (2) and (3) of which provide as follows:

> " (2) Subject to the provisions of this Act, all persons shall have cover under this Act in respect of personal injury by accident in New Zealand.
>
> (3) In the cases and to the extent specified in sections 60, 61 and 63 of this Act, persons shall have cover under this Act in respect of personal injury by accident outside New Zealand."

The first issue that must be decided by the Commission is whether personal injury by accident has been suffered. If it has not, cover under the Act cannot exist. If personal injury by accident has been suffered, the date on which it has been suffered must be ascertained as Section 5(4) of the Act provides that cover under the Act does not exist in respect of personal injury by accident if the accident occurred before 1 April 1974. If the accident occurred on or after that date, a decision must be made as to whether the personal injury by accident occurred in New Zealand or outside New Zealand. If it occurred in New Zealand, cover under the Act will exist unless the Act specifically makes provision to the contrary[21]. If it occurred outside New Zealand, a decision must be made as

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21. The only relevant provision would appear to be s.1C2C of the Act. Under that section, for example, a visitor who suffers personal injury by accident in New Zealand before disembarking from the ship or aircraft by which he arrived would not have cover under the Act. The question of the existence of cover should not be confused with the question of whether compensation is payable as it appears to have been by the Appeal Authority in Decision No. 41.

to whether cover exists by virtue of the provisions of sections 60, 61 or 63 of the Act. These sections "extend" cover in certain circumstances to New Zealand seamen and airmen, members of the armed forces, and to other persons who travel outside New Zealand in the course of their employment.

The Commission, having regard to these considerations, must issue a determination as to the existence of cover under the Act. This, however, is the limit of its jurisdiction. The determination as to cover will have indirectly determined whether personal injury by accident has been suffered, and if it has, where and when it has been suffered. A Judge or Magistrate having before him a determination issued by the Commission pursuant to section 5(5) or 5(6) of the Act must then decide the question of whether the proceedings before him arise directly or indirectly out of personal injury by accident, and therefore whether those proceedings are within the prohibition contained in section 5(1) of the Act.

The circumstances in which the Commission is required to issue a determination as to the cover of any person under the Act may require a strict observance of the principles of natural justice. For example, a person may commence proceedings for damages against a medical practitioner alleging negligence on the part of the medical practitioner. The defence may be raised that the plaintiff has suffered medical misadventure[22] and therefore has cover under the Act. As a question has arisen as to whether a person has cover under the Act, the Court is required by the Act[23] to refer that question to the Commission for determination. Subject to the right of appeal provided by the Act[24], a determination that cover exists will effectively mean the plaintiff cannot pursue a common law remedy but is restricted to seeking compensation under the Act; a determination that cover does not exist will render the defendant liable to an award of damages being made against him in the common law action. For this reason it is particularly important

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22. And therefore personal injury by accident: S.2(1) (a) (ii) of the Accident Compensation Amendment Act 1974.

23. S.5(5)

24. ss.5(7) and 162(c)

that the Commission adhere to the principles of natural justice in issuing a determination, particularly insofar as those principles require persons concerned to be given the opportunity of being heard. This would appear to be contemplated by the Act in providing a right of appeal against the Commission's determination direct to the Appeal Authority, by-passing the review procedure in the course of which the opportunity for a hearing would otherwise arise.

The Commission is required to exercise an adminstrative function in relation to levy matters. Under section 72 of the Act, by Order in Council the Governor-General may prescribe classes of earners, industries or occupations and prescribe the rate of levy payable to the Commission in respect of any such class. The Order in Council made pursuant to that power[25] classifies earners for levy purposes into employees and self-employed persons. It requires a self-employed person to pay a levy at the rate of one dollar per 100 dollars of earnings as a self-employed person. The rate of levy payable in respect of earnings as an employee depends upon the classification of the industrial activity in which the employee is engaged : the Schedule to the Order in Council sets out numerous industrial activities together with the rates of levy which apply to employees engaged in those activities. These rates vary from 0.25 cents to 5 dollars per 100 dollars of earnings as an employee[26]. Levy payable in respect of earnings as an employee is payable by the employer[27]. Levy payable in respect of earnings as a self-employed person is payable by that self-employed person.[28]

The principal decision making powers of the Commission in relation to levy matters are set out in section 83(1) of the Act which provides the Commission may decide:

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25. The Accident Compensation Earners' Scheme Levies Order 1973 (S.R. 1973/291) as amended by Amendment No. 1 (S.R. 1976/223)

26. Respectively the minimum and maximum rates prescribed by the Act: refer s.72 and Part I of the First Schedule to the Act.

27. S.71(2) (a)

28. S.71(2) (b)

"(a) Whether any earnings derived by any person are earnings as an employee or earnings as a self-employed person; and
(b) Which classification of earner, industry, or occupation is appropriate in relation to any person or persons by or in respect of whom a levy is payable; and
(c) Such other matters as it considers relevant for the purpose of determining the cover (if any) under this part of this Act of any person or for the purpose of assessing the amount or determining the rate of any levy to be paid under this Part of this Act."

The Commission may dispense with certain requirements laid down by the Act in relation to the assessment and collection of levies[29]. One such power of practical importance is the power to reassess the amount of levy payable at such amount as the Commission thinks fit having regard to the special circumstances of the case where the levy required to be paid "would be substantially more or substantially less that would in the circumstances be fair and reasonable"[30].

A further power of some interest in relation to levy matters is the Commission's power under section 73 of the Act to impose a penalty rate of levy upon an employer or self-employed person whose accident rate is significantly worse than that normally set by others of the same levy class[31]. While the duties required to be observed by the Commission in the exercise of the power are not altogether clear, it would appear that at least the Commission has a duty to act fairly[32]. If this is so, then the question arises of what does such a duty require: must the person upon whom it is intended to impose a penalty be given the opportunity to be heard, and what is the extent of the Commission's duty to disclose information upon which its decision is based? A person may be presumed to be aware of his own accident rate or that of his employees, but he cannot necessarily be expected to be aware of the accident record normally set by others in the same levy class.

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29. S.80(7)
30. S.80(7)(f); for an example of the application of this provision see Appeal Authority Decision no. 8, 1 N.Z.A.R. 108.
31. This power has not yet been invoked by the Commission.

In practice, however, it is suggested that because of the availability of a flexible procedure by which a decision of the Commission may be subjected to review,[33] with a right to an oral hearing and a statutory duty of disclosure upon the reviewing authority, the duty to act fairly will be "postponed" until the review procedure is invoked.

One further aspect of the decision making powers of the Commission requires consideration. The Commission has statutory power to delegate to an agent

> "... all or any of its functions and powers relating to the collection of levies, the refund of amounts of levies or penalties or both paid in excess, the remission of penalties, the refund of penalties remitted, the handling and payment of claims and inquiries, investigations, reports and returns in connection therewith ..."[34]

The Act specifies those persons who may be appointed by the Commission as its agent,[35] and authorises the Commission to pay them fees and commission in respect of the services they render.[36] It also authorises the Commission to revoke the appointment of an agent,[37] conferring upon the agent a right of appeal in accordance with Part VII of the Act against that decision.[38]

THE NEED FOR A REVIEW AND APPEAL SYSTEM

The question might well be asked "why have a review and appeal procedure?" After all, the Workers' Compensation Act 1956, and the Workers' Compensation legislation that went before it, provided no right of appeal. As Frazer J. stated in Vodanovich v Woods,

> "The reason of that is that this is a working man's Court, and it is undesirable that payment of compensation moneys should be held up by prolonging litigation. There is no doubt that, if appeals were allowed, it would, because of this, be more to the working man's disadvantage that to his advantage."[39]

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32. Notwithstanding that the exercise of the power conferred by s.73 of the Act is an administrative function: Lower Hutt City Council v. Bank. [1974] 1 N.Z.L.R. 545. Refer also D.L. Mathieson, "Executive Decisions and Audi Alteram Partem" [1974] N.Z.L.J. 277.

33. See Part II of this paper.

34. S.29(1)

35. S.25(1) For a current list of agents, refer N.Z. Gazette 21 April 1977 No. 43 p. 1115

36. S.27

37. S.25(2)

38. S.26

39. [1932] G.L.R. 559, 560

From the outset, this philosophy does not appear to have been considered applicable to an accident compensation scheme. The Woodhouse Commission[40] recommended a review and appeal system based on that provided by the Workmens' Compensation Act 1960 (Ontario). The procedure recommended by the Woodhouse Commission[41] was inquiry, investigation and decision at the first level, review by a review committee, a right of appeal to an appeal tribunal comprising three persons including a doctor and a lawyer, an appeal to the members of the Board (Commission), with a right of appeal to the Supreme Court on a point of law.[42] The right to a hearing and to be legally represented at that hearing would not arise until the appeal was considered by the appeal tribunal.

These proposals underwent various modifications[43] as the result of further consideration being given to the Woodhouse Commission's Report in the White Paper,[44] and by the "Gair Committee"[45] and the "Maclachlan Committee"[46].

The procedure now contained in Part VII of the Act provides that an application for review may be lodged in respect of a decision of the Commission. Should a hearing be necessary to dispose of that application for review, it may be conducted by the Commission, its Delegate, or by a Hearing Officer appointed by the Commission. An appeal to the Appeal Authority, a judicial authority, may be lodged in respect of a decision given on an application for review.[47] From the decision of the Appeal Authority, there is a right of appeal to the Administrative Division of the Supreme Court with leave either from the Appeal Authority or the Supreme Court. Such leave may be granted on a question of law or a question which by reason of its general or public importance or for any other reason ought to be submitted to the Supreme Court for decision.

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40. The Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.

41. Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967), paras. 308-309.

42. The right of appeal to the Supreme Court represents a variation on the Ontario structure.

43. These are traced by D.J. Cochrane in "The Review and Appeal Structure in the Accident Compensation System", LL.M Research Paper (1976)

There is a further right of appeal to the Court of Appeal by way of case stated on a question of law. Leave to appeal must be granted by either the Supreme Court or the Court of Appeal.

The review and appeal procedure may be illustrated in tabular form as follows:

COMMISSION'S PRIMARY DECISION

application for review: S153(1) compensation/levy matters.

COMMISSION OR HEARING OFFICER

right of appeal: 162 (b) and (c) determination as to cover (s.5) revocation of appointment of agent (s.26)

right of appeal : S162(a)

APPEAL AUTHORITY

right of appeal (with leave): S168 questions of law and questions of general or public importance.

SUPREME COURT (ADMINISTRATIVE DIVISION)

right of appeal by way of case stated (with leave): S169 questions of law

COURT OF APPEAL

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44. A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1969).

45. See Report of Select Committee on Compensation for Personal Injury in New Zealand (1970).

46. A further Select Committee which considered the Act in Bill form.

47. In some circumstances, an appeal will lie direct to the Appeal Authority in respect of a decision of the Commission see s.162 (b) and (c) of the Act.

Three principal reasons may be advanced in support of the need to provide in the Act a comprehensive review and appeal procedure.

First the Act has removed common law and statutory rights of action in respect of personal injury by accident and death resulting from personal injury by accident. Persons who suffer personal injury by accident, and their dependants where death occurs, now have as their only source of compensation any entitlement which may exist under the Act. The Act having removed the rights of persons to seek compensation in the courts and replaced them with the right to seek compensation under a statutory compensation scheme administered by a statutory corporation, it is essential that claimants under the scheme, and in certain circumstances other persons, be able to test the validity of decisions given by that body. By vesting the responsibility for compensating injured persons in a statutory corporation, there is generally little likelihood of any person other than the injured person seeking to exercise review and appeal rights. The dangers referred to by Frazer J. in Vodanovich v Woods[48] in relation to Workers' Compensation legislation do not become significant considerations in an accident compensation scheme.

Secondly, the Act vests in the Commission wide discretionary powers as to the circumstances in which compensation may be paid, the amount of compensation that may be paid, and the period for which payments made on a continuing basis may be paid. In many circumstances where a decision is made pursuant to the exercise of such a discretionary power, there will be no inherently correct decision. Furthermore, as has been shown, the initial decision making procedure followed by the Commission is an administrative procedure in the nature of an inquiry which enables the Commission to obtain the relevant information, but which from an injured person's point of view, affords few procedural protections.

48. Supra n.39

It is suggested the mere presence of a review and appeal procedure in such circumstances may be sufficient to discourage the Commission from exercising its discretionary powers in an arbitrary or capricious manner and may serve to correct such an exercise of a discretionary power.

Thirdly, it is inevitable, and no doubt desirable in the interests of maintaining a degree of consistency in the decision making process, that to assist in the practical application of the Act, the Commission will adopt formulations of policy which it will apply in determining entitlement to compensation under the Act. This leads to two dangers: the policy which is formulated may be inconsistent with or contrary to the provisions of the Act, or the policy itself may be unassailable when considered generally, but it may be wrongly applied in a particular case. A claimant should have the opportunity of correcting such applications of policy.

Against these arguments, some weight must be given to the fact that in dealing with a large number of claims the Commission has acquired a certain degree of expertise in matters relating to the compensation of personal injury by accident and has considerable powers and resources at its disposal before making a decision on any given matter. Thus, it might be argued that an appeal procedure external to the Commission, such as the right of appeal to the Appeal Authority, is inappropriate in an accident compensation scheme. Alternatively it might be argued that the Appeal Authority should regard itself as being slow to intervene in matters where the Commission, or a Hearing Officer, has been required to apply its expertise in reaching a decision.[49]

Two further considerations require brief mention. The existence of a procedure whereby a decision of the Commission given in accordance with a formulated policy may be subjected to consideration by an independent reviewing authority may endanger the existence of that policy, creating difficulties

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49. There is some indication that the Appeal Authority in fact takes this view: See Decision No. 15, discussed infra.

in the administration of the Act of which that reviewing authority may be unaware. The safeguards provided by the Act in respect of this possibility are discussed later in this paper.[50] There is also the consideration of what resources the Commission should be required to devote to the review and appeal procedure. In the year ended 31 March 1977, the Commission received 130,235 claims under the Act, 3,490 of which were declined fully or in part. During the same period, 2689 applications for review were received in respect of decisions of the Commission, 807 of which were dealt with at a hearing.[51]

Having considered the nature of the Commission's decision making powers and the principal reasons for making provision for a review and appeal procedure in the Act, it is proposed to consider that procedure in some detail.. Particular consideration will be given to the extent that the procedure is influenced by the nature of the initial decision making process and the absence of an independent reviewing body at the first stage of the procedure. Reference will also be made to the sixth report of the Public and Administrative Law Reform Committee[52] in which the Committee discusses the procedures of administrative tribunals. Although the Committee did not recommend the enactment of a comprehensive statutory code of procedure, it did outline a number of rules that should generally be regarded as applicable to administrative tribunals. These rules provide an objective standard against which the procedures of the review and appeal system may be considered.

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50. Part III.

51. 1977 Annual Report.

52. "Administrative Tribunals: Constitution, Procedure and Appeals". Sixth Report of the Public and Administrative Law Reform Committee presented to the Minister of Justice, 30 March 1973.

PART II

APPLICATIONS FOR REVIEW

An application for review is the initial step in the review and appeal procedure established by Part VII of the Act. It is proposed to consider the review procedure by asking the following questions:

WHAT DECISIONS OF THE COMMISSION ARE REVIEWABLE?

Section 153(1) of the Act specifies those decisions of the Commission in respect of which an application for review may be made. In practical terms, the provision is very wide and (subject to the provisions of the Act) allows an application for review to be made in respect of any decision which affects -

> "(a) The cover under this Act of any person or deceased person; or
>
> (b) The liability of the applicant to pay any levy under this Act or the amount of any such levy for which he is liable; or
>
> (c) The granting or payment of rehabilitation assistance under this Act to any person or of compensation under this Act to any person or deceased person."

An application for review must be made in writing within one month after the date on which notice of the Commission's decision has been given.[53] However, the Commission has a discretion to extend the time within which an application for review may be made.[54] In the absence of an express provision to the contrary, a question arises as to whether a decision of the Commission declining to extend time may itself be the subject of an application for review. Such an application for review would essentially be concerned with a matter of procedure rather than one of those substantive matters specified in paragraphs (a), (b) or (c) of section 153 (1) of the Act. However, it is suggested that if the decision of the Commission in respect of which an application for review is sought out of time "affects" one of those substantive matters, an

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53. S.153(4) 54. Ibid.

application for review will lie in respect of a decision of the Commission not to accept the application for review.[55]

ARE THERE UNREVIEWABLE DECISIONS?

Those decisions of the Commission which may not be the subject of an application for review may be considered under two heads: decisions in respect of which there are alternative appeal provisions, and decisions in respect of which there is no right of review or appeal.

Where the Commission's decision as to whether a person has cover under the Act is embodied in a determination issued pursuant to subsection (5) or (6) of section 5 of the Act, there is a right of appeal direct to the Appeal Authority.[56] There is also a right of appeal direct to the Appeal Authority on the part of any agent of the Commission appointed pursuant to section 25 of the Act against a decision of the Commission revoking the appointment.[57] Where a decision of the Commission affects the determination of a person's assessable income, the right to apply for a review of the Commission's decision is specifically excluded by the provisions of section 153(1) of the Act as the person affected may deliver a notice of objection to the Commissioner of Inland Revenue pursuant to section 30 of the Income Tax Act 1976.

Where there is no right of review or appeal in respect of a decision of the Commission, it may be because of a specific provision in the Act to this effect, or it may be because the decision of the Commission in question does not come within the terms of section 153(1) of the Act.

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55. It is arguable such a decision must always 'affect' one of those substantive matters in the sense that the applicant's ability to have those matters reviewed is affected. See also discussion of judicial review, Part IV, infra.

56. S.162(c) It has been suggested that one reason for this procedure is that the Commission will generally be required to conduct a hearing before issuing a determination. By-passing the review procedure also expedites the final determination on the question of cover, so proceedings in the court where the question has arisen will be stayed until the issue of cover is determined.

57. S.26; s.162(b); but there is no right of appeal on the part of a person who is not appointed as an agent - see discussion of judicial review, Part IV, infra.

The only example of a decision being specifically excluded from the review and appeal procedure is a decision of the Commission given under section 179A of the Act. That section of the Act enables the Commission, with the prior approval of the Minister of Finance, to make or provide on an ex gratia basis compensation and rehabilitation assistance to any person who either suffers personal injury by accident in New Zealand in respect of which he does not have cover under the Act[58] or, suffers personal injury by accident in respect of which he has cover under the Act, there being "special circumstances" to make it "reasonable and proper" that such a payment should be made in addition to other compensation payable or rehabilitation assistance provided by the Commission.[59]

There are, however, a number of decisions of the Commission which do not come within the terms of section 153(1) of the Act. For example, the Commission may accept a claim in respect of personal injury by accident and pay compensation accordingly. It may subsequently become apparent that the claim should not have been accepted and therefore the compensation has been paid in error. Alternatively, the claim may be acceptable, but there has been an error in the form or amount of compensation paid. The Commission may decide to exercise its power to seek recovery of the amount paid to the claimant.[60] The claimant clearly has a right to apply for a review of the Commission's decision not to accept the claim as one of personal injury by accident, or if the claim is accepted, as to the form or amount of compensation payable, but the decision of the Commission to seek recovery of the amount paid in error does not come within the terms of section 153(1) of the Act.

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58. supra, n21.

59. For a discussion of ex gratia payments, see [1974] N.Z.L.J. 290. But for the express exclusion provision, decisions of the Commission would be reviewable under s.153(1)(c).

60. S.171, s.173 confers a right to set off.

The decision to take recovery action is a decision taken as a consequence of, and subsequent too, the decision as to cover or the payment of compensation under the Act.[61]

Other decisions of the Commission that do not come within the terms of section 153(1) of the Act relate to the general administration of the Act, and include decisions appointing officers and employees;[62] appointing medical referees, medical committees and specialists;[63] appointing agents[64] and paying them fees and commission;[65] and concerning the investment of funds.[66]

The general rule would appear to be that any decision of the Commission which relates specifically to a claim under the Act, whether it concerns entitlement to a particular form of compensation payment or rehabilitation assistance or the quantum or extent of such compensation or rehabilitation assistance, may be the subject of an application for review. Similarly, a decision of the Commission may be the subject of an application for review if it relates to the question of whether a levy is payable, the amount of that levy or the question of by whom is it payable?

WHO MAY APPLY FOR A REVIEW?

Assuming a decision of the Commission may be the subject of an application for review, the question arises of who has legal capacity to challenge that decision. The general law may be stated as follows:

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61. The Commission appears to have adopted an analogous form of reasoning in respect of decisions under s.126(4A) of the Act to pay lump sum compensation payments to the Public Trustee where the person to whom the compensation is payable is a minor or is of feeble or unsound mind. The Commission takes the view there is no right to apply for a review in respect of such a decision: "section 126 provides a means for disbursing compensation; it does not provide a means of assessing the quantum of compensation". Review decision no. 76/R1471.

62. S.21 63. S.23

64. S.25, but once appointed, an appeal lies to the Appeal Authority in respect of a decision of the Commission revoking that appointment; supra n.37

65. S.27 66. S.30

> "Assuming that a right of appeal has been conferred, the range of persons entitled to appeal and the jurisdiction of the appellate body are entirely matters of definition and interpretation."[67]

Section 153(1) of the Act states:

> "any person who is dissatisfied with a decision of the Commission ... may apply to the Commission for a review of that decision ..."

Is being "dissatisfied" with a decision of the Commission the sole criterion which a person must establish in order to establish locus standi? If so, then it would appear an application for review could be sought by "the professional litigant and the meddlesome interloper",[68] or "a mere busy-body who is interfering in things which do not concern him".[69]

There are two classes of persons, whom it is suggested, should have the right to seek a review of a decision made by the Commission.

The first such class of persons includesthe injured person or a person acting on his behalf, such as a guardian, relative, friend, professional representative or trade union official.[70]

The second class of persons includes those persons whose interest in the matter is not identifiable with that of the injured person, and may even be in conflict with it. For example, a decision of the Commission that a person who is an employee has suffered personal injury by accident arising out of and in the course of his employment will render his employer responsible to pay "first week" compensation.[71] As the Commission's decision imposes an obligation on the employer, it is suggested the employer should have standing to seek a review of the Commission's decision.

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67. 1 Halsbury's Laws (4.Ed) 54
68. S.A. de Smith Judicial Review of Administrative Action (3Ed)363
69. R v Greater London Council, Ex parte Blackburn [1976] 1 W.L.R. 550 per Lord Denning M.R. at 559
70. This is envisaged by S.148 of the Act.
71. s.112

A decision of the Commission that a person has not suffered medical misadventure, and therefore personal injury by accident, may render a medical practitioner liable to an action for damages at common law. Therefore, it is suggested the interest of the medical practitioner is such as to entitle him to lodge an application for review in respect of the Commission's decision.

However, whether a stranger should have a right to seek a review of a decision of the Commission as a means of "testing policy" is another matter. Generally the problem will not arise because decisions of the Commission in respect of a claim under the Act are known only to those persons directly concerned. However, publicity through the news media to the effect that a particular person has, or has not, been granted compensation or rehabilitation assistance may result in a stranger being dissatisfied with the Commission's decision. The expression "any person who is dissatisfied" is not generally found in a statute conferring a right to have a decision reconsidered or reviewed. It might be considered more appropriate in legislation providing a right of public complaint.[72] In the United Kingdom, the expression generally used to confer standing is "any person aggrieved",[73] although this form of expression has not been without criticism.[74] In New Zealand legislation, a variety of approaches is discernible. For example, the War Pensions Act 1954,[75] in conferring a right of appeal from a decision of the War Pensions Board, follows the United Kingdom approach in using the words "any person aggrieved". The Social Security Act 1964[76] confers a right of review on "any applicant or beneficiary affected". Other

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72. e.g. the Indecent Publications Act 1963 or the Broadcasting Act 1976, although neither statute adopts this form of wording.

73. For a recent discussion of this expression, see Arsenal Football Club Ltd v Ende [1976] 3 W.L.R. 508 affirmed sub. nom. Arsenal Football Club Ltd v Smith [1976] 3 W.L.R. 1107; [1977] 2 All E.R. 267.

74. See de Smith op. cit. (n.68) at 364 where the comment is also made that being dissatisfied is not enough to meet the requirement.

75. S.85A

76. S.10

statutes specify those persons who may exercise appeal rights,[77] but may end with a "catch-all" provision such as "any person adversely affected by the decision".[78]

As the Act in conferring a right of review does not follow the more restrictive forms of wording adopted in other legislation, it might be argued that any person at all may apply for a review of a decision of the Commission provided only that he is dissatisfied with that decision: therefore, any member of the public at large, or any other legal person, may seize upon a decision given in respect of a particular claim to test matters relating to the Commission's interpretation of the Act or its formulation of policy.

In support of the view to the contrary, it might be argued that a more restrictive interpretation of section 153(1) is required and that the "any person" referred to in the opening words of the sub-section must be the "any person" whose cover or entitlement to compensation payments or rehabilitation assistance is in issue. However, it is submitted this argument is defeated by the wording of the sub-section itself. A comparison of the wording of paragraphs (a) and (c) of section 153(1) with the wording of paragraph (b) discloses an important difference. Paragraph (b) confers a right of review in respect of a decision of the Commission imposing a liability to pay a levy, not on "any person" but, on the person upon whom the liability has been imposed, that is, "the applicant". The applicant must be the person who is required by the Commission to pay the levy. However, paragraph (a) in conferring a right of review in respect of a decision of the Commission affecting cover refers not to the cover of the applicant, but of "any person".

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77. e.g. Commerce Act 1975; ss.44 and 81B

78. e.g. s.166 of the Transport Act 1964. In other statutes, the 'catch-all' provision will be more restricted: e.g. s.40 of the Air Services Licensing Act 1951; s.33 of the Motor Spirits Distribution Act 1953. See also s.99 of the Commerce Act 1975.

Similarly, paragraph (c) in conferring a right of review in respect of a decision of the Commission affecting entitlement to compensation payments or rehabilitation assistance refers not to the applicant, but to "any person". Therefore, the right to apply for a review in respect of a decision affecting these matters is not restricted to the person whose cover, or whose entitlement to compensation payments or rehabilitation assistance, is in issue.

The more restrictive interpretation prevents a "stranger" from seeking an application for review under section 153 of the Act. However, it has the disadvantage of preventing interested persons other than the claimant, such as the employer or the medical practitioner in the situations discussed earlier, from seeking a review of decisions of the Commission which may affect them adversely. That result would hardly be desirable.

Assuming the Commission is prepared to accept an application for review from a person who has no direct interest in the Commission's decision in the sense that he will neither benefit by it or be adversely affected by it, it does not follow that should the matter come before the Appeal Authority, the Commission may not challenge the applicant's standing. The decision of the Court of Appeal in Rogers v Special Town and Country Planning Appeal Board[79] would suggest that if an applicant has no valid right to seek a review in the first place, the fact that the Commission has accepted the application for review and heard and determined it cannot confer standing on the applicant beyond that given by the Act. In the event of an appeal to the Appeal Authority, it would be open to the Commission at the hearing of the appeal to dispute the standing of the party concerned.

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79. [1973] 1 N.Z.L.R. 529

WHAT HAPPENS IF THE COMMISSION'S DECISION WAS GIVEN IN ERROR?

Under the Act, the Commission is given power to revise its own decisions. Section 151(1D) provides:

> "... any decision made by the Commission may be revised by the Commission if it appears to it that the decision has been made in error, whether by reason of mistake or by reason of false or misleading information having been supplied or by reason of fresh evidence or for any other reason, and the Commission may thereupon alter or amend any such decision and substitute another decision therefore."

The Commission may exercise this power of revision whether or not an application for review is lodged[80] and it may be exercised either in favour of, or to the disadvantage of, a claimant. A revised decision has the same status as an initial or primary decision given by the Commission and therefore may itself be the subject of an application for review.[81]

The Commission may not exercise its power of revision to make an assessment of levy or a variation in an assessment of levy that is prohibited by section 83(3) of the Act; to reduce an assessment of entitlement to earnings related compensation made under section 114 of the Act in respect of permanent incapacity for work; to review an assessment of entitlement to compensation made under section 120 of the Act in respect of such matters as loss of amenities or capacity for enjoying life and pain and mental suffering; or to revise a decision of the Supreme Court or Court of Appeal given in respect of an appeal pursuant to sections 168 and 169 of the Act respectively.

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80. The power of revision would appear to be an important means of dealing with review applications: during the year ending 31 March 1977 2,689 applications for review were received by the Commission, 1047 were revised (1977 Annual Report).

81. Proviso to s.151 (1D)

WHO MAY CONDUCT HEARINGS?

Section 154(2) of the Act provides:

> "on receipt of ... (an application for review) the Commission may either hear the application itself or refer it to a Hearing Officer who has been so appointed by it either generally or in relation to a particular application."

Hearing Officers may be appointed under section 21 of the Act as officers or employees of the Commission for the purpose of hearing applications for review.[82] Where the Commission hears an application for review, it may either hear the application itself, or it may delegate the duty to either one or two of its members,[83] or to one or more of its officers or employees.[84] Hence applications for review may be heard by the Commission, by a Commission Delegate (or Commission Delegates) or by a Hearing Officer.

A Hearing Officer may be appointed to hear and decide on application for review, or merely to hear such an application and report his findings to the Commission, together with his recommendation.[85] In the latter case, the Commission is required to give a decision on the application for review.

WHAT POWERS MAY BE EXERCISED BY THE COMMISSION OR HEARING OFFICER?

Section 19(2) of the Act provides:

> "For the purpose of carrying out the duties and functions imposed on the Commission by this Act, the Commission or any member thereof or a Hearing Officer shall have the same power to summon witnesses, administer oaths, and hear evidence as are conferred on Commissions of Inquiry by the Commissions of Inquiry Act 1908, and the provisions of that Act except sections 2, 10, 11, and 12 shall apply accordingly."

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82. s.154(1)
83. s.29(3) (a)
84. s. 29(3) (c)
85. S.154(8). A copy of the Hearing Officer's report of his findings and his recommendation must be sent to the applicant.

The powers specifically excluded by section 19(2) of the Act are the powers of the Governor-General to appoint a person to enquire into certain matters specified in the Commissions of Inquiry Act[86]; the power to refer a point of law to the Supreme Court for decision;[87] and the power to order the whole or part of the costs of an inquiry to be paid by a party to the inquiry or the person who has brought about the inquiry[88] and to enforce such an order.[89]

Although their application is not expressly excluded by section 19(2) of the Act, there are other sections of the Commissions of Inquiry Act which are unlikely to have relevance when the Commission or a Hearing Officer is carrying out the duties and functions imposed on the Commission by the Act. These are the sections setting out the powers of a Judge of the Supreme Court when the member of a Commission holding an inquiry;[90] empowering any three or more Judges of the Supreme Court to make rules prescribing a scale of costs payable in respect of an inquiry under the Commissions of Inquiry Act[91] and extending the application of the Commissions of Inquiry Act to certain inquiries held by Commissioners.[92]

The sections in the Commissions of Inquiry Act which are of relevance are those which afford protection to persons exercising the powers conferred by that Act[93] and to witnesses and counsel,[94] and those which contain "machinery" provisions by which evidence may be obtained.[95]

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86. s.2(a) - (f)

87. Commissions of Inquiry Act; s.10

88. Ibid; s.11

89. Ibid; s.12. The Commission's power to award costs in respect of an application for review is discussed infra. It would appear the Commission has no power to award costs in respect of a hearing held prior to issuing a determination under s.5(5) and (6) of the Act. The Commission takes the view it has no power to award legal costs incurred in respect of lodging a claim under the Act; Review decision 75/R1006

90. Commissions of Inquiry Act; s.13

91. Ibid; s.14. In conducting a review hearing, the Commission or Hearing Officer is not conducting an inquiry under that Act.

92. Ibid; s.15

93. S.3, to be read in conjunction with s.16(4) of the Act.

94. S.6

Insofar as these "machinery" provisions are concerned, of particular importance is section 4A which provides:

> "Any person interested in the inquiry shall, if he satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry as if he had been cited as a party to the inquiry."[96]

Occasions may arise on which it will be desirable that the Commission or a Hearing Officer should take the initiative and give a person the opportunity to be joined as a party to the application for review. For example, a decision to the effect that a person has not suffered medical misadventure[97] may result in the unsuccessful applicant bringing an action at common law against a medical practitioner or the proprietors of a hospital. A decision to the effect that a person is an employee and not a self-employed person will result in the employer of that person being liable to pay to the Commission a levy in respect of his earnings as an employee.[98] Although both the medical practitioner (or hospital proprietors) and the employer would eventually have a right to be heard by the Commission,[99] there are a number of advantages to be obtained by joining them as parties to the respective applications for review, or at least giving them the opportunity to be so joined. All the relevant evidence may be presented at the one hearing with the parties having the opportunity to make submissions and call evidence. One hearing may be sufficient to determine the matter to the satisfaction of all concerned; if not, the matter will reach the Appeal Authority with all the interested persons and the Commission comprising the parties.

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95. ss. 4-9: where the witness is a medical practitioner he may be able to claim medical privilege in accordance with s.8(2) Evidence Act 1908: In Re the St Helens Hospital (1913) 32 N.Z.L.R. 682.

96. For a consideration of this section refer In Re The Royal Commission to Inquire into and Report upon State Services in New Zealand [1962] NZLR 96

97. And therefore "personal injury by accident" : s.2(1) (a) (ii) Accident Compensation Admendment Act 1974

98. S.71 (2) (a)

99. The medical practitioner prior to the issuing by the Commission of a determination as to cover under s.5(5) and (6) of the Act; the employer has a right of review in respect of the Commission's decision assessing levy - s.153(1) (b).

As to whether a person joined as a party to an application for review should be entitled to be represented at the hearing by counsel, the decision in In Re The Royal Commission to Inquire into and Report Upon the State Services in New Zealand[100] would suggest this is a matter for the Commission or Hearing Officer. Section 154(6) of the Act confers upon an applicant a right to be represented at a review hearing. Where the applicant avails himself of this right, a request by a party joined pursuant to section 4A of the Commissions of Inquiry Act to be represented by counsel is unlikely to be declined, but where the applicant is unrepresented, this will not necessarily be the case.[101]

TO WHAT EXTENT MUST THE RULES OF NATURAL JUSTICE BE OBSERVED?

> "English law recognises two principles of natural justice: that an adjudicater be disinterested and unbiased (nemo judex in causa sua) and that the parties be given adequate notice and opportunity to be heard (audi alteram partem)."[102]

Insofar as the first aspect of the rule is concerned, if the Commission is expressly empowered by the Act to make decisions in respect of various matters arising under the Act, and is then empowered to entertain an application for review in respect of those decisions with a view to determining whether they were correctly made, the degree of impartiality generally expected from administrative tribunals cannot be expected from the Commission or from a Hearing Officer in determining an application for review. However, this statutory inroad into the maxim nemo judex in causa sua does not mean a decision of the Commission or a Hearing Officer may never be impugned on the ground of likelihood of bias: rather it means that the decision may not be impugned merely because

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100. [1962] N.Z.L.R. 96

101. Unless, because of the nature of the inquiry (see In re The St Helens Hospital (1913) 32 N.Z.L.R. 682 per Cooper J. at 687) it may be argued legal representation must be allowed: Fett v Greyhound Racing Association Ltd [1969] 1 QB 46

102. de Smith op. cit (n.68) at 134

the deciding body has an interest in the issue by reason of his identification with one of the "parties".

Insofar as the second aspect of the rule is concerned this is also governed by the Act. In the absence of his agreement to the contrary, an applicant must be given seven clear days notice of the review hearing.[103] The applicant is entitled to be present at the hearing, to be heard either personally or by his representative, and to give any relevant evidence in support of the application for review.[104]

The duty of disclosure on the Commission or a Hearing Officer is governed by section 154(6) of the Act which provides:

> "The Commission or the Hearing Officer, as the case may be, may receive such other relevant evidence and make such other enquiries as it or he thinks fit, and may for that purpose appoint a medical committee. All evidence and information so received or ascertained (otherwise than at the hearing) shall be disclosed to every party to the review."[105]

MAY A REVIEW DECISION BE USED AS A VEHICLE FOR EXPOUNDING COMMISSION POLICY?

There appears to be no objection in principle to the use of review decisions as a means of expounding Commission policy and examples of decisions being used for this purpose are not difficult to find.

Review decisions have been used to explain the Commission's interpretation of section 120 of the Act with particular regard to the relevance of the principles applied at common law in assessing general damages and the effect of the section in prescribing the maximum amount of compensation that may be paid thereunder,[106] the concept of "dependency"

103. S.154(4)

104. S.154(5). There is no provision for the Commission to be represented even although important policy considerations may be in issue.

105. See Appeal Authority Decision no. 16, 1 N.Z.A.R. 166 where the view is expressed that failure to comply with this sub-section may not involve a breach of natural justice.

106. "The Salter decision", review decision no. 75/R 1148, ACC Report November 1976, 63. Decision of Commission Chairman.

insofar as it is relevant for the purposes of sections 123 and 124 of the Act,[107] the concept of "medical misadventure" which, by virtue of section 2(a) (a) (ii) of the Accident Compensation Amendment Act 1974, is included within the expression "personal injury by accident,"[108] and the effect of the partial definition of the expression "personal injury by accident" insofar as it is concerned with heart attacks and strokes.[109].

MAY REVIEW APPLICATIONS BE DECIDED ON THE BASIS OF POLICY ALONE?

This question raises two issues. The first is whether the Commission, or its delegate, when considering an application for review, may decide that application for review on the basis of pre-conceived policy.[110] The second is whether the Commission, who is after all the Hearing Officer's employer, may direct that the Hearing Officer must faithfully abide by Commission policy on any given matter, or whether a Hearing Officer must determine an application for review as he thinks fit free from the constraint of policy directives from the Commission.

The extent to which the Commission may determine applications for review on the basis of rules or principles of policy may be stated as follows:

> "A public body endowed with a statutory discretion may legitimately adopt general rules of principle or policy to guide itself as to the manner of exercising its own discretion in individual cases, providing that such rules or principles are legally relevant to the exercise

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107. Review decision no. 74/RCC267, ACC Report January 1976,17. Decision of full Commission.

108. Review decision no. 74/RC0408, ACC Report January 1976, 19. Decision of Commission Chairman; Review decision no. 74/RC0432 ACC Report March 1976 24 - Decision of Commission Chairman, upheld by Appeal Authority in Decision no. 9.

109. Review decision no. 75/RC548, ACC Report July 1977 32. Decision of full Commission, upheld by Appeal Authority in Decision no. 54.

110. For examples of expressions of Commission policy, refer Ch. 7 of the Medical Handbook as to when the cost of private hospital treatment will be met under S111 of the Act; and Medical Newsletter No. 1 as to the tests required to be met before a disease will be accepted as being "due to the nature of" a person's employment for the purposes of s.67 of the Act.

> of its powers, consistent with the enabling legislation and not arbitrary or capricious. Nevertheless it must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests; hence it must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment."[111]

The extent to which a Hearing Officer is subject to the direction of the Commission when determining applications for review is less clear. Citing as authority the decision in R v Stepney Corporation,[112] Halsbury states the general rule as follows:

> "a body entrusted with a statutory discretion must address itself independently to the matter for consideration. It cannot lawfully accept instructions from, or mechanically adopt the view of, another body as to the manner of exercising its discretion in a particular case ..."[113]

The general rule, however, is subject to two exceptions. The first is where another body is expressly empowered to lay down general policy and give guidance to the deciding body (or officer) in carrying out its duties.[114] The second is where the deciding body or officer is "a subordinate element in an administrative hierarchy within which instructions from above may properly be given on the question at issue".[115]

It is suggested that it cannot be said that either of these two exceptions clearly applies to a Hearing Officer appointed to conduct a hearing in respect of an application for review. There is no express provision in the Act authorising the Commission to give directions to a Hearing Officer as to those formulations of policy to which he must give effect in reaching a decision in respect of an application for review. The Hearing Officer is the person who is specifically required to give a decision and where a discretion is vested in a named officer,

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111. 1 Halsburys Laws (4 Ed) 35
112. [1902] 1 K.B. 317
113. 1 Halsbury's Laws (4 Ed) 33
114. Schmimidt v Secretary of State for Home Affairs [1969] 2 Ch. 149
115. Supra, n.113, see also R v Anderson Ex parte Ipec-Air Pty Limited (1965) 113 C.C.R. 177

the presumption is that he is to act according to his personal judgement.[116] Furthermore, if a Hearing Officer were to be regarded merely as part of the administrative hierarchy, there would seem to be little point in making decisions of the Commission subject to an application for review: it could be expected that an initial decision of the Commission made on the basis of Commission policy would merely be confirmed after a review hearing had been conducted notwithstanding the merits of the case.

Having regard to the fact that a Hearing Officer is an employee of the Commission, it would be unrealistic to expect that the Commission would exert no influence at all over a Hearing Officer insofar as adherence to Commission policy is concerned. However, the Hearing Officer who disagrees with a matter of policy formulated by the Commission may avoid giving effect to that policy by declining to give a decision in respect of an application for review, forwarding to the Commission and the applicant a written report of his findings together with his recommendation.[117]

It is submitted that, in general terms, for a decision given in respect of an application for review to be beyond reproach, it must be apparent that a properly conducted hearing has been held, and that the mind of the Commission or Hearing Officer was not so foreclosed that genuine consideration was not given to the grounds advanced by the applicant in support of the application for review.[118] If the Commission

116. Anderson's Case; Ibid
117. S.154(8) (b)
118. Franklin v Minister of Town and Country Planning [1948] A.C. 87

or Hearing Officer is vested with a discretion, purporting to determine the matter by reference to a pre-determined policy without considering the merits of the application for review, or in the case of a Hearing Officer determining the matter by acting under the dictation of the Commission, will amount to a wrongful refusal to exercise that discretion. It may be that the Appeal Authority has been a little optimistic in stating:

> "It is true ... that all Hearing Officers are salaried officers in the employment of the Commission and that on occasions their decision may be controlled to some extent by administrative rulings. However, they are senior officers and of course their primary duty when appointed under s.154 is to administer the statute. Their decisions are subject to scrutiny and appeal up to Court of Appeal level and accordingly there is little chance of bureaucratic administration."[119]

WHAT POWER DOES A HEARING OFFICER HAVE TO AWARD COSTS?

Section 154(14) of the Act provides as follows:

> "Where on an application for review a decision is given in favour of the applicant, or where the Commission considers the applicant has acted reasonably in applying for a review, the Commission may allow him reasonable costs."[120]

Numerous miscellaneous expenses may be incurred by an applicant in attending a review hearing. The applicant or his witnesses may incur expenses in travelling to and from the hearing or lose wages as the result of attending the hearing. A medical practitioner or accountant may charge the applicant a fee in respect of his attendance at a hearing or for the preparation of written evidence to be presented at the hearing. The payment of such expenses under section 154(14) of the Act seldom raises any difficulties.

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119. Decision No. 48

120. The sub-section makes no reference to a Hearing Officer, although in practice it is the Hearing Officer who makes the award of costs. It is to the claimant to whom the award is made.

However, some difficulties have arisen in relation to the interpretation of section 154 (14) of the Act concerning the payment of legal costs incurred in respect of the hearing of an application for review. The Commission has interpreted the sub-section as authorising it to make a contribution towards the costs incurred in engaging legal representation at the hearing of an application for review[121] where the application for review is successful, or where the Commission considers the applicant has acted reasonably in applying for a review. However, various contentions have been put forward as to the basis upon which an assessment of the quantum of an award should be made including an award of costs on a solicitor and client basis, a party and party basis, a legal aid basis or according to the court scales in civil proceedings.[122]

Some recent decisions of the Appeal Authority[123] clarify the interpretation of the subsection and substantially give approval to the approach adopted by the Commission. The first point that emerges from these decisions is that the review procedure involves an investigatory process rather than an adversary process and therefore the sub-section does not authorise the Commission to determine reasonable costs by reference to scales of costs utilised in adversary procedures:

> "On the contrary, I believe that Parliament has deliberately phrased the subsection in such a way that the Commission may apply its own standards of reasonableness. The subsection is aimed at allowing for a flexible approach. I think that Parliament has recognised that there will inevitably be a variety of situations and varying circumstances which would have a bearing on an application for reasonable costs.

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121. The sub-section would also appear to authorise the Commission to make an award of legal costs in respect of an application for review where no hearing is held, e.g. because the Commission revises its decision pursuant to s.151 (1D) of the Act in favour of the applicant.

122. e.g. see Appeal Authority Decision no. 59 where these possibilities were canvassed.

123. Decision nos. 59 (and Memorandum referred to therein) 60 and 61

> "The Hearing Officer can only deal with such applications as they arise and decide them in a practical way and award what he thinks are reasonable costs in the circumstances, unfettered by the Law Society scales but guided rather by the general philosophy of the Accident Compensation Act which is to cushion the loss suffered by an accident victim rather than to give him full restitution."[124]

The second point of importance to emerge from the decisions, which is also illustrated by the above quotation, is that whether an award of costs is made, and if so the quantum of the award, is a matter for the discretion of the Commission or Hearing Officer. What constitutes "reasonable costs" will be a matter to be determined having regard to the facts of each case. The general principle is that "reasonable costs are such costs as a reasonable man would regard as a fair contribution towards the expenses and disbursements of an appellant."[125]

More specifically, where an application for review is successful, an applicant is generally entitled to an award of reasonable costs. However, there may be circumstances which would justify the Commission or a Hearing Officer in declining to award costs, or making a lesser award than would generally be expected. The solicitor may be of little assistance at the hearing of the application for review, or the application may have succeeded because evidence was produced which had always been available and, if produced earlier to the Commission, would have allowed the Commission's decision to be revised pursuant to section 151(1D) of the Act in favour of the applicant. Where there are no such circumstances present, regard must be had to a solicitors "material value in presenting new material, marshalling the facts, or illuminating the law."[126]

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124. Decision no. 59
125. Ibid
126. Ibid

Relevant considerations in determining reasonable costs will include the complexity of the matter in issue, the amount of compensation in issue,[127] and the skill and time required of the solicitor.

In essence, a person who engages legal representation in respect of a review application may generally expect to receive a contribution towards the cost thereby incurred where the application for review is successful. Where the application for review does not succeed, whether an award of costs is made will depend upon the Commission or Hearing Officer forming the view that the applicant has acted reasonably in applying for a review of the Commission's decision and that in the circumstances an award should be made.

Awards of costs made pursuant to section 154 (14) of the Act generally vary between $15 - $100. The Appeal Authority would appear to envisage a slightly more generous range of $20 - $150 "with provision to allow moreor less in exceptional circumstances but reserving always to the Hearing Officer his discretion to make the final decision".[128]

MUST REASONS BE GIVEN FOR A DECISION

The Commission, or a Hearing Officer, is required by the Act to give reasons for his decision where the decision is one against which the applicant may appeal.[129] This may be the first occasion on which the applicant is advised of the grounds on which the Commission has reached its decision for, as has been noted, in giving its initial decision no obligation is imposed on the Commission by the Act to give reasons for that decision.

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127. quaere whether this is in fact a relevant consideration where the issue involved is one of principle.

128. supra n. 124

129. As to what constitutes reasons for a decision, see Clark v Wellington Rent Appeal Board [1975] 2 N.Z.L.R. 24

However, the Appeal Authority has rejected the submission that where the award of costs made is a contribution towards costs rather than a full indemnity, there is an obligation on the Commission or a Hearing Officer to give reasons for his award:

> "As regards the merits of the case before him the Hearing Officer of course gave adequate reasons for his finding. As regards costs he simply had to decide:
>
> (a) whether to award costs at all, and if so
>
> (b) quantum.
>
> He decided (a) in claimant's favour saying that ... (counsel) made cogent submissions and I do not think that more is required. Had he refused costs I would expect detailed reasons to be given."[130]

HOW DOES THE REVIEW PROCEDURE COMPARE WITH THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE'S RULES?

Although the Public and Administrative Law Reform Committee in formulating a series of rules applicable to administrative tribunals[131] no doubt envisaged an independent tribunal generally dealing with a "two party" situation, it is interesting to compare the procedure provided by the Act in relation to the hearing of applications for review with those rules.

As has been observed the Act, either directly or by reference to the Commissions of Inquiry Act 1908, makes specific provision in respect of such matters as the giving of notice of the hearing, representation at the hearing, the calling of evidence, immunities, the requirement of an oral hearing in the absence of agreement to the contrary, the obligation of the decider to hear the evidence unless the Hearing Officer is merely appointed to (or exercises the option to) hear and report, the giving of reasons for a decision and the awarding of costs.

130. Decision no. 60
131. Supra n. 52

In addition, the Act provides the Commission or a Hearing Officer is not bound by the rules of evidence.[132]

There is no provision that the hearing of an application for review should be held in public, nor would any such provision be expected having regard to the informal nature of the inquiry which may often involve intimate personal or financial matters. Although there is no specific provision allowing for a re-hearing, the Commission or a Hearing Officer is not prohibited from conducting a re-hearing. Where it becomes clear that an injustice has been caused to an unsuccessful review applicant, the Commission may revise its decision, or that of the Hearing Officer, pursuant to section 151 (1D) of the Act.[133] There is also an absence of any provision whereby the Commission or a Hearing Officer may state a case for the opinion of the Supreme Court on questions of law.

Although the conducting of a hearing in respect of an application for review may not have been the type of proceeding envisaged by the Public and Administrative Law Reform Committee in formulating a set of rules in relation to the procedures of administrative tribunals, there is a substantial degree of compliance by the Act with those rules. It is suggested this may be explained by the lack of procedural requirements the Commission is required to observe in the exercise of its initial decision making powers.

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132. s.154(7)

133. There appears to be an inconsistency between s.151 (1D) of the Act (from which a decision given in respect of an application for review is not exempt) and s.154 (1D) of the Act which requires the Commission to give effect to a Hearing Officer's decision.

PART III

THE APPEAL AUTHORITY

JURISDICTION, POWERS AND PROCEDURE

Section 155(1) of the Act establishes the Appeal Authority. The Appeal Authority is a judicial authority which determines appeals against:

> "(a) Any decision of the Commission or a Hearing Officer on an application for review under section 153 of this Act:
>
> (b) Any revocation by the Commission of the appointment of an agent:
>
> (c) Any decision of the Commission under subsection (5) or subsection (6) of section 5 of this Act."[134]

Of principal practical importance are appeals from decisions given by the Commission or a Hearing Officer on applications for review in respect of decisions of the Commission affecting cover under the Act or entitlement to rehabilitation assistance or compensation payments. Of the 66 decisions given by the Appeal Authority up to 8 September 1977, 64 decisions were concerned with these matters, 2 were concerned with the liability of the appellant to pay levy or the amount of levy payable, while there were no decisions given in respect of either a decision by the Commission revoking the appointment of an agent or a determination made by the Commission pursuant to section 5(5) or (6) of the Act.

The Appeal Authority has ruled that its jurisdiction to hear and determine appeals against decisions given by the Commission or Hearing Officers on applications for review extends to decisions making awards of costs pursuant to section 154 (14) of the Act, and is not limited to those matters of substance dealt with by the Commission or Hearing Officer.[135]

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134. S.162

135. i.e. those matters specified in s.153(1)(a) – (c): see Memorandum referred to in Decision no. 59

The Act does not specify who may appeal to the Appeal Authority,[136] but the Appeal Authority being a judicial authority, it may be assumed the principles of locus standi must be more strictly observed than in the case of an application for review. It is suggested that only a party to a review hearing, whether that party be the applicant or a party who is joined in the application for review, may appeal against a decision of the Commission or a Hearing Officer. Where the decision is one revoking the appointment of an agent, it would appear only the agent, to whom written notice of the Commission's decision must be given[137] has a right of appeal. Where the decision is one as to the existence of cover under the Act made pursuant to section 5(5) or (6), the class of persons who will have standing to appeal against the Commission's determination will be wider. Where the determination is made pursuant to section 5(5) of the Act, notice of the decision must be given to each of the parties to the proceedings in which the question as to the existence of cover arose, and also to the person in relation to whom the question arose if he is not a party to those proceedings.[138] Where the determination is made pursuant to section 5(6) of the Act, notice of the decision must be given to the person on whose application the decision has been made, and if that person is not the person in relation to whom the question arose, notice must also be given to that latter person. It is submitted any of these persons would have sufficient standing to appeal to the Appeal Authority against the Commission's finding on the question of the existence of cover under the Act.

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136. Quaere whether the Commission has a right of appeal - refer D.J. Cochrane supra n. 43 at 69 - 71.

137. S.151 (1B)

138. Notice of the decision must also be given to the Registrar of the Court referring the question to the Commission: s.151(1C)

A notice of appeal is required to be in the form prescribed[139] and must state "with particularity" the grounds of appeal and the nature of the relief sought.[140] A copy of the notice of appeal must be sent to the Commission.

The Act sets out the material which the Commission must place before the Appeal Authority upon receiving a copy of the notice of appeal. That material consists of:

> "(a) Any application, documents, written submissions, statements, reports and other papers lodged with, received by, or prepared for, the Commission or the Hearing Officer and relating to the decision or revocation appealed against;
> (b) A copy of any notes made by or by direction of the Commission of the evidence given at the hearing (if any) before the Commission or the Hearing Officer;
> (c) Any exhibits in the custody of the Commission; and
> (d) A copy of the decision or revocation appealed against."[141]

In practice, review hearings are recorded on tape and a transcript of the proceedings is transcribed and placed before the Appeal Authority.

The Commission may also furnish a report, and must furnish a report if directed to do so by the Appeal Authority.[142] That report is required to set out the considerations to which regard was had in reaching the decision subject to appeal, and may include:

> "... any material indicating the effect that the decision or revocation might have on the general administration of this Act, and any other matters relevant to the decision or revocation or to the general administration of this Act to which it wishes to draw the attention of the Authority."[143]

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139. S.163(1). No form has been prescribed, but see ACC Report November 1976 at p.52 for a suggested form of notice.

140. S.163(2)

141. S.163(4)

142. S.163(5). Where a report is lodged, the Appeal Authority may require a further report: S.163(6)

143. S.163(5)

The Appeal Authority is required to have regard to such a report "and to any matters referred to therein and to any evidence tendered thereon", even although such matters would not otherwise constitute admissible evidence.[144] Each party to the appeal is entitled to receive a copy of the Commission's report, and to be heard and to tender evidence on any matter referred to in the report.

In this manner, the Commission is able to place before the Appeal Authority information which may explain why, as a matter of policy, the Commission is interpreting the Act in a particular way or has made a particular decision.

The procedure the Act requires to be followed in respect of the hearing of appeals to the Appeal Authority generally conforms with the rules formulated by the Public and Administrative Law Reform Committee in its sixth report.[145] The appellant and the Commission must receive 10 clear days notice of the hearing[146]. The parties to the appeal, in which the Commission assumes an adversary role, are entitled to be represented.[147] Unless the Appeal Authority orders otherwise, sittings of the Appeal Authority are held in public.[148] The same powers under the Commissions of Inquiry Act 1908 as are conferred upon the Commission or a Hearing Officer by the Act are conferred upon the Appeal Authority[149] which may therefore require persons to give evidence or produce documents. The Appeal Authority, witnesses and counsel also receive the protection afforded by that Act. The Appeal Authority is not bound by the rules of evidence which apply to the courts, but has a wide discretionary power as to the kind of evidence it will receive if it is of the opinion that such evidence will assist in dealing with the matter before it.[150]

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144. S.164(4)
145. Supra n.52
146. S.163(8)
147. S.163(9)
148. S.165(1)
149. S.164(6)
150. S.164(5)

The Act clearly envisages that an appeal should be conducted by way of an oral hearing, although a hearing may be conducted "on the papers" if the parties request or consent to such a hearing.[151] An appeal may be disposed of without following the Appeal Authority's regular procedure should the parties agree.[152] The Appeal Authority may make an award of costs in favour of an appellant where an appeal is allowed in whole or in part,[153] but may not award costs against an appellant "unless in the opinion of the Authority the appeal was frivolous, vexatious or one that ought not to have been brought".[154]

The Appeal Authority may determine its own procedure[155] but has not yet adopted a set of rules. The Appeal Authority is not required by the Act to give reasons for its decisions, nor to advise of the fact that its decision may be the subject of an appeal.[156] Although the Appeal Authority has no statutory power to grant a re-hearing, it would appear the Commission has power under section 151 (1D) of the Act to revise the decision which has been the subject of an application for review should the circumstances warrant such action. Although the power of revision conferred by that section may not be exercised after a decision has been given by the Supreme Court or Court of Appeal, this restriction does not apply in respect of decisions of the Appeal Authority.

In determining an appeal, the Appeal Authority may "confirm, modify or reverse" the order or decision appealed against.[157] Alternatively, it may refer to the Commission for further consideration the whole or any part of the matter to which the appeal relates. The Appeal Authority is

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151. e.g. Decision no. 29

152. e.g. Decision no. 43 which records a Consent Order increasing the amount of compensation payable.

153. S.166(1); or where the Appeal Authority refers a matter back to the Commission. However, the basis on which an award of costs is made is not yet clear - see Decision no. 62

154. S.166(2)

155. S.163(11), except to the extent provision is made by the Act.

156. c.f. s.154(12)

157. S.164(7)

required to give the Commission its reasons for referring a matter back to it and to give directions as to the re-hearing or reconsideration of that matter.[158] An unusual example of the exercise of the power of referral back is illustrated by one of the decisions discussed earlier in this paper on the matter of legal costs awarded in respect of review hearings. Having decided the issue of substance involved in the appeal, the Appeal Authority suggested the Commission and the Law Society reach some "broad guidelines" on the awarding of legal costs, referring "the problem to the Commission pursuant to s.164(8)."[159]

THE REVIEW OF DISCRETIONARY POWERS

An appeal before the Appeal Authority is the first occasion on which, under the procedure provided by Part VII of the Act, a decision of the Commission or a Hearing Officer is considered by an independent judicial body. The effectiveness of the procedure will therefore depend upon the powers the Appeal Authority may exercise in relation to the decision which comes before it on appeal. It has already been observed that under the Act, the Appeal Authority may "confirm, modify or reverse" that decision, or refer the matter back to the commission for further consideration.

However, as has also been noted, many of the Commission's decision making powers require the exercise of a discretion as to whether or not compensation is payable, if so how much, and on some occasions, for what period of time. It is therefore apparent that the effectiveness of the Appeal Authority's powers will depend on whether or not it may exercise an original jurisdiction and freely substitute its own discretion for that of the Commission or a Hearing Officer. If the

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158. For an example of an exercise of the power, see Decision no. 24
159. Decision no. 59

Appeal Authority exercises an appellate jurisdiction, its ability to substitute its own discretion for that of the Commission or a Hearing Officer will be more restricted, as will the ability of an appellant to have the exercise of a discretion by the Commission or a Hearing Officer upset on an appeal.

The Act provides an appeal shall be by way of "re-hearing",[160] although that provision in itself is of little assistance in determining whether the function of the Appeal Authority is more properly described as being the exercise on original or appellate jurisdiction. As Richmond J. observed in Ross v Town and Country Planning Appeal Board[161]

> "It is often used to describe a hearing by an appellate court on the basis of a transcript of the evidence given in the original court of first instance: see F. Hoffman - La Roche & Co., A.G. v W.M. Bamford & Co. Ltd [1975] 2 N.Z.L.R. 507. It can also be used to describe a complete re-hearing de novo ..."[162]

Provision is made in the Act for evidence to be brought before the Appeal Authority on questions of fact by the production of notes taken by the Commission or a Hearing Officer, or a copy of a written statement read under oath, and by the production of affidavits and exhibits tendered by the appellant at the review hearing.[163] The Appeal Authority may re-hear any evidence[164] and has "full discretionary power to hear and receive evidence or further evidence on questions of fact."[165]

The provisions of the Act governing the powers of the Appeal Authority to hear and receive evidence closely following the provisions of section 76 of the Magistrates Courts Act 1947. In Clark v Licensing Control Commission[166]

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160. S.164(1)
161. [1976] 2 N.Z.L.R. 206
162. Ibid, 216
163. S.164(1)
164. S.164(2)
165. S.164(3)
166. [1971] N.Z.L.R. 678. See Also N.Z.B.C. v Stewart [1972] NZLR 556.

where the statutory provisions under consideration were also based on section 76 of the Magistrates' Court Act, after referring to the decision in A.M.P. Society v Licensing Control Commission,[167] Wild C.J. stated:

> "... the Legislature must have intended the practice laid down by the Court relating to the hearing of appeals from Magistrates to be followed in this jurisdiction. That means, of course, that the discretion ... to re-hear the whole or any part of the evidence will be sparingly exercised (Harper v Hesketh [1954] N.Z.L.R. 622...). It also means that the power ... to receive further evidence on questions of fact ... will be exercised only in exceptional cases (Belcher v Woodward [1958] N.Z.L.R. 1046)."[168]

The learned Chief Justice went on to state that while the appellant is entitled to show the body or person whose decision is subject to appeal made a wrong decision on the facts and in the circumstances at the time of the decision, he is not entitled to "convert the appeal into a second application" to the appellate body in the light of developments that have occurred since the decision which is the subject of the appeal was given.

Insofar as the power of a body such as the Appeal Authority to substitute its own discretion for that of the body or person whose decision is the subject of the appeal is concerned, there appear to be two important considerations. The first is the nature of the decision making process followed by the body whose decision is the subject of an appeal. The second is the statutory provisions conferring jurisdiction upon the appellate body.

In Hammond v Hutt Valley and Bays Metropolitan Milk Board,[169] a Magistrate in determining an appeal from a decision of the Board had power to "reverse or vary the decision appealed against, or ... confirm it...".[170] The Court of Appeal held that in hearing an appeal, the

167. [1970] N.Z.L.R. 1141 168. Supra n 166; 679-680
169. [1958] N.Z.L.R. 720
170. S.71 Milk Act 1944. See now S.26 Milk Act 1967

the Magistrate must form an opinion of his own as to the merits of the matter and was entitled to substitute his own discretion for that of the Board. However, it is suggested Hammond's case has no application in respect of an appeal which is before the Appeal Authority as in that case, as the court observed,

> "... there has been nothing in the nature of a formal hearing by the Board, there are no reasons for its decision, and there is no record of the proceedings for examination on appeal."[171]

As has been shown, the position is different when an appeal comes before the Appeal Authority from a decision given by the Commission on an application for review, or from a decision of a Hearing Officer, Furthermore, Hammond's case was not concerned merely with an issue between the appellant and the Board, but also with an assessment of the comparative merits as between the appellant and the successful applicants for a licence.

It is suggested the principle stated in New Zealand Broadcasting Corporation v Stewart[172] may be more appropriate in determining the circumstances in which the Appeal Authority may substitute its own discretion for that of the Commission or a Hearing Officer. Although that case was concerned with the circumstances in which the Supreme Court could substitute its own discretion for that of the New Zealand Broadcasting Authority on an appeal against a decision of that Authority, the decision has relevance for two reasons. The first reason is that the decision in Stewart's case concerned the granting of a sound radio warrant by the Broadcasting Authority. Before granting such a warrant, the

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171. Supra n. 169, per Cleary J. at 728
172. [1972] N.Z.L.R. 556

Broadcasting Authority was required to conduct a hearing. The Broadcasting Authority had similar powers conferred upon it by reference to the Commissions of Inquiry Act 1908 as does the Commission or a Hearing Officer, and the Appeal Authority. The nature of the Broadcasting Authority's decision making process was therefore quite different from the Milk Board's decision making process in Hammond's case. The second reason is that the provisions of the Broadcasting Authority Act determining the manner in which an appeal from a decision of the Broadcasting Authority was heard and determined by the Supreme Court were very similar to the provisions in the Act as to the manner in which the Appeal Authority hears and determines an appeal from a decision of the Commission or a Hearing Officer.

In Stewart's case, the court held it was not at liberty merely to substitute its own discretion or opinion for that of the Broadcasting Authority. The court could interfere with the exercise of a discretion only where there had been a wrongful exercise by the Broadcasting Authority of its discretion.

In Decision no. 15,[173] the Appeal Authority has set out the principles it considers relevant where a question arises as to whether it may substitute its own discretion for that of the Commission or a Hearing Officer:

> "(a) The Appeal Authority should interfere if of the opinion that an error of law has been made or the decision reached by the application of wrong principles.
>
> (b) It may interfere where the decision relates to the exercise of discretion or to a finding of fact provided that the Appeal Authority has re-heard the evidence or permitted the introduction of fresh evidence which has thrown fresh light on the matter in issue so that the Appeal Authority is in as good a position as the Hearing Officer to form a fresh opinion.

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173. 1 N.Z.A.R. 69

"(c) Subject to the above the Appeal Authority should be circumspect in over-ruling a decision based on the original evidence and which amounts to the exercise of a discretion."[174]

The above decision does not refer to Stewart's case although reference is made to two decisions under the English Industrial Injuries legislation. In the first of these two decisions, R v Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union,[175] Lord Denning warned against interfering "too much with the decisions of the arbitrators to whom the legislature had entrusted the administration of compensation." In the second decision, R v National Insurance Commissioner Ex parte Michael,[176] May J. stated:

"Where a real error of law is shown then this court will interfere, but it would in my opinion be wrong, by gradual erosion of the basic principle, to set up this court as in effect a court of appeal on fact from the decisions of these specialised tribunals."[177]

The limited jurisdiction of the Appeal Authority to substitute its own discretion for that of the Commission or a Hearing Officer is also indicated by the absence of any provision in the Act whereby the Appeal Authority, for the purpose of hearing and determining an appeal, shall have all the powers, duties, functions and discretions of the body appealed from. The presence of such a provision in the Town and Country Planning Act 1953[178] has the effect that the decisions given in respect of that Act by a Town and Country Planning Board are decisions given pursuant to the exercise of an original jurisdiction:

"What the board was undertaking is called an appeal in the statute, but ... it is a very special type of appeal and really amounts to an investigation de novo, especially since evidence is not limited to that which was before the Council."[179]

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174. Ibid; 73. For an application of these principles, see the decisions on legal costs supra n. 123.

175. [1966] 2 QB. 21, 45

176. [1976] 1 All E.R. 566

177. Ibid; 569

178. S.42(1A). See also s.53 Patents Act 1953

179. Ross v Number Two Town and Country Planning Appeal Board [1976] 2 N.Z.L.R. 206; per McCarthy 210

Having regard to the differing statutory provisions, and the resultant differences between the types of hearing conducted under the Town and Country Planning Act and the Act, it is submitted the decisions under the former Act[180] may be distinguished in determining the extent to which the Appeal Authority may substitute its own discretion for that of the Commission or a Hearing Officer.

RIGHTS OF APPEAL BEYOND THE APPEAL AUTHORITY

Any party who is dissatisfied with a decision of the Appeal Authority may, with leave to appeal, appeal to the Supreme Court.[181] Such appeals are heard and determined by the Administrative Division of the Court.[182]

Leave to appeal may be granted by the Appeal Authority, but should it refuse to grant such leave, the Supreme Court may grant special leave to appeal.[183] Leave to appeal may be granted on a question of law, or if in the opinion of the Appeal Authority or Supreme Court, "the question involved in the appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to the Supreme Court for decision."[184]

A party who is dissatisfied with a determination or decision of the Administrative Division of the Supreme Court on a question of law may, with leave to appeal, appeal to the Court of Appeal. Such an appeal is by way of case stated.[185]

Leave to appeal may be granted by the Administrative Division, but should it refuse to grant such leave, the Court of Appeal may grant special leave to appeal.[186] Leave to appeal may be granted if, in the opinion of the Administrative Division of the Supreme Court or the Court

180. e.g. Ross' case, Ibid; Wellington Club Inc. v Carson [1972] N.Z.L.R. 698. See also s.53 Patents Act 1953 and the decision in F. Hoffman - La Roche & Co. A.G. v W.N. Bamford & Co. Ltd [1975] 2 N.Z.L.R. 507

181. S.168(1)
182. 168(3)
183. S.168(1)
184. S.168(2)
185. S.169(1)
186. Ibid

of Appeal, "the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision".[187]

In determining an appeal, the Court of Appeal may do any one or more of the following things:

> "(a) Reverse; confirm, or amend the determination or decision in respect of which the case has been stated; or
>
> (b) Remit the matter to the Administrative Division with the opinion of the Court of Appeal thereon; or
>
> (c) Make such other order in relation to the matter as it thinks fit." [188]

In practice, the Supreme Court (and therefore the Court of Appeal) has not yet played an active role in the interpretation of the Act. Although a number of appeals from decisions of the Appeal Authority have been lodged with the Court, none has yet been heard. It is too early to predict with any degree of confidence how active a role the Supreme Court and Court of Appeal will be required to adopt in hearing and determining appeals from the Appeal Authority.

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187. S.169(3); s.169(4)

188. S.169(12)

PART IV

REMEDIES OTHER THAN REVIEW AND APPEAL

Part VII of the Act provides a review and appeal structure whereby a person who is dissatisfied with a decision of the Commission may have that decision subjected to further consideration. The degree of independence of the reviewing body from the Commission itself, and the power of the reviewing body to substitute its own decision for that of the Commission, will vary according to the level to which review is pursued.

Initially it may appear that because of the provision of a review and appeal system within the Act and the degree of precision with which the system is prescribed, a remedy within the review and appeal system is the only remedy available to a person who is dissatisfied with a decision of the Commission. This view is strengthened when regard is had to section 153(5) of the Act which states:

> "Where a remedy by way of review or appeal is provided under this Part of this Act, no other remedy shall be available."

It is proposed to consider the question of what remedies, if any, other than a remedy by way of review and appeal under Part VII of the Act might be available to a dissatisfied claimant. The question will be considered under three headings:

The Judicature Amendment Act 1972

The Ombudsman

The Minister.

THE JUDICATURE AMENDMENT ACT 1972

The Judicature Amendment Act 1972 makes provision for an application for review to be made to the Supreme Court in relation to "the exercise, refusal to exercise, or proposed or purported exercise" by any person of a statutory power. On such an application, the court may grant "any relief that the applicant would have been entitled to in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition or certiorari or for a declaration or injunction, against that person in any such proceedings." The power of the court to grant relief is expressed to be "notwithstanding any right of appeal possessed by the applicant in relation to the subject matter of the application".[189]

The expression "statutory power" is defined to include "... a power or right conferred by or under any Act ... to exercise a statutory power of decision".[190] The expression "statutory power of decision" is in turn defined to mean:

> "... a power or right conferred by or under any Act to make a decision deciding or prescribing -
>
> (a) The rights, powers, privileges, immunities, duties or liabilities of any person; or
>
> (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not."[191]

Pursuant to section 6 of the Judicature Amendment Act 1972, proceedings commenced for a writ of mandamus, prohibition or certiorari in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power are to be treated as an application for review. Where

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189. Judicature Amendment Act 1974; s.4

190. Ibid s.3

191. Ibid

proceedings are commenced for a declaration or injunction in relation to such matters, "the court on the application of any party to the proceedings may, if it considers it appropriate, direct that the proceedings be treated and disposed of, so far as they relate to that issue, as if they were an application for review.[192]

It will be apparent that as the Commission is created by statute[193] and derives its powers from a statute, any decision made by the Commission,[194] any refusal to make a decision, or any proposed or purported decision must be within the contemplation of the Judicature Amendment Act 1972.[195] The question that must be considered is whether an application for review under that Act is a remedy which is available to a person who experiences dissatisfaction when endeavouring to obtain their entitlement under the Act, and if so, in what circumstances?

It is submitted that a remedy in the form of an application for review under the Judicature Amendment Act 1972 will be available in two circumstances. The first is when there is no remedy provided by Part VII of the Act. The second is when there is a remedy provided by Part VII of the Act, but there has been an error on the part of the Commission, a Hearing Officer or the Appeal Authority which may be said to be a "jurisdictional error." Each of these instances is discussed below.

Section 153(5) of the Act, which purports to exclude an entitlement to a remedy other than a remedy provided by Part VII of the Act, applies only when a remedy by way of review or appeal is provided under that Part of the Act. Therefore, if it can be established that a remedy under Part VII

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192. Ibid s.7

193. S.6 of the Act

194. or by its delegate, a Hearing Officer, or its employees.

195. Unless it can be successfully argued that the Commission is not a "person" within the terms of s.3 of the Judicature Amendment Act 1972. The only Commission referred to in the definition of the word "person" in that section is the Industrial Commission, but expressly included within the definition is a body corporate: pursuant to s.10 of the Act to Commission is a body corporate.

of the Act is not available, a remedy may be sought in the form of a prerogative writ, or in the form of a declaration or injunction.

The effectiveness of Part VII of the Act is wholly dependent upon the Commission making a decision in respect of a claim lodged under the Act, or a decision in relation to a levy matter. If the Commission fails or refuses to make a decision, the initial procedure in the review and appeal process, an application for review pursuant to section 153 of the Act, will not be available. Section 151 of the Act requires a decision in respect of which an application for review may be made to be given "as soon as practicable". Section 120 of the Act, which provides compensation in respect of such matters as loss of amenities or capacity for enjoying life and pain and mental suffering, requires the Commission to pay any sum assessable under that section

> "... as soon as practicable after the medical condition of the person is in the opinion of the Commission sufficiently stabilised to enable an assessment to be made ... or forthwith after the expiration of 2 years from the date of the accident, whichever is the earlier".[196]

When a decision has been given by the Commission and an application for review has been made in respect of that decision, section 154(3) of the Act requires a hearing to be held "as expeditiously as possible".

Although expressions such as "as soon as practicable" and "as expeditiously as possible" may be comparatively vague expressions, the abovementioned sections of the Act nevertheless impose an obligation on the Commission which must be discharged if the Commission is to

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196. s.120(1)

effectively carry out its functions and powers under the Act. If the Commission fails or refuses to discharge these obligations,[197] there is no reason why an order in the nature of mandamus should not be available.[198] While much will depend upon the applicant being able to establish that the Commission has refused to comply with its statutory obligations or that its conduct establishes a determination not to comply, the mere fact of non-compliance may suffice:

> "There may ... be cases where the mere fact of non-compliance with a duty will be a sufficient ground for the award of a mandamus - e.g. where the applicant has been substantially prejudiced by the respondent's procrastination. Delay in complying with the demand or request, the signification of readiness to comply only subject to conditions, or persistent temporising and failure to give a direct answer, may well be tantamount to refusal; but in some circumstances they cannot properly be so construed."[199]

Even when a remedy is provided by Part VII of the Act, there may nevertheless be circumstances in which relief will be available under the provisions of the Judicature Amendment Act 1972. It is clear that, insofar as section 153(5) of the Act purports to be a privative clause, it does not restrict the power of the Court to grant any relief to which the applicant would have been entitled in proceedings for a writ of certiorari in respect of an error which goes to jurisdiction. As to what constitutes an error of jurisdiction, it is proposed to do no more than to refer to the majority decisions of the House of Lords in Anisminic Ltd v The Foreign Compensation Commission,[200] in particular the judgement of Lord Pearce wherein it is stated:

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197. Alternatively, the Commission might give a decision but refuse to accept an application for review.

198. The proceedings would be treated as an application for review under the Judicature Amendment Act: s.6 of that Act.

199. de Smith op. cit. (n 68) at 497

200. [1969] 2 A.C. 147. Applied by the Court of Appeal in New Zealand in Attorney General v Car Haulaways (N.Z.) Ltd [1974] 2 N.Z.L.R. 331

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct."[201]

The availability of relief under the Judicature Amendment Act in respect of an error of jurisdiction may be illustrated by the decision of Salmond J. in New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer.[202] In this decision, the statutory provision under consideration was section 96 of the Industrial Conciliation and Arbitration Act 1908 which provided:

> "No award, order or proceeding of the Court shall be liable to be reviewed, quashed, or called in question by any court of judicature on any account whatsoever."

The learned Judge stated that the section, which required a restrictive interpretation, could only protect awards, orders or proceedings within the jurisdiction of the Arbitration Court:

> "The section means merely that so long as the Court keeps within the limits of the jurisdiction entrusted to it by the Legislature its proceedings and judicial acts within those limits are not subject to the examination, question or control of any other Court, whether on the ground of error of law, or fact, irregularity of procedure, defect of form or substance, or any other ground whatever."[203]

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201. Ibid; at 195. This passage was, in part, cited with approval by Barker J. in Bay of Islands Timber Company Ltd v The Transport Licensing Appeal Authority (unreported, Auckland 4 April 1977)

202. [1924] N.Z.L.R. 689

203. Ibid; at 703

This passage in the judgement of Salmond J. in Frazer's case was recently considered by the Court of Appeal in New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration.[204] In the course of his decision, Richmond J. stated:

> " ... that learned judge pointed out that the effect of a statutory provision taking away the remedy of certiorari does not extend to certiorari to quash on the ground of want or excess of jurisdiction but does prevent the superior court from examining the proceedings in respect of errors appearing on the face of the record (but which do not amount to jurisdictional errors). I can find nothing in the Anisminic case which is contrary to that statement of law, although it is true that the result of the Anisminic case may be to show that the field of jurisdictional error, if one adopts that expression for lack of a better one, is perhaps wider than that covered by the words "want or excess of jurisdiction".[205]

The view is taken that the effect of the Judicature Amendment Act 1972 was to bring about procedural changes in seeking one of the prerogative writs, or an injunction or declaration. That Act did not bring about substantive changes in the law.[206] Therefore, relief granted in respect of an application for review is granted at the Court's discretion. While relief may be granted "notwithstanding any right of appeal possessed by the applicant in relation to the subject matter of the application",[207] the existence of an alternative remedy may influence the Court in exercising its discretion as to whether to grant relief.

While the existence of an alternative remedy may be relevant where relief in the form or nature of a writ of certiorari is sought to quash a decision in respect of which there has been an error of jurisdiction on

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204. [1976] 2 N.Z.L.R. 283 205. Ibid; at 295

206. The exceptions are the Court's power of referral back s.4(5) and the Courts power of validation(s.5)

207. S.4(1) Judicature Amendment Act 1972

the part of the deciding body,[208] an applicant for certiorari is not generally required to have exhausted his rights of appeal provided by the relevant statute, particularly if to grant certiorari would be more convenient, beneficial and effective than to follow the statutory procedure.[209]

It is therefore submitted relief under the Judicature Amendment Act 1972 will be available, in principle, in relation to "the exercise, refusal to exercise, or purported or proposed exercise" of a power conferred by the Act upon the Commission, a Hearing Officer or the Appeal Authority. Relief may be available where the Commission fails to discharge the statutory obligations placed upon it which must be discharged before the review and appeal procedure provided by Part VII of the Act may be invoked. Relief may also be available where the Commission, a Hearing Officer or the Appeal Authority has given a decision which may be subject to review or appeal, but in so doing has committed an error which goes to jurisdiction. When compared with other statutory provisions, section 153(5) of the Act appears to be considerably less emphatic in its curtailment of a right to obtain relief in the form of a prerogative writ or declaration or injunction and it may be that the reasoning adopted by Salmond J. in Frazer's case is applicable:

> "The existence and exercise of ...(a)... controlling authority on the part of the Supreme Court is so essential a point of civil freedom and public policy that an intention to take it away in the case of any court of special and limited jurisdiction cannot be properly imputed to the Legislature merely because of the use of general language which is reasonably capable of a more restricted and reasonable interpretation."[210]

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208. Or where relief in the form or nature of prohibition is sought to restrain a deciding body from acting outside its jurisdiction.

209. R v Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd [1966] 1 Q.B. 380

210. Supra n. 202 at 703

Whether relief in the form of judical review will be available in other circumstances is not entirely clear. Possible situations in which it might be sought would include the refusal by the Commission to appoint one of the persons specified in section 25(1) of the Act as an agent. where the Commission declines to grant a right of review in respect of a decision declining to accept an application for review lodged out of time; and where the Commission makes a payment of moneys to the Public Trustee pursuant to section 124 (4A) of the Act.[211]

THE MINISTER

The "Minister" is defined by the Act to mean the Minister of Labour.[212] He does not play an active role in the Administration of the Act. The Commission is established by the Act[213] as a body corporate[214] and is responsible for the administration of the Act and of the Funds and schemes to which it applies.[215]

The Minister's functions are two-fold. First, he is required to perform certain functions of an administrative nature. He recommends to the Governor-General the appointment of members of the Commission[216] and accepts the resignation of such members,[217] although he has no direct power to remove them from office.[218] The Minister may also be called upon to exercise certain functions in relation to the appointment, renumeration and conditions of service of the Commission's staff.[219] Secondly, the Minister exercises certain functions in relation to matters of policy. He is the medium for the communication to the Commission of

211. Supra n. 61
212. S.2(1)
213. S.6
214. S.10
215. S.16
216. S.6(2)
217. S.8(1)
218. This power is vested in the Governor-General: s.8(2)
219. S.21

the policy of the Government in relation to the exercise of the functions and powers of the Commission.[220] The Minister also receives from the Commission recommendations on various matters relating to levies and compensation.[221] The Minister plays no part in matters relating directly to the financial aspects of the scheme: where ministerial direction or approval is required, it is from the Minister of Finance.[222]

Although the Minister is not directly concerned in the administration of the Act, he may make enquiries from the Commission on behalf of his own constituents or the constituents of other Members of Parliament in his capacity as Minister in Charge of Accident Compensation. Such enquiries may be concerned with matters of general policy, or they may relate to the manner in which the Commission has dealt with a particular claim under the Act. The Minister has no statutory power to direct the Commission to treat a particular claim in a particular way, and having regard to the fact that the administration of the Act has been vested in a statutory corporation, it would be constitutionally improper for the Minister to attempt to influence the Commission in the manner it deals with any particular claim. However, the need to maintain good relations between the Minister and the Commission (and ultimately, if necessary, the Minister's power to recommend the re-appointment of Commission members) may be a sufficient inducement to ensure the Minister's enquiries are treated both sympathetically and promptly.

In circumstances where the complaint to the Minister is one of undue delay, or inadequate attention having been given to a claim, a letter from the claimant to the Minister may produce the desired effect. However, if the complaint is one of a claim having been declined either in whole or

220. S.20
221. S.15
222. e.g. ss 35-37

in part, unless the Commission exercises its power of revision pursuant to section 151 (1D) of the Act, the claimant is unlikely to receive from the Minister anything more than a reminder of his rights of review and appeal under Part VII of the Act.

THE OMBUDSMEN

The Commission is one of those organisations whose decisions or recommendations and acts or omissions relating to a matter of administration and affecting any person in his personal capacity may be investigated by an Ombudsman.[223] While at first sight an Ombudsman would appear to have wide powers in matters relating to claims lodged under the Act, Part VII of the Act effectively restricts an Ombudsman's jurisdiction to investigate matters dealt with by the Commission.

Under the provisions of the Ombudsmen Act 1975,[224] an Ombudsman may not investigate any matter "in respect of which there is, under the provisions of any Act ... a right of appeal ... or a right to apply for a review, available to the complainant, on the merits of the case, to any court, or to any tribunal constituted by or under any enactment..." This restriction on the powers of an Ombudsman applies whether or not the right to apply for a review, or to appeal, has been exercised. It also applies even although the time for seeking a review or lodging an appeal has elapsed. However, this restriction is subject to a proviso to the effect that if by reason of "special circumstances" it would be unreasonable to expect a complainant to exercise his rights of review and appeal, an Ombudsman may exercise his powers of investigation.

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223. S.13 Ombudsman Act 1975 & Schedule

224. S.13 (7)

Section 22 of the Ombudsman Act sets out the powers an Ombudsman may exercise after he has completed an investigation. These powers may relate specifically to the matter under investigation, such as a power to recommend the cancellation or variation of a decision, or they may be much broader in scope, such as a power to recommend that any law on which the decision under investigation was based should be reconsidered.

A recent opinion of an Ombudsman[225] illustrates the manner in which the above provisions may restrict an Ombudsman's jurisdiction. A firm of solicitors acted for a self-employed farmer whose claim under the Act in respect of a heart attack was declined on the ground that cover under the Act in respect of the heart attack was excluded by section 2(1)(b)(i) of the Accident Compensation Amendment Act 1974. The effect of that provision is that, subject to section 2(1)(a) of that Act, the expression "personal injury by accident" does not include -

> "Damage to the body or mind caused by a cardio-vascular or cerebro-vascular episode unless the episode is the result of effort, strain, or stress that is abnormal, excessive, or unusual for the person suffering it, and the effort, strain, or stress arises out of and in the course of that person as an employee."

An application for review was lodged in respect of the Commission's decision. In giving a decision in respect of the application for review,[226] the Hearing Officer stated he was satisfied the heart attack was the result of effort, strain or stress that was abnormal, excessive, or unusual for the person suffering it. The Hearing Officer also accepted the heart attack arose out of and in the course of the applicant's employment. However, cover under the Act in respect of a heart attack occurring in such circumstances is expressly restricted to employees.[227] The application for review was therefore unsuccessful.

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225. W.11570; 1 N.Z.A.R. 113 226. Review No. 75/R1117
227. As defined in s.2(1) of the Act.

It being apparent an appeal to the Appeal Authority would also be unsuccessful, the solicitors approached the Ombudsmen with a view to bringing about an amendment to the Act. An Ombudsman declined to accept jurisdiction to consider the matter for the following reasons:

> "While s.22(3)(e) of the Ombudsmen Act 1975 provides that an Ombudsman may recommend that any law be reconsidered, he may do so only after carrying out an investigation into a complaint which falls within the scope of the main operative provisions of the Act, namely s.13 (1). In this case there was no act or omission, decision or recommendation which could form the subject of an investigation by me. The decision of the Hearing Officer was one in respect of which there was a statutory right of appeal to the Accident Compensation Appeal Authority, and in terms of s.13(7) of the Ombudsmen Act 1975 such decisions are excluded from an Ombudsman's jurisdiction unless there are special reasons why the person cannot be expected to take advantage of that right. No such reasons appeared to exist in this case, indeed the claimant had availed himself of the preliminary part of the appeal procedure by applying for a review."[228]

It could be expected that the power of an Ombudsman to investigate matters relating to the administration of the Act will, in practice, be very restricted. The presence of a review and appeal procedure means that an Ombudsman may not investigate matters which are subject to that procedure unless the "special circumstances" provision applies. The following statistics have been taken from the Report of the Ombudsmen for the year ended 31 March 1977:

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228. 1 N.Z.A.R. 113-114.

	declined jurisdiction s.13(1)	declined jurisdiction s.13(7)	discontinued s.17(1)	withdrawn	investigated justified	investigated not justified	investigated continuing	total
a.	2	10	12	3	6	10	9	52
b.	3	21	16	5	7	18		70

a. - year ended 31.3.75

b. - cumulative 1.10.75 to 31.3.75

In each case where the complaint to an Ombudsman was found to be justified, and in many cases where the complaint was discontinued, the complaint related to a delay in dealing with a claim under the Act, or in dealing with an application for review. In each case where jurisdiction was declined, the complaint related to the merits of a person's claim under the Act.

It would therefore appear that, like the Minister, the effectiveness of an Ombudsman is limited to investigating matters such as delay experienced in the processing of claims or the type of treatment the claimant has experienced when dealing with the Commission. Matters going to the merits of a claim would not generally come within the jurisdiction of an Ombudsman. However, in some respects, an Ombudsman's jurisdiction may be more limited than that of the Minister. The Minister may concern himself with matters of general policy: an Ombudsman may only exercise his powers of investigation in respect of a matter affecting any person or body of persons "in his or its personal capacity". Furthermore the more general powers of an Ombudsman, such as the power to recommend reconsideration of statutory provisions, may not be exercised unless an Ombudsman may first assume jurisdiction.

CONCLUSIONS

Although the review and appeal procedure provided by Part VII of the Act is not necessarily the sole means by which a person who is dissatisfied with a decision of the Commission may have that decision reviewed, it is the procedure of principal practical significance.

The need for a procedure whereby decisions of the Commission may be subjected to review and appeal, and the form that procedure takes, is governed largely by the Commission's initial decision making process. When the Commission is exercising its initial decision making powers, particularly in relation to claims for compensation or rehabilitation assistance under the Act, there are few procedural requirements which must be observed by the Commission. The Commission is required to make enquiries for the purposes of which it has certain powers vested in it by the Act, and to make a decision pursuant to the exercise of an administrative power. The considerations which have been taken into account by the Commission in reaching its decision, whether they relate specifically to the matter under consideration, or more generally to matters of policy, will not necessarily be disclosed to the person affected by the decision and that person will generally not have the opportunity to be heard. While such a procedure may enable the Commission to deal with a large number of claims (and other matters) on a continuing basis, it does represent a bureaucratic decision-making process in which the person affected by the Commission's decision has few rights or privileges.

An application for review in respect of a decision of the Commission, which is the first stage in the review and appeal process in matters relating to the payment of compensation, the provision of rehabilitation assistance, and levies, is not an independent review. Rather, it is a

form of review within the bureaucratic structure of the Commission, conducted either by the Commission itself, its Delegate, or a Hearing Officer appointed by the Commission. However, the review procedure has an apparently unique feature in that unless the Commission revises its decision in favour of a review applicant, or the applicant withdraws an application for review, the application for review may only be disposed of after there has been compliance on the part of the Commission or Hearing Officer with the full rigours of the audi alteram partem aspect of the principles of natural justice. The review applicant is entitled to a hearing in respect of which he has had the requisite notice and at which he may be present, represented, and at which he may present any relevant evidence in support of his application. Furthermore, the Commission or Hearing Officer must disclose to the applicant (or at least to his representative) all evidence and information received or ascertained other than at the hearing. The applicant is entitled to a decision in writing giving reasons where that decision may be the subject of an appeal to the Appeal Authority.

An appeal before the Appeal Authority is the first occasion on which a decision of the Commission is considered by an independent judicial authority. Two matters of importance may be noted in respect of the Appeal Authority.

The first concerns formulations of policy by the Commission. Comment has already been made to the effect that in an appeal procedure which provides a right of appeal to an independent tribunal, there is a danger that tribunal, when considering an appeal which concerns the application

of policy considerations to a particular set of facts, may fail to appreciate the full implications of the policy in question. A decision by the Appeal Authority which achieves a fair and just result in the case before it may amount to disapproval of a particular policy followed and applied by the Commission. This may cause considerable difficulties in the administration of the Act, yet applications of policy to a particular case should not be beyond challenge by the person affected by them.

The solution provided by the Act, whereby the Commission may be represented by Counsel before the Appeal Authority and may lodge a report (and tender evidence) in respect of policy matters raised by an appeal appears to achieve a desirable balance between the interests of an individual, and the public interest in the efficient administration of the Act.

The second matter of importance in relation to the Appeal Authority concerns the Appeal Authority's power to substitute its own discretion for that of the Commission or a Hearing Officer. Cases decided under legislation containing similar provisions to those in the Act regulating the powers of the Appeal Authority would suggest the Appeal Authority does not exercise an original jurisdiction when hearing and determining appeals from the Commission or a Hearing Officer. Accordingly, its power to substitute its own discretion for that of the Commission or a Hearing Officer may be exercised only in limited circumstances. This has the effect of increasing the practical importance of the review procedure which may not be used simply as a "trial run" to disclose the shortcomings in the review applicant's case before it is considered by the Appeal Authority.

The extent to which the Supreme Court and Court of Appeal will become involved in the review and appeal procedure provided by Part VII of the Act is not clear. Certainly, one of the objects of the Accident Compensation Scheme was to avoid the extent to which it was necessary to have recourse to the Courts, with resultant delays and expense, in seeking compensation in respect of personal injury under Workers' Compensation Legislation or in an action at common law. It may be that one way of measuring the success of the review and appeal procedure will be by reference to frequency with which appeals eventually reach the Courts.

It is suggested, however, that if the Courts are to form part of the review and appeal procedure there should be provision for the Commission, or the Appeal Authority, to state a case for the opinion of the Supreme Court on questions of law which arise in the course of matters before them.

One conclusion, however, is inescapable. The review and appeal procedure is a flexible procedure which persons who are dissatisfied with a decision of the Commission are not slow to invoke.