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THE NATIONAL DEVELOPMENT ACT 1979:

A CRITICAL ANALYSIS

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ABSTRACT

This thesis analyses the National Development Act 1979. The theories of Claus Offe and Jurgen Habermas are used to analyse the Act as a capitalist state planning process. Two major theoretical distinctions provide a framework for the thesis. These are: (1) the distinction between technical rationalisation and practical rationalisation and (2) the contradiction between accumulation and legitimation. A clarification is made in the concept of legitimation to distinguish between actual or deserved legitimation and nominal or unfounded legitimation. An analysis of legislation, Tribunal reports, Cabinet papers and other documents shows the Act to be a dual planning process: one process occurring in secret and relating to accumulation; the other in public and relating to legitimation. Thus the Act is analysed as a technical planning process through which the state attempts to reconcile accumulation and legitimation.

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ABBREVIATIONS.

BP.	British Petroleum.
CFE.	Commission for the Environment.
COG.	Coalition for Open Government.
CREEDNZ.	Coalition for Rational Economic and Environmental Development in New Zealand Inc.
CRPR.	Committee to Review Power Requirements in New Zealand.
DSIR.	Department of Scientific and Industrial Research.
EDS.	Environmental Defense Society.
EIR.	Environmental Impact Report.
EPEP.	Environmental Protection and Enhancement Procedures.
G-G.	Governor-General.
GWh.	Gigawatt-hour.
ICOP.	Interdepartmental Committee on Petrochemicals.
JEC.	Joint Executive Committee.
LFTB.	Liquid Fuels Trust Board.
MP.	Member of Parliament.
NBR.	National Business Review.
NBR Outlook.	National Business Review Outlook.
ND Act.	National Development Act 1979.
ND Amendment Act.	National Development Amendment Act 1981.
ND Bill.	National Development Bill.
ND Conference.	National Development Conference.

ND Council.	National Development Council.
ND Strategy.	National Development Strategy.
NTEPA.	North Taranaki Environment Protection Association Inc.
NWSCA.	National Water and Soil Conservation Authority.
NZLR.	New Zealand Law Reports.
NZPC.	New Zealand Planning Council.
NZPD.	New Zealand Parliamentary Debates.
NZSFCL.	New Zealand Synthetic Fuels Corporation Limited.
OECD.	Organisation for European Co-operation and Development.
OND.	Organisation for National Development.
PCEPD.	Planning Committee on Electric Power Development in New Zealand.
Petralgas.	Petralgas Chemicals (NZ) Limited.
SPA.	South Pacific Aluminium Limited.
Task Force.	Task Force on Economic and Social Planning.
TCP Act.	Town and Country Planning Act 1977.
Working Party.	Working Party on Environmental Administration in New Zealand.
WSC Act	Water and Soil Conservation Act 1967.

### INTRODUCTION.

The National Development Act (ND Act) was designed to prevent delays in the implementation of major projects by placing them on a fast-track planning process. It became law after being rushed through Parliament in 1979, despite widespread opposition. The long title to the Act describes it as:

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

The Act can be applied to any project that is considered to be in the national interest. Application of the Act means that a single Planning Tribunal inquiry considers all the planning consents sought instead of these consents being considered separately by various authorities under different Acts (e.g., Town and Country Planning Act, Water and Soil Conservation Act, Clean Air Act). It has been used twice: for a methanol plant and a synthetic petrol plant, both in Taranaki. It was

to have been used for an aluminium smelter but one of the proponents withdrew from the project. However, despite its limited use it is one of the most controversial pieces of recent legislation.

The synthetic petrol plant, implemented under the Act in 1982, was officially opened on 27 February 1986. It will use four million cubic metres of natural gas per day to produce 4,407 tonnes of methanol which is then converted into 1,680 tonnes of petrol. Total annual production of the plant is 570,000 tonnes of synthetic petrol. It is the first of its type built in the world. The Chairman of the Planning Tribunal inquiry considering the plant said:

It is difficult, if not impossible, to gain any real appreciation of the immensity of this plant. Engineers employed by the applicant conceded it was large even on a world scale (Planning Tribunal, 1981b:7).

The decision to proceed with the plant was the most important decision made by the government in 1981 (Terry et al, 1981:2). Yet because of the ND Act there was no public input into this decision.

This thesis is a critical analysis of the ND Act. For such an analysis it is necessary to consider the economic, social and political framework in which the Act was enacted and used. This framework is democratic capitalism. Within this framework it is necessary to consider the nature and the functions of the capitalist state. To do this the theories of Claus Offe and Jurgen Habermas are used (1).

These theories are presented rather than argued for as the main emphasis of the thesis is on an analysis of the ND Act, not the explication of a theory of the state. The work of Offe and Habermas is presented as a single theory (with an emphasis on Offe), although there are of course differences between them. These differences have not been overlooked in the writing of the thesis but it is felt that discussion of them should not intrude upon the analysis of the Act. The theory is being used to analyse the Act: the Act has not been used to illustrate the theory.

#### THESIS ORGANISATION.

Chapter 1 begins with a section on instrumental and practical rationalisation. These are ideal types constructed by Habermas and are used here to distinguish between two types of planning: instrumental planning, of which the ND Act is an example; and practical planning upon which, it is considered in this thesis, planning should be based. The main emphasis of the chapter is the theories of the state put forward by Offe and Habermas. Of particular importance in the theory presented is the contradiction between accumulation and legitimization. These are seen as necessary but contradictory functions that the capitalist state must fulfill. The contradiction between them is an integral part of the state itself. A distinction is made in the thesis between actual and nominal legitimization: the former is justifiable and

deserved, the latter is merely claimed and has no basis apart from this claim.

Chapter 2 is a selective history of national development in New Zealand that draws out the meaning of "national development" as it has been used in the New Zealand context. One part of this history is the Think Big growth strategy developed by the National Government between 1979 and 1981. This strategy, for which the ND Act was introduced, is covered in more detail in Chapter 3. Its origins and development are traced with an emphasis on the methanol plant, the synthetic petrol plant and the second aluminium smelter. Chapter 3 also looks at the enactment of the ND Act.

Chapter 4 begins with a descriptive outline of the procedures under the Act. This is followed by a section that sets out the scheme that will be used to analyse the Act. The ND Act procedures can be divided into five main stages. These are the application of the Act, environmental impact evaluation, the Planning Tribunal inquiry, the granting of consents and judicial review. The Act is applied to a project by the Governor-General in Council, (this effectively means by Cabinet decision). Following the application of the Act is the process of environmental impact evaluation. This involves an environmental impact report prepared by the proponent, public submissions on the report and an audit by the Commissioner for the Environment, which considers both the report and the public submissions. Once the audit

is completed a Planning Tribunal inquiry is held. This involves some public participation and results in a recommendation being sent to the Minister of National Development on whether the consents sought should be granted. The actual decision is again made by Cabinet through the Governor-General in Council. Judicial review can occur at various stages of the procedures.

However, it is important to analyse the Act in its economic and political context so more than just an analysis of the Act's statutory procedures is required. It is especially important to look at negotiation and planning that occurs between the state and the proponent of the project before the Act is invoked. It is during this stage that the major decisions are made, hence it is called the decisive planning process. Thus the order of events, excluding judicial review (which is considered at the end of Chapter 4), is: decisive planning process, application of the Act, environmental impact evaluation, Planning Tribunal inquiry, granting of consents. However, because of similarities between the decisive planning process, the application of the Act and the granting of consents, these stages are considered together. They all involve Cabinet decisions made in conjunction with the proponent and excluding public input. They are analysed in Chapter 5 and are related to the state's function of maintaining accumulation. The process of environmental impact evaluation and the Planning Tribunal inquiry are also considered together as they both involve public participation. These are analysed in Chapter 6 and are related to the state's function of maintaining

legitimation. Thus the Act is analysed as a dual planning process through which the state attempts to reconcile the contradiction between accumulation and legitimization. Chapter 7 provides a conclusion to the analysis.

In a postscript elements of an alternative planning process are considered. No detailed or concrete process is put forward, but ideas that have arisen from the critique of the Act are developed. The most important of these is that planning should be based upon practical rather than technical rationalisation. Such a practical planning processes could only be worked out through informed public debate. but one example of a more practical approach to planning is the Waitangi Tribunal hearing on the discharge of waste along the Taranaki coast. The postscript concludes with a discussion of this hearing.

Although the ND Act is to be repealed by the Labour Government this thesis was begun when the ND Act was still firmly on the statute books so the present tense has been used for the analysis.

CHAPTER 1.A MODEL OF ADVANCED CAPITALISM.

## 1. CAPITALISM AND RATIONALISATION.

Max Weber was the first important theorist to emphasise the link between capitalism and rationalisation. He used rationality in a number of senses but the key usage was in terms of means-ends rationality (Eisen, 1978:58). This is the methodical attainment of a clearly defined goal by adequate and precisely calculated means. This type of rationality is the basis of the capitalist market and with capitalism it becomes extended to all areas of life. This link between capitalism and rationalisation became the starting point for many of the writings of the Frankfurt School, who replaced Marx's critique of political economy with the critique of instrumental rationality as the central element of a critical theory of society (Connerton, 1976:27).

This central concern with rationalisation is carried on in the work of Habermas. In order to understand the way in which he analyses rationalisation it is first necessary to consider his distinction between two types of action: labour and interaction (2).

Labour is action oriented towards the achievement of a given goal. It can refer to either the choice or the use of appropriate means to achieve a goal, or both. It is governed by analytic knowledge and technical rules. The validity of these rules depends upon their being empirically true or analytically correct. By learning the rules of labour we learn skills. Interaction is action oriented towards intersubjective understanding and the maintenance of social relationships and institutions. "It is governed by binding consensual norms, which define reciprocal expectations about behaviour and which must be understood and recognized by at least two acting subjects" (Habermas, 1971:92). These norms are defined by an intersubjectively shared language. Their validity is based upon their recognition and acceptance as obligatory. By internalising these norms we develop personality structures. Habermas sees labour and interaction as the "...fundamental conditions of the possible reproduction and self-construction of the human species ..." (Habermas, 1972:196). They are vital to any society because they allow the processes of production and socialisation respectively. Thus labour and interaction correspond to Marx's distinction between the forces and relations of production.

Habermas uses this distinction on two broad levels: for a critique of knowledge and for a critique of society. He says that at both of these levels interaction is reduced to labour. At the level of knowledge this occurs as positivism; at the socio-political level it occurs as technocracy (3). At the socio-political level he makes an analytical distinction between the institutional framework of a society and the subsystems of labour that are embedded in it (Habermas, 1971:93-94). The institutional framework is the sphere of interaction. It consists of the norms, values and belief systems that guide symbolic interaction. Within this framework are subsystems (such as the economy) in which action guided by labour is dominant. This does not mean that all action in the economy is labour, but only that this is the primary type of action to be found in this subsystem. In an interview Habermas said:

I only want to say that you can order subsystems on a scale, that is from a point where you have almost exclusively a subsystem in which communication [interaction] governs the whole process, to another point, where you have systems in which you have exclusively almost a type of purposive-rational behaviour [labour] (Frankel, 1974:43).

Using this distinction between labour and interaction, Habermas reformulates the concept of rationalisation. Two types of rationalisation are derived: technical rationalisation and practical rationalisation. The history of capitalism is the history of technical rationalisation. The capitalist mode of production involves a permanent growth in the forces of production and consequently a continual extension in the subsystem of labour (Habermas, 1971:97-98).

Labour, instead of being embedded in the institutional framework, becomes the dominant part of the framework. Therefore structures previously based on interaction become based on labour and more and more areas of life become subject to a means-ends rationality. Technical rationality comes to dominate reason and encroaches upon interaction. Social relations and consciousness are modified and transformed by labour. Social problems are seen as technical problems (Giddens, 1982:151). Hence, they are to be solved by technical means.

Practical rationalisation, however, occurs at the level of interaction. It involves the "...extension of communication [interaction] free from domination" (Habermas, 1971:93). It is:

...found in the liberation from externally imposed compulsions and it implies the good life, both private and collective, of individuals as well as citizens (Connerton, 1976:27).

Thus it can be linked with wisdom, which is "...the capacity to discover and achieve that which is of value in life, for oneself and others ..." (Maxwell, 1980:19). Practical rationalisation and technical rationalisation can occur beneficially for the development of society if they occur in conjunction. This means when the direction and limits of technical rationalisation are set by free and open public discussion. However in capitalism, technical rationalisation occurs at the expense of practical rationalisation.

Based upon these two types of rationalisation two concepts of democracy (and two corresponding types of planning) can be formulated. (This distinction is outlined only briefly as it is developed further below). Technical democracy is characterised by a lack of public participation and a lack of discussion about the goals and values of politics. The technocratic framework means that planning goals are implicitly defined and unquestionable. In contrast, practical democracy involves effective public discussion about the goals and values of society. It is:

...the institutionally secured forms of general and public communication that deal with the practical question of how men [sic] can and want to live under the objective conditions of their ever-expanding power of control [i.e. labour] (Habermas, 1971:57).

Practical democracy is concerned with the "good life": what it is and how it can be attained. It thus involves open and informed public debate on all aspects of political and social life.

## 2. THEORY OF THE CAPITALIST STATE.

All Marxist theorists studying capitalism concentrate on its inherently contradictory nature and increasingly they focus on the state and the role it plays in capitalist society. One of the major contradictions of the capitalist mode of production is the contradiction between accumulation and legitimization. Sections 2(a) and (b) set out the nature of contradictions and, in particular, look at the contradiction between accumulation and legitimization. Sections 2(b)(i) and (ii) look at this contradiction in more detail and consider how it applies to New Zealand.

### 2(a). The Concept of Contradiction.

Contradiction is an important concept and it needs to be clearly defined. A contradiction is more than a dilemma or a conflict. These latter events are contingent everyday occurrences whereas a contradiction is more fundamental. A contradiction occurs at the level of the mode of production; it is embedded in the very structure of society:

...the term contradiction is not used as an attribute of a particular actor in a particular situation, or as a condition that prevails in a specific institutional sector of society. The term contradiction is rather used as an analytical concept related to the dominant mode of production by which a society reproduces itself. Contradictions are not contingent, but rooted in the mode of production, which is itself seen to be contradictory, that is, self-paralysing and self-destructive (Offe, 1984:132-133).

It is important to note that Offe places contradictions at the level of the mode of production. He is not saying that a contradiction will necessarily occur at the level of social formation, its existence can only be determined by empirical inquiry.

A contradiction does not appear as an either/or situation. Both sides of the contradiction are necessary and each depends upon the other although at the same time negating it (Giddens, 1981:231). A contradiction is thus a structural incompatibility that also involves an interdependence. A contradiction occurs at the base of the mode of production but it will not necessarily appear to be at the root of a society, nor will it necessarily appear as itself. Instead it may become manifest as secondary contradictions and conflicts in various areas of society, without immediately threatening the existence of that society. Thus the existence of a contradiction does not imply an immediately unavoidable crisis. It is its deep-seated structural nature that distinguishes a contradiction from a conflict, which is an antagonistic relationship between individuals or groups of actors who have different interests, or differently perceived interests. Nevertheless, contradictions and conflicts are related and often

contradictions will give rise to conflicts. Contradictions can therefore be seen as "...structural fault-lines that tend to produce clusterings of conflicts" (Giddens, 1981:238). The destructive effects of the base contradiction can be absorbed and processed by various mechanisms, in particular state mechanisms, to lessen their impact. But such mechanisms are themselves part of the mode of production and are involved in its contradictions. Therefore they will also be contradictory and will lead to new contradictions. In this sense the base contradiction can be said to be "mobile" (Giddens, 1979:142). Thus the adaptive mechanisms can only postpone crises and in the long run will add to the destructive effects of the base contradiction. In other words, contradictions are cumulative and become more pervasive with time:

...the self-destructive tendencies of the capitalist mode of production evolve in a historical process, and their destructive and revolutionary potential can well be controlled and kept latent through various adaptive mechanisms of the system, at least temporarily....[However the] contradictions will finally result in a crisis of the capitalist mode of production ... [because] ...there is no actor or agency within the capitalist mode of production that is sufficiently unaffected by those contradictions that are to be reconciled to be able to act in such a way as to counteract them (Offe, 1984:133).

2(b). The Contradictions of Capitalism.

The fundamental contradiction of the capitalist mode of production is that of social production for private accumulation (Offe, 1984:49). Wealth, although produced socially, is distributed privately and unequally. From this come many more contradictions, some of which will be outlined in subsequent sections. This fundamental contradiction was first identified and analysed by Marx. He saw how it emerged in liberal capitalist society as economic and social crises. The economic crises arose through market dysfunctions and the "self-negating pattern" of economic development that lead to the tendency to a falling rate of profit and to reduced powers of consumption (Habermas, 1976:29). These crises occurred in cycles so accumulation in this stage of capitalism was characterised by a "crisis-ridden form of economic growth" (Habermas, 1976:31). Social crises also arose directly from the economic system. This was because legitimization was based on the ideology of a free market in which all participants had equal opportunities. This ideology of equal exchange in the market provided the basis for social integration. But the periodically re-occurring economic crises disturbed this integration, as they threatened the interests of the bourgeoisie in the market and, in moving to protect these interests, they unwittingly showed up the asymmetric structure of the market (Habermas, 1976:29).

Since accumulation and legitimization were both based upon the market it meant that, in Marx's analysis of capitalism, an analysis of the economy also served as an analysis of society. But does this still apply to today's capitalist societies or have these societies changed so that an analysis of the economy is no longer sufficient as a study of society? Has the way in which the fundamental contradiction manifests itself changed? According to Offe and Habermas the answer to these questions is "Yes", and these changes have been marked by the transition from liberal capitalism to advanced (also late or monopoly) capitalism. The two major characteristics of this change are state intervention and economic concentration (Habermas, 1976:33; see also Offe, 1976b:395-396). The liberal market was not self-regulating and this led to market dysfunctions that threatened to disrupt society. To prevent this the state has had to intervene in the market to regulate and compensate for these dysfunctions. Economic concentration refers to the increasing organisation of markets for goods, capital and labour, and to the rise of multinational corporations.

In advanced capitalism the state acts as an adaptive mechanism that attempts to overcome the contradictions of the capitalist mode of production. This role of the state is acknowledged by most social theorists. The key question concerns not whether the advanced capitalist state is interventionist but whether such interventions can be successful:

Both liberal and Marxist theorists see the state as the major institutional system in advanced capitalist society that could assume the function of overcoming contradictions. The central analytical controversy, however, concerns the question of whether the state is actually able to perform this function effectively or whether there are systematic contradictions on the level of state activity itself that prevent the state from dealing successfully with the contradictions of the capitalist mode of production (Offe, 1984:134).

In the general discussion of contradictions it was argued that any attempted solution to a contradiction is in fact contradictory itself and can only solve the problem temporarily. Thus, at the level of the mode of production, state interventionism is problematic and rather than solving the contradictions, as they appeared in liberal capitalism, it merely transposes them. In advanced capitalism the fundamental contradiction appears as the contradiction between accumulation and legitimization.

Before considering accumulation and legitimization in advanced capitalism it is necessary to consider briefly the model of advanced capitalism used by Offe and Habermas. Both divide advanced capitalist society into three separate but related subsystems. These are the economic, administrative (state) and normative (legitimating) subsystems (Offe, 1984:37-38; Habermas, 1976:33-37). They are differentiated by the organisational principle upon which each is based. These organisational principles are exchange relationships, coercive relationships and normative structures respectively. In capitalism the economic subsystem and its organisational principle of exchange are dominant. This means that the economic subsystem is

relatively free from constraint by the other subsystems although it is still dependent upon them. The economy cannot exist without power structures to enforce and sanction social rules (the administrative subsystem) or without individuals learning social norms through the socialisation process (the normative subsystem). However, the economy dominates society and the administrative and normative subsystems act as "flanking subsystems" to the economy (Offe, 1984:38).

Accumulation refers to the private accumulation of capital. It is the amassing of capital on an ever-expanding scale by a capitalist class for the purpose of further investment. Legitimation is a more difficult concept to define. Two current definitions are:

Legitimacy means there are good arguments for a political order's claim to be recognised as right and just; a legitimate order deserves recognition....[It] is a contestable validity claim...(Habermas, 1979:178).

Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society (Lipset, 1963:77).

While both these definitions show that legitimacy involves support for the political order or institutions, the source of this support is different. For Habermas, the claim to legitimization depends upon its being proved: "...every effective belief in legitimacy is assumed to have an immanent relation to truth ...that can be tested and criticized" (Habermas, 1976:97). Any claim to legitimization must "...show how and why existing (or recommended) institutions are fit to

employ political power ..." (Habermas, 1979:183). Thus the basis of legitimacy, in this conception, is truth. The claim to legitimacy rests upon "...foundations external to and independent of the mere assertion or opinion of the claimant ..." (Schaar, 1970:283). For Lipset, however, legitimization depends, not on its being justifiable in relation to truth, but upon its being convincing. The state bases its legitimacy on its own claims. This second definition dissolves legitimacy into belief or opinion (Schaar, 1970:284). Accordingly, if people believe that existing institutions are appropriate or morally proper, then those institutions are legitimate, whether or not this belief is justified. Although Offe is aware of this distinction (4) he tends to use the concept in its second, reduced sense: legitimacy depends upon the ability of the state "...to convey the image of an organization of power that pursues common and general interests of society as a whole, allows equal access to power and is responsive to justified demands ..." (Offe, 1975:127). It is the image of the state, not its actual nature, that is important. Offe also uses a concept of mass loyalty that could remove some of the confusion over the concept of legitimacy, for he says:

The concept of mass loyalty marks a point of departure from the traditional concept of legitimacy insofar as it [mass loyalty] consists not in the steadfast acceptance of a given order, but, on the contrary, in the total renunciation of any claim for legitimization (Offe, 1976b:414).

This concept could therefore be used instead of legitimization in its reduced sense, thus retaining "legitimization" for the sense of its verifiable relation to truth. However, Offe continues to use the concept of legitimization in its reduced sense as well as using the concept of mass loyalty. He also confuses the concept of mass loyalty by saying elsewhere that "...mass loyalty can be described as the ability of the administrative system to win genuine acceptance for its structures, processes and actual policy outcomes" (Offe, 1984:60). "Genuine acceptance" would imply genuine legitimization.

To remove some of this confusion and to clarify the concept of legitimization, a distinction is made in this thesis between actual and nominal legitimization. Actual legitimization is when the state is justifiably and properly legitimate. Its goals and policies would have to be sanctioned by all members of society. Although such legitimization would be unattainable, it does provide a measure against which the state's claims to be legitimate can be evaluated. Nominal legitimization is legitimization in name only; it is when the state nominates its own legitimacy. It corresponds to Lipset's definition of legitimacy and is an example of the Thomas theorem: if people believe something to be true then it will be true in its effect. A nominally legitimate state is not actually legitimate but it will have no major legitimization problems. This distinction between actual and nominal legitimization is related to the distinction between practical and technical democracy. The state and its policies can only be accorded actual legitimization through practical democracy. Actual legitimization depends upon genuine

and effective public participation. Technical democracy, however, is where there is no effective public participation and where the goals of politics are given, so there can be no active public agreement as to their validity and value. Thus technical democracy can only be nominally legitimate.

Accumulation and legitimization are basic functions that every democratic capitalist state must fulfill because capitalism is accumulation and democracy is based upon the idea of a continually legitimated government (5). The contradiction between them is normally expressed (i.e., without the above distinction being made) in the following way. The state must maintain the accumulation process. It is required to provide the prerequisites for the accumulation process, to overcome the dysfunctions of the market (internal threats), and to repress outside threats to the system. In doing so it protects and sustains a system of private appropriation of social resources. It is ensuring the dominance and privileges of the capitalist class. At the same time it must be legitimate. It must act - or at least appear to act - in the public interest. It must appear to be class-neutral. And because they are contradictory, the processes of accumulation and legitimization are dependent upon each other. Accumulation requires state action. Such action requires public support and for this the state must be legitimate. In this way accumulation depends upon legitimization. In turn, legitimization depends upon accumulation, since a state's legitimacy depends largely upon its ability to manage the economy. If it can maintain economic growth so that there is

sufficient demand for goods and labour, and exchange opportunities are maximised, then it will be legitimate. The state derives legitimacy from its ability to maintain a healthy economy. Legitimacy is also derived from the provision of welfare state services. The ability to provide these services depends, in turn, upon a healthy accumulation process from which the state can derive the resources to pay for them.

However, when a distinction is made between actual and nominal legitimisation, it becomes clear that the contradiction is not as simple as this. To be contradictory, accumulation and (actual or nominal) legitimisation have to be incompatible and interdependent. But actual legitimisation (true public acceptability) is unlikely to be either compatible with or dependent upon private accumulation (i.e., social production for private appropriation). Hence they are not contradictory. Nominal legitimisation is dependent upon accumulation since it depends upon a healthy economy and the provision of welfare state services. But it is not incompatible with accumulation – unless accumulation itself is problematic. In this case, the withdrawal by the state of resources from the accumulation process for its nominally legitimating functions will place a serious burden on the accumulation process and lead to calls for cutbacks in state spending, including cutbacks in its nominally legitimating functions. Because capitalism is characterised by cycles of downturn and recovery, accumulation cannot always be guaranteed. Hence, in the long term, accumulation and nominal legitimisation are contradictory, but this contradiction will be suppressed if the state can maintain the accumulation process at a

sufficient level to guarantee its own resources and nominal legitimacy, and if legitimization can be maintained at the level of nominal legitimization. This latter condition depends partly on maintaining politics at the technical level, for as soon as practical questions are asked about the goals of politics, there will be questions about the role of the state. Such questions will endanger its nominal legitimization.

The contradiction between accumulation and nominal legitimization is embedded in the state structure. Offe (1975:125-7 and 1984:120-121) defines the capitalist state in terms of accumulation and (nominal) legitimization. In this definition he does not attempt to identify actual state institutions or structures. Instead he looks at the relationship between the state and the accumulation process. The definition has four elements. The first is that the state cannot organise or control production. Production, which is the basis of accumulation, is carried out by enterprises that must be free to make their own investment decisions. Of course there are state regulations affecting such enterprises, (e.g., price controls, import licence controls, anti-monopoly regulations) but the state cannot direct private enterprise to invest in any particular venture (6). However, and this is the second element, the state must ensure the conditions for accumulation. It is required to create and maintain the conditions under which profitable investment by private enterprises can occur. This includes suppressing or removing threats to accumulation as well as providing the necessary inputs and supports for the system. Third, the state is dependent upon the accumulation process. It is dependent

upon the revenue it can derive from the accumulation process through the taxation of profits and wages and through government borrowing. Without this revenue it will not have the resources to carry out its functions. These first three elements of the definition are directly related to the accumulation process. Offe (1975:127) calls them "exclusion", "maintenance" and "dependency" respectively. Legitimation, the fourth element of the definition, is not commonly seen as being related to the accumulation process - and this is the essence of its function. To ensure accumulation the state must hide the extent to which it is acting in support of private interests and, instead, must seem to be acting in a more general, public interest. This is nominal legitimization. These then are the four elements of the state's relationship with the accumulation process:

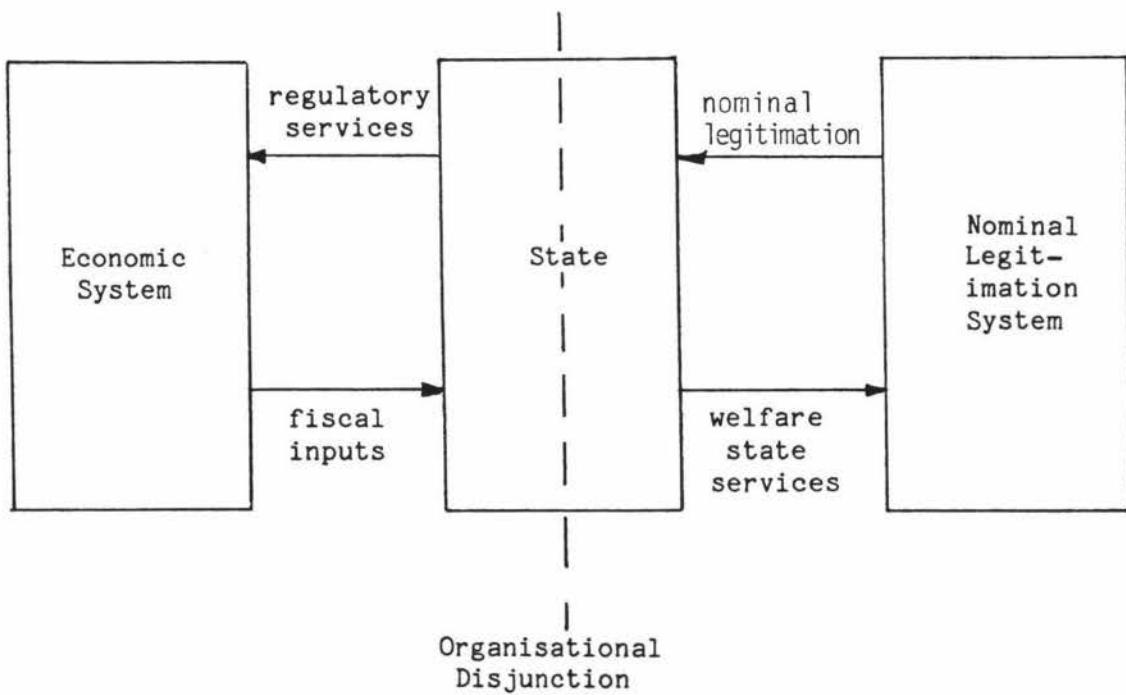
Exclusion means ...that the state is not a capitalist itself....[It is] something that has its existence outside the accumulation process. Maintenance implies that the process cannot perpetuate itself in the absence of this external being, that there are threats and possible disturbances to the process of accumulation that require some state-organized protection of the process. Dependency means that this protective device itself would be threatened if it engaged in policies inconsistent with its protective functions....[Nominal legitimization means that] the state can only function as a capitalist state by appealing to symbols and sources of support that conceal its nature as a capitalist state (Offe, 1975:127).

This shows that the contradiction between accumulation and nominal legitimization is actually built into the state. The state itself has a contradictory nature. If the state is to overcome this contradictory nature it needs to achieve a relative separation of its accumulation and nominal legitimization functions. It "...must exhibit an internal

differentiation which prevents interference between those institutions responsible for its [nominal] legitimation and steering [accumulation] functions" (Offe, 1984:58-59). Its success, or lack of it, will depend upon the "organisational linking or mutual isolation" of the economic, state and nominal legitimation subsystems (Offe, 1984:52). This is shown in Figure 1.

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Figure 1. THE ORGANISATIONAL DISJUNCTION OF THE STATE.



(Adapted from Offe, 1984:52).

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It is through the internal differentiation or organisational disjunction that the state attempts to reconcile the contradictory imperatives of accumulation and nominal legitimization. The result is a dual political system with "...two faces of the same state, one responsible for accumulation and the other for legitimization" (Wolfe, 1977:10). (This seems entirely appropriate as most politicians are at least two-faced.) The dual state has a public nature that allows it to meet its nominal legitimating functions. But it also has a private nature, unseen by the public, through which it maintains the accumulation process. This has been clearly described in relation to the United States:

Indeed, one might think of ours as a dual political system: first there is the symbolic input-output system centering around electoral and representative activities including party conflicts, voter turnout, political personalities, public pronouncements, official role-playing and certain ambiguous presentations of some of the public issues which bestir presidents, governors, mayors and their respective legislatures. Then there is the substantive input-output system, involving multibillion dollar contracts, tax write-offs, protections, rebates, grants, loss compensations, subsidies, leases, giveaways and the whole vast process of budgeting, legislating, allocating, "regulating", protecting and servicing major producer interests, now bending or ignoring the law on behalf of the powerful, now applying it with full punitive vigor against heretics and "trouble makers". The symbolic system is highly visible, taught in the schools, dissected by academicians, gossiped about by newsmen [sic]. The substantive system is seldom heard of or accounted for (Parenti, 1970:84-85).

As will be shown these comments are also relevant to New Zealand.

Although accumulation and nominal legitimation are two faces of the same state, forming a contradictory unity, to analyse them further it is necessary to consider them separately. The next two sections do this. In both sections the analysis is still at the level of the mode of production; that is, at the abstract level. But quotes from a variety of sources are used to show how the analysis applies to the New Zealand social formation of the 1970s and early 1980s and to indicate that, as predicted by the theory, this is a contradictory social formation.

2(b)(i). Accumulation in Advanced Capitalism.

Even if the state could temporarily ignore the contradictory imperatives of accumulation and nominal legitimation it would not be relieved of planning incompatibilities - for even in planning for accumulation it faces incompatible priorities. This section will show three groups of incompatibilities, but first it is necessary to describe the economic system of advanced capitalism.

Offe (1984:42-45; see also O'Connor, 1973:13-32) divides the economy into the monopoly, competitive, state and residual labour sectors (7). The monopoly and competitive sectors are organised by private capital. The monopoly sector is capital intensive and is based

upon highly organised international and national markets where agreements between sector members limit competition. Such enterprises are price-makers whereas enterprises in the competitive sector are price-takers. The latter are subject to market forces and are predominantly labour intensive. In the state sector investment decisions are made according to political criteria rather than market considerations. The residual labour sector consists of those individuals who are not actively involved in the labour market (e.g., the unemployed, students, housewives not in paid employment).

The monopoly sector is the most important sector of the economy. According to O'Connor (1973:23) it is "...the 'engine' of capital accumulation and economic growth." Offe (1984:46-47) says that:

The prosperity of the system as a whole depends quite substantially on the contributions to growth, the potential for innovation, and the market strategies of sector M [the monopoly sector].

Therefore it is to this sector that the state directs most of its actions and policies. This gives rise to the first area of difficulty for the state:

Monopolies tend to make large profits relative to industries in competitive systems and hence they need larger investment opportunities in order to maintain their operation at a given level of employment of both capital and labour. In the absence of easy to occupy new markets, it becomes more costly for the state to open new investment opportunities for monopoly profits (for example, socialising part of their

private costs or by relieving them of the burden of paying for their social costs), and hence to maintain their rate of growth (Offe, 1984:134).

Difficulties in the employment of capital arise because monopoly profits become more and more dependent upon giant investment projects involving huge capital outlays and high social overheads. To maintain the profitability of the monopoly sector, the state sector takes on more and more of the monopoly sector's costs of production. For instance, the Ministry of Works and Development provides industrial infrastructure such as dams and roads, the Department of Trade and Industry sells electricity to large industrial complexes at subsidised prices, the DSIR carries out research and development which benefits the private sector, the Labour Department operates job training schemes, etc. (These expenditures are of benefit not only to the monopoly sector and some of them have accumulation and nominal legitimization functions. Because of the dual, contradictory nature of the state most of its expenditure has this dual nature (O'Connor, 1973:7).) But, although the costs of production are socialised the profits are not. This means that state expenditure increases more than state revenue, leading to a fiscal crisis. This is the tendency for state expenditure to outrun state revenue (O'Connor, 1973:9). Therefore the state cannot afford to open up the investment opportunities and there is a permanent under-utilisation of capital and a lack of investment outlets in advanced capitalism (Keane, 1978:64). Difficulties in the employment of labour arise because the monopoly sector is capital, not labour, intensive.

The increasingly socialised nature of production is not only a burden on the state but is also a potential burden on the economic system itself, as the resources that the state uses to support the economic system have to come from this system in the first place:

The socialization of production organized by the state apparatus depends upon the conversion of large and generally increasing portions of the gross national product into "revenue" by withdrawing it from the process of surplus-value creation (Offe, 1984:57).

Through taxation and state borrowing the state reduces the resources available for private investment and consumption. This diversion of resources is often seen as being unproductive and may lead to calls for a reduction in taxation and government spending. Whether the state uses these withdrawn resources in such a way as to increase overall production above that which could be achieved by their private investment or consumption is an empirical question that is outside the scope of this thesis. What is important to note is that the maintenance of the accumulation process imposes an economic burden upon the state and, possibly, also upon capital.

A second area of difficulty for the state is that the nature of state planning negates the nature of the market. Accumulation is based on the exchange of commodities through the market. But, in order to maintain this exchange of commodities, the state has to provide goods and services that are not commodities (e.g., health, education, roading). These are goods and services that are not exchanged through

the market. Instead, they are distributed according to political criteria such as legal claims, free rights or need (Offe, 1984:127). This can undermine the exchange process upon which the economy is based - and which the state is trying to maintain.

The maintenance of the rules governing the creation of surplus value and the retention of the exchange principle as the dominant organizing principle of society necessitate the establishment and growth of subsidiary regulatory principles. These principles must then be prevented from intruding into the domain of private production (Offe, 1984:50).

Thus the state vacillates between intervention to support the market and withdrawal so as not to weaken it: As the commodity form becomes more and more dependent upon the non-commodity form, the realm in which the commodity form is dominant shrinks.

Both of these processes - the withdrawal of resources from the economy and the intrusion of non-market principles - can come back upon the state as tax strikes and calls for the reprivatisation of state functions. Thus even if the state is acting in the interests of capital it may not be recognised as such, adding to its problems.

This indicates a third difficulty for the state. Even though the state has to maintain the accumulation process there will be a divergence of interests between the state and capitalists. The state has to maintain the accumulation process for capital as a whole and therefore may need to act against the isolated and competitive nature

of capitalist units. There can be no collective capitalist interest as individual capitalist units are competing against each other (Offe, 1974:33-34). Also these units are generally acting with short-term, narrow interests and often do not recognise the importance of the state's nominally legitimating policies.

However, despite this divergence of interests between the state and capitalists, the state does generally act in their long term interests. Because the state is dependent upon the accumulation process, both for its own resources and for its nominal legitimization, it must ensure a reasonable level of economic activity. The basis of capitalist economic activity is investment. But it is precisely this investment that the state cannot enforce. Hence the state is dependent upon an activity that is beyond its control: it is dependent upon the willingness of capitalists to invest. Therefore it must encourage and promote investment, which it does, in part, by socialising the costs of production and thereby lowering the cost of new investment. As shown, this leads to a fiscal crisis and may also place a burden upon capital. But, more importantly, this relationship of dependency means that capitalists, in their collective role as investors, have an indirect veto over the state (Block, 1979:133). By not investing they have the potential to deprive the state of its resources and thereby obstruct its policies. This power of veto does not need to be organised or explicitly stated to be effective:

[Capital] is in a privileged power position, which results from the fact that, in a capitalist society, the state depends on the flourishing of the accumulation process. Even before it begins to put explicit political pressure and demands upon the government, capital enjoys a position of indirect control over public affairs (Offe and Wiesenthal, 1980:85).

The isolated and unco-ordinated actions of individual capitalists are sufficient, in aggregate, to cause economic and thus political crises. Therefore state policies must be consistent in the long term with the accumulation process and must encourage and facilitate investment. This is the result of the structural dependence of the state upon the accumulation process and it is not derived from any conspiracy or alliance of the state with any particular class or from the state acting directly as the instrument of any class:

The entire relationship between capital and the state is built not upon what capital can do politically via its association, but upon what capital can refuse to do in terms of investments decided upon by the individual firm. This asymmetrical relationship of control makes comparatively inconspicuous forms of communication and interaction between business associations and the state apparatus sufficient to accomplish the political objectives of capital (Offe and Wiesenthal, 1980:86).

Hence there are two centres of power in a capitalist society: the state and the investors upon which it is dependent:

In New Zealand, as in all societies, there is a dialectical relationship between economic and political interests. The State ...occupies a dominant role within society. On the one hand, it has enormous power to influence economic and social behaviour and does so in many areas of social life. On the other hand, its [nominal] legitimacy rests upon ensuring that most people are satisfied most of the time. This means that the State has to respond to the demands of key economic

groups in order to ensure that they produce the goods and services that satisfy societal needs....State sensitivity to key producer and commercial groups means that organised economic interests are constantly taken into account in Government decision making....There are, therefore, two main individual centres of organised power in New Zealand - one public, one private. They are in a dependent relationship with one another (Clements, 1982:143).

Here it needs to be pointed out that, just as the state sector should not be referred to as the "public" sector, the state should not be called a centre of "public" power. Although the state is dependent upon investors it also needs some degree of independence from them and their short term interests if it is to maintain the accumulation process on a long term basis.

Thus state is constantly faced with planning incompatibilities, including those that arise from its intervention in the economy. This means that it cannot act consistently. Instead its activities have a "vacillating, active-reactive" (Keane, 1978:65) nature as it attempts to maintain accumulation:

State involvement in the New Zealand economy has not been based on any consistent theory but has been essentially pragmatic. Various techniques have been used, regardless of their intellectual ancestry. Thus today we find that state intervention is many-layered, often as a result of successive measures being introduced to modify the side-effects of earlier ones (Task Force, 1976:269).

These "side-effects" arise because of the contradiction between accumulation and nominal legitimization and the contradictory nature of state intervention. Even with - and because of - state intervention, accumulation is problematic. The cure has become a curse.

2(b)(ii). Nominal Legitimation in Advanced Capitalism.

Legitimation is the fourth element of Offe's definition of the state: in order to be able to fulfill its functions as a capitalist state it must deny these functions and instead appear to be acting in the general social interest. This is nominal legitimization. The state has to engender the belief that it is acting in the public interest at the same time as it is maintaining the accumulation process.

With the rise of market dysfunctions in liberal capitalism, leading to state intervention in the economy and the collapse of the ideology of equal exchange, come fundamental changes in the nominal legitimization system. Not only does the collapse of the ideology of just exchange mean that there is a need for a new form of nominal legitimization, but state intervention in the market actually increases the need for nominal legitimization. This is because economic growth is no longer seen as occurring through spontaneous market forces but is now a matter of political design (Offe, 1984:198). Therefore success

in the market is seen as being contingent upon the extent to which state favours can be procured. Also, by socialising the costs of production in such areas as health, housing, and welfare, the state is increasing the areas of life which it administers and therefore the areas of life which are seen as political (Habermas, 1976:71-72). This draws attention to the role of the state and in particular to its planning and allocative functions. This all increases the need for legitimization: as the state acquires more functions it requires more (nominal) legitimization (Offe, 1976a:16).

In advanced capitalism the state's nominal legitimization depends upon three related factors: democracy, technocracy and the Keynesian welfare state. Advanced capitalist states cannot maintain nominal legitimization without some form of democracy. The bourgeois ideology of civil liberties and individual political rights, which has become firmly established in capitalist societies, finds its main political expression in universal suffrage. Consequently, "...[nominal] legitimization can only be dissociated from the mechanisms of elections temporarily and under extraordinary conditions" (Habermas, 1976:36). But direct participation in policy making (i.e., practical democracy) is likely to result in policies inconsistent with the state's function of maintaining accumulation. What is required therefore is a system of democracy that allows some form of public participation in the political decision making process without threatening the continuation of private market decisions. This type of system is found in technical democracy. The state's decision making process becomes uncoupled from

the mechanisms of democratic politics. Democratic decision making means no more than taking part in tri-ennial elections:

Certainly the system which has evolved in New Zealand does not rest upon direct democracy with its stigmatisation of the apathetic and apolitical. What has emerged instead is a system of representative democracy in which all that is required of the citizens is that a vote be cast every three years....[This is] sustained by a culture which expects and rewards limited, constrained participation (Levine, 1979:142).

It is the principle of participation that is important for nominal legitimization. There must appear to be opportunities for public input into decision making and the state must appear to be responsive to this input.

This depoliticised democratic system is itself nominally legitimated by technocracy. In order to provide the goods and services upon which nominal legitimization depends, the state must maintain a stable economy. The state must intervene into the economy to overcome actual and potential market instabilities. Its principle function becomes "cautious crisis management and long-term avoidance strategy" (Offe, 1976b:415). Stability is the implicit goal of the state's carefully designed strategies and preventive techniques. This changes the nature of politics:

Insofar as government action is directed towards the economic system's stability and growth, politics now takes on a peculiarly negative character. For it is oriented toward the elimination of dysfunctions and the avoidance of risks that threaten the system; not, in other words, toward the realization of practical goals but toward the solution of technical problems (Habermas, 1971:102-103).

This is technocracy. It means that the state's decision making processes are based upon "technically interpreted avoidance strategies", not upon "guidelines for action based on a consensus" (Offe, 1976b:419). This justifies depoliticisation as it is considered that the public no longer have the necessary skills to participate: "...as soon as an issue is institutionally defined as requiring scientific advice and expertise, the scope of legitimate participants is drastically reduced" (Offe, 1984:168). Habermas says:

...propaganda can refer to the role of technology and science in order to explain and [nominally] legitimate why in modern societies the process of democratic decision-making about practical problems loses its function and "must" be replaced by plebiscitary decisions about alternative sets of leaders of administrative personnel (Habermas, 1971:105).

Instead decision making is delegated to state experts.

Depoliticisation is also justified by the "...culture which expects and rewards limited, constrained participation" (Levine, 1979:142). This sustaining culture can be described as civic privatism. It is "political abstinence" combined with an emphasis on career, leisure and consumption that promotes the expectation of suitable rewards within the system (Habermas, 1976:37). This

expectation links with the third source of nominal legitimization: the state maintains the image of an administrative system that is acting in the public interest and that all members of society benefit from its actions in maintaining accumulation. This image is conveyed by the Keynesian welfare state, which is "...perceived as an independent body regulating the economic system, sustaining private enterprise and adjudicating in the distribution of national income" (Shirley, 1982b:256). The capitalist economy becomes seen as a positive sum game: the state intervenes in the economy to stimulate economic growth which, in turn, increases the resources the state is able to withdraw from the economy, thus enabling an extension of its welfare services, at the same time as continued economic growth reduces the need for the welfare state. Thus everybody benefits (Offe, 1984:196-197). In this way the Keynesian welfare state creates a consensus on the need for economic growth and social security and transforms possible conflicts over the control of the mode of production into claims over the distribution of goods and services (Offe, 1984:194). Political demands are transformed into economic demands (Wright E, 1978:157). In its intervention to stimulate economic growth the Keynesian state is also a technical state, thus linking the three sources of nominal legitimization.

But this interrelated nature of nominal legitimization in advanced capitalism does not mean that nominal legitimization is unproblematic. The state attempts to ensure that only the minimum conditions for nominal legitimization are maintained. This is to keep the costs and

dysfunctions (which arise through the contradictory nature of state intervention) of nominal legitimization to a minimum. However, the nature of nominal legitimization means that the required minimum conditions for nominal legitimization tend to increase over time:

There is a certain logic to [nominal] legitimization which means that the political apparatus gets progressively diminishing returns in added [nominal] legitimization for a given programme over time. Once a programme becomes seen as a right, the continuation of that programme adds little to the [nominal] legitimacy of the state whereas a cutback in the programme would constitute a source of delegitimation. There is thus not only a tendency for programmes once established to continue, but a constant pressure on programmes to expand, regardless of the requirements of the accumulation process (Wright E, 1978:157).

Thus, in maintaining nominal legitimization the state becomes overloaded with demands, leading again to calls for cut-backs in its functions and expenditures (Offe, 1984:67-73).

In technical democracy decisions are made by the the executive and those groups with the most power of veto. These are the two centres of power previously identified by Clements. These include major corporate groups, producer groups, and, to a limited extent, unions. These decision making partnerships are described as neo-corporatist (Offe, 1984:167-168). Neo-corporatism is characterised by its informal and inconspicuous methods and it is kept as "remote as possible ...from the general public eye ..." (Offe, 1984:167). Planning occurs in secret between corporate groups and the state:

The pattern is very consistent in Australia and New Zealand. Multinationals come in, and if there's any opposition to them, or if the government anticipates any opposition, there are repressive measures, curtailment of rights of appeal, closed door negotiations, no public information about the details that are struck between the government and the multinational ... (Nader, 1980:8).

The advantage (for the state) of neo-corporatist decision making, rather than democratic processes, is that neo-corporatism restricts the scope of the participants in decision making and the scope of strategies and tactics that are used in the pursuit of conflicting interests. It is thus a reaction to the overloaded agenda of democracy (Offe, 1981:140-141).

The executive (Cabinet and government departments) is the key state decision making structure:

It is an evident fact that the majority of legislative proposals and fundamental political decisions now fall under the responsibility of the executive branch with its vast bureaucratic information and regulatory facilities. It can more reliably decide issues because it has access to more information and greater chances for enlisting co-operation; and it can operate smoothly, without friction, because its non-public decision-making processes are shielded from the pressure of legitimization (Offe, 1976b:404).

New Zealand politics is characterised by this executive dominance (Palmer G., 1979:31). The Coalition for Open Government (COG) has said:

Over the last three years [1979-1981] the government has moved to constrain the rights and opportunities for dissent by individuals, resident's groups, environmentalists and trade unions. Some of these constraints have been imposed specifically to assist with the promotion of major development projects, others can be seen as part of a more general increase in the power of the executive (COG, No.11:6).

To shield this decision making from legitimization pressures it occurs in secret:

[State] secrecy allied with the "ideology of the expert" in presenting issues as technical ones when they are anything but, has long been recognised as an important power base of the state bureaucracy; one which the New Zealand bureaucracy has in abundance due to its almost absolute protection under the Official Secrets Act (Shannon, 1979:84).

The Official Secrets Act has since been repealed and replaced with the Official Information Act 1983. Although this new Act was the legislative centre of the National Government's Open Government policy it has not greatly changed the nature of the political system. "Open Government" is not like "Open Sesame": the door to effective public participation remains firmly shut. The Official Information Act makes information available unless there is "good reason" for withholding it. The Act lists a large number of such good reasons and makes Ministers responsible for deciding whether or not to release any information. If any requested information is not released an appeal may be made to the Ombudsman [sic] who may then advise the Minister to release it. He or she, however, cannot ensure its release as the Minister has the final power to veto this. Non-sensitive information is happily released,

which affirms the government's stated openness and seconds its nominated legitimacy, while other information is kept hidden. Ministers can control the release of information behind a legitimating facade of open government and freedom of information. This is the dual nature of politics. It will be shown that the ND Act has a similar dual nature.

## CHAPTER 2.

### NATIONAL DEVELOPMENT IN NEW ZEALAND.

New Zealand has had an Organisation for National Development (OND) (1944-45), a ND Conference (1969), a ND Council (1969-72), a Minister of National Development (since 1975), a ND Act (since 1979) and in 1983 the government published a ND Strategy. But what do all these mean? What is "national development"? One common feature to all national development programmes is that they involve some form of state intervention. In the previous chapter it was shown that state intervention requires nominal legitimization, that is, the state must appear to be acting in the public interest. This chapter looks at national development as part of the state's "official self-imagery and self-explanation" (Offe, 1976a:11) to see what lies behind the image of national development. The chapter begins with a selective history of national development in New Zealand and then discusses the meaning of the term "national development".

## 1. THE HISTORY OF NATIONAL DEVELOPMENT IN NEW ZEALAND.

The history of national development in New Zealand is closely linked with the history of state intervention in New Zealand. This began with Julius Vogel's Public Works policy in 1870. Vogel established the Department of Immigration and Public Works (this became the Public Works Department in 1872 and is now the Ministry of Works and Development) and borrowed overseas to establish an internal transport network, open up the land for agriculture and encourage immigration in the hope of stimulating the economy. He planned to pay back the loans by selling the opened up land to the new settlers. Although the land was opened up his plan failed because speculators forced up land values. New Zealand became a land of huge pastoral farms run by a small farming aristocracy (Sutch, 1966:59). However, it did initiate an active role for the public works sector:

...the public sector was used to provide the economic infrastructure without which the private sector could not have existed....It was this [Public Works] department which from 1870 until the late 1920s undertook the major task of constructing a national network which opened up the nation for development. It is to this department that we owe the construction of our road systems, of our bridges, tunnels and viaducts. When the government embarked on a scheme of using hydro-electric power, it was this department that constructed the power stations and the transmission lines. Public works also built for New Zealand: airports, schools, colleges, universities, hospitals, dental clinics, post offices, telephone exchanges and, more recently, state houses (Thorp, 1984:47).

The boom that was generated by the public works policy was quickly followed by depression that lasted for eighteen years. This was relieved by rising prices for New Zealand exports and the changes in farm production that followed the advent of refrigerated shipping (Sutch, 1966:64). Prosperity was taken for granted and after the war there was "lavish borrowing" for more public works and for the settlement of returned soldiers (Condliffe, 1959:45). This meant that the next depression, which began in New Zealand with the fall of export prices in 1921, had a harsh impact upon the country. It lasted until the Second World War.

In 1944, with the establishment of the OND, came New Zealand's first attempt at central planning (Baker J, 1965:527). The OND was to guide the country through the transition from war to peace, with particular emphasis on ensuring full employment. All major government departments were represented in the OND, along with representatives from commercial, industrial, agricultural and labour groups. Through various committees it carried out comprehensive planning exercises which "...would have converted New Zealand's economic policy into a centrally co-ordinated detailed plan" (Baker J, 1965:531). However, in October 1945, eighteen months after it began, the OND was abolished. Some of its functions were taken over by other departments, but comprehensive planning was discontinued. Reasons for disbanding the OND included the "impetuous proliferation of committees and sub-committees", the non-emergence of anticipated employment problems and an over emphasis by the OND on detail instead of providing

guidelines for economic policy (Baker J, 1965:530-531). However, the major reason appears to have been that the OND was taking too comprehensive and too political a role (Shirley, 1982b:250). Rather than being concerned with research and advice the OND tended to usurp the policy-making role of Cabinet. Its concern for a detailed and centrally co-ordinated plan for national development threatened both the system of private enterprise and the apparent neutrality of the state. The OND was in danger of breaking the limits to state activity set by the processes of accumulation and legitimization. Central planning threatened the structural limits of private production and could also have raised questions of actual legitimization in terms of the type of society that should be planned for and the role of the state in society. Therefore it was rejected and "...policy decisions reverted to the market place with cabinet reasserting itself as the 'neutral' body, coordinating the 'national' interest" (Shirley, 1982b:250).

A Cabinet sub-committee was established in the early 1950s to advise Cabinet on economic and financial matters. (This is now the Cabinet Economic Committee). Attached to this sub-committee was the Officials Committee which was made up of permanent heads of departments and which was responsible for advising the Cabinet sub-committee. It was not responsible for establishing policy and so avoided the problems of the OND (Baker J, 1965:569).

In 1969 the ND Conference was held. It followed a series of similar conferences on housing, industry, exports and agriculture that had been held during the 1950s and 1960s. These conferences aimed at co-ordinating the various groups in their particular areas but there was no attempt at overall co-ordination. The ND Conference was an attempt at such overall co-ordination:

...was the first major effort to look at New Zealand's opportunities and problems comprehensively in a long-term context, with a view to defining realistic objectives and guidelines for development (Task Force, 1976:11).

The type of planning used in the ND Conference was carefully distinguished from any form of central planning:

The National Development Conference marks the coming of age of a form of economic planning that has been evolving in New Zealand over the past two decades. During this period there has developed a growing demand for more co-ordinated, longer term thinking about the economy and a growing awareness of the value of setting objectives and targets by a process of co-operation and consultation both within and between sectors. This process, known as "indicative" planning, is as much in contrast with a completely unplanned type of economy as it is with planning of the authoritarian type. Its guidelines and targets are not imposed upon the economy; rather they are arrived at by consultation and consensus between Government and the private sector, and so serve as "indications" of what appears to each to be feasible and desirable (ND Conference, 1969a:7).

The distinction between indicative planning and authoritarian planning was made to prevent any nominal or actual legitimisation problems arising through what could have appeared as an attempt by government to impose a central planning mechanism upon the economy. The function of indicative planning is to overcome the uncertainty inherent in the

capitalist market (Philpott, 1971:8-15). In a purely laissez-faire market there is uncertainty about the future growth of the economy and about its future shape. Such uncertainty can inhibit the investment necessary for growth. Indicative planning attempts to reduce these two areas of uncertainty by planning for a high rate of economic growth and by indicating the relative importance of the different sectors (e.g., agriculture, manufacturing, tourism, labour) in the economy. Target growth rates are established for each sector so that, if met, they will give both the desired growth rate and shape of the economy. It thus indicates the desired future shape of the economy to assist planning by private and public organisations. No attempt is made to impose these targets upon the economy and there is no allocation of quotas to ensure that the targets are reached. Indicative planning merely provides a broad framework within which private enterprises can make co-ordinated but free investment decisions. Thus indicative planning has a "voluntary nature" (Jessop, 1980:41). In this respect it contrasted sharply with the much more centrally directed approach taken by the OND.

The Conference consisted of a series of committees and sector councils that contained representatives of major economic interests (predominantly capital interests) and government. These established the target growth rates for the economy and the individual sectors. The Conference decided that these targets would require ongoing review so it recommended the establishment of a ND Council to act as a "co-ordinating nucleus" for the ongoing sector councils (ND Conference,

1969a:14). This recommendation was accepted and the ND Council was established in 1969, shortly after the end of the Conference. A Targets Advisory Group was established to keep the targets under review and if necessary to propose changes in them or in the methods for their attainment. In 1972 the Labour Government took office and made some changes to this system (Task Force, 1976:13). The ND Council was abolished, but its functions were taken over by the Cabinet Committee on Policy and Priorities. The Targets Advisory Group became the Planning Advisory Group. The sector councils, most of which were retained, now reported directly to the appropriate Minister.

The ND Council and the subsequent Labour mechanism provided the basis for planning in New Zealand for the first half of the 1970s. However the targets set by the ND Conference were not reached. (For details of the targets set and the actual outcomes see Task Force, 1976:16.) One reason for this was that the nature of the targets was misunderstood by many of the people involved. Often the targets were seen as forecasts instead of goals. When it became clear that the targets were not being reached, planners tended to reject the targets as bad forecasts instead of asking why they were not being reached and what could be done about it (Philpott, 1976:16). Also the targets became isolated from the international and national contexts in which they were derived. When these contexts changed (i.e., Britain joined the European Economic Community, New Zealand joined the International Monetary Fund, oil prices increased, agricultural production declined) the targets needed reassessing but despite the on-going planning

mechanisms they were not (Shirley, 1982b:251). Due to the discrepancies between the targets and the actual outcomes the ND Council mechanism gradually lost momentum and there was a growing lack of co-ordination between its structures. Many of the sector councils meet infrequently and irregularly and the key Planning Advisory Group rarely met after 1973 (Task Force, 1976:14).

Further changes followed the next change of government in 1975. The incoming National Government established a portfolio of National Development and abolished the Cabinet Committee on Policy and Priorities. In 1976 a Task Force on Economic and Social Planning was established to "...study previous experience with planning in New Zealand and to recommend an institutional framework to meet present-day requirements for planning" (Task Force, 1976:i). "Planning" referred to economic and social planning in the public and private sectors. The Task Force was required to report to the government within six months. It concluded that the major faults with previous planning methods were a lack of regular appraisal of the extent to which planning goals were being reached and a lack of a satisfactory mechanism for co-ordinated planning (Task Force, 1976:x). To overcome these problems it recommended the establishment of a Planning Council. This was established by the New Zealand Planning Act 1977. This Act also gave a statutory basis to the Commission for the Future, which had been established in 1976.

The New Zealand Planning Council represents "...the promised revitalisation of the planning mechanism set up as the ND Council by the previous National Government" (NZPD, 1977:2355). Although the Council continues the consultative planning of the ND Council it is not concerned with the setting of targets. Under its Act (section 5(1)(a)) one of the principle functions of the Planning Council is "...to advise the Government on planning for social, economic, and cultural development in New Zealand." This development is medium-term development (i.e., a five year planning horizon). It must also assist the government in co-ordinating planning, act as a focal point for consultative planning, foster discussion between government and private agencies and prepare and publish reports on New Zealand's development.

The Commission for the Future was established to study the possibilities for the long-term (i.e., a 30 year time span) economic and social development of New Zealand and to ensure that such possibilities were recognised and discussed. A series of documents under the general title "New Zealand in the Future World" were published, setting out four different scenarios for the future of New Zealand society. In conjunction with these several public polls were conducted and these found a lack of public support for the government's Think Big strategy. It is likely that this contributed to the government's decision in September 1982 to disband the Commission.

At the 1979 National Party Conference Mr Barry Brill, the Parliamentary Under-Secretary for Energy, gave an address in which he outlined a strategy for "New Zealand's second 'Great Leap Forward'" (Brill, 1979b:15). (The first leap occurred with refrigerated shipping.) The strategy would enable New Zealand "...to regain its status as 'God's own economy', to achieve massive growth levels and to provide employment opportunities in abundance" (Brill, 1979b:16). This was the first public mention of what became known as the Think Big strategy. It involved large-scale energy and capital intensive projects based upon an apparent surplus of energy in the forms of hydro-electricity and Maui gas. Brill said that these projects were vital to New Zealand and that they needed to be implemented quickly. However, delays in the planning system could prevent this so he called for a streamlined planning system for projects of national importance. This was the first public indication of the impending ND Act (see Chapter 3).

Think Big was part of a wider strategy to restructure the New Zealand economy by emphasising and encouraging the export sector. The major constraint to economic growth had been identified as the balance of payments deficit. Increasing exports would earn more foreign exchange which, it was assumed, would improve the balance of payments and stimulate the domestic economy. Exports, such as petrochemical products and aluminium, from the Think Big projects would play an important role in this. Projects associated with Maui gas would also reduce the amount of oil that needed to be imported, thus saving foreign exchange. The projects would also attract the new investment

that was considered necessary: "If New Zealand is to achieve a more satisfactory rate of exchange, maximum encouragement must be given to worthwhile new investment projects" (Muldoon, 1979:21). The strategy was summarised in the 1979 Budget:

The aim of this budget is to set a course which will encourage the reshaping of the economy in a climate in which initiative and enterprise can function more flexibly and freely. I trust that I have made the Government's growth strategy clear. Quite simply it is this: to put in place measures which will overcome the major obstacle slowing New Zealand's development, the shortage of foreign exchange. Tonight I have announced policies that will boost exporter's profitability, ensure greater investment in the export sector, and help to lift exports to the level necessary to accelerate economic growth and to provide the level of imports we need (Muldoon, 1979:37).

The strategy was the key to the National Party's election campaign in 1981. At this stage the Think Big projects already approved or being actively considered, were the second aluminium smelter, the synthetic petrol plant, the methanol plant, the Marsden Point oil refinery expansion, the NZ steelmill expansion, the Clutha power scheme, the Kapuni ammonia urea plant, the CSR-Baigent pulpmill, a third potline for the Comalco aluminium smelter, railway electrification, plus other less extensive projects. But less than two months before the election three of the major projects suffered setbacks. Alusuisse withdrew from the second aluminium smelter consortium, Mobil postponed signing agreements on the synthetic petrol plant pending the outcome of the election, and the cost estimates for the Marsden Point oil refinery nearly doubled. To bolster the strategy the government quickly approved the NZ steelmill expansion. This

approval was against Treasury advice and included a commitment to provide coal for the mill before proper cost or feasibility studies of this were carried out. This premature commitment, typical of the government's response to many of the Think Big projects, is now causing serious planning and supply problems in the Waikato coalfields (COG, No.16:1-9). National won the election but with a majority of only one and with less votes than Labour. However, it still claimed that this was an endorsement of its Think Big strategy (Wilson, 1982:69).

Finally, in late 1983 the National Government published its ND Strategy. This was a glossy document that indicated the future direction of New Zealand society (as envisaged by the National Government) so that this direction could be understood and followed with confidence. This direction was towards:

...greater freedom of enterprise, more effective competition to serve customers and more constructive co-operation among the different elements of our economy and society in achieving national objectives. The emphasis is on making room for private initiative and innovation in a more open and competitive environment ... (ND Strategy, 1983:32).

## 2. THE MEANING OF NATIONAL DEVELOPMENT IN NEW ZEALAND.

From these various mechanisms and strategies a number of common features indicating the real nature of national development in New Zealand can be drawn together. These are presented in terms of 1) the contradiction between accumulation and nominal legitimization and 2) the distinction between technical and practical planning.

### 2(a) Accumulation, Legitimation and National Development.

The professed aim of all these development mechanisms and strategies was to ensure sufficient levels of economic growth to bring about increased standards of living, or improved social well-being. For instance, the central objective of the ND Strategy (1983:7) was "Higher living standards for all New Zealanders, including the disadvantaged, through sustained economic growth ..." But little or no attention is paid to the relationship between economic growth and social well-being. It is simply assumed that social well-being depends upon economic growth and that economic growth will cause a general increase in social well-being. This assumption is evident in all forms of social policy in New Zealand: "...policy and planning decisions have been reduced to a form of 'economic myopia' which correlates

social wellbeing with increased economic growth" (Hall and Shirley, 1982:146). However, this overlooks an important distinction that should be made between growth and development.

"Growth" usually refers to an economic phenomenon and is commonly measured by an increase in gross national product. It is the increase in the economic output of a country and it usually occurs through technological innovation. "Development", however, normally describes a political process that is based upon the distribution of this new output (or the redistribution of existing output) so that the standards of living of all the population are raised. "Put simply, development means good growth ..." (Berger, 1974:52). Despite this important difference, growth and development are often confused:

There is currently an oversimplified and quite misleading equation made in New Zealand between growth and development. The two terms are frequently used interchangeably, the 1980 budget speech being a case in point. It is taken for granted that growth will bring development (Counter-Strategy Group, 1981:9)

But growth does not necessarily bring development. According to Sutch (1966:98), for example, "...the benefits of refrigeration in general and of rising prices after 1900 went to the large landowners and the banks and mortgage institutions." The Think Big strategy was a growth strategy and it gave no attention to the distribution of any increased wealth. It will not bring any development or growth: a Treasury report shows that on the basis of Treasury's 10% rate of return standard, the steelmill and refinery expansions and the ammonia urea,

methanol and synthetic petrol plants will involve an annual loss of \$130 million in national income (Treasury, 1984b:12-13). The strategy, as outlined in Brill's "Great Leap Forward" speech, was more explicit in its economic emphasis than the other development processes. It seems to have been based on a take-off theory of growth. The period of take-off is like a great leap forward when "...old blocks and resistances to steady growth are finally overcome. The forces making for economic progress ...expand and come to dominate the society. Growth becomes its normal condition" (Rostow, 1960:7).

The equation of development with growth means that three of the four elements of Offe's definition of the state are reconciled. The four elements are that the state cannot organise or control accumulation, that it must maintain the conditions necessary for accumulation, that it is dependent upon the accumulation process for its own resources, and that it must be at least nominally legitimate. It is the last three elements that are reconciled when development is reduced to growth. Through its national development strategies the state creates and maintains the conditions for economic growth - which means increasing accumulation. If successful, these strategies increase the volume of accumulation from which the state can draw its resources. And because economic growth is assumed to enhance social well-being, the state's actions in maintaining private accumulation are nominally legitimated as being in the public interest. "National" development reinforces this.

However, the first element of Offe's definition - that the state cannot organise or control accumulation - would appear to contradict the notion of planning for national development. Planning would seem to interfere with the nature of accumulation, as in the case of the OND when the possibility of such interference caused its abolition. But the planning processes since then have aimed at providing a framework of certainty within which decisions can be made:

A major aim of planning must be to help create a stimulating but reasonably stable economic and social environment in which individuals and enterprises can effectively plan their own development (NZPC, 1981:58).

Thus the emphasis is on providing a planning framework and support structure for private interests. This, as shown in the next section, is assumed to be in the public interest (8).

#### 2(b). National Development: A Technical Process.

The national development programmes are based upon a technocratic model of politics and an associated Keynesian model of the economy:

To achieve balanced economic growth, and purge capitalism of its inefficiencies, Keynes advocated rational state intervention as a means of guiding economic and social development. He perceived the State, and its technicians, as independent bodies regulating the economic system, sustaining private enterprise and adjudicating in the public interest. Although planning and capitalism are conceived as being compatible, his primary concern was the preservation of the free market system as the source of individual initiative and the bastion of personal liberty (Shirley, 1982a:19).

The state and its technicians intervene in the economy in an attempt to overcome the dysfunctions of the market and to maintain growth. This intervention is directed towards "the solution of technical problems", not the "realization of practical goals" (Habermas, 1971:103). In Berger's terms, the solution of technical problems implies growth while the realisation of practical goals would mean development.

The definition of national development as a technical process also means that public participation is eliminated. There is no public participation in setting the goals of national development programmes. The goal of these programmes is given simply as growth. National development thus becomes like photographic development: it is a technical process directed towards the realisation of a fixed image and, of course, it occurs in the dark. Defining national development as a technical process also means that it is considered to be an apolitical process, thus removing its political implications (in terms of the distribution of wealth). The ND Conference was described as a "non-political forum" (ND Conference, 1969b:1), and the ND Strategy was called an "apolitical document" (ND Strategy, 1983:foreword). The OND was disbanded because it threatened to become too political for a

planning mechanism. (Yet, despite this proclaimed apolitical nature, every time there is a change in government there is also a change in the planning mechanisms and processes.) As part of this apparently apolitical nature, political demands are transformed into economic demands and there is a general consensus that the goal of national development is economic growth, or accumulation.

Also, public and private interests become linked so that the public interest is seen as the aggregate of private interests. According to Hugh Fletcher (1982:5), one of the proponents of the second smelter, "The private sector has an honourable tradition of developing the interests of society". (However, had the smelter proceeded, it would have been the public (as taxpayers) who would have borne most of the risks associated with the project, while Fletchers and the other consortium partners would have been "relatively immune" from these risks (Wright R, 1981:27-28).)

The Keynesian approach also sees the state itself as an apolitical body that sustains private enterprise and adjudicates in the public interest. And because the state is seen as acting in the public interest there is no need for public participation. The state's function is to maintain the conditions in which initiative and enterprise can flourish. This was a common theme in the development strategies and was clearly expressed in the 1979 Budget and the ND Strategy. The state maintains accumulation without taking away the

investment freedom of private enterprise. And because it is seen as an apolitical body acting in the public interest it is nominally legitimatized.

Thus through its national development programmes the state can maintain its functions of accumulation and nominal legitimatization. Whether or not it can do this on a continuing basis depends upon its ability to maintain the accumulation process at a sufficient level to ensure its own resources and its nominal legitimatization, and its ability to maintain legitimatization at the nominal level.

#### 2(c). Conclusion.

This analysis shows that there is a close association between the state, growth and the private sector. Through its national development programmes the state intervenes in the economy in order to maintain the accumulation process, but, in doing so, it claims to be acting in the public interest. This claim rests upon the assumption that public and private interests are congruent. All the national development programmes reduce the public interest to private interests. This is evident in the assumption that social well-being is derived from growth, the equating of development with growth, and the assumed consensus on the goals of development. Behind its ideological facade

"national development" means accumulation. "National development" is a double ideology. "Development" is a nominally legitimating ideology for private accumulation. "National" development further nominally legitimates this as being in the public interest. Thus, through national development programmes the state attempts to fulfill both its functions of accumulation and nominal legitimization.

## CHAPTER 3.

### THE THINK BIG STRATEGY AND THE NATIONAL DEVELOPMENT ACT.

#### 1. THE DEVELOPMENT OF THE THINK BIG STRATEGY.

The Think Big strategy was based on the development of New Zealand's hydro-electric and hydrocarbon energy resources. It was first publicly outlined (although not by name) by Mr Brill at the 1979 National Party Conference. However the conditions which gave rise to the strategy can be traced back to the period of electricity demand forecasting between 1945 and 1973 and to the discovery of the Maui gas field in 1969.

1(a). The Development of Hydro-Electricity Resources.

For the New Zealand Electricity Department (now the New Zealand Electricity Division of the Ministry of Energy) the period from 1945 to 1973 was one of power shortages and of planning for growth (Bertram and Johnston, 1980:1). During the 1950s there were power cuts due to lack of supply and once in 1972 parts of Dunedin had their power cut to ensure an adequate supply to the Comalco aluminium smelter at Tiwai Point. The importance of electricity was emphasised in the 1971 Report of the Planning Committee on Electric Power Development (PCEPD) (9):

Electric power provides the food on which industrial strength grows; community health is dependent upon it for adequate water supplies, adequate disposal of sewage, for keeping our hospitals functioning, and many of our modern devices which provide us with our creature comforts depend upon an adequate supply of electricity (PCEPD, 1971:13).

Thus industrial strength, and hence accumulation, depends partly upon an adequate electricity supply. Also nominal legitimation depends, amongst other things, upon the ability of the state to provide the necessary electricity for this "community health" and these "creature comforts". For these reasons the construction of power stations was given a high priority. But power shortages were still predicted for the late 1970s and early 1980s so South Island dam construction was speeded up even more and plans were made to use the recently discovered Maui gas field for electricity generation (PCEPD, 1971:19). The future demand for electricity was expected to be so great that the Maui field would only act as a stopgap measure to allow the deferment of nuclear

power development until the 1990s (10).

However, while plans were being made to increase generating capacity there were growing indications that there was in fact an excess of generating capacity. In 1974 the Environmental Defense Society (EDS) claimed that the electricity demand forecasts were too high. This was in response to plans to construct a Maui gas-burning power station in Auckland (Auckland thermal No.1 power station). The claim was officially denied but in 1978, after government attempts to avoid the Town and Country Planning Act (TCP Act) planning procedures had delayed the project (11), plans to build the station were abandoned due to a lack of electricity demand. In 1975 the composition of the Committee to Review Power Requirements (CRPR) was changed from three electricity supply representatives (from the Electricity Division of the Ministry of Energy Resources and the Electricity Supply Authorities) and three independent members (from the Ministry of Energy and Resources, Treasury and the Department of Statistics) to four supply representatives and three independent members. This was possibly a move by the supply representatives, with their vested interest in maintaining high levels of electricity demand, to stack the committee against the growing indications of the excess in generating capacity (Court, 1979:26). Indeed in 1975 the three independent representatives dissented from the forecasts but were outvoted by the four supply representatives (Court, 1979:26). A number of submissions to the 1976 Royal Commission on Nuclear Power expressed concern over the discrepancy between electricity demand forecasts and actual

consumption. Although nuclear power was rejected, planning for high levels of electricity demand continued. In 1977 the CRPR produced two series of forecasts: a majority schedule of estimates put forward by the supply representatives and a lower, minority schedule put forward by the independent representatives. In 1978 it produced an upper and a lower forecast, but recommended that the upper forecast be used as the basis for power planning. The crunch-point came in June 1978 when the Cabinet Economic Committee was informed that the forecasts were wrong and that there was a surplus generating capacity. The forecasts had been based on a fairly constant increase in power usage over the last forty years. However, for a number of reasons, including electricity price increases, slower economic growth, a saturation of domestic energy usage and energy conservation campaigns, this increase in demand was not maintained into the projection period. The long lead time associated with power station construction also makes forecasting difficult. Furthermore the Comalco aluminium smelter had began using ever-increasing amounts of electricity, which tended to hide and temporarily off-set the levelling off in demand. Forecasts had been made excluding Comalco's electricity usage but these were not released because of an agreement between Comalco and the government to keep secret the details of the smelter's power usage (NBR Outlook, 1984:11). A number of intended power stations, including Auckland thermal No.1, were removed from the construction schedule while others were postponed. However, over \$1000 million dollars had been spent on power stations that were unnecessary (Court, 1979:25). Rather than admit this over-investment the government decided to present the surplus generating capacity as a bonus that could be used to attract energy

intensive industries. Also a large workforce was dependent upon power station construction for continued employment, so the government decided to proceed with projects already under construction. Minutes of the Cabinet Economic Committee meeting of 7 June 1978 state:

Rather than abandoning [hydro] works already started the Government could continue with these projects recognising that there could be a resulting surplus of power and re-assess the situation at a later stage. If there was a surplus, consideration could then be given to introducing a new energy intensive industry to utilise this power (NBR Outlook, 1984:29).

The amount of surplus generating capacity would vary from year to year but in August 1979 the Cabinet Economic Committee estimated that an annual surplus of 2000 GWh would be available throughout the fifteen year period (Miller, 1982:141). However, in October 1979 the government began considering making up to 5000 GWh per year available for a third potline at the Comalco smelter and a second aluminium smelter. This new figure reflected growing optimism about the future of aluminium prices and the number of inquiries the government had received about the surplus (Miller, 1982:142-143). It was not based upon a reassessment of the surplus available. Thus the new figure carried with it "...the implication that the country should produce electricity in order to sell it to EII's [electricity intensive industries]" (Miller, 1982:142).

In February 1980 the government published a document called "Growth Opportunities in New Zealand" (Birch, 1980). This set out the investment and development opportunities in the various sectors, including energy, and encouraged such development by outlining the government assistance available to New Zealand and overseas firms. This assistance included concessional energy prices. The document implied that the surplus generating capacity was at least 5000 GWh per year. It was not acknowledged that this was over twice the actual surplus available, although a COG study soon showed that making this amount of electricity available would mean constructing new power stations or burning expensive imported oil in thermal power stations or both (Bertram and Johnston, 1980:2-5; see also Energywatch 1980:No.3). This was subsequently confirmed by the 1980 Energy Plan which stated that a "vigorous programme of system expansion" would be required to meet the expected new demand (Energy Plan, 1980:44). Thus in the guise of utilising an energy surplus, the government was committing New Zealand to build new power stations to provide cheap power to large industrial plants. It was thus socialising the energy costs of production. The only industries capable of absorbing the electricity surplus were large-scale energy intensive industries such as smelting and pulping. A third potline for the Comalco aluminium smelter was planned (with approval given in July 1980) and various companies began investigating the possibility of establishing new industrial plants to make use of the concessional energy prices. This led to the approval by the government, on 22 July 1980, of a second aluminium smelter and in September it signed a memorandum of intent with a Fletcher Holdings, Alusuisse and CSR consortium. (This consortium became South Pacific

Aluminium Ltd.) The Otago Harbour Board was also involved as a joint proponent.

1(a)(i). The Second Aluminium Smelter.

The new smelter would use up to 3000 GWh of electricity per year and was used to justify the high dam at Clyde even though the decision to build the dam was made before the smelter was planned (12). There was considerable difficulty in reaching price agreements for the supply of electricity to the smelter. The smelter could not be economic if it was required to pay the full price for its power but neither the government nor the consortium would release any details of their pricing negotiations. This lack of information led to much suspicion and debate about the level of power subsidy the consortium was seeking and the net benefit or cost to the nation of the smelter (13). An application to have the smelter placed under the provisions of the ND Act was made in March 1981. (Brief details of the events following this are given below but they are analysed in more detail in chapters 5 and 6; see also Appendix 3). This was approved by Order in Council on 27 April 1981. This Order in Council was challenged unsuccessfully in Court of Appeal (EDS v SPA [1981] 1 NZLR 146; EDS v SPA (No.2) [1981] 1 NZLR 153; (EDS v SPA (No.3) [1981] 1 NZLR 216; and CREEDNZ v G-G [1981] 1 NZLR 172) but the ND Act procedures could not begin anyway because the EIR required to set off the Act's timetable was not

forthcoming from the proponent. This report was finally published in July 1981 with the Tribunal inquiry being scheduled for March 1982. However, in October 1981 Alusuisse announced that it was withdrawing from the project because the power price and freight costs were too high. In January 1982 the remaining partners sought a delay in the proceedings of the ND Act but this was not granted and the application for planning consents had to be withdrawn. Despite much negotiation with other companies no replacement partner could be found.

The smelter saga affected another of the major projects that at several stages seemed destined to be placed on the fast track. This was the Luggate dam on the Upper Clutha River. The 1980 Energy Plan (1980:46) claimed that the dam would have to be placed under the ND Act provisions by April 1981 if it were to supply power to the smelter. However no application for these provisions was made because action on the Luggate dam was only needed urgently if the smelter was going ahead and already on the fast track. Without this urgency the ND Act could not be applied. Just before the July 1984 elections the government again announced that it would seek to have the Act's provisions applied to the dam. However, Labour won the election and said that the ND Act would be repealed but the Luggate dam would go ahead, under special legislation if necessary. Water rights for the dam have since been applied for in the normal way under the Water and Soil Conservation Act.

1(b). The Development of Maui Gas.

The Maui gas field had been discovered off the Taranaki Coast in 1969. Although it is a large field by world standards, difficulties in bringing the gas ashore meant it would only be developed if substantial markets for the gas could be found. Four possible uses were identified (Freer, 1973:14). These were:

- 1) as a premium fuel for domestic, commercial and industrial uses;
- 2) as a feedstock for petrochemical industries;
- 3) as fuel for energy intensive industries such as smelting;
- 4) as fuel for electricity generation.

At the time it was considered that the only realistic use was for electricity generation. The premium fuel market was being adequately served by the Kapuni field; there were only small scale domestic markets and strong competition in overseas markets for petrochemical products; and there were no prospective buyers willing to buy the gas for a smelting industry at a realistic price. Although it was realised that burning the gas to generate electricity was an inefficient and wasteful use of the gas, it was planned to build four new thermal power stations (including Auckland thermal No.1) to help meet the CRPR's forecasted electricity requirements. Without this guaranteed market for the gas it would not have been economically viable to develop the field (PCEPD, 1973:4). In April 1973 an agreement was signed between the Shell-BP-Todd consortium (the finders of the field) and the government to develop the field on a 30 year joint venture basis. One

important feature of the agreement is the Take or Pay clause (Freer, 1973:248). Under this clause the government is committed to paying for a specified amount of gas each year whether or not this amount of gas is used. In other words, the government has to use the gas within 30 years or pay for it anyway, although it is not clear who will actually own any unused gas after the 30 years (Fitzsimons, 1981:7). The 30 year period began when gas was first piped ashore and it expires in 2008.

The oil crisis in late 1973 increased the value of the gas and made its use for electricity generation even more wasteful, so plans were made to reticulate some of it as a premium fuel to areas not already served by Kapuni. Interest in petrochemical industries was revived and in May 1974 the Interdepartmental Committee on Petrochemicals (ICOP) was established. Its function was to investigate and report to the government "...on the type of petrochemical development best suited to New Zealand's needs" (ICOP, 1976:1). Its evaluations were based solely on technical feasibility and economic criteria. The report found that the best options were the production of chemical methanol for export and ammonia urea for nitrogenous fertilisers (ICOP, 1976:76). In August 1976 the government invited interested companies to submit proposals for using Maui gas in petrochemical manufacture (Morten, 1981:45-46). Eight proposals were received by the July 1977 deadline. These were assessed but no definite decisions were made. Early in 1978 a further proposal was received that involved a second hand ammonia urea plant. The proposal

was placed under the secrecy associated with the preparation of the Budget and was analysed by Treasury. The government decided to buy the plant but this decision was too late to include in the Budget so it was announced in November 1978. In March 1979 the Cabinet Economic Committee was asked to approve the project but this was a mere formality as the plant had already been bought. (NBR Outlook, 1984:16). (This is the ammonia urea plant at Kapuni.)

However the 1978 Budget (presented in June) did initiate a significant step in the development of New Zealand's energy strategy. It announced the establishment of a Liquid Fuels Trust Board (LFTB):

...to promote, encourage, finance, undertake, and co-operate in any activity that has as its purpose, or one of its purposes, the reduction of the use of imported oils for transport purposes in New Zealand (s4(1) of the Liquid Fuels Trust Act 1978).

The Board (which was not formally created until 31 October 1978) is funded by a levy on imported fuels and it contains representatives of Treasury, the Ministry of Energy, the Department of Trade and Industry, the DSIR and three from the private sector. It is responsible to the Minister of Energy.

In June 1978 the Cabinet Economic Committee was informed of the surplus in power generating capacity. As a consequence plans to use Maui gas for electricity generation were forgotten. This put pressure on the LFTB to develop quickly a strategy for Maui gas so that the government would not have to pay for gas not taken. In February 1979 the LFTB expressed concern that finalisation of plans for the expansion of the Marsden Point oil refinery could conflict with some of the options it was considering (e.g., the refinery expansion, as proposed, was not compatible with a synthetic petrol plant as together they would produce an excess of light fuels). The refinery expansion decision was accordingly delayed until September 1979, giving the LFTB a total of ten months in which to develop a strategy instead of the originally intended two years (Morten, 1981:60). By mid-1979 the government had received four proposals for petrochemical industries. BP proposed (originally in 1977) to build a nitrogenous fertiliser and methanol complex. Mobil wanted to build a synthetic petrol plant to test its newly developed but commercially untested process for manufacturing petrol. Shell planned a large scale liquefied natural gas complex and Petrocorp proposed an integrated petrochemicals complex consisting of a synthetic petrol plant (using the Fischer-Tropsch process), a methanol plant, an ethane extraction plant and its already approved ammonia urea plant (Morten, 1981:62).

On 31 August 1979 the first LFTB report was presented to the Minister of Energy (14). Its recommendations included:

- 1) that the gas be taken at its Take or Pay rate;
- 2) that gas be allocated for a methanol plant;
- 3) that gas be allocated for a synthetic petrol plant. (But no recommendation was given as to whether the Mobil or Fischer-Tropsch process should be used); and
- 4) that the planned expansion of the refinery be modified to be compatible with a synthetic petrol plant (LFTB, 1980:Part 1, pages 1-2).

These recommendations would result in an estimated 40-50% self-sufficiency in transport fuels by 1987. They were accepted by the Cabinet Economic Committee on 11 September 1979.

A second report was given to the Minister on 31 October 1979. Its recommendations included:

- 1) that the capacity of the methanol plant should be determined by the size of overseas methanol markets unless definite local markets could be found;
- 2) that the Mobil process be used for the synthetic petrol plant; and
- 3) that the size of the refinery expansion be reduced and a hydrocracker be included to make it compatible with the synthetic petrol plant (LFTB, 1980:Part 2, pages 1-3).

These were accepted by the Cabinet Economic Committee on 13 November 1979.

1(b)(i). The Methanol Plant.

There were two main contenders for the operation of a methanol plant. A BP-Fletchers-Challenge consortium proposed to build a 2000 tonne per day plant while a Petrocorp-Alberta Gas consortium wanted to build a 1200 tonne per day plant. After much debate, mostly in secret, it was announced on 31 March 1980 that the Petrocorp-Alberta Gas proposal had been chosen. Discussions for the final proposal began and on 18 July 1980 an application was made to the Minister of National Development to have the provisions of the ND Act applied to the project. (Brief details are given below with full discussion in chapters 5 and 6.) A joint venture company was formed (Petalgas Chemicals (NZ) Ltd) with Petrocorp holding 51% of the shares and Alberta Gas 49%. The ND Act application was referred to the Planning Tribunal on 20 August 1980. Final planning approval was given on 25 May 1981. Construction of the plant was completed within timetable and budget, and it was officially opened on 31 January 1984.

## 1(b)(ii). The Synthetic Petrol Plant.

Meanwhile, the Mobil process had been chosen for the synthetic petrol plant at the November 1979 Cabinet Economic Committee meeting. On 1 April 1980 the government and Mobil signed a memorandum of understanding to develop the project to the stage where contracts could be signed. A joint executive committee was formed to carry out appraisal studies. In September the New Zealand Synthetic Fuels Corporation Ltd (NZSFCL) was registered so that land purchases could begin at Motunui. NZSFCL will own and operate the plant which will be managed, under the overall control of NZSFCL, by Mobil. The government owns 75% of the shares in the Corporation, Mobil 25%. On 22 December 1980 NZSFCL applied to have the provisions of the ND Act applied to the synthetic petrol plant. However this application was withdrawn on 4 February 1981 so that it could be modified as a planned barge jetty was no longer required. An amended application was made on 9 February 1981. On 24 February 1981 the Order in Council applying the provisions of the Act to the project came into force and the application was referred to the Planning Tribunal. (Only brief details are given below with a full analysis in chapters 5 and 6.) On 11 September 1981 Cabinet announced that the project would go ahead despite the fact that the Tribunal had not completed its inquiry. However, Mobil refused to sign any final contracts until after the 1981 election (27 November) as Labour had promised to review all Think Big projects if elected. National won the election and in December the Planning Tribunal recommended that the project go ahead, although with an extended ocean

outfall to minimise pollution of reefs at Motunui. Final contracts were signed in February 1982 but by then an appeal against the plant had been lodged with the Court of Appeal (NTEPA v G-G [1982] 1 NZLR 312). The case was unsuccessful and the final go-ahead was given on 11 March 1982. However, a further case was brought against the plant. This was lodged with the Waitangi Tribunal on the grounds that waste from the plant would result in the pollution of tribal reefs and that this was against the principles of the Treaty of Waitangi (see Waitangi Tribunal, 1983). In March 1983 the Tribunal recommended that approval for an ocean outfall be revoked, with waste from the plant being temporarily discharged through the Waitara Borough Council outfall until a long term solution could be found. An Act of Parliament was ultimately passed to this effect. The plant began producing petrol on 17 October 1985 and was officially opened on 27 February 1986.

## 2. THE NATIONAL DEVELOPMENT BILL.

As well as outlining the philosophy behind the Think Big strategy Mr Brill's speech to the 1979 National Party Conference claimed that a new planning process was needed for projects of national importance. According to Brill, New Zealand's future depended upon the development of its energy resources. But he was concerned that protests against proposed uses of Maui gas could result in planning delays of up to four

years before construction of the projects could begin. During this time New Zealand would have to go on importing expensive overseas oil. This led Brill to ask:

Can we afford to wait for projects of vital national importance to find their way through the jungle of bureaucracy? Would it not be possible to identify a limited number of major undertakings as being essential to national development and give them first priority for hearing by the Planning Tribunal, excising appeal rights, extending the power of the Tribunal to grant all the permissions needed by local and national authorities (but giving these authorities locus standi to appear and argue their cases to the Tribunal) and limiting the Tribunal's power to the attachment of conditions to minimise perceived harmful effects? (Brill, 1979b:16).

Brill clearly thought that such a procedure was desirable. Shortly after the Conference he said that he had informally discussed the proposals with government colleagues, who had supported the idea and that he would be discussing the matter in more detail with Cabinet Ministers. National MPs Mr Doug Kidd and Mr Ian McLean were also involved as co-initiators of the Act (Kidd, 1979:4). Brill also discussed the idea with private industry for on 10 August he received a letter from BP, concerning previous discussions between BP, the Attorney-General and Mr Brill on his suggestions for a separate planning process for procedures of national importance. Attached to the letter were detailed proposals for a streamlined planning process. These detailed proposals were given two months before the public or any statutory or local authorities had an opportunity to comment on changes in the planning procedures. The letter, which did not come to light until it was leaked in December 1979, was sent in conjunction with BP's proposals for its methanol ammonia and urea plant and was obviously to

facilitate its progress (COG, No.7:7). BP claimed that:

The uncertainties which are inherent in the conventional process, especially in respect of time and the likelihood of a decision which is not compatible with the proposal can result in difficulties in gaining commitments from potential investors; lost market opportunities; and substantial cost increases. The procedure which is put forward below could result not only in reducing considerably the time span involved in obtaining administrative consents, but also in controlling the procedures to a degree which would greatly assist in overcoming all these problems (BP, 1979:A1) (15).

The suggested planning procedure would apply only to projects of national importance and would place these projects before a special Tribunal. All the statutory bodies normally involved in the application for planning consents would "...need to be made subordinate to the findings of such a Tribunal" (BP, 1979:A2). The Tribunal would be limited to considering the "technical and scientific" aspects of the proposal (BP, 1979:A4). The major decisions about resource allocation would have already been made through negotiations between the government and the developer (BP, 1979:3). The Tribunal would allow public participation while "...tacitly accepting that the proposal must be proceeded with in the national interest" and only after the major decisions had been made (BP, 1969:A1). This prejudgetment and control of the procedures clearly shows that the suggested planning process is not just a streamlined planning process. Instead it was an attempt to override and remove the normal democratic safeguards that protect citizens against the activities of private interests. The procedure proposed by BP only differs in detail from the ND Act. Both the process proposed by BP and the way in which it was proposed were characterised by a process of consultation between government and

private interests through which the major decisions were made before there was any opportunity for public input. They both had in common the "informal, inconspicuous and non-public procedures" which (Offe, 1984:190) describes as neo-corporatist.

A Government Caucus Committee on National Development was convened in September 1979 to direct the drafting of a ND Bill. The Bill was introduced to Parliament on 5 October by Mr Bill Birch, Minister of National Development. He said: "The Bill allows for major development projects to be declared works of national importance, and provides for a shortened and consolidated procedure for obtaining all appropriate statutory consents" (NZPD, 1979:3352). He went on to say:

In the near future the country is likely to see a number of major developments that will be vital to our future economic well-being and that will contribute greatly to the Government's objective of achieving greater self-sufficiency in the production of energy and other resources. Long delays in obtaining consents and approvals for such projects are a real possibility under present procedures, and such delays could not only be extremely costly, but could also undermine the viability of the project (NZPD, 1979:3352).

This continues the theme of Brill's speech and it clearly shows that the ND Act is an integral and important part of the Think Big strategy. It was to ensure the implementation of the projects making up the strategy.

The Bill contained all the essential features of the BP proposal. Projects of major importance would be placed before a Planning Tribunal for an inquiry and report. Consents that would normally have to be sought separately under the 28 Acts listed in the Schedule to the Bill could be sought simultaneously before the Tribunal. Statutory bodies appearing before the Tribunal would lose their normal decision-making powers and would instead become "supplicating bodies" (Bertram and Johnston, 1979:1). The Tribunal inquiry would allow limited public submissions and would be concerned only with site-specific matters. Once the Tribunal completed its inquiry it would send to the Minister of National Development a report containing its recommendation as to whether the consents should be granted. The Minister would then decide whether the project should go ahead. In making this decision he or she would not be bound in any way by the Tribunal's recommendation. No appeals could be brought against the Minister's decisions.

The Bill was referred to the Lands and Agriculture Select Committee on 5 October 1979 and public submissions were called for by 29 October 1979, giving the public only 24 days in which to prepare submissions. This was made even harder because of difficulties in getting copies of the Bill to study. Despite these constraints 361 submissions were received. Most of the submissions supported the need for some streamlining of the planning process but criticised the Bill for being too repressive and extreme. Major points raised included the unacceptable concentration of power in the hands of the executive, the lack of rights of appeal and the difficulties of bringing together 28

separate Acts under one Act without losing their carefully developed provisions. The Committee began hearing submissions on 30 October 1979. Forty-nine submissions were heard before the Chairman of the Committee, Mr Leo Shultz, National MP, announced, on 27 November 1979, that no more submissions would be heard. This left 24 individuals or organisations unheard, including the Wellington City Council, the Arthur's Pass National Parks Board and four individual members of COG (although the COG submission was heard). In justifying this Mr Shultz claimed that there was little likelihood of new, positive material being put forward in any further submissions (Evening Post, 28 November 1979, page 8). The Bill was reported back to Parliament on 4 December 1979. It still contained the same basic process, although some important modifications had been made. These included provision for limited rights of appeal; a provision to ensure that the Commissioner for the Environment would not be subject to Ministerial control; a requirement that there must be a need for urgency before the Bill's provisions could be applied to a project; and a requirement that the Minister of National Development give the reasons for any differences between the Tribunal's recommendation and the final consents granted. The Bill received its second reading on 5 December 1979. Urgency was moved by the government and a bitter debate followed until midnight. (Normally when urgency is moved Parliament remains in session until the business in hand is concluded but Parliament can not sit on a Sunday so the session had to be stayed.) The debate continued on 7 December 1979 in a similar fashion, with the second hearing finally concluding at midnight. On 11 December 1979 Parliament formed a Committee of the Whole House. (This is when a Bill is considered clause by clause.)

During the voting three government members (Mr Mike Minogue, Mr Ian Shearer and Ms Marilyn Waring) crossed the floor to vote against the clause that allowed the Minister of National Development to present to Parliament the reasons for any differences between the Tribunal recommendation and the final consents granted without requiring these to be ratified by Parliament. This was the first time for several years that government members had voted against the government in other than a free vote. Parliament concluded at 3.50 am. The third reading was held on 12 December, this time finishing at 2.00 am. The Bill was given Royal Assent on 14 December 1979. Seventy-one days after the Bill was first presented for public scrutiny it became law. The fast track legislation had arrived on a fast track of its own. Despite this it was not used until August 1980.

The government consistently maintained that the Act was needed to prevent delays in the implementation of the Think Big projects. The Clyde dam and the Karioi pulpmill were often given as examples of projects hindered by planning delays (for instance Brill, 1979a:14). However, most of the delays in the Clyde dam project were caused by the government itself and were not the direct result of protests. For instance, there was a delay of 30 months (February 1978 to September 1980) in the sitting of the Planning Tribunal at the government's request, the government took five months (January to July 1980) to reply to the appellants offer to abandon their appeal to the Court of Appeal, and often Government Ministers were not available for decision making at Cabinet meetings (CFE, 1983:76-77.) The Karioi mill took

only thirteen months from the time the Winstone company first declared its interest in building a mill to the time construction began. The proponents of the mill were required to get 59 consents under 34 separate Acts (Brill, 1979a:14). (This does show a need for an overhaul of the planning system to overcome its fragmentary nature but the fact that all these consents were obtained within thirteen months shows that delays were not a problem.) This was probably less time than it would have taken under the ND Act (NBR Outlook, 1984:28). Hence it is difficult to reconcile the actual events associated with these two projects and the claimed need for the ND Act. Also delays should not be seen as intrinsically hindering the planning process nor as being necessarily costly. Often they can save money by preventing unnecessary expenditure. For instance, it was only because of planning delays, mostly due to government intransigence, that the need for the Auckland thermal No.1 power station could be questioned. Without the delays an expensive and unnecessary power station would have been built. In these cases it is not appropriate to speak of "costly planning delays"; instead it is "costly planning shortcuts" that need to be discussed. In his speech to the EDS Seminar, Mr McLay (1983:14) acknowledged that delays in projects would be expected and justified if there was little public support for the policy behind the projects. He said: "If that policy is found wanting or does not have wide community support then there will inevitably be objections, litigation and delay in the individual projects."

Besides which, the government already had fast track clauses to allow them to implement projects without delay. The Town and Country Planning Act 1977 had required, for the first time, that the government obtain planning consent for any proposed works. However, a fast track, escape clause was included in the Act that allowed it to avoid obtaining planning consent if it considered it was "...in the national interest to construct or undertake any public work without delay" (TCP Act, section 116(2)). In such case of national importance authorisation for the work would be given through an Order in Council. However, these provisions applied only to public works. They could not be used for the authorisation of private works and were subject to judicial review. Section 23(7) of the WSC Act gave the government similar pre-emptive rights in relation to gaining water rights. Thus the government could have used existing legislation, with small changes, to speed up the planning process. A letter from Mr Bob Norman, Ministry of Works and Development, to Mr Cooper on 17 August 1979 suggested that the present procedures could be speeded up by six to twelve months by requiring the Planning Tribunal to give priority to certain classes of appeal. He also suggested that other sources of delay would be removed by the current proposals to amend the WSC Act. Cabinet minutes of 27 August 1979 state that "...irrespective of decisions on the proposal in this paper [for a new planning procedure] useful steps could be taken to shorten present procedures by minor legislative or regulatory amendment." Thus it is clear that, despite the claims of government, a concern with planning delays was not the sole reason for the ND Act. If this had been the case simple amendments to existing legislation would have sufficed.

Instead it was the inability to place private works on a fast track that provided one of the main reasons for the ND Act:

We knew that we were going to make some very major decisions this year - in fact all the major decisions would be made this year. We sat down to look at how they would be implemented, because implementing them was absolutely critical. Making a decision was nothing if there wasn't any guarantee of delivery. I have had a fairly substantial background in planning work, and it occurred to me that - particularly if the projects weren't necessarily going to be government projects - the mechanisms didn't exist to make sure that the projects would get through and be completed by the deadline (Kidd, 1979:4).

This relates the ND Act to the process of neo-corporatist planning. Previous planning procedures could have been used to ensure that there were no planning delays for government works. However, these procedures could not have been used for private works. Hence the ND Act was passed to enable government and private works to be placed on the fast track and to enable the state and proponent to plan for private works together and to control the planning procedures. The role of BP in the formulation of the ND Act shows this.

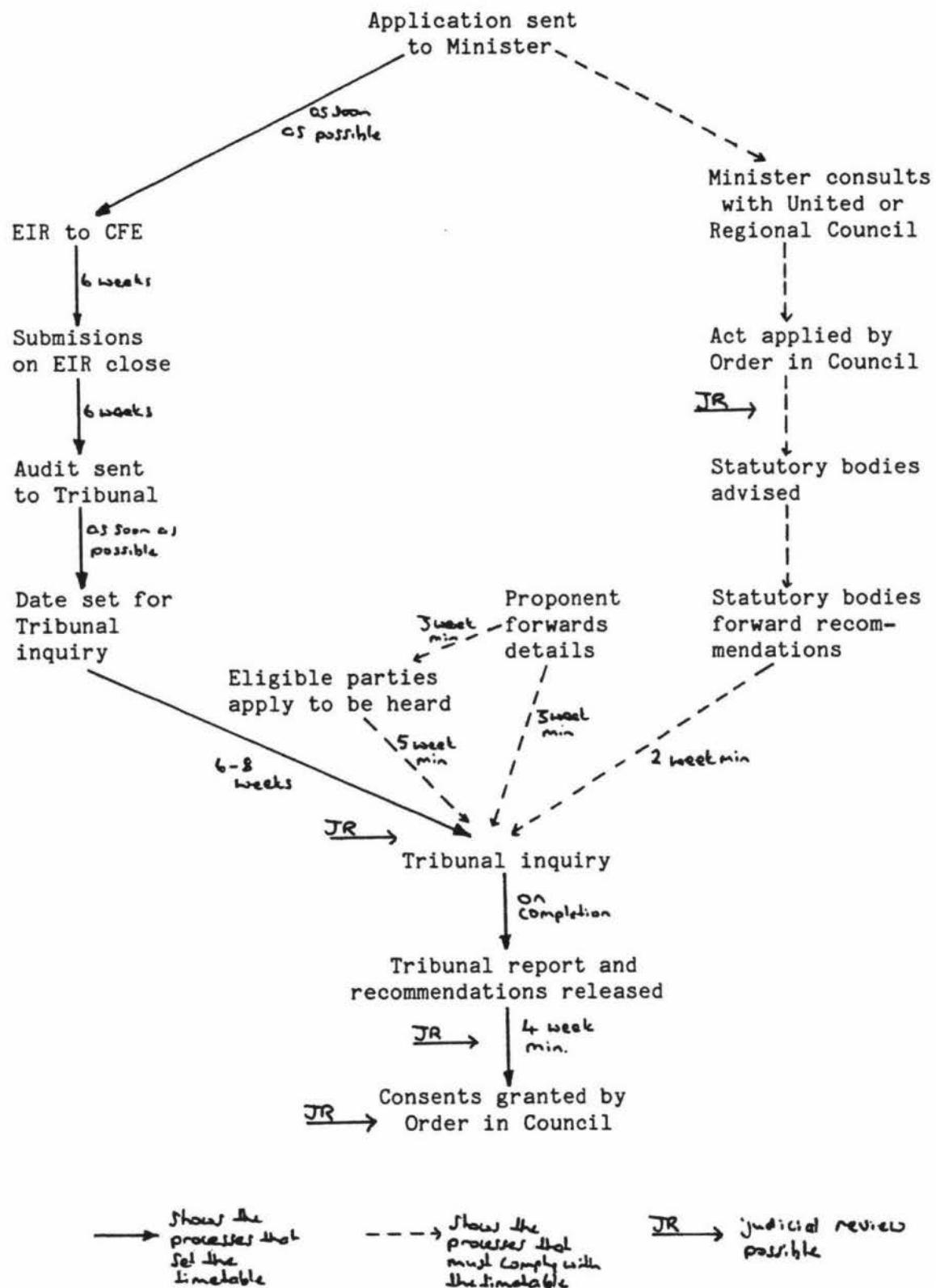
## CHAPTER 4.

### THE NATIONAL DEVELOPMENT ACT PLANNING PROCESS.

#### 1. DESCRIPTION OF THE NATIONAL DEVELOPMENT ACT PROCEDURES.

This section is a descriptive outline of the main features of the ND Act. The ND Act 1979 and ND Amendment Act 1981 are included in Appendices I and II, see also Figure 2. For the provisions of the ND Act to be applied to a work an application must be made to the Minister of National Development (s3(1)) (i.e., section 3, subsection 1 of the ND Act 1979). The work can be a government or private work. In the application the proponent must show that the work meets the criteria of section 3(3) (16). These are that it is a major work that is likely to be in the national interest, that it is essential that the decisions on the planning consents be made quickly, and that the work is essential for the development of New Zealand's resources, or the development of

Figure 2: NATIONAL DEVELOPMENT ACT PROCEDURES.



New Zealand's self-sufficiency in energy (excluding nuclear power), or the expansion of exports or of import substitutions, or the development of significant employment opportunities. The application must also contain a description of the work and its proposed location; specify what planning consents are required, and by what statutory authority they would normally be granted; include all details that would be required under the normal procedures; and give a statement of the economic, social, and environmental effects of the work (s3(2)).

The Minister must then consult with the United or Regional Council in whose area the proposed work would be sited (s3(4)). Following this, if the Governor-General in Council considers that the proposed work meets the criteria of section 3(3), then the provisions of the Act can be applied to the work by Order in Council (s3(3)). The Minister must then send the application to the Planning Tribunal but, before doing so, may delete any of the planning consents applied for or add any consents not already specified (s4(2)). The referral must be publicly notified and copies of the application must be forwarded to any statutory bodies, authorities, or individuals who would have been involved if the consents had been applied for in the normal way (s4(3)-(6)). The statutory authorities that would normally be involved must carry out investigations into the consents being sought.

As soon as practicable after making the application under section 3, the proponent must forward an environmental impact report to the Commissioner for the Environment (s5(1)). This Commissioner must make the report publicly available and call for public submissions. These must be made within 6 weeks (s5(2)). After considering the submissions the Commissioner must prepare an audit containing his or her opinion on the environmental implications of the proposed work. This audit must be publicly available and must be made within 3 months of the environmental impact report becoming publicly available (s5(3)(4)). The Act was amended in 1981 so that the Commissioner is restricted to commenting on the accuracy and adequacy of the environmental impact report (rather than commenting on the work itself).

As soon as practicable after receiving notification from the Commissioner that the audit has been completed the Planning Tribunal must give public notice of the date (which must be within 6-8 weeks of this notice) and place of the Tribunal inquiry (s7(3)). No less than 5 weeks before this inquiry date all those who have the right to appear before the Tribunal must give notice if they intend to appear (s8(4)). Those persons entitled to be heard include all relevant statutory and local authorities; any body or person affected by the work; or any body or person representing a relevant aspect of the public interest (s8(2)). No less than 3 weeks before the Tribunal inquiry the proponent must forward all relevant details and information to the Tribunal and all bodies or persons attending the inquiry (s7(5)). No less than 2 weeks before the inquiry those statutory bodies which would

consider the application if it were made in the normal way must forward recommendations, based on their investigations made under section 4, on the consents being sought to the Tribunal (s6(1)).

The Planning Tribunal must hold its inquiry in public (s7(6)) and must take into account those matters that would be considered if the consents were being sought in the normal way (s9(1)). However it cannot inquire into the matters relating to the national importance criteria of section 3(3) (s9(2)). The amendments to the Act in 1981 changed this so that the Tribunal can consider matters relevant to section 3(3) but only if these matters would have been considered if the consents had been sought in the normal way. Once the Tribunal has completed its inquiry it must forward a report to the Minister of National Development with a recommendation as to whether the consents should be granted and whether any conditions, restrictions, or prohibitions should be imposed upon each consent granted. The Tribunal must also forward copies of its report to all those who participated in the inquiry and make the report publicly available (s10(2)).

No earlier than 28 days after this the Governor General in Council, having taken into consideration the Tribunal recommendation and the criteria set out in section 3(3), may declare, by Order in Council, the work to be of national importance and grant any or all of the consents applied for subject to any conditions, restrictions, or prohibitions that are considered necessary (s11). The Order in Council

must be laid before Parliament within 14 days. If Parliament is not in session then this must be within 14 days of the commencement of the next session (s12(1)). If the provisions of the Order in Council differ from the recommendations of the Tribunal then the Minister of National Development must also present written reasons for the differences (s12(2)).

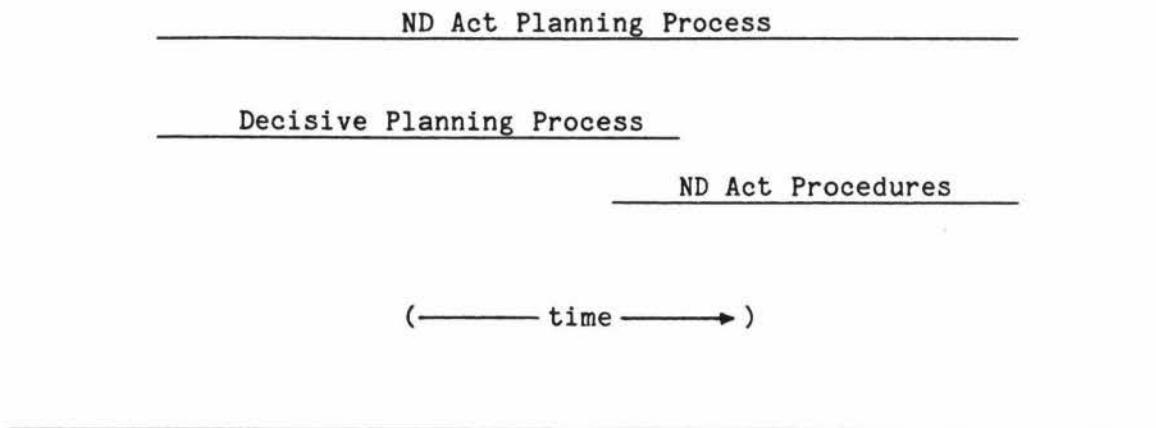
Tribunal inquiries cannot be invalidated through procedural errors (s17(4)). However, judicial review of the Tribunal procedures can be held on the basis of jurisdictional errors (s17(3)), and the validity of any Order in Council made under the Act can also be challenged (s17(3)). Any application for such reviews must be made within 21 days of the notification that the Tribunal report is publicly available (in the case of reviews relating to Tribunal procedures) or within 21 days of the Order in Council coming into force (if the review relates to the validity of an Order in Council) (s17(5)). The Court of Appeal must give priority to the hearing and it must be held within 49 days of the application for judicial review being made (s17(6)). The decision of the Court of Appeal in respect to such reviews is final (s17(9)).

## 2. ANALYTIC SCHEME FOR THE NATIONAL DEVELOPMENT ACT.

Planning for a ND Act project is a major exercise and a great deal of negotiation and many decisions are necessary before the ND Act can be applied. Hence it is important to look at the entire ND Act planning process, and not just the ND Act procedures themselves. The ND Act planning process begins when a development proposal is first discussed by the state and proponent and concludes when formal planning approval for the project is given. Significant steps in the ND Act planning process include the decision to commit particular resources to the project, choice of technology and site, the decision to apply the ND Act, and all the subsequent statutory procedures. The ND Act planning process can be divided into two separate processes: the decisive planning process and the ND Act procedures. The period of planning before the Act is invoked is called the decisive planning process because this is when the most important decisions are made. These include the decision by the state and proponent to go ahead with the project. This decision is made independently of statutory provisions (17). The period after the Act is applied involves the ND Act procedures. This is an analytical distinction only and there may be some chronological overlap between the two processes. The two processes are shown in Figure 3. The decisive planning process is the most important part of the ND Act planning process but the ND Act procedures are the more conspicuous.

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Figure 3: THE NATIONAL DEVELOPMENT ACT PLANNING PROCESS.



The ND Act procedures can be broken into five stages:

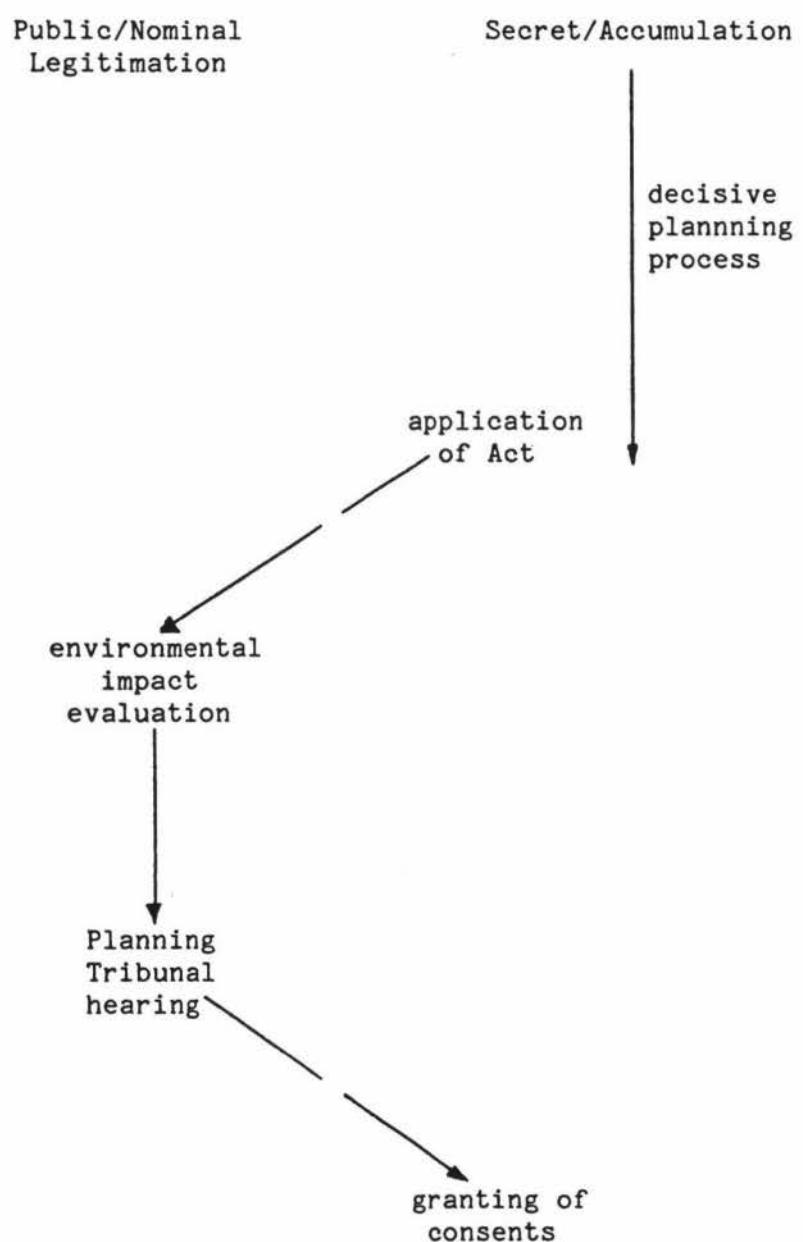
- 1) the application of the Act;
- 2) environmental impact evaluation;
- 3) the Planning Tribunal inquiry and report;
- 4) the granting of the consents;
- 5) judicial review.

Judicial review can occur at various points of the procedures but the other four stages are listed in the order in which they occur. However, as the first and fourth stages both involve secret Cabinet decisions it is appropriate to consider them together. Similarly, the second and third stages can be considered together as they both involve some form of public participation. By arranging the first four stages in this way and temporarily excluding judicial review, the ND Act procedures can be seen as consisting of two processes, one of which occurs in secret, the other in public. The next two chapters will look at the ND Act procedures in this way and will relate the secret process

to the state's function of maintaining accumulation and the public process to its function of nominal legitimization. Because the decisive planning process involves secret negotiations between government and proponent it is considered with the secret process of the ND Act procedures. Thus the ND Act planning process is analysed as a dual planning process that reflects the nature of the dual state. This scheme is shown in Figure 4.

This chapter concludes with a brief section on judicial review. This is considered before the main analysis because some of the material for the analysis comes from such cases of review. Chapter 5 looks at the decisive planning process, the application of the ND Act and the granting of consents in terms of the state's function of maintaining accumulation. Chapter 6 analyses the process of environmental impact evaluation and the Planning Tribunal inquiry in terms of nominal legitimization.

Figure 4:

ANALYTICAL SCHEME FOR THE NATIONAL DEVELOPMENT ACT PLANNING PROCESS.

### 3. JUDICIAL REVIEW.

One of the functions of the judiciary is to ensure that administrative decisions made by Tribunals and officials are made within the terms of the appropriate legislation and according to the rules of natural justice. This can be done by considering appeals brought before the Court or by considering cases of judicial review. Appeal is when the Court is concerned with whether or not the correct decision was made in terms of the interpretation of statutory guidelines. Review is when the Court is concerned with whether or not the decision was made in the correct way, bearing in mind the principles that have developed under common law (prerogative writs) and adopted by statute law (i.e., the Judicature Amendment Act 1972). Under administrative law there is no inherent right of appeal and it must be provided for in the specific legislation if it is to apply. There is, however, an inherent right of review although, in theory, it could be excluded by Parliament (Lamborn, 1980:13).

Under the ND Act, recourse to the courts is limited to judicial review. Thus the courts cannot consider whether an aluminium smelter is in the national interest but it can decide whether or not the decision to place an aluminium smelter on the fast track was made correctly and with regard to the proper facts and procedures. Under judicial review:

[The Judge's] duty is only to see that the matter in contention has been determined by the relevant statutory officer or tribunal within the confines of the appropriate legal jurisdiction, in accordance with natural justice in cases where that concept has not been excluded by legislation, and without illegality or actionable pre-determination (Mahon, 1979:197).

Under the Bill presented to Parliament there were extremely limited opportunities for judicial review. Neither the Order in Council applying the Act nor the Order in Council granting consents could be challenged or questioned in a Court of Law (clauses 4(3) and 15). Clause 16 expressly excluded all possible reasons for review of Tribunal proceedings other than on the grounds of lack of jurisdiction. "Lack of jurisdiction" was narrowly defined as where the Tribunal had no right to make the inquiry; or its report was outside its authority; or it gave no hearing "at all" to a person or body that was entitled to be heard; or it acted in bad faith (clause 16(3)). However, these provisions were substantially modified in the Act so that most kinds of review proceedings can now be brought under it (Lamborn, 1980:11). Section 17(1) does prevent any review being brought on the grounds of informality or error of form. This is to prevent procedural mistakes

or irregularities in the Tribunal proceedings from invalidating the inquiry. However, it is likely that any major procedural errors or irregularities could be challenged under the separate head of lack of jurisdiction. "Procedural mistakes" would only apply to minor errors such as public notice requirements (Palmer K, 1985:925).

It is unclear whether the initial intention of the Bill was actually to exclude most cases of review or whether it was a purposeful exaggeration which could then be modified as a concession to public pressure and to divert pressure from other provisions of the Bill. In his speech to the National Party Conference Mr Brill spoke of "excising appeal rights" from the planning system (Brill, 1979b:16). BP wanted to restrict rights of appeal to the proponent (applicant):

If an applicant ...considers that the constraints imposed by the Tribunal are such that the economic viability of the project is adversely affected to an unacceptable degree, he [sic] would have a right of appeal to the Minister (BP, 1979:A4).

No public appeal procedures were suggested. Nevertheless it does appear that public rights of review were initially envisaged by government (NBR, 10 December 1979:23). However, there was some subsequent concern in Cabinet that such rights might not be in the government's interests. Minutes of a meeting on 28 August 1979 between Cabinet Ministers and officials state:

The Crown Law Office were now not so sure that the Supreme Court should have the final say in any case brought against the Crown. What would happen if the Court found against the Crown and there was no right of appeal?

Clearly the concern expressed here was not for the protection of the public interest but to ensure that Cabinet's decision making power was not inhibited. The Crown Law Office suggested that it may be better to have a right of appeal but to require that such a right be claimed within 21 days, apparently in an attempt to limit reviews by default if possible. However, provision for this was not included in the Bill considered by the Lands and Agriculture Select Committee. The Ministry of Works and Development submission to the Select Committee also suggested that the time taken by the courts, rather than their role, should be limited and said that any provisions attempting to limit the role of the courts would probably be ineffective (Ministry of Works and Development, 1979:2). The Committee was also told, by Alex Frame, Senior Lecturer in Law at Victoria University, that any attempt to exclude provisions for judicial review could be fought in Court, all the way to the Privy Council if necessary.

Thus it appears that provisions for judicial review were included in the first draft of the Bill but that these were then removed, either because of uncertainty as to whether they could be used to limit Cabinet's power or so that they could be subsequently reinstated as a nominal legitimating concession. It was the clauses that attempted to exclude judicial review that "attracted most of the criticism expressed in submissions" (Ministry of Works and Development, 1979:8) and given

the short time allowed for the preparation of submissions it is likely that opposition to these clauses diverted attention away from the rest of the Bill.

Opportunities for judicial review are circumscribed in two main ways: by strict time limits and by limiting procedures to the Court of Appeal (Palmer K, 1984:924). Any application for judicial review must be made within 21 days of the notification that the Tribunal report is available (if the review relates to Tribunal procedures) or within 21 days of the Order in Council coming into force (if the review relates to either of the Orders in Council made under the Act) or within 21 days of the decision to grant consents (if the review relates to the consents granted or any of the conditions, restrictions and prohibitions imposed). This last restriction applies to all decisions concerning consents sought for a work that has been declared a work of national importance under section 3(3) of the ND Act, whether or not the decision in question was made under the Act. No applications for review can be accepted after these 21 day limits. A further section was added with the ND Amendment Act 1981. Under this section proceedings must be brought no less than seven days before the Planning Tribunal inquiry is due to begin if the review relates to any proceedings under section 3(1) or sections 4-7 and the proceedings can not be brought under the initial three heads. Prior to this it was unclear whether the time restrictions concerning any applications for review applied to these sections. This gives a varying amount of time in which proceedings can be brought depending on the section relevant

to the challenge. The minimum time will be two weeks for section 7(5). (This section relates to documents that must be forwarded by the proponent to the Tribunal and other parties attending the inquiry.) The main 21 day limit compares with one month for most appeals under the TCP Act, 28 days for appeals against decisions of the Director-General of Health under the Clean Air Act, and 28 days for appeals on applications made by the Crown for water rights under the WSC Act. Under English planning law a six week period is common but even this is criticised by judges and commentators as being insufficient time to bring a case for review (Lamborn, 1980:10).

The time restrictions do not stop with this short 21 day limit, for within a further 21 days a Court of Appeal judge must call a conference of all interested parties and fix a date for a hearing that is to be no later than 28 days after the conference. Thus the appellant will have a maximum of ten weeks in which to prepare the case. No postponement of the hearing is possible and the Court must give it priority.

The other restriction on review proceedings is that they are limited to the Court of Appeal. The case is taken straight to the Court of Appeal and no appeal or further review is possible:

The decision of the Court of Appeal on any such matter [brought before it under section 17] shall be final and conclusive, and there shall be no right of review or of appeal against the Court's decision (section 17(9)).

Under normal planning legislation there usually exists a further right of appeal. For instance, under the TCP Act, appeals can be made to the Planning Tribunal and the Tribunal's decision can then be appealed on a point of law to the High Court, the Court of Appeal, and the Privy Council if necessary.

Six cases of review have been brought under the Act; all but one of them concerning the proposed Aramoana smelter. The Aramoana cases related to whether discovery and interrogatories could be ordered against the Crown (EDS v SPA [1981] 1 NZLR 146); discovery of documents relating to the invoking of the Act (EDS v SPA (No.2) [1981] 1 NZLR 153); whether Cabinet was justified in invoking the Act (EDS v SPA (No.3) [1981] 1 NZLR 216 and CREEDNZ v G-G [1981] 1 NZLR 172); and the adequacy of the EIR (EDS v SPA (No.4) [1981] 1 NZLR 530). The other case involved the synthetic petrol plant and related to Planning Tribunal proceedings (NTEPA v G-G [1981] 1 NZLR 312). None of the cases was successful. One further challenge was made to the synthetic petrol plant but this was brought under the Treaty of Waitangi Act 1975. This eventually resulted in the cancellation of the plant's water rights to discharge waste into the ocean at Motunui. Further details of these cases will be given below. (The six ND Act cases and findings are summarised in Palmer K, 1982; see also Northey, 1981).

CHAPTER 5.THE NATIONAL DEVELOPMENT ACT AND ACCUMULATION.

The state must maintain the accumulation process. This is because the economy is the state's base for its power and nominal legitimization. The state's power depends upon its ability to raise revenue through taxation and borrowing, and its nominal legitimacy depends upon its ability to maintain a healthy economy and its using part of its revenue to provide welfare state services. Therefore the state is dependent upon the functioning of the accumulation process. One way in which it tries to maintain the accumulation process is through its national development programmes. In such programmes the emphasis is on economic growth, or accumulation. (Although, as "national development" programmes, they are presented as being in the national or public interest and are thereby nominally legitimated.) Economic growth is dependent upon the expansion of investment (and consumption). But the expansion of investment opportunities is not automatic. Within advanced capitalism there is a constant shortage of investment outlets

(Offe, 1984:122). In analysing the New Zealand economy the New Zealand Institute of Economic Research said:

At present the economy is producing at well below its capacity. Large resources of both capital and labour are lying idle or are under-used. Investment, employment and output are cyclically linked with more investment leading to greater demand for productive capacity, and more employment, and thus to more investment (Butcher et al, 1981:I.4).

Therefore, to maintain the accumulation process the state has, amongst other things, to ensure that sufficient investment occurs. But it cannot direct private enterprises to make investment decisions. It can only encourage investment by removing inhibitors to investment and by creating investment opportunities. This means that the investment decisions of private enterprise are no longer made according to perceived opportunities in a free market (as they were in liberal capitalism) but are now increasingly made according to state-created opportunities:

In my view, whatever growth potential there is in the near future is likely to be created through forms of investment and consumption that are administratively imposed upon the population - through industries such as defence, energy, transportation and communications. These are the industries that are the most likely to flourish and to catalyse any new cycles of capital-intensive accumulation (Offe, 1984:266-267).

Encouraging investment in energy was one of the key reasons for the Think Big strategy. Indeed a Treasury (1984b:summary, page 1) review of some of the Think Big projects referred to Think Big as the "major project investment strategy" (see also NZPC, 1979). The contribution

of the strategy to investment is shown in Table 1. This of course does not include the second aluminium smelter which would have meant an additional investment of \$650 million (1980 NZ dollars) over a four or five year period (SPA, 1981a:26).

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Table 1: INVESTMENT AND THE THINK BIG STRATEGY

	1982/83	1983/84	1984/85	1985/86
Millions of Dollars				
Think Big Project Investment	1,100	1,600	1,500	1,000
Other Investment	6,233	6,266	7,285	8,149
Total Investment	7,333	7,866	8,785	9,149
Think Big Project Investment as a Proportion of Total Investment (%)	15.0	20.3	17.1	10.9

Note: Figures for 1984/84 and 1985/86 are forecasts. Figures include public and private investment.

(from Treasury, 1984a:34)

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One of the inhibitors to investment in New Zealand, especially in major projects, has been the planning system. This was one of the main concerns expressed by BP in its letter to Mr Brill:

...some streamlining of the [planning] system in major projects is essential if those who are willing to expend capital on innovative developments are not to risk incurring added costs and losing potential markets....

Many potential overseas investors are basically interested in a plant which will produce product [sic] as part of a supply system to meet their future needs. If they are obliged to wait while administrative procedures of uncertain duration take place then they may very well not align themselves with any New Zealand project until they have a reasonably well defined time period within which it can be seen that the plant will become a reality. Under the present system this would not occur with the certainty necessary until the planning process is completed. Consequently, with the present planning process one runs risks not only of greater costs and of losing potential markets, but also of not having, from the outset, any committed investors/consumers (BP, 1979:2,3).

Similarly, the New Zealand Planning Council (NZPC) said:

The investment process itself is often costly because of the generally long gestation caused by delays in obtaining approvals, in construction, or in obtaining and installing capital equipment from overseas (NZPC, 1980:11).

The major costs of the planning system are time (in terms of inflation and, possibly, lost markets), money (the direct cost of planning) and uncertainty. The ND Act was an attempt to facilitate investment by reducing these costs, especially time and uncertainty, for major projects. It is an integral part of the strategy to attract investment:

The basic requirements of a successful investment strategy are that a good environment should be created, the appropriate price signals given, and the impediments to investment and the effective use of capital as far as possible removed. The Government has sought to create these conditions for direct investment in exports of goods and services. The National Development Act was passed to ensure these for energy and other large-scale projects (NZPC, 1980:17).

In the debate over the Labour Government's ND Act Repeal Bill, Mr Warren Cooper, National MP, asked: "What would the Government do without the provisions of the [ND] Act if it needed to fast-track a project because of a possible foreign investor?" (NZPD, 22 August 1985:6609). This clearly shows that the purpose of the ND Act was to attract investment, especially foreign investment. It also shows the power investors have over the government: Mr Cooper wanted to know how the government could fast track a project, at the request of a foreign investor, without the ND Act. This power derives from the state's dependence upon investment.

At the same time as the planning system for large projects was being streamlined, changes were being made to the system of consents and approvals required for new investment. The 1979 Budget announced the establishment of an Investment Unit in the Department of Trade and Industry to streamline the existing procedures and to encourage new investment, particularly from overseas (Muldoon, 1979:4, 21-22). This complemented the streamlined planning procedures.

To encourage investment the state also takes on many of the costs of production thereby lessening the cost to private enterprise of investing in new ventures. For instance, the state provided the industrial infrastructure for the synthetic petrol plant (including pipelines to and from the plant, storage and port facilities, effluent disposal, road widening and power supply) and the aluminium smelter (the Clyde dam and transmission lines) (18). Also socialised are the risks associated with new ventures. (In many ways these risks can be seen as costs of production). Socialisation of risks means that a large part of the risks are shifted from private enterprise to the public. This facilitates investment:

By reducing the risks facing the private companies involved, some [Think Big] projects have gone ahead that conceivably would not have proceeded had both the risk and the investment decision been left with the private sector (Treasury, 1984b:19).

It is important to note that investment freedom is left with the private sector. The government may decide to invest in a project and without this investment the project may not go ahead, but no private enterprise is compelled to invest in the project. This was shown when Alusuisse withdrew from the smelter proposal. The above statement by Treasury is ambiguous on this point. Under the agreements signed for the synthetic petrol plant, it is the public that is most at risk because NZSFCL is paid a tolling fee for processing the gas to petrol, while the government continues to own the gas and the petrol. This tolling fee covers NZSFCL's operating costs, debt and interest payments, tax liabilities and a return on shareholders' risk capital

(Birch, 1982:6). The fee is set so that Mobil will get a 16% rate of return, after tax and inflation, on its investment if the plant is completed within time and budget and if it meets agreed operating standards. The rate of return will be increased if these standards are bettered and decreased if they are not met. However, there is a guaranteed minimum rate of return after tax and inflation of 2% (Birch, 1982:25; Terry, 1982:5-6). This means that Mobil is guaranteed at least a net 2% profit while getting a cheap opportunity to test its new process. The value of the synthetic petrol is set at the value of imported petrol which means that the value of the gas is equal to the current price of petrol less the tolling fee. This may be less than the price the government initially paid for the gas. Thus the return to the public (as taxpayers) is dependent upon oil prices. However, Mobil is "insulated from vacillating oil prices" (NBR, 26 July 1982:16). The biggest risk to Mobil is that its process will not work properly and therefore it may lose future markets for the process. Of course, the public is also at risk if the process does not work.

A similar sharing of risks would have occurred with the Aramoana smelter. The public would have borne a "disproportionately large share" of the risks while the consortium would have been "relatively immune" (Wright R, 1981:27-28). The power price for the smelter was to have been linked to the world price for aluminium prices, meaning that when aluminium prices were low the consortium would have paid a low price for its power. The division of risks in these projects is made during the decisive planning process. This is why it is important to

look at the whole ND Act planning process and not just the ND Act procedures.

#### 1. THE DECISIVE PLANNING PROCESS.

The decisive planning process is the most important part of the planning process. However, its importance is often unrecognised:

We have on our statute books much legislation that taken together establishes a formal planning framework for specific resource utilisation projects. These "written rules" are fairly well known and widely debated. However even those directly involved or interested in such projects (whether from a supportive, neutral or opposing point of view) will be less familiar with the steps that precede a decision to allocate and develop a particular resource. Such steps can be viewed as a strategic planning process and in many respects should be regarded by the public with the same significance as are the subsequent statutory steps involved in considering a specific development proposal. However from the public point of view it is the later stages - those involving applications to statutory tribunals for various consents - that are usually regarded as the "all or nothing" opportunity to influence major resource allocations [sic] decisions - when, in fact, such decisions are really made at a much earlier stage (McLay, 1983:13-14).

The decisive planning process is not restricted to the ND Act planning process, i.e., it can be followed by a number of different statutory procedures, for example: the ND Act (methanol plant, synthetic petrol plant, aluminium smelter), normal legislation such as the TCP Act, WSC Act and Clean Air Act (Kapuni ammonia urea plant), special legislation (Clyde dam), or even no specific procedures (NZ Steelmill expansion, refinery expansion). Nor is it a specific planning process. During the first stage of planning for large projects, including non-ND Act projects, there are no formal structures and no set procedures to be followed. The process for each project is different but each has two major factors in common that justifies grouping them together. These are pre-emptive and neo-corporatist decision making.

The most important factor is the pre-emptive decision making. Pre-emptive decisions were a distinctive feature of the development of many of the major projects (NBR Outlook, 1984:9). Major decisions were made either before statutory procedures began or during their initial stages. This was shown in non-ND Act projects such as the Kapuni ammonia urea plant. The proposal for the plant was prepared by Treasury under the secrecy associated with the 1978 Budget and initially even the Minister and Ministry of Energy Resources were unaware of the proposal. The public was not informed of it until November 1978. In March 1979 the Cabinet Economic Committee was asked to approve the project but this was a mere formality as the plant had already been purchased. Even more of a formality were the public

planning procedures which did not begin until 30 April 1979, when the Waimate West County Council notified a proposed district scheme change to accommodate the plant. The Clyde dam and NZ Steelmill expansion are other examples of a political commitment to projects before the planning procedures have taken place.

The ND Act projects also clearly show this pre-emptive style of decision making. In January 1979 Mobil approached the government with a proposal to manufacture synthetic petrol from Maui gas. This was one of the proposed uses of the gas considered by the Liquid Fuels Trust Board (LFTB) in 1979. A report by the LFTB on 31 August 1979 recommended the production of synthetic petrol from Maui gas and on 13 September 1979 the government accepted this in principle. At this stage the options were to use either the Mobil process or the Fischer-Tropsch process. The second LFTB report, on 31 October 1979, recommended the Mobil process. This was accepted on 15 November 1979 and the government began negotiations with Mobil to determine the economic, commercial and technological feasibility of the project. These negotiations were undertaken with haste as it was considered an urgent decision was needed. This had important consequences for the subsequent decisions:

In the interests of expedition therefore, the Government and Mobil agreed to address their negotiations initially to the conclusion of a Memorandum of Understanding in terms of which they would jointly design and engineer the plant, and obtain consents for its construction so that the evaluation of economic and technological viability of the venture would be based on a site specific designed, engineered and costed plant (Birch, 1982:5).

This meant work was proceeding on "a site specific designed, engineered and costed plant" before its economic and technological viability had been established. This gave the proposal a great deal of momentum and meant that specific design work tended to outrun and to lead the feasibility studies. On 26-27 November 1979 the key commercial elements of the proposal were established by government and Mobil (Birch, 1982:5). These were confirmed by Cabinet on 3 December 1979, less than three weeks after the decision to enter into negotiations over the project. On 1 April 1980 government and Mobil signed the memorandum of understanding to develop the project to the contract signing stage. A Joint Executive Committee (JEC) was established, with representatives from government and Mobil, to carry on the appraisal and design work. On 16 September 1980 the joint venture company, New Zealand Synthetic Fuels Corporation (NZSFCL), was formed by government and Mobil. Based on the assumptions made, especially regarding a continuing rise in the price of oil, the JEC reported to government on 23 July 1981 that the project was commercially viable. After some further evaluation of the economic viability of the project it was given Cabinet approval on 11 September 1981 and a decision was made to go ahead with the project "...pending ...the issue of the planning consents sought by the [NZSFCL] under the National Development Act 1979 ..." (Birch, 1982:19). At this stage the government was prepared to sign the contracts for the plant even though the Planning Tribunal inquiry had not been completed (the inquiry was from 4 August to 8 October 1981) (NZSFCL, 1982:16). Only the impending general election made Mobil hesitant about signing. Thus Cabinet had approved the

project and contracts would have been signed while the Planning Tribunal inquiry was still underway had it not been for the general election. National won the election and the contracts for the plant were signed on 12 February 1982. This was before the NTEPA case opposing the plant was dismissed (5 March 1982) and before the Order in Council granting the consents for the plant came into force (12 March 1982).

A similar series of events had occurred with the methanol plant. The Gas Sale and Purchase Contract for the plant was signed on 13 March 1981, thirteen days before the Tribunal sent its recommendation to the Minister. This contract set out the rights and obligations of the Crown and Petralgas Chemicals Ltd in connection with supply of gas to the plant. It also required Petralgas:

...to take all reasonable steps to complete construction of its methanol plant in Taranaki (including obtaining all necessary approvals for this purpose), so that it [would] be able to accept delivery of gas by the target date of 1 September 1983 (Birch, 1981:4).

In both these cases the government was prepared to sign the contracts for the plants before it had received the Planning Tribunals' recommendations on whether the consents sought should be granted.

The matter of pre-emptive decision making formed one of the central aspects of the CREEDNZ challenge to the Order in Council applying the ND Act to the second aluminium smelter. CREEDNZ claimed that Cabinet Ministers had already decided to grant the Order in Council before they considered, in Executive Council, the application for the provisions of the Act. Therefore, CREEDNZ contended, they could not have considered the application properly so the Order in Council was invalid. As evidence of this predetermination newspaper reports containing Ministers' statements were presented. These included:

The Fletcher-CSR-Alusuisse consortium has won the battle for a second South Island aluminium smelter. Substantial agreement [was] reached late yesterday afternoon with the Government on a power price for the \$650 million proposal....The Minister of Energy, the Hon. W. F. Birch, said that to provide the 3,000 gwh of power needed, "the Clyde dam will need to be finalised and the Upper Clutha dams commissioned sooner than expected." (23 July 1980).

"...a decision has been taken to proceed with the project" [said Mr Birch] (24 July 1980).

The Minister of Energy, the Hon. W. F. Birch said yesterday he has every confidence a second aluminium smelter will be built in the South Island. "Agreement in principle has already been reached between the Government and a consortium of Fletcher Alusuisse and CSR over its proposal to build a second smelter," the Minister said. "Final agreement is naturally subject to the satisfactory negotiation of a number of details, none of which should be insurmountable." (12 August 1980).

The Minister of Energy, the Hon. W. F. Birch, and representatives of Fletcher Holdings Ltd., Swiss Aluminium Australia Ltd. [a subsidiary of Alusuisse], and Gove Alumina [a subsidiary of CSR] have signed a memorandum of intent in respect of the proposed second aluminium smelter in the South Island. "The memorandum commits the Government to supplying electricity to the smelter ..." Mr Birch said yesterday (3 September 1980) (CREEDNZ v G-G [1981] 1 NZLR 172 at 195-196).

From these the Court concluded that the government had decided by the end of July 1980 that the smelter should be built, although some details still needed to be finalised. These included the base power price, the level of rebates and discounts available to the consortium, taxation arrangements, and the site. (As it turned out agreement on the power price could not be reached and on 1 October 1981 Alusuisse withdrew from the consortium because a downturn in world aluminium prices meant the project was no longer attractive, despite the subsidised power prices (19)). The signing of the memorandum of intent on 2 September 1980 that committed the government to supplying electricity for the smelter and the consequent bringing forward of the construction schedule for the Upper Clutha power scheme showed the government's intention to proceed with the smelter. This commitment was made well before the ND Act procedures which began when the Act was invoked on 27 April 1981.

Although the government made its commitment to the smelter before the ND Act procedures began this did not invalidate the Order in Council applying the Act:

Given the nature, scope and size of works qualifying for consideration under the National Development Act it must also be assumed in the case of private works that there is likely to have been considerable consultation and negotiation between the applicant and Ministers and officials with some indication being given of supportive Government attitudes to various aspects of a projected work before an application is made under s3. It is implicit in the statutory scheme that that type of involvement and expression of commitment in principle is not a disqualifying factor under s3(3) (CREEDNZ v G-G [1981] 1 NZLR 172 at 193).

Thus the CREEDNZ claim was rejected. This shows that the decisive planning process is an integral part of the ND Act planning process.

This evidence shows that the decisions to proceed with the ND Act projects were made before the ND Act procedures were completed (as with the decisions for other projects under other legislation). Although the decisions were made pending planning approval they actually pre-empted such approval. The Clyde example shows that Planning Tribunal decisions have little effect if the government has already decided in favour of a project. The Clutha Development (Clyde Dam) Empowering was passed in September 1982 so that the government could proceed with its decision to build the high dam despite the Planning Tribunal's decision that the water rights should not have been granted. If the ND Act Planning Tribunal recommendation went against a project the government would not even need to resort to special legislation as it could simply overrule the recommendation. Comments made by Mr Birch before the methanol plant inquiry also indicate the extent of the government commitment to the plants. He said:

If people think they are going to frustrate the building of the projects and the commissioning of them, by using the law as a device, then the Government may not be able to tolerate such delays and may be forced into the only other alternative which is special legislation....There is a provision in action for review and if that is going to be used genuinely, then there'll be no objection....But if people think they're going to manipulate the Act so that they can delay the projects ...then the Government will have to act in some way or other" (The Taranaki Daily News, 19 July 1980, page 3).

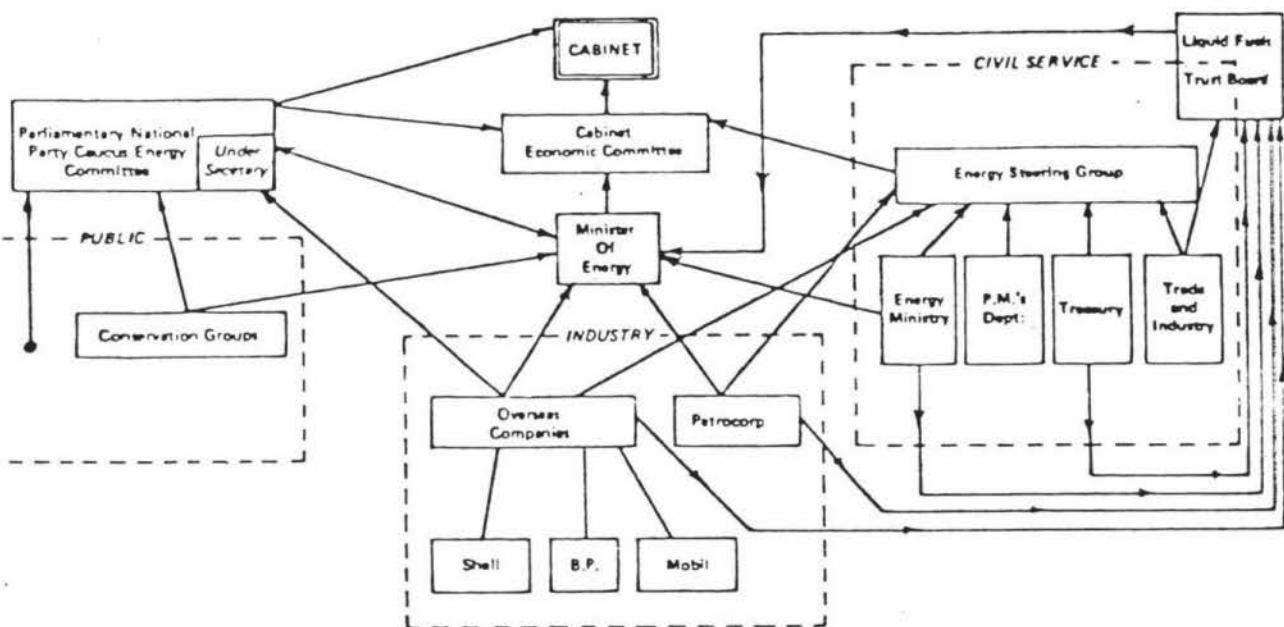
Thus before any of the ND Act procedures had begun the government had stated that if there were delays in the procedures it would use special empowering legislation to ensure that the projects would go ahead.

The second feature of the decisive planning process is that the decisions are made by the state and proponent. Offe calls this neo-corporatist planning. This is when:

...decisions on key political issues emerge ...out of a highly informal process of negotiation among representatives of strategic groups within the public and private sectors (Offe, 1984:167).

These private sector strategic groups are the ones with the most veto power in terms of investment. The main decision making body for the Maui gas decisions was the LFTB. The close relationship between the LFTB and Cabinet, government departments and private sector interests is shown in Figure 5. This also shows the very limited public input into the decision making. At the time of the decisions leading to the methanol and synthetic petrol plants the LFTB contained four government department members and three private sector members. Its Chairman, Dr Colin Maiden, was also the Chairman of NZSFCL. This means that the chief adviser to government on its liquid fuels policy was closely associated with Mobil, one of the main private sector interests involved. This led to an obvious conflict of interests and gave Mobil, with its high veto power, enormous opportunity to influence policy decisions. The other private sector representatives, both of whom had retired before they were appointed, were Alan Mackray (New Zealand

Figure 5:

THE LIQUID FUELS TRUST BOARD AND THE DECISION MAKING STRUCTURE.

(from NBR, 5 September 1979, page 3)

Forest Products) and Ian Stace (General Motors). The LFTB's deputy Chairman was Mr John Cook, from Treasury. Also represented were the Ministry of Energy, the Department of Trade and Industry and the DSIR.

The primary focus of the LFTB was on technical comparative analyses, but little of its work was released. For instance, a crucial document on "A Re-assessment of the Mobil Gas to Petrol, Comparison with other Options" was never made public, despite it being requested at the synthetic petrol plant Tribunal inquiry (Gray, 1983:1). Other material was released but too late to allow it to be used for any public input into the decision making process (Fitzsimons, 1981:7). The LFTB operated on a technocratic model of decision making. In February 1979 it had decided that it should provide technical advice only and should not be concerned with non-technical issues such as the ownership of any eventuating projects. A separate Energy Steering Group was formed with representatives from the Ministry of Energy, the Department of Trade and Industry, Treasury and the Prime Minister's Department to address these non-technical issues and to monitor the progress of the LFTB for the Cabinet Economic Committee (Morten, 1981:62-63). Although the LFTB concentrated on technical issues, its decisions had enormous policy implications. But these implications were never open to public discussion or input:

...much energy planning is now done by the Liquid Fuels Trust Board, a body much less open to public scrutiny than the Ministry of Energy. It does not seek any public input to its policy recommendations (Environmental Council, 1983:9).

By considering only technical issues the public are excluded as non-experts (Offe, 1984:167).

The Prime Minister's Department is another neo-corporatist body involved in energy decision making. It is a liaison group involving "special interest/development related sections of the community" (Robertson, 1982:17). Private sector representatives are co-opted into the Department and this led to conflict of interests concerning the second aluminium smelter when Mr Graeme Hawkins, an executive with Fletcher Holdings Ltd was an industrial development and business adviser to the Department during the time the government was negotiating with Fletchers over the proposed smelter (NBR, 9 February 1981:3). Thus again government was taking advice from private interests which held a vested interest in the decisions being made.

Pre-emptive and neo-corporatist decisions are the main features of the decisive planning process. They result in a decision to proceed with a project that is arrived at independently of any public input. This decision is made either prior to, or during the initial stages of, the ND Act procedures. Given the structure of the ND Act there is very little possibility that this decision will be overturned by the Planning Tribunal (this will be shown in subsequent sections). This is

why the initial planning stage is indeed the decisive planning process.

## 2. THE NATIONAL DEVELOPMENT ACT PROCEDURES.

In the case of ND Act projects the decisive planning process is followed by the ND Act procedures. For the purposes of analysis the procedures have been divided into two separate processes: one relating to accumulation and the other to nominal legitimization. The process relating to accumulation is analysed first. It consists of the application of the ND Act and the granting of consents.

### 2(a). The Application of The National Development Act.

The ND Act can be applied to government or private works. A government work is any "...work constructed or intended to be constructed by or on behalf of Her Majesty the Queen or the Government of New Zealand or any Minister of the Crown" (section 2). A private work is any other work, including works undertaken by local authorities (Palmer K, 1984:896). In both cases "work" involves "the construction, undertaking, and operation of the work" (section 2). Under the Act the

only distinction between public and private works is made in sections 4(3)(e) and 8(1)(b). These relate to the role of the Minister of Works and Development. For government works he or she will be the proponent. For private works he or she will have a separate right to receive a copy of the application when it is referred to the Planning Tribunal and to be heard at the Tribunal inquiry. Both the methanol and synthetic petrol plants were private works.

To qualify for the provisions of the Act the public or private work must meet the criteria of section 3(3). This is a critical section of the Act and it reads:

(3) After an application has been made under subsection (1) of this section, the Governor-General in Council may, if the Governor-General in Council considers that the Government work or private work is a major work that is likely to be in the national interest, and considers-

- (a) That the work is essential for the purposes of-
  - (i) The orderly production, development, or utilisation of New Zealand's resources; or
  - (ii) The development of New Zealand's self-sufficiency in energy (other than atomic energy as defined in section 2 of the Atomic Energy Act 1945); or
  - (iii) The major expansion of exports or of import substitution; or
  - (iv) The development of significant opportunities for employment; and

- (b) That it is essential a decision be made promptly as to whether or not the consents sought should be granted-  
apply the provisions of this Act to the work or any part of it.

The "Governor-General in Council" means "the Governor-General acting by and with the advice and consent of the Executive Council" (Acts Interpretation Act 1924, section 4). The Executive Council consists of Cabinet Ministers and the Governor-General. Its function is to take action, or to direct that action be taken, on Cabinet decisions (McGee, 1985:55-56). Thus, in CREEDNZ v Governor-General [1981] 1 NZLR 530 the proceedings were directed against the decision of Cabinet to apply the Act to the smelter and the subsequent advice given to the Governor-General by the Executive Council, not against the Governor-General himself. Although the Governor-General is not strictly bound to follow the advice of the Cabinet Ministers, such advice is invariably followed (Palmer G, 1979:21).

Thus it is Cabinet that applies the Act to a project. To do this it must consider that the project is (i) a major work that is (ii) likely to be in the national interest and (iii) is essential for one or more of the listed purposes of section 3(3) and (iv) requires a prompt decision regarding the consents sought. These criteria merit detailed consideration.

(i) A major work. The Act can only be applied to major works but no definition of "major work" is given. However, there is no doubt that the methanol and synthetic petrol plants are major works. The smelter also would have been a major work if it had gone ahead. The synthetic petrol plant was described as a major work because it would cost \$750 million (1980 dollars) and would involve the largest single methanol complex in the world (NZSFCL, 1981b:1/4). A Cabinet memorandum (CS(81)132) on NZSFCL's application for the provisions of the ND Act said "...the proposed plant is a 'major work' in monetary terms and its impact on New Zealand's energy situation".

Because the Act can only be applied to major works large New Zealand or multinational corporations are significantly advantaged over the proponents of smaller works, which still have to face the cumbersome and fragmentary planning system (Bertram and Johnston, 1979:13) (20). Yet smaller works are just as likely, if not more likely, to bring development. Mr Henry Lang, former Secretary of the Treasury, told the Select Committee considering the ND Bill that:

There is no evidence I know of which shows that government and large private enterprise projects make a relatively greater contribution to national development and economic growth than medium and small projects. Indeed, it is likely that the substantial number of smaller projects will account for the bulk of investment outlays and, more importantly, for the bulk of new employment opportunities in the 1980s. Therefore, discrimination between major and other projects does not seem justified (Lang, 1979:1).

Although Mr Birch did want to extend fast track planning to include these smaller projects (21) it is significant that the ND Act is biased towards multinational corporations. These companies have the most veto power and they also have the easiest access to investment funds. The veto power is increased in the case of the oil companies as the country is dependent upon them for supplies of oil. This gives the companies a great deal of power which they can use to influence government decisions (22):

Behind all the [oil] companies' approach is the unspoken (though at times quietly whispered) threat that if they are shut out of the Maui action, their interest in New Zealand - and thus their interest in supplying oil to New Zealand over the next critical half-decade or more - might diminish (NBR, 5 September 1979:12).

(ii) In the national interest. Before the Act can be applied it must also be considered that the work is likely to be in the national interest. This is a doubly subjective criteria (Chew, 1984:44). What is "in the national interest" is a matter of political judgement and is open to wide interpretation - which is made even wider as it is only necessary for Cabinet to consider that the work is "likely" to be in the national interest. Furthermore this "national interest" criteria is superfluous as any work that is essential for the purposes of section 3(3)(a) is likely to be considered to be in the national interest. It does, however, have one important consequence: it means that when the Act is applied to a private work, that work becomes formally defined as being in the national or public interest. Private works thus become treated as if they were in the public interest. This

was the case with the second aluminium smelter, which was to be totally privately owned and, to a lesser extent, with the methanol plant (49% privately owned) and the synthetic petrol plant (25% privately owned but with the possibility of up to 49% private ownership). Although both these companies have a minority private enterprise shareholding they operate on a commercial basis and cannot be directed by government (letter from Mr Tizard, Minister of Energy, to author, Minister of Energy, 28 January 1986). This equating of private interests with the public interest is one of the characteristics of national development in New Zealand and it means that private accumulation becomes nominally legitimated. It also means that state action in support of the private interests is nominally legitimated as being in the public interest.

(iii) Essential for the listed purposes. Section 3(3)(a) contains very wide criteria for applying the Act and almost any large project could qualify for the provisions of the Act under one or more of these. The criteria are a statement of government policy and because they are written in the Act they become statutory goals that the government must work towards:

The enactment of the legislation involves a commitment by Parliament to the statutory goals set out in para (a) of s3(3). Ministers, and in particular the Minister of National Development, must be involved on a continuing basis in the development and implementation of policies designed to attain those ends (CREEDNZ v G-G [1981] 1 NZLR 172 at 192).

The development of resources, energy self-sufficiency, expansion of exports or of import substitutes and the development of employment opportunities are the given goals of national development. Although these goals, especially those of self-sufficiency and employment, may receive public support, there was no public input into their formulation (other than the addition of the provision excluding atomic energy they were unchanged by the select committee). Hence they are technical goals. They are also technically interpreted. It is Cabinet that decides whether a project will enable these goals to be reached. There is no public input into this decision and the Planning Tribunal cannot consider the proposed project in terms of the criteria (both of these points will be expanded subsequently). The Court of Appeal can review the Order in Council applying the provisions of the Act, that is, it can inquire whether the relevant matters - as defined by the criteria - were taken into account and that the decision was not made on the basis of facts that should not have been considered (CREEDNZ v G-G [1981] 1 NZLR 172 at 208). It cannot, however, consider whether the project will meet the statutory goals:

[The Court's] inquiry does not involve any challenge to or defence of Government policies. It is simply a determination as to whether the Governor-General in Council has exercised the statutory powers according to law (EDS v SPA (No.2) [1981] 1 NZLR 153 at 163)

The criteria of section 3(3)(a) relate the Act to the Think Big strategy, although they are not confined to the energy issues that gave the strategy its beginning. The development of atomic energy under the provisions of the Act was excluded because the use of atomic energy in

New Zealand is unlikely to gain even nominal legitimation (see Wilson, 1982:40 51). The criterion of the expansion of exports or of import substitution is to enable projects that could reduce the balance of payments deficit to be placed on the fast track.

NZSFCL claimed that the synthetic petrol plant was essential for all the criteria of section 3(3)(a). The application said that the plant was an essential element for the orderly production, development and utilisation of New Zealand's natural gas resources; would be a major contribution to the development of New Zealand's self-sufficiency in energy; would result in a major substitution of imported crude oil and refined petroleum products; and would create significant employment opportunities in Taranaki (NZSFCL 1981b:1/4-1/9). However, a Cabinet memorandum relating to the Order in Council applying the ND Act to the project rejected the last claim, saying that the peak workforce during construction would be only 5% of the regional workforce and that the operational workforce would be less than 1%. Therefore Cabinet decided to "...avoid the possibility of an Order in Council being challenged in the High Court on the grounds of compliance with the generation of 'significant' employment opportunities ..." by not including this criterion in the Order in Council (Cabinet memorandum CS(81)132, page 3). The proponent of the second aluminium smelter claimed that it was essential for the expansion of exports, the development of significant employment opportunities and the development and utilisation of resources. A Cabinet memorandum (CS(81)396) on the Order in Council applying the ND Act accepted the first two claims, but

not the one regarding the use of resources. The application had listed five resources that would be developed and utilised by the plant. These were labour, the existing infrastructure of the Dunedin area, regional resources, construction materials and fabrication resources, and electricity (SPA, 1981a:26-27). The electricity resource was the Upper Clutha power scheme, including the Clyde dam. The Cabinet memorandum (CS(81)396, page 5) said that the listed resources were:

...all issues about which there has been much public comment and some contention. This criterion is open to a number of contradictory interpretations. As the work need only conform to one of the four criteria set out in section 3(3)(a), the attached Order in Council does not make reference to section 3(3)(a)(i).

In both these cases the government ensured proposed works were accurately described by the criteria listed in the Orders in Council so that these could not be challenged. Although the criteria are wide enough to qualify most major works for the provisions of the Act, the expressed justifications for applying the Act to the projects were very specific to ensure that they would stand up to judicial review. The methanol plant was considered, by both its proponent and Cabinet, to be essential for the orderly utilisation of Maui gas, expansion of exports, and the development of employment opportunities.

Two judgements of "essentiality" must be made before the Act can be applied: the work must be essential for one or more of the purposes listed in section 3(3)(a) and it must be essential that a prompt decision be made regarding planning consents. In the CREEDNZ and EDS No.3 cases consideration was given to whether Cabinet had properly judged these matters in applying the Act to the Aramoana smelter.

Judge Richardson said:

'Essential' is an unusually emphatic word in the context of the exercise of statutory powers. It imposes an exacting test. It connotes a high degree of necessity. Nevertheless its application must depend upon the circumstances as they appear at the time and so on what options are then available to the Governor-General in Council for the use of New Zealand's resources to meet the policy objectives reflected in s.3(3)(a). The spirit of urgency underlying the legislation extends to the achievement of the goals identified in the paragraph (CREEDNZ v G-G [1981] 1 NZLR 172 at 203).

Nevertheless, the test of essentiality involves "questions of degree and value judgement" (CREEDNZ v G-G [1981] 1 NZLR 172 at 186) so any major work could be regarded as "essential" for the purposes of the Act.

(iv) A prompt decision. Finally it must be essential that a prompt decision be made regarding the consents sought. Although the government said that the Act was introduced to prevent planning delays this requirement was not included in the original Bill. In its application for the provisions of the Act NZSFCL said that a prompt decision was essential if substantial progress were to be made towards

New Zealand's self-sufficiency in energy by the mid-1980's. Also the plant was designed to be complementary with the refinery expansion, which was well underway, and delays in the plant meant the continued importing of oil. Since all the projects claimed to be in the national interest, they all claimed the early attainment of this benefit as a reason why a prompt decision was essential. However, as shown in Chapter 3, planning delays often save money as they allow time for a proper scrutiny of the proposal.

The application must also specify the consents being sought and list under what legislation they would normally be sought. Thus the ND Act application actually contains two applications: first is an application for the provisions of the Act and then, if this is successful, an application for the specified consents. A "consent" is "...an authorisation, permission, a licence, a permit, a right, and any other approval of any type whatsoever capable of being granted under any statutory provision" (section 2). But only consents that would normally be sought under the statutory provisions listed in the schedule to the ND Act can be sought under the ND Act. However, the schedule lists all the Acts that the government thought would be involved in any major project so it is extremely unlikely that any consent sought for a ND Act project could not be sought under the ND Act. But even if this did occur it would not prevent the Act being applied to the project as there is no requirement that all the consents for a project be sought under the ND Act. Consents sought under Acts not listed in the schedule could be sought in the normal way while the

other consents were sought under the ND Act. The schedule is shown in Table 2. (It includes amendments to the schedule made by various amendments to the Acts listed.) The ND Act prevails over all these Acts and over every "regulation, rule, Order in Council, Proclamation, notice or bylaw" in force under them (ND Act, section 18). Most of these Acts contain carefully developed provisions to protect the public interest from undue intrusion by the state or private interests. For instance, the Land Act 1948 and the National Parks Act 1952 established authorities distinct from the executive to ensure the protection of Crown (public) land from exploitation (Hannan, 1980:206-207). However, under the ND Act the decision making powers that enabled this protection are removed from the authorities and organisations that administer these Acts and taken over by the executive. Thus:

When the Reserves Act, Mining Act and National Parks Act are read together with the National Development Act, we find that national parks, public reserves, wildlife refuges and even (after certain procedures under the Mining Act) private land are all open for mining, and that mining privileges can again be granted by executive fiat (Hannan, 1980:206).

This reverses the normal role of legislation:

Most planning procedures are designed, in theory, to protect individuals from the activities of the State and of other individuals. The National Development [Act] appears designed to protect the State and the developer from aggrieved individuals (Bertram and Johnston, 1979:15).

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Table 2: SCHEDULE TO THE NATIONAL DEVELOPMENT ACT

The Clean Air Act 1972: Sections 8, 10, 13, 18, 23 to 26, 28, 29, 31, and 55.

The Coal Mines Act 1979: Part III and section 266.

The Electricity Act 1968: Sections 20, 21, and 55.

The Forests Act 1949: Sections 30 to 33 and 72.

The Geothermal Energy Act 1953: Sections 6 and 9.

The Harbours Act 1950: Parts IV (other than sections 150 and 175(1)) and VI, and sections 241, 241A, 241B, and 241C.

The Historic Places Act 1980: Part II.

The Land Act 1948: Sections 60, 77, 80, 89, 93, and 165.

The Local Government Act 1974: Parts XX and XLIII.

The Marine Pollution Act 1974: Sections 22B and 68.

The Mining Act 1971: Part IV and section 233.

The National Parks Act 1980: Sections 54 and 55(2).

The Petroleum Act 1937: Sections 5, 12, 47M, 50, 55, 70, and 87.

The Reserves Act 1977: Sections 48, 106, 109(3), and 123.

The Soil Conservation and Rivers Control Act 1941: Sections 149, 150, and 166.

The Soil Conservation and Rivers Control Amendment Act 1959: Section 34.

The Town and Country Planning Act 1977: Parts I to VIA, and section 175.

The Tramways Act 1908: Sections 3(1), 16, and Second Schedule.

The Tramways Amendment Act 1910: Section 5.

The Tramways Amendment Act 1911: Section 6.

The Water and Soil Conservation Act 1967: Sections 21, 23, 24, 24B, 26L, 34A, and 37.

The Water and Soil Conservation Amendment Act 1973: Section 4.

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NZSFCL sought consents for the synthetic petrol plant under the TCP Act, the WSC Act, the Clean Air Act and the Historic Places Act. These normally would have been considered by the Clifton County Council, the Taranaki Catchment Commission, the Director-General of Health and the Historic Places Trust. The actual consents sought were:

- (a) Under Section 74 of the Town and Country Planning Act 1977 consent for the use of land for the construction and operation of a synthetic petrol plant and related buildings, installations and facilities including two methanol plants; a methanol to petroleum plant; a cooling tower; plant utilities including three flare stacks and associated facilities; storage tanks and pipelines; water and wastewater treatment facilities, temporary ponds, and other temporary and permanent drainage or sewerage works; an electrical substation with associated transmission lines; general storage, maintenance, administration, and amenity facilities; access and internal site roading, fencing, landscaping and ancillary site works;
- (b) Under Section 21 of the Water and Soil Conservation Act 1967 water rights to take 370 litres per second of water from the Waitara River ...; to discharge treated effluent from a marine outfall; to discharge uncontaminated stormwater; to discharge stormwater during construction; and a foundation and site dewatering right relating to plant construction;
- (c) Under Section 31 of the Clean Air Act 1972 approval to construct a building on the plant site to be used for a scheduled process;
- (d) Under Section 46 of the Historic Places Act 1980 approval to destroy, damage, or modify archaeological sites encountered during construction.

(These are the consents as summarised by the Cabinet memorandum (CS(82)165, pages 1-2) relating to the Order in Council declaring the work to be of national importance and granting the consents. The full details of the consents are set out in NZSFCL, 1981b:part 5.)

From this it can be seen that the consents sought were wide-ranging. However, they were not comprehensive. The consents applied for were only those directly associated with the plant. Consents for infrastructural works outside the plant site were not sought under the ND Act. This infrastructure consisted of gas pipelines to the plant, petrol and methanol pipelines from the plant, storage tanks and port facilities, power supply to the plant and road widening and strengthening (NZSFCL, 1981c:Annex, page 2). These works were the responsibility of the government, which sought planning approval for them in the normal way. Consents for two infrastructural works (water supply and effluent disposal) were sought by NZSFCL under the ND Act because they were site-related issues, even though the government was responsible for their finance and construction. The reasons put forward for this division of responsibility included:

It was clear that the infrastructural facilities perhaps more than the plant itself, would have environmental and regional impacts which could not be seen in isolation of other plants being developed (e.g. pipeline corridors with Petralgas, linkage to possible gas processing facility) [and] should be carefully reconciled with regional interests outside the time constraints of the National Development Act procedures (Letter from the Ministry of Energy to the Commissioner for the Environment, 15 May 1981, in CFE, 1981b:Vol.1, Annex P).

This clearly shows one of the major problems with the ND Act: the time constraints mean that a proper evaluation of a project cannot be made once a project is placed on the fast track. (In this respect one of the Judges at the methanol plant inquiry said that the Act was beginning to "look more like an ice slope" than a fast track (COG, No.8:5).) Thus the impacts of these infrastructure works were not considered under the ND Act procedures, supposedly so that they could

receive a full evaluation. But this had the effect of avoiding any environmental impact evaluation on the project as a whole and it meant that the synthetic petrol plant was considered in isolation of the other plants being developed and its own infrastructure. An "Outline Description of the Infrastructure Work to be undertaken by the Crown" was included in the EIR (NZSFCL, 1981c:Annex) but this contained no evaluation. At the request of the Commissioner for the Environment an Infrastructure Status Report (CFE, 1981b:Vol.1, Annex M) was supplied by the Ministry of Works and Development for inclusion in the audit but this was after public submissions had been made and was too late for evaluation by the Commissioner for the Environment. The Commissioner commented:

It is rather ironic that so much of the project should be excluded from consideration under the National Development Act, since the Act was promoted as a method of co-ordinating the many consents which a project of this magnitude requires (CFE, 1981b:Vol.1, page 41).

And because the Planning Tribunal inquiry is restricted to considering the consents sought, and not the project itself (section 7(1)) the impact of these works could not be investigated by the Tribunal. Thus, once the plant had received the consents sought under the ND Act it stood in a "planning quarantine" because none of consents necessary for the surrounding infrastructure had been granted (Young, 1982a:19).

The Planning Tribunal was further limited in both the methanol and synthetic petrol plant cases because no Clean Air consents to operate the plants were sought at the time of the ND Act inquiry. This meant that the methanol plant Tribunal could not consider the use of chromates as rust inhibitors in the plant's water cooling system. The use of chromates in the cooling system makes it inevitable that traces of toxic chromium will be discharged into the air and water. But because no Clean Air Act consent was sought under the ND Act to actually operate the plant the discharge of chromates into the atmosphere could not be considered by the Tribunal. Similarly, the discharge of chromates into the water system could not be considered because Petralgas withdrew its application to discharge waste into the Waitara River after the Planning Tribunal had indicated its disfavour of a river discharge. Petralgas arranged to discharge its waste through the already defective Waitara Borough outfall but this arrangement was not subject to any Regional Water Board or Planning Tribunal consideration. Thus the matter of marine discharge of waste was removed from the planning agenda (Waitangi Tribunal, 1983:29-30).

Because the proponent does not need to seek all the consents for the project under the ND Act, it can control the environmental impact evaluation process and determine the agenda of the Tribunal. This is the type of planning process sought by BP. BP's suggested planning process was to enable the proponent to control the planning process so that it could overcome the uncertainty inherent in planning (BP, 1979:A1). Under section 4(2) of the ND Act the Minister may delete any

of the consents applied for or add any further consents before sending the application to the Planning Tribunal. This could be used to ensure that all the necessary consents were sought, thus allowing a full environmental impact evaluation process and Planning Tribunal inquiry. However, this provision has never been used.

Before the Act can be applied to a project that meets the criteria of section 3(3) the Minister of National Development must consult with the appropriate United or Regional Council and any other statutory authorities considered necessary. In all three cases under the Act the Minister consulted with the authorities that would have been involved if the consents had been sought in the normal way. At the time the application was made for the ND Act to be applied to the Aramoana smelter, the Coastal-North Otago United Council had not been formed so the Minister consulted with the various local authorities involved instead. The Act gives no indication as to what this consultation should involve but it appears little more is required than the Minister informing the appropriate bodies that an application has been made. In the methanol plant case local bodies were given only three days in which to consult with the Minister. The Taranaki United Council had received a copy of the application for the provisions of the ND Act in December 1980 but the application was subsequently amended and it was not until 10 February 1981 that the New Plymouth City Council, the Taranaki Catchment Commission and the Clifton County Council saw the final application. Nevertheless, they were asked by Mr Birch to give their opinions on the proposal by 13 February 1981. This gave them no

time to prepare an adequate response and, indeed, no response was given until 19 February 1981 when they advised Mr Birch that they would support the application. Such authorities will be more involved later in the ND Act procedures so this consultation appears to be no more than an advance notification that the Act will be applied to the work. This notification is formally repeated after the Act has been applied to the work (section 4(3)(a)(d)).

There is no provision for any public participation in the decision to apply the ND Act. In the CREEDNZ case the appellants challenged the Order in Council applying the ND Act to the Aramoana smelter on the grounds that, amongst other things, affected property owners were not given the right to see the application and make representations on it to Cabinet before the Act was applied. It was claimed that the ND Act took away rights of objection guaranteed under other legislation and therefore, in the interests of natural justice, it should be supplemented with the right to make such representations. However, it is considered that the requirements of natural justice depend upon the circumstances of each case and, in particular, that they need to be balanced with the intent of the statute in question. In his judgement, Judge Richardson quoted from the benchmark case, *Wiseman v Borneman*, on this point:

"For a long time the courts have, without objection from Parliament, supplemented procedures laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation" (CREEDNZ v G-G [1981] 1 NZLR 172 at 187).

It was conceded that the Act did involve a loss of rights of objection, but that this was inevitable given the intention of the Act:

...it has to be remembered that a streamlining of procedures is the very purpose of the National Development Act. It is only to be expected that some rights will be done away with in the process (CREEDNZ v G-G [1981] 1 NZLR 172 at 177).

The Court decided that rights of public participation through the Commission for the Environment audit and the Planning Tribunal inquiry were sufficient to maintain the requirements of natural justice. It also found that the Act was designed specifically to preclude public participation at this stage: the lack of a requirement for the Minister of National Development to give public notice that an application has been received, in contrast with the requirements to give public notice at other stages, suggests that such notice was specifically and purposely excluded; and the requirement for the Minister to consult specifically with the United or Regional Council implies that there should be no general right of consultation. Finally, the introduction of a requirement for Cabinet to consider the views of affected property owners and other interested groups would be counter to the purpose of the Act - the prompt consideration of proposed works of national importance. The Court thus concluded that

supplementing the Act with a provision for public representation, on the grounds of natural justice, before the Act was applied "...would be inconsistent with the scheme of the legislation and [would] frustrate the purpose of the statute" (CREEDNZ v G-G [1981] 1 NZLR 172 at 191).

It is the next two stages, the environmental impact evaluation and the Planning Tribunal inquiry, that do involve public participation. It is at this point that the order of analysis differs from the order of events under the ND Act as these two stages are analysed in Chapter 6. The main function of these two stages is to shield the decisive planning process and to nominally legitimate the decisions made. They result in the Planning Tribunal sending a report containing its recommendation on the consents sought to the Minister of National Development.

2(b). The Granting of Consents.

Although the Tribunal report will contain public input through the Tribunal inquiry and, indirectly, the environmental impact evaluation process, there is no guarantee that this input will actually influence the decision on the granting of consents since Cabinet, in making its decision, is not required to accept the Tribunal's recommendation. Section 11, on the granting of consents, merely states that (as

slightly amended by the ND Amendment Act):

...the Governor-General in Council, after taking into account the report and recommendation of the Tribunal and further considering the criteria set out in section 3(3) of this Act, may declare the Government work or private work concerned to be a work of national importance [and] grant such of the consents set out in the report of the Tribunal as he [sic] thinks fit...

This means that under the ND Act the Tribunal is acting as an advisory body, not a decision making one. The actual decision makers are the executive and the proponent, who make the decision to go ahead with the project during the decisive planning process. This decision is formalised and confirmed by the Order in Council applying the Act to the project. Section 11 requires Cabinet to take the Tribunal recommendation into account but this is after it has decided to proceed with the work and after it has said that the work is likely to be in the national interest and that it is essential for the development of resources, the development of energy self-sufficiency, the expansion of exports or of import substitution, or the development of employment opportunities. These factors are likely to outweigh any contrary Tribunal recommendation. Hence it is unlikely that any Tribunal recommendation that could prevent the project from going ahead, would be accepted by government. The only constraint against Cabinet completely ignoring any Tribunal recommendation is contained in section 12(2) of the Act, which requires that, if there are any differences between the Tribunal's recommendation and the consents granted, then the Minister of National Development must give written reasons for such differences to Parliament. Thus the overruling will be in public.

During the Select Committee hearing on the ND Bill Mr Ian McLean, National MP, suggested that the government would not risk the flak of publicly overriding the Tribunal's recommendation. An Environmental Council witness replied that the political flak over the introduction of the ND Bill was enormous yet the government was still prepared to proceed with it (NBR, 10 December 1979:22).

Only once has the Tribunal recommended against granting any of the consents sought in its original form but it still recommended, under section 10(4), that the work be allowed to proceed in a modified form. This involved the ocean outfall for the synthetic petrol plant. The original consent applied for was to discharge waste through a 600m outfall pipe. The Tribunal recommended that this be modified to 900m. NZSFCL had also sought a 27 year right to discharge waste but this was reduced to ten years by the Tribunal (Planning Tribunal, 1981b:60-61). This was accepted by Cabinet although it was later successfully challenged before the Waitangi Tribunal (see postscript).

If Cabinet decides that the work should go ahead then the Governor-General in Council will issue an Order in Council declaring the work to be of national importance and granting the consents. These consents can be subject to any conditions, prohibitions or restrictions that would normally be imposed. The Order in Council cannot be made until at least 28 days after the public notification that the Tribunal report is publicly available. This is to allow a period for Cabinet to

consider the Tribunal's recommendation and to allow for any applications for judicial review on matters relating to the Tribunal procedures. Any application for such review must be made within 21 days of the public notice of the Tribunal report.

Each Order in Council declaring the work to be of national importance must be laid before Parliament within fourteen days of its being made or, if Parliament is not in session, within fourteen days of the commencement of the next session. The Order in Council is deemed to be a regulation and, as such, it may be called before the Statutes Revision Committee for consideration. However, it also means that it cannot be challenged on the grounds of unreasonableness.

The proponent or the statutory body that would have normally considered the application for planning consent may apply for the variation or cancellation of any conditions, restrictions, or prohibitions imposed upon the consents, or the imposition of new ones. The Tribunal shall consider whether the alterations applied for are significant enough to justify a full inquiry - in which case a new Tribunal hearing shall be held. If a new hearing is not justified then the Tribunal shall consider submissions from the proponent and the statutory body before advising the Minister whether the application should be granted or refused. Any change in the conditions, restrictions, or prohibitions must be made through an Order in Council (section 15(4)).

### 3. SUMMARY.

Under the ND Act planning process key decisions are made in the decisive planning process but this process is separated from and pre-empts the statutory procedures. Decisions in the decisive planning process are made through a neo-corporatist planning relationship between state and private interests. Public input is excluded. This allows the state and private interests to control the planning system and reduce the cost (in terms of time and uncertainty) to the proponent of obtaining the necessary planning approvals for a large project. In this way the state is acting to facilitate investment. Public participation is also excluded from the key stages of the ND Act procedures. These stages are the application of the Act and the granting of consents. Both involve formal pronouncements by Governor-General in Council of decisions made during the decisive planning process.

CHAPTER 6.THE NATIONAL DEVELOPMENT ACT AND NOMINAL LEGITIMATION.

To ensure accumulation the capitalist state must protect and encourage private interests in the market. To be nominally legitimate it has to hide the extent to which it is acting in the private interest and appear, instead, to be acting in the public interest. The public must seem to be able to influence the state's policies and decisions. Genuine public participation in government decision making (practical democracy) would reveal the extent to which the state acts in the private interest and would uncover the contradiction between accumulation and nominal legitimization. Hence what is required is a facade of democratic decision making, with a minimum of public participation. The government also attempts to confine the planning process to technical issues by excluding practical issues from the planning process. In this way questions concerning goals and values

are made inappropriate and irrelevant to the planning process and the implicit goal of national development as accumulation is not questioned.

#### 1. ENVIRONMENTAL IMPACT EVALUATION.

Under the ND Act, environmental impact evaluation consists of an environmental impact report (EIR) prepared by the proponent, public submissions on the EIR, and an audit of the EIR by the Commissioner for the Environment. The aim of environmental impact evaluation should be to assess the environmental effects of a project by comparing it with possible alternatives, including the alternative of doing nothing. This assessment could then be used to evaluate all the costs and benefits of the proposal. It should be an integral part of the whole decision making process and should include real opportunities for public participation.

1(a). Environmental Impact Report.

As soon as possible after seeking to have the ND Act apply to a project the proponent must forward an EIR to the Commissioner for the Environment. This may be before the application to have the Act invoked is granted although the Commissioner cannot act upon receipt of the EIR until the Act has been applied (section 5(2)). This means that the EIR and the application will be prepared together during the decisive planning process. The Act contains no definition of "environmental impact report" and gives no indication as to what it should contain. Nor is there any definition of "environment" although section 3(2)(f) states that an application for the provisions of the ND Act must be "...accompanied by a statement of the economic, social, and environmental effects of the proposed work". This suggests that economic, social and environmental factors are all separate and implies a narrow definition of environment as physical surroundings. It does not recognise that the environment "...is a dynamic thing, involving the evolution and interaction of people and all that surrounds them, both in terms of natural resources and what they can make from them" (Working Party, 1985:5). It includes the community values associated with the physical surroundings (Working Party, 1985:16). This means that environmental matters are practical issues and any process that evaluates environmental impacts in a technical way will be inappropriate and inadequate.

Guidance on the preparation of an EIR was given to the proponents of the aluminium smelter and the synthetic petrol plant by the Commissioner for the Environment. He said that the 1973 Environmental Protection and Enhancement Procedures (1973 EPEP) (23) and "the best contemporary practice" could be used as guidelines for the preparation of an EIR (CFE, 1981a:Annex A, page 1; and 1981b:Annex A, page 2).

The 1973 EPEP had defined an EIR as:

...an objective evaluation setting out clearly and precisely, with appropriate documentation, the environmental consequences of a proposed action and of the alternatives to that action, and ways of avoiding or ameliorating any harmful environmental consequences (CFE, 1973:3).

The discussion of alternatives was an important requirement of the EIR. However the procedures had no statutory authority and were not specifically referred to in the ND Act. The examples of "contemporary practice" given by the Commissioner were varied and included the controversial CSR-Baigent Pulpmill EIR (1980) (24). The other EIRs listed were for the Poor Knights Marine Reserve (1979), the Devonport Naval Wharf (1980), the Auckland-Hunly Gas Pipeline (1980) and the Petralgas Methanol Plant (1980).

The Commissioner also advised South Pacific Aluminium Ltd that, because ND Act applications were site specific, the EIR could be limited to consideration of the impacts on the chosen site. However he recommended that some discussion of the site selection criteria be included (CFE, 1981a:Annex A, page 2). He went on to say that "...the

environmental evaluation should be limited to the 'area of significance'" (CFE, 1981a:Annex A, page 3). In the case of the Aramoana smelter this meant the Dunedin area. He also said no discussion was required on the impact at the national level, other than a possible brief description in the introduction. Similar advice was given about government policy: matters of government policy need not be discussed other than a possible brief description, separated from the body of the EIR, to help the public understand the project (CFE, 1981a:Annex A, page 2). The EIR did contain a brief chapter on the site selection process but there was no discussion of the smelter's impact at the national level, nor was there any discussion of government policy. It merely stated:

The [SPA] Company and the [Otago Harbour] Board see the [environmental impact] report as providing the public with an opportunity to view the expected local physical, economic and social impacts of the project. The report does not attempt to evaluate the national economic impact of the project, nor the issue of power pricing. The project came about in response to a government development strategy to utilise electricity to create growth in exports. The availability and price of power and whether the project is in the overall national interest - these matters lie properly within the ambit of government policy, and are not discussed here (SPA, 1981b:3).

This part of the Commissioner's advice clearly contradicts his other advice to follow the 1973 EPEP, especially in terms of the discussion of alternatives.

All this meant there was a great deal of uncertainty as to what an EIR should contain. But, because of the secrecy of the decisive planning process, the content of an EIR is of vital importance as it is likely to be the first real public description of the proposed project and its implications (Black, 1979a:435). Some of the uncertainty was resolved by the Court of Appeal when EDS challenged the adequacy of the aluminium smelter EIR (EDS v SPA (No.4) [1981] 1 NZLR 530). EDS claimed that the EIR should consider the environmental effects of the Clutha Valley hydro-electricity projects as these were necessary to provide power for the smelter. Because it did not do this EDS sought to have it declared null. After looking at the 1973 EPEP (this was before the 1981 revisions) and section 3 of the TCP Act, both of which relate to the importance of environmental evaluation, the Court concluded that:

...this suggests strongly that the statutory intention concerning such a report is that the document will include adequate and reliable reference to every matter that is significant and relevant and so provide a coherent and sufficient basis for consideration by the public and by those local authorities and individuals who may be affected and the Commissioner himself [sic] as a starting point for the important audit he [sic] must make (EDS v SPA (No.4) [1981] 1 NZLR 530 at 534).

But the Court went on to say that the decision about what is "significant and relevant" is a matter of differentiating between the primary and secondary implications of the work and in this there must be allowance for some discretion on the part of the proponent. If the EIR adequately covered the direct implications of a project, indicated the secondary implications so that it constituted a coherent and

sufficient basis for consideration by interested parties and provided a suitable basis for public understanding of the project then, according to the Court, it would have fulfilled the statutory requirements. In the EDS case the Court stated:

...the demand for electricity for the project is emphasised and it would seem obvious to any reader that the Aramoana scheme may have environmental and other implications in that regard. Accordingly we have concluded that the report sufficiently signposts those secondary implications and that it cannot be said that it is so deficient in that regard as not to constitute an environmental impact report for the purposes of the legislation (EDS v SPA (No.4) [1981] 1 NZLR 530 at 536).

It also said that the actual availability and price of electricity and whether the project was in the national interest were matters of government policy and therefore did not need to be discussed in the EIR (EDS v SPA (No.4) [1981] 1 NZLR 530 at 536).

Further clarification of the requirements of an EIR under the ND Act was provided by the 1981 revision of the EPEP, especially paragraphs 18-20. These changes were made to incorporate the ND Act procedures into the EPEP and in response to the CSR-Baigent Pulpmill audit (CFE, 1983:8). Paragraph 18 states:

Where a specific project proposal has been selected with form, location, scope and operational characteristics clarified, the environmental impact report shall:

- (i) describe the existing environment;
- (ii) describe the project;
- (iii) describe the direct physical and biological impacts of a project and provide a general treatment of significant impacts on the surrounding community;
- (iv) list associated works and the responsibility for them.

In general the impacts considered, need only be those caused by the works and the operation of the works for which the proponent of the project is financially responsible (CFE, 1981c:7).

It is important to note that this paragraph merely requires the proponent to "list" and "describe" various aspects of the project. It does not require any analysis or evaluation of the project's environmental effects (Allin, 1983:199 note 465). Paragraph 19 continues:

The scope of the impacts considered in an environmental impact report of a specific project proposal and the extent to which alternative industrial processing technologies are addressed may be the subject of prior discussion between the proponent of the project, the Commissioner for the Environment and representatives of appropriate Government departments. Where choices between alternative technologies for aspects of a project have been made by the proponent these alternatives do not need to be described in the environmental impact report. For aspects of the project where a choice between technological alternatives has not been made and where these have significantly different environmental impacts, the alternatives and their impacts should be described in the environmental impact report (CFE, 1981c:7).

This means that where the project characteristics such as site, technology and size are already chosen, and this would be the case for all ND Act projects, there is no need for the EIR to discuss alternatives to these characteristics.

But this takes away much of the purpose of environmental impact reporting and potentially turns the EIR into a public relations exercise justifying the project. It is significant that the requirement of the 1973 EPEP that the EIR "...is not to be a justification for a proposed action ..." (CFE, 1973:3) has been omitted from the 1981 EPEP. The proponent may discuss the scope of the EIR with the Commissioner for the Environment but there is no requirement that such discussion must occur. It is the proponent who can decide what is to be covered in the EIR. This approach is summarised in paragraph 20: "The format for an environmental impact report is dependent on the extent to which design and other commitments have been made" (CFE, 1981c:7). The extent to which these design and other commitments will be made prior to the preparation of the EIR, and hence outside its scope, is entirely under the control of the proponent. This is the type of planning process sought by BP. The Commissioner for the Environment has concluded that:

Environmental impact assessments of projects under the NDA are more narrowly focussed than those outside the scope of the Act. NDA projects are site specific and options are not discussed to the extent possible in non NDA EIRs. As a result some of the wider issues associated with the project, such as regional social impacts and the consideration of alternatives, can be lost sight of unless the proponent wishes to take them into account (CFE, 1983:17).

The Commissioner will encourage the inclusion of these wider issues in the EIR, but has no statutory power to ensure that such an approach is taken. Although an EIR is mandatory under the ND Act, its scope has been so narrowed that it potentially excludes all discussion of alternatives.

1(b). Public Submissions.

As soon as the Commissioner for the Environment receives the EIR he or she must, if the provisions of the Act have been applied, make it available for public inspection, give notice that it is available for inspection and call for public submissions to be made within six weeks. This brief period for public submissions contrasts markedly with the years of the decisive planning process in which the government and proponent will have been preparing their case. The Court of Appeal described it as an "unusually limited period" for public submissions (EDS v SPA (No.4) [1981] 1 NZLR 530 at 534). Some planning legislation gives a minimum rather than a maximum time for submissions. For instance a minimum of two months is allowed for public submissions on matters that should be included in a regional planning scheme. Once a draft regional planning scheme has been prepared submissions are again called for, this time with a minimum of four months.

Despite this short time for the preparation of submissions, 34 submissions were received on the methanol plant, 68 on the synthetic petrol plant, and 473 on the aluminium smelter. "Most" of the submissions on the methanol and synthetic petrol plants were opposed to the projects (CFE, 1980b:Vol.1, page 21; and CFE, 1981b:Vol.1, page 20). A more detailed breakdown was given on the smelter submissions: eleven favoured the smelter, eighteen were neutral, while 444 opposed it (CFE, 1981a:7 and Annex 4).

Under the 1981 EPEP public submissions on matters of government policy are to be referred to "the appropriate Government departments or local bodies" (CFE, 1981c:11). It is not clear whether the Commissioner is to consider these submissions first. There is also no indication as to what will happen to these submissions once they are received by the government department. Although ambiguous, this requirement seems to be an attempt to separate practical issues from the environmental impact evaluation process and it implies that these practical issues are the responsibility of government. Such an approach negates the purpose of environmental impact evaluation. The environment is a practical issue so environmental impact evaluation must be a practical process.

1(c). Environmental Impact Audit.

In preparing the audit the Commissioner for the Environment "...shall act independently and shall not be subject to the directions of the Minister for the Environment or any other Minister" (section 2(2)). The audit must be completed within three months of the date of the public notice about the EIR. The Commissioner must notify the Tribunal when the audit is completed, send a copy to the proponent and give public notice that it is publicly available.

The Commissioner has three months in which to complete the audit. Within this time he or she must carry out an appraisal of the audit and the public submissions (which will only be available for the last six weeks of this period) and conduct independent investigations, consultations and site visits (Kenderdine, 1982:291). There are thus severe time limits on the preparation of the audit.

There are also restrictions due to a lack of information. Although the basic technological processes for the project will have been selected before environmental impact evaluation began, many of the details and design factors associated with the chosen technology will not have been determined. Furthermore, the technology to be used in the project may be new and relatively unknown, as in the case of the synthetic petrol plant. Hence many details, such as noise levels and effluent composition, are uncertain at the time of environmental impact evaluation. Because of the haste imposed upon these projects by their "national importance" and "urgent" status, much of this detailed design and development occurs concurrently with the ND Act processes instead of before. Thus these details cannot be evaluated. This limits the effectiveness of all stages of environmental impact evaluation: the EIR will contain inadequate details, meaning that the public submissions and the audit will not be based on the full details of the proposal. NZSFCL responded to criticisms of inadequate details in the synthetic petrol plant EIR by saying:

As continual refinement is being made in many areas [of design and technological processes] it has not been possible to provide the statutory authorities and the public at any earlier stage with certain details of the plant's air emissions, the wastewater effluent composition, final noise levels and certain other matters. Nevertheless, the final details of any such matters have been released as soon as they have become available and this process will continue down to the time of the National Development Act hearing (CFE, 1981b:Vol.1, Annex L, page 2).

But clearly an adequate assessment of the project cannot be made without these details. One of the problems with preparing a single EIR and audit for each project is that the process of environmental impact evaluation normally occurs after the decisive planning process but before the design and technical details have been established. Hence it is too late to affect policy decisions but too early to take into account many design details. (Other problems would arise if environmental impact evaluation did not occur until after the design and details had been established. In such a case the evaluation would probably be too late to affect these details as well as the policy decisions. Hence what is required is a series of EIRs and audits at various stages of the planning process. This is discussed in the postscript.) Thus both the timing of the EIR and audit and the time available for the preparation of the audit severely constrain the ability of the Commissioner to assess thoroughly the environmental implications of a project. The major problem is that the provisions of environmental impact evaluation do not occur until after the decisive planning process. The OECD review of environmental procedures in New Zealand found that:

The institutional framework in New Zealand, as in many other countries, continues to reflect the assumption that environmental considerations should be brought to bear only after the basic economic and engineering parameters have been established. While understandable on historic grounds, this makes it difficult for environment agencies, even environmental units within operating departments, to become full participants in energy planning, and it tends to cast them in the role of protagonists (OECD, 1981:70).

The role of the Commissioner for the Environment has been further limited by the amendment of the ND Act and the revision of the EPEP, both in 1981. Under the 1979 Act the Commissioner was required to "...give his [sic] opinion on the environmental implications of the work in the form of an audit ..." (section 5(3)). The 1981 amendment to the Act changed this to a requirement that the Commissioner "...audit the environmental impact report by examining and giving his [sic] opinion on the accuracy and adequacy of the report in so far as it relates to the proposed work" (ND Amendment Act, section 2). The aim of this amendment was to prevent the Commissioner from challenging economic and policy implications of the projects in the audit. The wording of the amendment seems to have been derived from a comment made during the EDS case on the second aluminium smelter EIR:

It would of course be extraordinary if [the Commissioner] were to feel inhibited in the discharge of his [sic] own responsibility by the absence of reference in a report to some relevant matter. That consideration is reinforced by the requirement of s5(3) that the Commissioner consider the environmental implications of the work - rather than confine himself [sic] to an assessment of the environmental impact report (EDS v SPA (No.4) [1981] 1 NZLR 530 at 535).

By changing the subject of the audit from the work to the EIR the amendment does try to limit the Commissioner to an assessment of the EIR. However, the Commissioner for the Environment, Mr Ken Piddington, interpreted this as restating his function and as having little effect on his role (Kenderdine, 1982:290). He said:

...the focus will change from my opinion on the environmental implications of projects to [the] accuracy and adequacy of the impact report but from our point of view the process will be the same" (The Dominion, 4 September 1981, page 2).

In his view he can only consider the accuracy and the adequacy of the EIR by first considering the actual environmental implications of the project, thus making the amendment little more than a semantic change. No ND Act EIRs have been prepared since the amendment so there is no indication of Cabinet's attitude towards this interpretation.

However, the changes introduced in the 1981 EPEP are more far reaching and do change the role of the Commissioner for the Environment. Particularly relevant is paragraph 34 which includes the restriction that "The Commissioner will not concern himself [sic] with the economic implications of the proposal including those relating to alternative resource use" (CFE, 1981c:11). This change was partly in response to the Commissioner's audit of the CSR-Baigent pulpmill proposal, which was severely criticised by the government for questioning the policy behind the proposal, and appears to have been made to prevent similar comments about other Think Big projects. The Commissioner has interpreted the change as meaning that, although the

economic implications of alternative resource use are precluded, it is possible for the audit to cover the environmental implications of alternative resource use (CFE, 1983:9). The Court of Appeal clearly saw the economic implications of a project as being outside the Commissioner's role, even before the changes to the EPEP:

After considering any submissions [the Commissioner] is to give his [sic] opinion on the environmental implications (an expression which plainly excludes from his [sic] role such matters as wider economic implications) of the proposed work in the form of an audit, which is to be publicly available (CREEDNZ v G-G [1981] 1 NZLR 172 at 174).

So although the Commissioner for the Environment is given statutory independence by the ND Act and cannot be directed by any Ministers, Cabinet direction has limited the scope within which the Commissioner can act independently. Following the process of environmental impact evaluation for the methanol plant, but before the changes to the ND Act and the 1973 EPEP, the editor of the New Zealand Law Journal said:

As far as the Commissioner for the Environment is concerned, in many ways his [sic] trial is till to come. His [sic] office, being without a statutory basis, is vulnerable and when one looks at the potential limitations on NDA inquiries and hears of the possible redefinition of his [sic] function it is difficult not to feel alarm at the way in which an elaborate structure has been established, supposedly for environmental protection, but with such in-built limitations as to virtually ensure that all matters are debated except the really important ones (Black, 1981:42).

## 2. PLANNING TRIBUNAL INQUIRY AND REPORT.

During the period of environmental impact evaluation the various parties will be preparing for the Planning Tribunal inquiry. All relevant documentation must be forwarded by the proponent to the Tribunal and to all the parties that would be involved if the consents were being sought in the normal way. Statutory authorities must carry out investigations and send their recommendations on the consents sought to the proponent and the Tribunal. Once the audit has been completed the Tribunal sets a date and place for the inquiry. The inquiry must be held in public. However the right to participate in the inquiry is limited. Matters that can be considered by the Tribunal are also limited. Of particular importance are the restrictions preventing the Tribunal from considering matters of government policy. Once the Tribunal has completed its inquiry it must forward to the Minister of National Development a report containing its recommendation on the consents sought. These recommendation are not binding in any way.

2(a). Referral of the Application to the Planning Tribunal.

As soon as the provisions of the ND Act are applied to the project by the Governor-General in Council, the Minister of National Development must forward the application, along with all the accompanying documents, to the Planning Tribunal for an inquiry, report and recommendation. It is at this stage that the Minister could add any consents not being sought under the Act, thus enabling a more complete environmental impact evaluation process and Planning Tribunal inquiry. The application and documents must also be forwarded to the United or Regional Council, the territorial authority and the Regional Water Board within whose districts the work would be sited; the National Water and Soil Conservation Authority; the Commissioner for the Environment; the Minister of Works and Development (if the work is a private one); and every statutory authority that would normally consider the consents applied for. The referral of the application to the Tribunal must be made public and the application and documents must be publicly available.

Where a consent under the TCP Act is specified in the application, the appropriate territorial authority must give notice of the application to all those who would be so advised if the consent was being sought in the normal way. This would be the bodies or persons considered to have a greater interest in the work than the general public. The proponent must advise all the bodies and people who would

normally be advised about the other consents being sought. The aim of these provisions is to ensure that all statutory authorities, bodies and persons who would be involved if the consents were being sought in the normal way are informed of the application for planning consents under the ND Act. But many of the authorities informed would normally make the decisions regarding the consents sought. Their decision making powers have been removed and replaced with the right to be informed.

2(b). Statutory Authorities Report to the Planning Tribunal.

Every statutory authority that would normally consider the consents applied for must send to the Tribunal a report containing recommendations as to whether the relevant consents should be granted, the period of time for which each consent should be granted (if such discretion normally applies), and any conditions, restrictions or prohibitions which should be imposed upon the consent. These recommendations must be made no later than fourteen days before the Tribunal inquiry is due to begin unless, under exceptional circumstances, the Tribunal allows an extension of time. The recommendations must also be sent to the proponent and any other parties that the Tribunal thinks appropriate. These recommendations can form the basis of the evidence to be given to the Tribunal by the authority, although its evidence is not restricted to them.

The investigations upon which the recommendations are based are subject to extreme time constraints. They do not begin until after the Act is applied to a work and they must be completed and the report written two weeks before the inquiry. This gave the authorities less than five months to carry out their investigations and write their reports for each of the methanol and synthetic petrol plants. The actual time periods were 20 August 1980 to 3 January 1981 for the methanol plant and 24 February 1981 to 21 July 1981 for the synthetic petrol plant. Furthermore there was a time overlap between the two planning processes as the methanol plant inquiry did not finish until 6 March 1981. Thus for a short time statutory authorities found themselves running simultaneously on two fast tracks. To meet the workload of the ND Act applications the Taranaki Catchment Commission had to employ large numbers of short term staff and defer its normal work (Taranaki United Council, 1984:8).

The authorities also face constraints due to a lack of knowledge about new technologies. These were particularly tight for the synthetic petrol plant as the conversion process for gas to petrol was new. James Kitto, a biotechnologist with the Taranaki Catchment Commission, which would normally have considered the applications for water rights for the methanol and synthetic petrol plants, said:

...we didn't know exactly what the [synthetic petrol plant's] effluent composition would be and what changes the thousand-fold scale-up from the pilot plant would incur. Even if we had known, we simply didn't have the time to conduct the necessary tests. However, if we hadn't been satisfied with the dilution afforded by a 600m outfall, we would not have recommended that a right to discharge be granted (Young, 1982a:18) (25).

Some of the information was unavailable because the plant's design was still being finalised, other information was kept secret for commercial reasons. Thus these statutory authorities face the same problems as the Commissioner for the Environment. These investigations occur concurrently with the preparation of the audit so it is difficult for the Commissioner and the authorities to draw on each other's work.

2(c). Participation in the Planning Tribunal Inquiry.

Section 8 of the ND Act lists the bodies and persons entitled to be heard at the Planning Tribunal inquiry. "Bodies and persons" means "every public, private, corporate or unincorporate body or person known to the law" (Palmer K, 1984:113). Those who must appear or be represented are the proponent, the Minister of Works and Development (in the case of a government work the Minister will appear as the proponent), the Commissioner for the Environment and every statutory authority which would normally consider the consents being sought. Those who may appear are any local authority in whose district the project would be built or whose district would be directly affected by

the project, "any body or person affected by the proposed work" (section 8(e)) or "any body or person representing some relevant aspect of the public interest" (section 8(f)). It is these last two criteria that would seem to allow direct public participation in the Planning Tribunal inquiry. However, these criteria are the same as those found in section 2(3) of the TCP Act governing those who may make submissions on district, regional or maritime planning schemes. These criteria have previously been interpreted by the Planning Tribunal and the Courts in a way that restricts public participation. The ND Act does not change the interpretation given to the section under the TCP Act (Planning Tribunal, 1981b:Appendix II).

"Any body or person affected" has been interpreted as meaning any body or person who is affected more than the public in general or who has a greater interest than the public in general. This means that there is no right for the general public to participate. Thus, in the Petralgas Methanol Plant case a Mr Shem Kerr, a member of the public, was refused the right to appear before the Tribunal because he was not a "person affected". The Tribunal stated:

Mr Shem Kerr claimed to be a person affected by the proposed work. But the Tribunal found that he lives at Inglewood some 14.5 km from the proposed methanol plant and held that he would not be affected by the proposed work to any degree greater than or in any manner different from the degree or manner in which the general public would be affected. The Tribunal therefore ruled that Mr Kerr did not have the right to be heard at the inquiry (Planning Tribunal, 1981a:2).

However, the Tribunal ruled that BP (NZ) Ltd, BP (Chemicals) Ltd and NZSFCL could appear as they all "...had an interest greater than the public generally and were 'persons affected'" (Planning Tribunal, 1981a:2). BP's interests were in preserving the usefulness of its land at Omata and in protecting its storage tanks at the port. NZSFCL's interest was in ensuring that the methanol plant's water requirements would be compatible with its anticipated water requirements for the synthetic petrol plant (Planning Tribunal, 1981a:9). These are technical issues yet they were held to be greater than the public interest. The public interest involves practical questions concerning national resource allocation and use, the desired goals of development, how the costs and benefits of development are to be distributed, as well as the mechanisms by which these questions are asked and answered. Only in a technical planning system could the specific, technical interests of BP and NZSFCL be said to be greater than the public interest.

When the Bill was first introduced this clause read, "any person or body who or which will be directly affected by the proposed work". clause 8(1)(f), emphasis added). Given the strict interpretation of the clause as it now stands it is clear that "directly" was a tautology.

The section on "representing some relevant aspect of the public interest" was introduced into the TCP Act to widen the scope of standing. Previously standing had been limited to "bodies and persons affected". "Representing" has been held to mean "standing for" (Remarkables Protection Committee v Lake County Council (1980) 7 NZTPA 273 at 280). It does not require that the body or person has a mandate from the public to act. However, to appear as a representative of the public interest they must be able to show that they actually stand for some aspect of the public interest. It is not sufficient just to want to raise a matter of public interest. In the case of a body this could be shown by its particular objectives; in the case of a person by some particular office that they hold or any interest that they pursue. Also they must be representing some relevant aspect of the public interest and not just objecting on a personal basis. Thus Mr Kerr would not have been able to claim successfully to be representing some relevant aspect of the public interest.

Analysis of both the clauses seeming to allow public participation at the Tribunal inquiry shows that local people (which does not include those living 14.5 km away) and public interest groups can participate but that there is no right for the general public to participate. Judge Turner, chairman of the Planning Tribunal on the methanol plant, said:

It is apparent that some people have a complete misunderstanding as to the right of the public to participate in the planning process....There has never been what has been described as a "basic democratic right" to make submissions (Taranaki Daily News, 21 February 1981, page 2).

This shows the technical nature of the Act (although this is not confined to the ND Act as other legislation has the same criteria for public standing).

All those who wish to appear before the Tribunal must notify the Tribunal and the proponent of that intention at least five weeks before the inquiry begins. This is to enable the proponent to forward details of its case to all those who will be appearing. It also has the effect of excluding those people who do not see the notice of the inquiry or fail to respond in time. The public notice requirements of the Planning Tribunal inquiry seem designed to restrict public participation by default where possible. Section 2 of the ND Act generally defines a public notice as a notice that appears once in the Gazette, twice in a newspaper circulating in the area where the work is to be sited, once in a daily newspaper published in each of the four main centres and in any other newspaper thought necessary by the person making the notice. However, under section 7(4)(a) the notice advising the time and place of the Tribunal inquiry needs only to be published once in a newspaper circulating in the area and once in the four main centres. Thus, the restrictive public notice requirements and the need to notify the Tribunal of any intended appearance can act as a crude streamlining mechanism: "the fewer people who appear, the more

streamlined the process" (Allin 1983:415). Four parties, including Petralgas, were excluded from the synthetic petrol plant inquiry in this way (Planning Tribunal, 1981b:Appendix I, part G).

2(d). The Planning Tribunal Inquiry.

As soon as possible after receiving notification from the Commissioner for the Environment that the audit has been completed the Registrar of the Tribunal must give public notice of the date and place of the Tribunal inquiry. This must be between six and eight weeks after the date of the public notice, unless the proponent seeks a later date. The Tribunal must give the inquiry and the subsequent report and recommendation priority over all other matters before the Tribunal, except other ND Act applications. The proponent and all statutory authorities normally involved must be specifically notified of the date and place of the inquiry. No less than three weeks before the Tribunal inquiry is due to begin the proponent must forward to the Tribunal and every body or person who has advised the Tribunal of their intention to appear at the inquiry, sufficient details to "fully and fairly" inform the other parties of the proponent's case (section 7(5)(a)). The inquiry must be held in public and in the nearest convenient location to the proposed site of the work. The Tribunal is to inquire into matters relevant to the consents sought.

The date of the Tribunal inquiry is set once the Commissioner for the Environment sends the Tribunal a certificate stating that the audit has been completed. This certificate is the only real connection between the process of environmental impact evaluation and the Tribunal inquiry as Tribunals have consistently refused to accept EIRs and audits as evidence. This is because both documents are collections of untested opinion. Information from these can only be presented as evidence by expert witnesses who are available for cross examination. The Chairman at the synthetic petrol plant inquiry said:

The audit by the Commissioner for the Environment is not a document at the moment officially before this Tribunal. Any conclusions contained therein must be proved in the normal way by a witness with knowledge of and expertise concerning those matters. This same comment applies to the Environmental Impact Report (Planning Tribunal, 1981b:Appendix II).

The area of admissibility is a contentious one and in the EDS No.4 case the Tribunal asked the Court of Appeal for guidance. The Court found that the Act did not require the audit to be sent to the Tribunal but that "it would be remarkable if the legislative attention which has been given to [ensuring adequate assessment of environmental impact evaluation] were to end with an audit by the Commissioner which could then be ignored on all sides" (EDS v SPA (No.4) [1981] NZLR 530 at 537). The Court reserved its opinion on whether or not the audit should be brought directly before the Tribunal but did say there could be no objections to the Tribunal using the audit when preparing its report for the Minister.

The scope of the inquiry is determined by sections 7(1) and 9. Under section 7(1) the Tribunal must conduct its inquiry into the matters relevant to the consents applied for. This means that the inquiry is into the consents sought, not into the project itself. The consequences of this were shown in Chapter 5. It means that the proponent can control the planning system and can divert sensitive issues from the process of environmental impact evaluation and the Planning Tribunal inquiry. Section 9 sets out the matters to be taken into consideration in the inquiry. Under the original Act this section read:

#### 9. Matters to be taken into account -

(1) The matters to be taken into account, recognised, and provided for by the Tribunal in conducting the inquiry and making the report and recommendation to the Minister [of National Development] shall be those matters that would have been taken into account, recognised ,and provided for if the applicant had applied in the normal way for the consents set out in the application referred to the Tribunal.

(2) The Tribunal shall not be concerned to inquire into the criteria set out in section 3(3) of this Act.

The criteria of section 3(3) are those by which a project is deemed to be in the national interest and therefore those by which the ND Act is applied to a project. They were that the work was a major work; that was likely to be in the national interest; that it required a prompt decision concerning the consents sought; and that it was essential for the development of resources, or the development of self-sufficiency in energy, or the expansion of exports or of import substitution, or the development of employment. Section 9(1) requires the Tribunal to take into account all the matters that would have been considered if the

consents had been applied for in the normal way. Under the TCP Act certain matters have been defined as being of national importance and these must be taken into account when considering any planning consent sought under the TCP Act. These matters include "the wise use and management of New Zealand's resources" (TCP Act, section 3(1)(b)). Thus, in considering any TCP Act consent sought under the ND Act, the Tribunal should consider whether or not the project represents "the wise use and management of New Zealand's resources". But under section 9(2) of the ND Act the Tribunal is prohibited from considering, amongst other things, whether or not the work is in the national interest and whether or not it is essential for "the orderly production, development, or utilisation of New Zealand's resources" (section 3(3)(a)(i)). Because of this overlap in the subject matter of the TCP Act section 3(1)(b) and the ND Act 3(3)(a), section 9(2) would appear to prevent the fulfillment of section 9(1). In the methanol and synthetic petrol plant cases the Tribunals ruled that because of section 9(2) it could not hear evidence relating to the wisdom of using Maui gas for the manufacture of methanol or synthetic petrol:

Some of those who took part in the inquiry sought to have us inquire into the wisdom of using natural gas for the manufacture of methanol for export. The Tribunal ruled that that question is not a relevant consideration ... (Planning Tribunal, 1981a:10).

We are not, however, called upon to decide whether the use of natural gas for the production of synthetic petrol is indeed the best or wisest use of that natural resource. Consequently we will not admit evidence directed to persuade us that alternative fuels derived from natural gas or alternative synthetic petrol processes would better represent the wise use or management of resources (Planning Tribunal, 1981b:Appendix III).

Judge Turner, Chairman of the methanol plant Tribunal, summed it up by saying, "the importance of the project is, in my mind, not important" (COG, No.8:4).

The methanol plant Tribunal reconciled section 9(1) with section 9(2) by saying that the TCP Act applies only to the use and development of land, but not to the use of raw materials and resources once they have been taken from the land (Planning Tribunal, 1981a:11). This interpretation is based on a distinction between policy and planning. The Tribunal identified three broad aspects of any decision to manufacture a particular product (Planning Tribunal, 1981a:11). These are:

- 1) the decision to use a particular resource;
- 2) the choice of a particular site;
- 3) the environmental and social consequences of using that particular site.

According to the Tribunal the first aspect is a policy matter and is not subject to planning control, whereas the latter two are subject to such control. The Tribunal conceded that these three aspects were interrelated and that the distinction was not always clearcut. However, the distinction effectively meant that matters of policy relating to the use of Maui gas for the manufacture of methanol were not heard before the Tribunal.

A similar approach was taken by the synthetic petrol plant Tribunal. It said it could consider the placing of an enterprise wishing to make use of a particular resource but that it was not concerned with how the resource was to be used (Planning Tribunal, 1981b:Appendix III). The Tribunal also said that by applying the ND Act to the synthetic petrol plant, Cabinet had defined it as a matter of national importance but that it could still be compared with the other matters of national importance listed in section 3 of the TCP Act. One such matter is the protection of land that is valuable for the production of food (TCP Act, section 3(1)(d)). The Tribunal could weigh up any conflicting considerations between these two matters of national importance. It could not, however, consider the national importance of the synthetic petrol plant as such (Planning Tribunal, 1981b:15-16 and Appendix 3).

Although section 9(2) showed a clear government move to delete policy matters from the planning agenda, in many ways it was unnecessary because there is already a restrictive interpretation placed on section 3(1)(b) of the TCP Act. As interpreted, this section does not allow any evaluation of a proposed resource use. Two non-ND Act Tribunal decisions clearly show this. In the ammonia urea case the Tribunal said that "wise use" meant "ensuring in a planning sense that an opportunity is afforded to make use thereof" and that the economics of the end-project are not a relevant planning issue (Smith and EDS v Waimate West County Council (1980) 7 NZTPA 241 at 259). The Tribunal for the CSR-Baigent pulpmill repeated the methanol plant Tribunal's

argument that the TCP Act regulates the use of land but not the use of resources and said that the territorial council or Tribunal was not required to inquire into "...the relative merits of various uses which might be made of resources such as forest products" (Chelsea Investment Ltd v Waimea County (1981) 8 NZTPA 129 at 133). On this basis the Counsel for NZSFCL (1981a:11) said in its opening address:

The applicants do not wish to argue for any restrictive interpretation in s.9(2) and in their evidence and submissions will address the matters referred to in s.(3)(1) of the Town and Country Planning Act 1977. This concession is subject, of course, to the adoption of a true interpretation of Section 3(1) of the Town and Country Planning Act - a task rendered simple by the previous rulings of the Planning Tribunal in the Ammonia Urea case, the Petralgas case and the Baigent case.

It would have been more accurate for NZSFCL to say that it did not need to argue for a restrictive interpretation of section 9(2) since, as shown in the cases it cited, there is already a restrictive interpretation placed on questions of resource use. This interpretation of wise use clearly shows the technical nature of the planning process in general. Technical rationalisation means that words like "wisdom" and "wise" lose their meaning. Thus, the "wise use" of resources is interpreted as the "use" of resources.

In October 1981, section 9(2) was amended to read:

(2) The Tribunal shall not have regard to the criteria set out in section 3(3) of this Act except to such extent as is necessary in order to comply with subsection (1) of this section.

But given the technical interpretation of the TCP Act section 3(1)(b) this would not have changed the decision of the Tribunals not to be concerned with the end use of Maui gas.

Because the Tribunal could not consider matters of government policy or wise resource use it could not consider whether or not New Zealand needed a methanol plant or a synthetic petrol plant. The importance of the projects was irrelevant. The Coalition for Open Government said:

The fundamental and inescapable problem with the National Development Act procedures is that they assume the project in question is not in question. The points allowed to be discussed are technical ones, limited to how we build the best (methanol plant) (synthetic petrol plant) (aluminium smelter) (COG, No 8:4) (26).

This is technical planning. There is no discussion of the goals or value of the individual projects or of the wider development strategy. Practical questions such as, "What shall we do with the opportunities given to us by the surplus of energy?" "Will these strategies help us achieve the lifestyle we want?" "What sort of society do we want to plan for?" are not asked. They cannot be asked under the ND Act. Instead the Tribunal must take the project as a given goal and restrict its inquiry to the technical consents applied for.

2(e). The Planning Tribunal Report and Recommendation.

After its inquiry the Tribunal must send to the Minister of National Development a report containing its recommendation regarding the planning consents sought. However this is recommendation only and it does not have any binding power. The Tribunal must give reasons for the recommendation and specify any time limits, conditions, restrictions or prohibitions that it considers should be imposed upon each consent granted. These can only be imposed if they were possible under the normal legislation. The Tribunal must also send a copy of the report to every body and person who appeared at the inquiry and give notice that the report is publicly available. In the original Act, besides giving a recommendation on each consent sought, the Tribunal had to give an overall recommendation as to "whether the work should proceed as proposed, or proceed in a modified form, or not proceed at all" (section 10(4)). This meant that the Tribunal could have commented on the work itself, rather than confining its comments to the consents sought, so this section was repealed in 1981. It should be noted that the Tribunal has the power to recommend that a consent not be granted, which would, if the recommendation was accepted, prevent the work from going ahead. It cannot, however, directly recommend that the work not go ahead.

The decision to proceed with a project is made during the decisive planning process. The relationship between the decisive planning process and the Planning Tribunal was clearly shown by a promotional booklet on the synthetic petrol plant published by NZSFCL in 1982. The booklet included a chronology giving the following order of events for the latter part of 1981:

August 4: Planning Tribunal Hearings begin.  
September 11: Cabinet approves the project.  
October 2: Mobil defers contract signing until outcome of November 27 Election known.  
October 8: Planning Tribunal Hearings end.  
December 4: Planning Tribunal decision endorses the project (NZSFCL, 1982:16).

This indicates that as far as NZSFCL is concerned the function of the Planning Tribunal is to endorse or approve Cabinet's earlier decision, made in conjunction with the proponent, to go ahead with the project. Clearly, the Tribunal is to be separate from the decision making process.

If the Tribunal's recommendation is compatible with this decision then it will nominally legitimate it. In this way the Tribunal fulfills a nominally legitimating role. It involves "...the symbolic use of hearings, expert judgements [and] juridical incantations..." (Habermas, 1976:70) that maintain the public acceptance of government decisions. The ND Act Tribunal is in a similar position to the Planning Tribunal that considered the appeal against the granting of water rights for the high dam at Clyde. To obtain the water rights the

government could have used section 23(7) of the WSC Act to declare the waters to be of national importance and grant the water right by Order in Council. However, the government chose to seek the rights through the National Water and Soil Conservation Authority (NWSCA) and thereby placed itself under the jurisdiction of the Planning Tribunal on any question of appeal. NWSCA granted the rights but this was appealed. Prior to the Tribunal hearing the appellants sought an assurance from the government that it would accept the Tribunal decision and would not use section 23(7) or special legislation if the appeal was upheld. The government declined to give this assurance. The Crown Counsel wrote to the appellants on 5 September 1980, saying:

You will appreciate that much wider issues of policy are involved in this matter than could properly be said to be within the jurisdiction of the Planning Tribunal on the hearing of these appeals. I cannot, therefore, give the wide assurance that you seek. I can, however, tell you that the Government prefers to deal with this matter via the Planning Tribunal, so that there may be (and be seen to be) a proper measure of public involvement in which the pros and cons of this highly complex question may be fully considered (Annan v NWSCA and Minister of Energy (No.2) (1982) 8 NZTPA 369 at 375).

The government wanted the public participation to be seen. It did not, however, want it to be effective to the extent that it would not get the water rights. This is why it kept open the option of going outside the Tribunal's decision (if the appeal was upheld) and using section 23(7) or special legislation to ensure the rights. It was clear that the government was hoping for a favourable decision from the Tribunal that would give the dam "an important measure of independent approval" (Brookfield, 1983:62). However, the Tribunal considered that, if these

wider issues were not in its jurisdiction, the government should have taken the responsibility for deciding the water rights itself and not placed the question before the Tribunal. Judge Treadwell, one of the Tribunal members, said:

...I am not however prepared to give a judicial cloak to a policy decision of Government when the Crown has placed a specific provision in the Act which, if it chooses to use, removes the matter from the judicial process (Annan v NWSCA and Minister of Energy (1980) 7 NZTPA 417 at 438).

Under the ND Act, the government removes policy matters from the judicial process and then asks the Tribunal to give the project and, by implication, these policy matters, a judicial cloak of respectability. Thus the government's decision appears to receive judicial sanction. This gives the decisions a non-political appearance and diverts attention away from the fact that the decisions are made together by the state and proponent. The Governor-General fulfills a similar role by formally announcing, as the apolitical Governor-General in Council, decisions made by Cabinet. Nominal legitimation is also derived for the work when the Act is applied and the work is said to be in the national interest and when the consents are granted and the work is declared to be a work of national importance.

If the Tribunal's recommendation is not compatible with the government's decision then the government will either have to overturn the decision made during the decisive planning process (and the pronouncement that the project is in the national interest) or the Tribunal's recommendation. The latter is far more likely.

The nominal legitimating function of environmental impact evaluation and the Planning Tribunal inquiry is not unproblematic and it does have some delegitimating consequences. One of the conditions for nominal legitimization is that politics and decision making be maintained at the technical level, for as soon as practical questions are asked in a planning process there will be questions about the role of the state. Therefore public participation is excluded from planning. But nominal legitimization also depends upon the principle of public participation. There must appear to be opportunities for public input into the decision making process. Hence nominal legitimization both excludes and depends upon public participation. This would not be problematic for the state if it were practical participation that was excluded, with technical participation providing the nominal legitimization. But it is the principle of participation upon which nominal legitimization is dependent and this can be interpreted either practically or technically (Rodger, 1984:415). The government clearly interprets this principle as technical participation. It extends technical participation but restricts practical participation:

...while the opportunity for individuals to participate in planning has been widened, the scope of planning has been narrowed and the opportunity to participate in the selection of policy options removed (Black, 1982:3).

But public interest and environmental groups interpret this principle as meaning practical participation and therefore expect to be able to raise practical issues such as "Is a synthetic petrol plant in the national interest?", "How can Maui gas best be used?". This is the type of important question that should be considered in any planning process. Because there is no opportunity for this type of question to be raised before the ND Act is applied, the process of environmental impact evaluation and the Planning Tribunal inquiry appear as the only place such issues can be discussed:

It is unfortunately true that the environmental procedures are at present seen by many as the only forum for public participation in major decisions. This seems to be the case for projects dealt with under the National Development Act (CFE, 1981d:3).

However, these stages are based upon technical planning and practical questions cannot be asked. This leads to a tension in the process of environmental impact evaluation and the Planning Tribunal inquiry between practical and technical participation. This has been well described in relation to natural justice:

There has arisen therefore a discernible tension within current practice between the administrators' insistence upon "procedural" [technical] forms of legitimacy (natural justice as a right to a formal hearing) and many objectors groups' insistence upon "discursive" [practical] forms of legitimacy (natural justice as a right to an open and independent debate about issues) (Rodger, 1985:416)

This tension leads to questions being asked about the purpose of planning and about the role of the state in planning. These are practical questions and they are asked outside official political forums. This matches the state's move from democratic processes to neo-corporatist decision making:

If the governability crisis is responded to through the resort of governing elites to para-parliamentary, non-public, informal and poorly legitimised forms of resolving policy issues often described as neo-corporatist, the participation crisis is responded to by citizens in a parallel retreat from the official channels of conflict articulation (Offe, 1984:170).

The "official forms of conflict articulation" are themselves questioned. A good example of this is the Coalition for Open Government, which was formed in reaction to the ND Bill. COG worked towards "open, accountable, decentralised, participatory decision making" (COG, No.21:3) and raised many practical questions about the role of the state. In this way, the state's attempt to maintain planning at the technical level leads to practical questions about its role. This can have delegitimising consequences, as nominal legitimisation depends upon its not being questioned.

Other delegitimating consequences arise from the actual use of the Act. The nominally legitimating functions of environmental impact evaluation and the Planning Tribunal inquiry become revealed as the Act is used. It becomes clear that the actual decision to proceed with a project is made before the ND Act procedures began. The solicitor for the CFE said:

Despite the status accorded it in the National Development Act 1979, the [Commissioner's] Audit of NDA projects is not sufficiently integrated into the planning process to be widely and fully utilised by the decision-makers. The public must therefore increasingly see the Audit function under that Act as one, where in part, review of the environmental implications of a work is merely to legitimise decisions already taken or to merely assess the narrow environmental consents sought (Kenderdine, 1983:640-641).

This increasing public awareness of the function of the audit and the other procedures under the ND Act planning process, also brings its nominal legitimacy into question. These delegitimizing consequences of the Act show that the contradiction between accumulation and nominal legitimization is not resolved in the Act. Because the Act was only used to implement two projects these consequences were not great and did not endanger the nominal legitimacy of the state. It is likely, however, that if the Act were continued to be used, then these consequences would have a larger and more pervasive effect.

### 3. SUMMARY.

The environmental impact evaluation and Planning Tribunal stages of the ND Act procedure involve public participation. However, these stages are separated from the key decision making processes. This separation occurs through:

- an EIR that is limited to direct and significant impacts and to the regional "area of significance", with no discussion of impacts at a national level;
- an EIR that occurs after key decisions are made and that therefore does not need to consider alternatives to the chosen options;
- public submissions that have to be made within six weeks no matter how large or complex the project;
- an audit commenting on the "accuracy and adequacy" of the EIR, and not on the work itself;
- an audit that has to be completed within three months;
- an audit that may be based on incomplete information because design decisions are still being made;
- an audit that cannot discuss the economic implications of alternate resource use or matters of government policy;
- a Planning Tribunal inquiry that cannot hear evidence on the extent to which a project will be in the national interest;
- a Planning Tribunal inquiry that cannot consider whether the project constitutes a wise use of resources;
- a Planning Tribunal inquiry that does not allow the general

- public to participate (although local people and public interest groups can);
- a Planning Tribunal inquiry that puts technical interests above practical ones;
  - a Planning Tribunal inquiry that considers the consents applied for and not the work itself;
  - a Planning Tribunal inquiry that results in a recommendation that has no binding power upon Cabinet, where Cabinet has already said that the project is in the national interest and therefore by implication will go ahead.

All these factors mean that public participation is directed away from the key decisions. These are made through neo-corporatist decision making processes involving the state and private interests. The limited public participation in the Act is not to provide input into these decisions, but to shield them. The public environmental impact evaluation process and the Planning Tribunal inquiry provides a nominal legitimating facade for these neo-corporatist decisions.

CHAPTER 7.THE NATIONAL DEVELOPMENT ACT: A CONCLUSION.

The ND Act planning process consists of the decisive planning process and the ND Act procedures. The decisive planning process is the stage in which the major decisions, including resource allocation and the decision to proceed with the project, are made by the state and proponent through a neo-corporatist planning relationship that pre-empts the ND Act procedures. These procedures involve the application of the Act, environmental impact evaluation, the Planning Tribunal inquiry, the granting of consents and judicial review. They begin when the Act is formally applied to a project by the Governor-General in Council, although the actual decision to apply the Act is made by Cabinet. Application of the Act means that the project is considered to be in the national interest. Environmental impact evaluation consists of an EIR prepared by the proponent, public submissions on the EIR and an audit of the EIR by the Commissioner for

the Environment. If the proponent has already chosen site and project characteristics such as technology and design details then alternatives to these do not have to be discussed in the EIR. This limits the subsequent environmental impact evaluation contained in the public submissions and the audit, especially since the 1981 amendment to the ND Act which restricts the Commissioner to evaluating the EIR, not the actual work. This enables the proponent to control the environmental impact evaluation process. The proponent also has control over the agenda of the Planning Tribunal inquiry as the inquiry is into the consents sought, not the work itself. Furthermore the Tribunal cannot consider matters of government policy and cannot inquire into questions of resource use. The result of this inquiry is a report containing the Tribunal's recommendation on the consents sought being sent to the Minister of National Development. The final decision on whether to grant the consents is made by Cabinet. Judicial review can occur at various stages of the procedures but questions of appeal are not possible. Thus the Court of Appeal can only consider whether a decision was made properly; it cannot consider whether a correct decision was made.

Public participation in the ND Act planning process occurs in the process of environmental impact evaluation and the Planning Tribunal inquiry, but as chapters 5 and 6 showed, these stages are separated from the decisive planning process and the two formal Orders in Council. The purpose of public participation in the Act is not to ensure public input into decision making, nor the public determination

of the goals of national development. Under the ND Act these goals are statutorily defined as the development of resources, the development of self-sufficiency in energy, the expansion of exports or of import substitutes and the development of employment opportunities. These cannot be questioned. It is this lack of public participation and public determination of goals that gives the ND Act its technical nature (as defined in Chapter 1). The Act is structured to separate public participation from the key decision making stages and to exclude practical questions about goals and values from the planning agenda.

The function of public participation in the ND Act planning process is to nominally legitimate the decisions made during the decisive planning process. Nominal legitimization depends upon appearances: it depends upon the appearance of a state that is acting in the general public interest and the appearance of a state that is receptive and responsive to public input. These appearances are provided by the ND Act. However, in the ND Act planning process decisions are made by the state acting in conjunction with the proponent. Decisions are made through a neo-corporatist planning relationship. This gives the state and proponent control over the planning procedures, thus reducing the costs, in terms of time and uncertainty, of planning. This facilitates the investment and accumulation upon which the state is dependent.

In Chapter 1, Offe's definition of the state was used to show that there are four elements in the state's relationship to the accumulation process. These are that the state cannot organise or control production; that it must maintain the accumulation process; that it is dependent upon this accumulation process; and that it must be (nominally) legitimate. The ND Act planning process can enable the state to fulfill these four requirements. Through its neo-corporatist partnership with private enterprise the state can maintain the accumulation process without controlling it. This can stimulate the accumulation process upon which the state is dependent for its own resources (whether the Think Big strategy will be successfull in this is another question). Public participation in the environmental impact evaluation and Planning Tribunal means that the process is nominally legitimated. Thus the ND Act is a dual Act through which the state attempts to maintain both accumulation and nominal legitimization.

Although the ND Act is to be repealed the conditions which gave rise to its enactment and use are still present: the state must still maintain accumulation and nominal legitimization; the state is still dependent upon the investment decisions of private enterprise; and the state must still maintain politics at the technical level or risk its nominal legitimization. It needs to be remembered that it is the ND Act procedures that are being repealed: the decisive planning process will remain. This means that decisions will continue to be made with out any public input.

POSTSCRIPT.

## 1. THE BASIS OF AN ALTERNATIVE PLANNING PROCESS.

The aim of this postscript is to draw together some of the criticisms and inadequacies of the ND Act and to see how they could be used as the basis for an alternative planning process. The most important criteria of any alternative planning process is that it be a practical planning process. Any planning process will involve some aspects of technical planning to select the most efficient means to achieve the chosen goal (if efficiency itself is chosen as an appropriate criteria). But these technical aspects should be embedded in an overall framework of practical planning. This means effective public participation and it would involve the public determination of the goals of development. Questions concerning resource allocation would be fully debated. The environmental impact evaluation process and the Planning Tribunal inquiry would need to be fully integrated into the decision making process. Public participation needs to occur at all stages of the process.

In all the major development projects, and especially the ND Act projects, there has been an early commitment, formed during the decisive planning process, between state and proponent. This arises because of the state's dependence, for its own power and nominal legitimization, upon the investment decisions of private interests. The obverse of this is that the planning process is independent of the public. Therefore the public are excluded from participating in planning. One way to overcome this would be to incorporate a public veto into the planning process to match the veto power of capital. The idea of such a veto is implicit in democracy. But a veto through triennial elections cannot be effective because voting is done on more than one issue and often is too late to prevent a particular policy from being implemented. Any system of veto would need to be incorporated directly into the planning system so that it could be applied before any decisions were made. Such a planning process could begin with a statement of intent in which the proponent would set out the main features of the proposal (Mann, 1979:7). The required contents of such a statement would need to be statutorily defined so that all aspects of the proposal were covered. These would not require detailed discussion: at this stage the projects details would not need to be established. The statement would be used as the basis for an informal public hearing to establish areas of public concern about the proposal. Following this there would be a period for the possible organisation and imposition of a public veto on the project. This could be either a total veto, in which case the project could not go ahead, or a partial veto, which would be a veto on some particular aspect of the project. For instance, a partial veto could be applied

to a project to prevent it going ahead with an ocean outfall, but this would allow the project to go ahead if it were modified to use a land-based waste disposal system. These vetos could take the form of a public petition. If sufficient signatures were collected within the set time then a veto would be applied. The difficulty would be to decide the number of signatures required before a veto could be applied. The number would need to be high enough to prevent sectional interests from being able to control the system but still low enough to be realistically attainable. It would also be difficult to determine a realistic period to allow for the collection of signatures. However, the key to this type of planning process is not in the actual number of signatures required but in the changed relationship between the public and the proponent.

Modification to the planning process of the kind mentioned above would mean a realignment of the various parties involved, the main change being that the planning process would be dependent upon the public, not independent of it. A project that did not have the backing of the public would be unlikely to go ahead. During the time allowed for the organisation of a veto the proponent could be working on the detailed design stage of the project. It is possible that this costly design work would be wasted if a veto was subsequently applied so it is in the proponent's interests to carry out this work with the public's expressed concerns (from the informal hearing) in mind. This type of

planning process would also encourage freedom of information. Secrecy would lead to suspicion which would increase the possibility of a veto being applied.

An alternative to this public veto is an initial hearing in the form of a Commission of Inquiry to consider whether the project is in the national interest (COG, No.17:6-7). This would be an informal hearing on practical issues and it would clearly establish and evaluate the policy issues involved in the proposal. The "national interest" would be a set of guidelines or goals that had been publicly determined and approved. If the proposal did not comply with this definition of national interest then it would not be allowed to go ahead.

Once these policy issues had been determined and if no veto had been applied (either directly or through the Commission of Inquiry), planning for the project could begin. (This is based on COG's distinction between policy and planning; see note 17.) While consideration of the policy issues would clearly need to be based upon the ideal of practical planning, this planning stage would have a more technical nature. It could involve a Planning Tribunal inquiry similar to the present ND Act inquiry, although it would need wider rights of public participation. The end-point of the hearing would be the granting or the refusal of the consents sought to construct and operate the project. But this would not be the end of the planning process. Because of the dynamic relationship between the policy and planning

stages one further hearing would be required (COG, No.16:15). Whether or not to provide a proposed aluminium smelter with cheap electricity is a policy issue. Whether or not the downstream processing of aluminium products will deafen the neighbours is a planning issue. But whether or not the project should proceed if the cost of noise control adds to the cost of the project so that the proponent asks for more electricity concessions is a case of planning issues creating further policy questions (COG, No.16:15). This means that the parameters of any policy decision are likely to change during the planning process and, therefore, any commitment to a project before all the policy and planning decisions are made (or the decisive planning process and the ND Act procedures are completed) is likely to be premature. Therefore after the planning stage, there needs to be a third hearing or review to reconsider the project, as it is now defined, in terms of the original national interest determination (COG, No.16:15). This hearing would be very similar to the initial public hearing. Thus there need to be three hearings, instead of the present one, to consider fully the practical and the technical aspects of any proposal.

An important requirement of all these hearings is that there be freedom of information. The Environmental Council (1983:9) identified secrecy as one of the "overwhelming barriers" to greater public participation in the planning system. (The other barrier was the late involvement of the public.) An information levy, similar to the present development levy, could be imposed on the proponent so that information about the proposal would be widely disseminated.

Occurring in close conjunction with this procedure would be the process of environmental impact evaluation. Unwillingness to accept environmental impact evaluation as an integral and valid part of the planning process is a basic flaw in the existing planning framework (Chew, 1984:100). To be effective, environmental impact evaluation must occur early in the planning process. But the earlier it occurs the less information on specific sites and technical processes may be available:

A trade-off has to be made between the level of detail possible in an EIR prepared at an early stage in the planning process and the extent to which a project is likely to be 'set in concrete' if an EIR is prepared at a later stage when more comprehensive information can be expected to be available (CFE, 1983:28).

A solution to this dilemma might be found in the use of stage-EIRs. This is when EIRs are prepared at various stages in the planning process. In the case of the Maui gas field development three EIRs could have been prepared as follows (Allin, 1983:503):

- a). Policy stage-EIR. This would attempt to determine the best use of Maui gas. Each potential proponent would prepare an EIR on its particular proposal. These would be publicly available and would lead to a public hearing to determine which proposal(s), if any, should go ahead.
- b). Plan stage-EIR. This would cover the site selection and the more general aspects of each selected proposal.
- c). Design stage-EIR. This would consider the specific ways in which each proposal could be designed.

Stage-EIRs cannot be prepared under the ND Act but there is provision

for them under the 1981 EPEP. Paragraph 25 states:

Departments are to bear in mind that for certain major projects with substantial environmental impacts more than one environmental impact report might be appropriate (CFE, 1981c:8).

The Upper Clutha Development projects approximated this approach with one EIR being prepared on the overall scheme (the Upper Clutha Valley Development EIR, 1975) followed by EIRs on the Clyde dam (EIR on Design and Construction Proposals - Clyde Power Project) and the Queensberry-Luggate projects (Luggate and Queensberry Hydro Power Stations EIR, 1982). (However, for a number of other reasons the environmental impact evaluation of the Upper Clutha Valley Development projects was far from satisfactory. For instance, work had begun on the Clyde dam site before the EIR was released. Also the four options presented in the Queensberry-Luggate EIR all involved the maximum development of the Upper Clutha river.)

Another important aspect of environmental impact evaluation is the content of the various documents produced. At present the contents of an EIR are determined by the proponent according to the commitments and decisions it has already made. Furthermore, alternatives to the proposed scheme do not need to be discussed. However, the contents of EIRs should be determined through public input (Mann, 1979:8; Morton, 1979:3). This could be through an initial informal public hearing. It is also vital that there be no legislative or policy restrictions on what can be covered in environmental impact evaluation documents. The

present prohibition on the Commissioner for the Environment discussing the economic implications of proposals and their alternatives must be removed. Instead of stating that certain subjects are outside the scope of the environmental impact evaluation process, legislation should define what must be included.

## 2. THE WAITANGI TRIBUNAL.

One recent example of a more practical approach to planning is the Waitangi Tribunal hearing brought by the Te Atiawa people opposing the discharge of waste into the ocean along the North Taranaki Coast, including the synthetic petrol plant's proposed ocean outfall at Motunui, and the methanol plant's intended use of the already overloaded and defective Waitara Borough outfall.

The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975 "...to make recommendations on claims relating to the practical application of the Treaty [of Waitangi] and to determine whether certain matters are inconsistent with the principles of the Treaty" (Long Title to the Treaty of Waitangi Act 1975). Here "practical" refers to the actual implementation of the Treaty of Waitangi and its usage does not distinguish between technical and practical implementation. However, the nature of the Treaty and the

requirement to determine whether certain matters are consistent with the "principles" (rather than the provisions) of the Treaty mean that "practical" in Habermas' sense of non-technical is appropriate.

Although the claim to the Tribunal was on the disposal of waste into the ocean in general much of the focus was placed on the synthetic petrol plant. In its ND Act application NZSFCL proposed a 600m long ocean pipeline for the discharge of treated sewage and waste from the synthetic petrol plant. After hearing a great deal of evidence, mostly based upon scientific investigations, the Tribunal recommended that the pipeline be extended to a length of 900m. It was satisfied that with an outfall of this length pollution of the reefs would not occur. However, this was not sufficient to meet local concerns, particularly those of the Te Atiawa people, who claimed that any ocean outfall would irrevocably damage the reefs from which they gathered food. A case was taken to the Court of Appeal (NTEPA v G-G [1982] 1 NZLR 312) under section 17 of the ND Act, challenging, amongst other things, the jurisdiction of the Planning Tribunal to alter the consents applied for in recommending an extended outfall, and claiming that there was no rationale for an extended outfall. When this case failed the Te Atiawa claim was initiated. The substance of this claim was that the Te Atiawa hapu were being prejudicially affected by the discharge of wastes onto their fishing grounds and that pollution of their fishing grounds was inconsistent with the principles of the Treaty of Waitangi. The claim was first filed on 4 June 1981 and, although it was in relation to the discharge of wastes into the ocean in general, nothing

was done until after the Order in Council for the synthetic petrol plant was gazetted and the subsequent Court of Appeal case was heard. In response to a request from the Waitangi Tribunal a more specific claim was filed on 25 March 1982. The claim was heard in three separate hearings, each a week long, between 5 July 1982 and 26 November 1982. The Report was sent to the Minister of Maori Affairs on 17 March 1983.

Under the Treaty of Waitangi Act, Second Schedule clause 8, the Waitangi Tribunal is considered to be a Commission of Inquiry and therefore, unlike the Planning Tribunal, it can determine its own procedures according to the circumstances of each particular case before it. For the Te Atiawa case the Tribunal decided to hold its hearings on the local marae:

The proceedings were held on the [Manukorihi] Marae because the Tribunal was of the firm opinion that on their home territory the Maori people would be better able to express their feelings and make their concerns known. The Tribunal is completely satisfied that by adopting this procedure it was able to reach the real heart of the matter. This would not have been possible had the proceedings been held in a building such as a Courthouse or in proceedings conducted in the same manner as a court hearing (Waitangi Tribunal, 1983:9).

None of the evidence was sworn evidence. The "real heart of the matter" that the Tribunal was able to reach was "...the spiritual and mental concepts of the Maori in relation to seafood and water" (Waitangi Tribunal, 1983:14). Especially important were differences between Maori and Pakeha concepts of pollution. The Pakeha concept is

a scientific one that sees pollution as the physical contamination of water. The Maori concept is a spiritual one that sees pollution occurring when any waste, which belongs to the land, is mixed with water. Thus:

Many of the Maori who appeared at the hearings stressed that spiritual pollution of water and sea resources was of paramount concern to them. Prevention of physical contamination was sought, of course, but treatment of sewage before discharge in the water did not necessarily satisfy the Maori cultural values which stressed the tapu (sacred) nature of water (Williams D.V., 1983:382).

On the basis of the scientific evidence presented at the Planning Tribunal hearing physical pollution of the reefs would not occur. But the Waitangi Tribunal questioned the relevance of this scientific evidence:

In our view it is not entirely relevant to consider whether the Te Atiawa contention is corroborated by scientific evidence. Indeed we question the extent to which scientific evidence should be preferred. The Maori lore on conservation and preservation of natural resources, as inherited by word of mouth, represents the collective wisdom of generations of people whose existence depended upon their perceptions and observations of nature. We do not consider that the weight given to scientific evidence should be such as to denigrate the worth of customary lore, or to inhibit the Maori people from relying on it. In the final analysis it is the test of experience (and the generations of the future) that will determine the worth of scientific postulates (Waitangi Tribunal, 1983:34).

This "collective wisdom" or "customary lore" belongs to the sphere of interaction. Its form (i.e., not just the content of the claim) differs markedly from the scientific form of the other evidence. Because it took a practical approach there was more opportunity for public participation in the hearing.

The Tribunal's recommendations included the cancellation of NZSFCL's discharge right at Motunui but this was immediately rejected by the government which said that the Motunui Outfall would go ahead. The government, with its 51% share in the project, was committed to the proposal for an ocean outfall at Motunui and had already called for tenders for its construction (Chew, 1984:72). The government's attitude caused a great deal of controversy and criticism. After further meetings with the Te Atiawa people, the government announced that it would accept the Tribunal's recommendation and a Bill was introduced to Parliament to achieve this. But, as the Coalition for Open Government showed the Bill actually consolidated NZSFCL's right to build an outfall at Motunui in the future if it wished. It also provided no incentive for NZSFCL to find a long-term solution for its waste disposal problems as it could have used the Waitara Borough Outfall indefinitely (COG, No.15:7). After further public outcry and submissions to the Commerce and Energy Select Committee the Bill was amended so that it did cancel the right to discharge waste at Motunui and a time limit was placed on the interim right to discharge at Waitara.

This example shows that public input into the planning system can be successful, even when it is input against the plans of the government and proponent, but it also shows the difficulty of achieving this success:

...all this sound and fury, long hours of concentration and effort from overworked MPs on the [Commerce and Energy Select] Committee, years of hard work for Te Atiawa, a major Tribunal report, a full-scale public row, were required to shift one Think Big project's effluent five kilometres to the west. Nothing like this amount of public debate was ever devoted to the question of whether the project itself was a good idea, nor whether its design and siting were the best possible (COG, No.16:6).

Although the Waitangi Tribunal hearing does represent a practical approach to planning, it is clearly an isolated instance. It is an example of practical planning in an overwhelmingly technical framework. This needs to be reversed so that the technical aspects of planning take place in a practical framework.

and communicative action. This thesis uses the terms "labour" and "interaction" or, where adjectives are required, "technical" and "practical". The distinction is most clearly expressed in sociological terms in Habermas, 1971:91-94. It is expressed in more philosophical terms in Habermas, 1974:142-169.

One of the problems with this distinction is the terminology for "practical" is usually taken to mean "technical application" or "know-how". Thus there is confusion between the terms "practical" and "technical". But this confusion does support Habermas' claim that practical action has been reduced to technical action (Bernstein, 1976:187). The translator's preface to Habermas 1971 says, "In current English 'practical' means 'down-to-earth' or 'expedient'. In this text, this sense of 'practical' would fall under 'technical'. 'Practical' (praktisch) always refers to symbolic interaction within a normative order, to ethics and politics."

(3). This thesis is primarily concerned with the reduction of interaction to labour at the socio-political level. For an analysis of the reduction at the level of knowledge see Habermas 1972.

(4). "From a sociological or social-psychological perspective, legitimacy means the prevalence of attitudes of trust in the given political system. From a philosophical perspective ...the concept of legitimacy is more applicable to cases in which regime norms become problematic and are questioned: the

legitimacy of a regime or government depends upon the justifiability of its institutional arrangements and political outcomes" (Offe, 1984:268).

(5). Since the contradiction between accumulation and legitimization is inherent in democratic capitalism a possible solution may appear in the suspension of democratic procedures as in the Fascist states of Europe in the 1930s or present day right-authoritarian states such as the Phillipines or Chile. However, a move to overt fascism or authoritarianism in New Zealand is unlikely. Far more likely is the development of a creeping, covert fascism. While assuming the continuation of democratic capitalism this thesis acknowledges that there is an increasing emphasis on the accumulation side of the contradiction - and it will show that the ND Act is a part of this changing emphasis.

(6). Offe (1975:126) also says that the state cannot stop production that is considered profitable. But the state can and does prevent private investment in areas such as railways, postal services, and communications (Mascarenhas, 1982:55). But this is a policy restriction and not a structural limitation. This is shown by the fact that such restrictions are reversible - as in the decision in 1982 to remove the New Zealand Listener's monopoly on the publishing of television and radio programmes. There are also restrictions on overseas investment in New Zealand, although these were relaxed in 1979. But the state

cannot impose investment decisions on capitalist units (i.e., make these units invest) without changing the fundamental structure of capitalism. It is this restriction that is the most important one since, as will be shown, this gives private enterprise a veto over state policies.

- (7). The state sector is sometimes called the public sector (for instance, Habermas, 1976:34) but this is not always appropriate as this sector often acts in conjunction with private interests rather than acting in the public interest (O'Connor, 1973:10, note 3). This is the case with the ND Act. Calling this sector the "public" sector helps to nominally legitimate this.

## CHAPTER TWO.

- (8). One difficulty with the term "the public interest" is that it implies there is a common interest between all members of society. This is taken to be a common interest in economic growth and thus accumulation becomes nominally legitimated. However, in this thesis the singular public interest is used to describe an interest in participation and in determining one's own life. This thesis assumes that practical public participation is in the public interest but it makes no attempt to define the outcome of such a participation or of the content of "the public interest".

CHAPTER THREE.

(9). There are two important committees involved in power planning in New Zealand: the Committee to Review Power Requirements (CRPR) and the Planning Committee on Electric Power Development in New Zealand (PCEPD). The CRPR produces an annual forecast of electricity generating requirements for the following fifteen years. The PCEPD translates the CRPR's forecasts into construction schedules so that power stations can be built to meet the estimated demand. For an analysis of these committees see Court 1979.

(10). It should be noted that section 3(a)(ii) of the ND Act presently excludes the development of atomic energy under its procedures.

(11). The government claimed that it did not need to comply with the TCP Act in order to build the station. This meant there would be no Planning Tribunal hearing. Late in 1975 EDS issued legal proceedings to show that to comply with the Clean Air Act the government did need to comply with the TCP Act. The government responded by saying that it would hold a Planning Tribunal but that it would not be bound by the Tribunal's decision. In mid-1977 EDS won its case, forcing the government to admit that

it would be bound by the Tribunal's decision. However, so as not to be caught again, the government repealed section 29(9) of the Clean Air Act that had required it to comply with the TCP Act.

(12). Investigations into using the Clutha River for power generation began in 1966. Various options were considered and in 1976 the government decided to build a high dam at Clyde. This was financially the cheapest option but it had the most damaging environmental effects. In July 1977 it sought the water rights for the high dam. The Otago Regional Water Board recommended to the National Water and Soil Conservation Authority (NWSCA) that the water right for the high dam be declined but that a right for a low dam be given. This was overruled by NWSCA, whose chairman, Mr Bill Young, was also the Minister of Works and Development, and water rights for the high dam were granted. In February 1978 local landowners and environmental groups lodged appeals with the Planning Tribunal against the granting of the water rights. They also sought a declaration from the Supreme Court preventing the government from proceeding with construction work until the appeal had been heard and applied, also to the Supreme Court, for a judicial review of the NWSCA's decision to grant the water right. In June 1978 the government applied to have the appellants' claim to the Supreme Court struck out. Cabinet was also informed of the over-supply of generating capacity but the construction schedule for the Clyde dam was not altered. In August 1978 the CFE released its audit

on the Clyde dam, criticising the commencement of preliminary work on the dam site before its audit had been released and before all the appeals had been heard. The government's application to have the appellant's claim struck out was declined in November 1978. The 1979 PCEPD Report delayed the commissioning date for the dam for four years but work continued on the site. The appellants two claims to the Supreme Court were rejected in July and October 1979 respectively (EDS and Others v NWSCA (1979) 7 NZTPA 385). The appellants then appealed these decisions in the Court of Appeal but in January 1980, in response to government complaints about delays, they offered to withdraw these appeals if the government waived an application for costs against them. It was not until July 1980 that the government acknowledged this offer but declined to waive costs. The appellants withdrew their appeals to the Court of Appeal anyway.

Meanwhile, the date for the Planning Tribunal hearing against the granting of the water right had been repeatedly deferred at the government's request as it did not want to go into the Tribunal hearing without having a definite use for the electricity. In September 1980 the government signed the memorandum of intent with Fletcher-CSR-Alusuisse to build the smelter. The government could thus confidently apply for water rights as it had a buyer for the electricity. The Planning Tribunal hearing was held in September-October 1980 (Annan v NWSCA and Minister of Energy (1980) 7 NZTPA 417). It did not allow evidence relating to the end use of the Clyde electricity. In December 1980 it rejected the appeal against the granting of

water rights. However, the two judges dissented, while the four lay members decided that the water rights had been properly granted. This was an unusual step for the Planning Tribunal which normally issues unanimous decisions. The appellants filed an appeal with the High Court against the Planning Tribunal's decision. Then, in October 1981, Alusuisse withdrew from the smelter consortium. In May 1982 the High Court (Gilmore and others v NWSCA and Minister of Energy (1982) 8 NZTPA 298) ruled that the Planning Tribunal had been incorrect in not considering the end use of the electricity and referred the matter back to the Planning Tribunal. In less than two weeks the government stated that it would use special legislation to ensure that the dam could proceed. Since Parliament is the ultimate law making body it can overrule judicial decisions but normally only after the judicial process has finished and where the judiciary has misinterpreted Parliament's intention in passing the law. National MP Mike Minogue said he would not support the special legislation which meant the government, which only had a majority of one, could not be certain of passing the legislation. Labour said it would support special legislation to enable a low dam to be built (but not the high dam) as this would not infringe upon the rights of the appellants whose legal challenges were only to the high dam. National rejected this. Social Credit then said they would support special legislation for a high dam if the appeal was heard (and upheld) by the Planning Tribunal first. In August 1982 the Planning Tribunal reheard the appeal, this time upholding it on the grounds that there was no definite need for the electricity and therefore the

flooding of valuable land could not be justified. (Annan v NWSCA and Minister of Energy (No.2) (1982) 8 NZTPA 369). In September 1982 the government passed the Clutha Development (Clyde Dam) Empowering Act, granting itself the necessary water rights for the high dam. (This chronology was compiled from COG, No.13:8-10; CFE, 1983:88; and NBR Outlook, 1984:32-33.)

The whole saga was aptly described by the NBR Outlook (1984:32) as one of "a Government deeply committed to a dam which lost its purpose".

(13). Many of the contributions in this debate are collected in Ericksen 1981.

(14). This report was combined with the LFTB's second report (October 1979) and published in June 1980. See LFTB 1980.

(15). The letter consisted of a covering letter and three attached papers, including one on a suggested procedure for streamlining the planning process. "BP, 1979:1" refers to page 1 of the covering letter; "BP, 1979:A1" refers to page 1 of the attachment on the streamlined planning process.

(16). The ND Act uses the term "applicant" to describe the person or company applying for the ND Act. This thesis uses the word "proponent" instead to include the period of planning before the Act is applied for.

(17). It is often difficult to determine when this process actually starts. For instance, Mobil first put forward the idea of a synthetic petrol plant in 1976 but no definite decisions were made and it was not until 1979, when Mobil reapproached the government, that planning began in earnest. Hence this is taken as the beginning of the ND Act planning process in this case. The White Paper on the NZSFCL Venture Contracts states: "The synthetic gasoline venture to which the contracts addressed in this paper relate, has, of course, been under development since 1979" (Birch, 1982:2).

A similar distinction to the one made in this thesis is made by the Coalition for Open Government. The planning process in general involves "policy" and "planning" decisions:

...policy decisions can be defined as those made by politicians, and planning decisions are the ones which the politicians delegate to the planners and the Tribunals, with varying degrees of guidance. Put another way, the policy decisions are those dealing with the allocation of public resources (land, water, air, taxpayers' money) and the planning discussions centre on the design and granting of consents which govern the details of how the resource is used (COG, No.16:15).

In this distinction the public participate in the planning stage, but not the policy stage.

#### CHAPTER 5.

(18). The government provided similar infrastructure to ensure that the Comalco aluminium smelter would be built. In 1969 Comalco planned to build a smelter at Tiwai Point and a power station at Manapouri to supply the smelter with electricity. However, despite the government's willingness to guarantee loans, Comalco could not raise sufficient finance for the power station. Comalco told that government that it could not proceed with the project so in 1963 the government decided to build the dam and sell the electricity to Comalco (COG, No.11:9-10).

(19). Although the state has to maintain the accumulation process by socialising the costs of production there are fiscal and legitimisation limits on the extent to which such costs can be socialised. In this case, the government could not offer Alusuisse an acceptable (in Alusuisse's terms) power price because too low a price could have had delegitimating (i.e., raised the level from nominal to actual legitimisation) effects. The electricity price was sensitive for a number of reasons. The bulk electricity tariff had increased by 5% on 1 April 1979

and a further 55% on 1 May 1979 (the 5% rise had been announced before the 1978 general election, the 55% rise afterwards); the feasibility of the smelter was dependent on the power price so the smelter debate focussed on it; the power price and the level of subsidies was publicly debated by economists such as Paul Van Moeseke, Murray Ellis, Geof Bertram and Kerry McDonald; and the Clyde dam, which was necessary for the smelter, was a very contentious issue.

(20). This does not suggest the need for a fast track planning process for smaller projects; the need is for a streamlined and coordinated planning system, with provisions for effective public input, for all projects, irrespective of their size.

(21). During the debate on the ND Bill, Mr Birch said:

I should like to provide a fast-track for every project - large, medium, or small - but that is not immediately possible. However, the Government intends to give early attention to a review of all procedures.... The Government intends to update existing legislation so that the benefits in the Bill can be applied more widely to existing Town and Country Planning legislation (NZPD, 1979:4472).

A second fast track planning process was considered by government in late 1982 but it would have applied only to major projects. It was put forward by the Minister of Works and Development, Mr Tony Friedlander, following the Clyde dam saga.

It involved amending the TCP Act by including in its provisions an Alternative Procedure for Major Developments. The new procedures could have been applied to any project that involved a major use of New Zealand's resources or that involved policy issues of significance. Key steps of the proposed procedures were:

- 1) The proponent would apply to have the new provisions invoked.
- 2) After the procedures were invoked the proponent would release a public statement "...explaining the proposed work and setting out the principle policy or other similar issues involved (section 125K of the draft proposals).
- 3) No less than a month after the release of the statement an informal hearing would be held. At this hearing the proponent and any interested party could "...express their views on the proposed work and on any policy, resource, or other major issue involved" (125L(4)). The hearing would be chaired by a Commissioner appointed by the Minister of Works and Development.
- 4) Following the hearing the Commissioner would submit to the Minister a report on the views expressed at the hearing and identify the main areas of agreement and disagreement. This report would be publicly available.
- 5) The Minister would prepare a public statement stating the government policy on the project and responding to the matters raised in the Commissioner's report.
- 6) The matter would then be referred to the Planning Tribunal. Within six weeks the statutory authorities that would normally consider the consents sought, must forward

recommendations on the consents sought to the Tribunal.

7) The Tribunal would conduct a public inquiry into the consents sought. The inquiry would take into account the matters that would have been considered had the consents been sought in the normal way, but it would not be able to inquire into matters dealt in the official policy statement.

8) The Tribunal would then send its recommendations on the consents sought to the Minister of Works and Development.

9) The Minister would then grant or refuse the consents sought.

10) Any judicial proceedings would be taken straight to the High Court or Court of Appeal.

It can be seen that the proposed alternative planning system contained the same dual nature as the ND Act: public participation would be separated from the decision making stages and there would be no discussion of the policy issues involved. The Tribunal would be limited in its inquiry and would be in an advisory role, with the final decision being made by the Minister, who, by appointing the Commissioner and preparing the official policy statement would be able to control the planning process. No environmental impact report was required.

The proposed amendment was circulated to government departments but was never introduced to Parliament. One possible reason is that the Minister's control over the procedures was too obvious and this could have raised legitimation problems.

(22). This is one of the reasons for the differences between the publicly derived goals and values of the "Goals and Guidelines" exercise (1978) and the policies of Think Big. These publicly derived goals, which stressed diversity, efficiency, independence and a balance between development and conservation are sharply contrasted with the Think Big strategy which maintains New Zealand's dependence on oil and exports energy. The synthetic petrol plant means that New Zealand motorists are committed to using petrol (a non-sustainable oil-based fuel) instead of being able to use Maui gas as CNG which would then allow a relatively smooth transition to sustainable fuels such as biogas. A move to sustainable fuels is against the interests of the oil companies because it would lessen New Zealand's dependence upon oil and hence upon oil companies (Fitzsimons, 1981:8-9). Therefore they veto any such moves and seek instead to transfer New Zealand's dependence on imported oil to a dependence upon synthetic petrol from Maui gas and then to synthetic petrol from Southland lignite, all the time using their technology:

Synthetic petrol crowds out alternative fuels by taking the energy resources needed and diverting the development finance and political will into an all-consuming programme which further bolsters the infrastructure serving oil-based fuels (Terry, 1982:8).

The methanol plant is exporting energy by converting natural gas (which otherwise could have been used directly as an energy source) to chemical methanol which is then exported. The

aluminium smelter would have exported hydro-electricity as aluminium if it had gone ahead.

## CHAPTER SIX.

(23). The 1973 EPEP were a set of non-statutory procedures established to provide for a process of environmental impact evaluation for all government works and policies that had significant environmental impacts and for private works that required statutory consents or involved public funds. They involved the same three stages as environmental impact evaluation in the ND Act; that is, EIR, public submissions and CFE audit. Because they were non-statutory they were not enforceable. In 1978 the Environmental Enhancement Operations were introduced. These confirmed the 1973 EPEP but also introduced less rigorous environmental impact assessments. In 1981 the EPEP were substantially modified. The 1981 EPEP contain the same basic processes as the 1973 EPEP but their role in planning was considerably diminished:

The emphasis in the 1973 Procedures was on what the Commission should consider its audit; the 1981 Procedures focussed on what the Commission should not consider (Allin, 1983:203).

The Commissioner's advice to the smelter and synthetic petrol plant proponents was made before the 1981 revision. The nature

of some of the changes contained in the 1981 EPEP is shown in the following text. For a history of the 1973 EPEP, see Mills 1979

(24). In his audit of the EIR the Commissioner said that "...the economic benefits claimed in the EIR for the proposal appear to be based on the wrong assumptions" (CFE, 1980a:41) and called for the government to make a statement that the proposal had been evaluated in its wider context and found to be in the national interest (CFE, 1980a:44). These comments caused a great deal of concern within Cabinet and led to moves to limit the Commissioner's role.

(25). As shown in Chapter 5 the Planning Tribunal did not accept that a 600m outfall was sufficient and recommended that a 900m outfall be used.

(26). COG uses the word "technical" in its everyday sense. It does not specifically refer to the way in which Habermas uses it although this sense is contained in it.

## APPENDIX I

THE NATIONAL DEVELOPMENT ACT 1979

1979

*National Development*

No. 147



## ANALYSIS

Title	12. Orders in Council to be laid before Parliament, etc.
1. Short Title	13. Effect of granting consents
2. Interpretation	14. Application for further consents
3. Application of Act to works	15. Application for variation or cancellation of conditions or imposition of new conditions
4. Reference of application to Planning Tribunal	16. Variation or cancellation of conditions and imposition of new conditions
5. Environmental impact report and audit	17. Review of proceedings before Tribunal, etc.
6. Statutory authorities to report to Tribunal	18. Certain Acts to be read subject to this Act, etc.
7. Inquiry by Planning Tribunal	19. Amendments to Town and Country Planning Act 1977 Schedule
8. Persons entitled to be heard	
9. Matters to be taken into account	
10. Tribunal to report to Minister, etc.	
11. Work may be declared to be of national importance and consents granted	

1979, No. 147

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

[14 December 1979]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

**1. Short Title**—This Act may be cited as the National Development Act 1979.

**2. Interpretation**—(1) In this Act, unless the context otherwise requires,—

Public—147

Price 45c

**"Applicant"** means—

(a) In respect of a Government work, the Minister of Works and Development:

(b) In respect of a private work, the person proposing to construct, undertake, or operate the work or cause the work to be constructed, undertaken, or operated:

**"Commissioner for the Environment"** means the person for the time being holding that office under the State Services Act 1962:

**"Consent"** means an authorisation, permission, a licence, a permit, a right, and any other approval of any type whatsoever capable of being granted under any statutory provision:

**"District"**, in relation to a local authority, means the district or region of that local authority:

**"Government work"** means a work constructed or intended to be constructed by or on behalf of Her Majesty the Queen or the Government of New Zealand or any Minister of the Crown; and includes the construction, undertaking, and operation of the work:

**"Land"** includes water; and also includes—

(a) The foreshore, being the area between the high-water mark of the sea at ordinary spring tides and its low-water mark at ordinary spring tides:

(b) The seabed between the low-water mark at ordinary spring tides and the seaward limits of the territorial sea of New Zealand as defined in the Territorial Sea and Exclusive Economic Zone Act 1977:

(c) The continental shelf as defined in the Continental Shelf Act 1964:

**"Local authority"** has the same meaning as is ascribed to that term by section 2 of the Town and Country Planning Act 1977:

**"Minister"** means the Minister of National Development:

**"Private work"** means a work constructed or intended to be constructed by or on behalf of any person or body other than Her Majesty the Queen or the Government of New Zealand or any Minister of the Crown; and includes the construction, undertaking, and operation of the work:

"Public notice" means a notice published—

(a) Once in the *Gazette*;

(b) Twice in a newspaper circulating in the area in which it is proposed that the work which is the subject-matter of the notice will be situated, with an interval of not less than 5 nor more than 10 days between each notification;

(c) Once in a daily newspaper published in each of the Cities of Auckland, Wellington, Christchurch, and Dunedin; and

(d) Once in such other newspapers (if any) as the person required to give the notice thinks desirable:

"Statutory provision" means any Act, regulation, rule, Order in Council, Proclamation, notice, or bylaw or any part or section thereof; and includes any regional planning scheme, district scheme, or maritime planning scheme in force under the Town and Country Planning Act 1977:

"Tribunal" means the Planning Tribunal established under section 128 of the Town and Country Planning Act 1977.

(2) In the exercise and performance of his powers, functions, and duties under this Act, the Commissioner for the Environment shall act independently and shall not be subject to the directions of the Minister for the Environment or any other Minister.

(3) The date of any public notice required to be given under this Act shall be the date on which the requirements as to public notice have been complied with.

(4) In computing any period of time for the purposes of this Act, no account shall be taken of the period or any part of the period commencing on the 20th day of December in any year and ending with the 20th day of January next following.

**3. Application of Act to works**—(1) Any person may apply for the provisions of this Act to be applied to any Government work or private work, as the case may be, by submitting 20 copies of an application to the Minister.

(2) Every such application shall—

(a) Specify the reasons why the applicant considers the work meets or will meet the criteria set out in subsection (3) of this section:

- (b) Describe the land on which it is proposed to construct the work, and the reasons why the site is preferred to other practicable sites;
  - (c) Give such particulars as would be required if an application for the consent were made in the normal way;
  - (d) Be accompanied by such plans as will generally describe the proposed work and by a plan of its proposed location on the site;
  - (e) Specify every consent that he wishes to have granted to him under this Act, the specific statutory provision under which the consent would normally be granted (being a statutory provision in an Act, or in force under an Act, specified in the Schedule to this Act), and the statutory authority which would normally grant it;
  - (f) Be accompanied by a statement of the economic, social, and environmental effects of the proposed work;
  - (g) Be supplemented by such other reports, plans, statements, or information (including amplification of any of the matters referred to in paragraphs (a) to (f) of this subsection) as the Minister notifies the applicant he considers necessary.
- (3) After an application has been made under subsection (1) of this section, the Governor-General in Council may, if the Governor-General in Council considers that the Government work or private work is a major work that is likely to be in the national interest, and considers—
- (a) That the work is essential for the purposes of—
    - (i) The orderly production, development, or utilisation of New Zealand's resources; or
    - (ii) The development of New Zealand's self-sufficiency in energy (other than atomic energy as defined in section 2 of the Atomic Energy Act 1945); or
    - (iii) The major expansion of exports or of import substitution; or
    - (iv) The development of significant opportunities for employment; and
  - (b) That it is essential a decision be made promptly as to whether or not the consents sought should be granted—
- apply the provisions of this Act to the work or any part of it.

(4) Before the Governor-General in Council applies the provisions of this Act to any work or part of any work, the Minister shall consult the united or regional council within whose district it is proposed that the work be situated and such other statutory authorities as he considers appropriate.

**4. Reference of application to Planning Tribunal—**  
 (1) When the provisions of this Act are applied to any Government work or private work under section 3 of this Act, the Minister shall forthwith refer the application received under that section, together with all documents and plans which accompanied it, to the Tribunal for an inquiry, report, and recommendation.

(2) Before the application is so referred, the Minister may delete any consent specified in the application under section 3 (2) (e) of this Act if he considers that it should be applied for in the normal way, or add any consent not so specified. If any consent is so deleted or added, the Minister shall forthwith advise the applicant who may if he wishes withdraw the application.

(3) At the same time as the Minister refers the application to the Tribunal, he shall cause public notice to be given of the fact that he has so referred the application, and forward a copy of the application, together with all documents and plans which accompanied it, to—

- (a) The united or regional council, the territorial authority within the meaning of the Local Government Act 1974, and the Regional Water Board, within whose district it is proposed that the work be situated;
- (b) The National Water and Soil Conservation Authority;
- (c) The Commissioner for the Environment;
- (d) Every statutory authority which would normally grant the consents set out in the application referred to the Tribunal; and
- (e) The Minister of Works and Development, if the proposed work is a private work.

(4) On application by any person and on the payment of such reasonable fee as may be fixed by the Registrar of the Tribunal, the Registrar shall supply to that person a copy of the application which has been referred to the Tribunal, and of all documents and plans which accompanied it.

(5) If a consent under the Town and Country Planning Act 1977 is specified in the application, the territorial authority

shall as soon as practicable serve notice of the application on every person who would be required to be served if application for that consent had been made in the normal way.

(6) The applicant shall, as soon as practicable after the application has been referred to the Tribunal, cause notice of the application or a copy of the application, as the case may be, to be served on every person who would be required to be so served if application for the consents set out in the application referred to the Tribunal had been made in the normal way.

**5. Environmental impact report and audit—**(1) The applicant shall, as soon as practicable after making an application under section 3 of this Act, forward to the Commissioner for the Environment an environmental impact report on the proposed work.

(2) On receipt of the environmental impact report, the Commissioner for the Environment shall, if the provisions of this Act have been applied to the proposed work, forthwith—

- (a) Make it available for inspection by the public and give public notice of the fact that it is so available and of the places where it may be inspected;
- (b) Call for submissions to be made to him in respect of it within 6 weeks after the date on which such public notice is given;
- (c) On application by any person and on the payment of such reasonable fee as may be fixed by the Commissioner, make a copy of it available to that person.

(3) After considering any submissions received within the time allowed, the Commissioner for the Environment shall give his opinion on the environmental implications of the work in the form of an audit and forward a certificate that the audit has been completed to the Tribunal within 3 months after the date on which public notice was given under subsection (2) of this section.

(4) At the same time as the Commissioner for the Environment forwards the certificate of completion of the audit to the Tribunal, he shall—

- (a) Forward a copy of the audit to the applicant;
- (b) Make it available for inspection by the public and give public notice of the fact that the audit is so available and of the places where it may be inspected;

(c) On application by any person and on the payment of such reasonable fee as may be fixed by the Commissioner, make a copy of the audit available to that person.

**6. Statutory authorities to report to Tribunal**—(1) Every statutory authority which would normally grant any consent set out in the application referred to the Tribunal shall, as soon as practicable after receiving a copy of the application under section 4 (3) (d) of this Act but not later than 14 days before the date on which the inquiry will commence under section 7 of this Act or such later date as the Chairman of a Division of the Tribunal allows in exceptional circumstances, carry out such investigations as it thinks appropriate and forward to the Tribunal a recommendation as to whether or not the consent should be granted, together with a recommendation as to the term or period of time for which it should be granted (if there would normally be a discretion exercisable in that respect), and the conditions, restrictions, and prohibitions which should be imposed in respect of the consent if it is granted.

(2) At the same time as the statutory authority forwards the recommendation to the Tribunal, it shall serve a copy of it on the applicant.

(3) The Tribunal may direct the statutory authority to serve a copy of the recommendation on such other parties to the inquiry as the Tribunal considers appropriate.

(4) A recommendation forwarded to the Tribunal under this section shall not be regarded as evidence.

**7. Inquiry by Planning Tribunal**—(1) The Tribunal, whenever any application has been referred to it under section 4 of this Act, shall have jurisdiction to conduct and shall conduct an inquiry into the matters relevant to the consents set out in that application.

(2) Subject to the provisions of this Act, for the purposes of conducting an inquiry under this section, the Tribunal shall have all the powers, privileges, and immunities conferred on it by Part VIII of the Town and Country Planning Act 1977.

(3) As soon as practicable after receiving the certificate of completion of the audit, the Registrar of the Tribunal shall advise the applicant and the statutory authorities referred to in section 6 of this Act of, and give public notice of, the

place at which and the date on which the inquiry will commence, being a date not less than 6 weeks nor more than 8 weeks after the date of the public notice or such later date as the Chairman of a Division of the Tribunal specifies at the request of the applicant.

(4) Notwithstanding the provisions of section 2 of this Act, for the purposes of this section—

(a) The term "public notice" means a notice published—

(i) In a newspaper circulating in the area in which it is proposed that the work that is the subject-matter of the inquiry be situated; and

(ii) In a daily newspaper published in each of the Cities of Auckland, Wellington, Christchurch, and Dunedin:

(b) The date of public notice shall be the date on which it is published in accordance with paragraph (a) (i) of this subsection.

(5) Not later than 3 weeks before the date on which the inquiry will commence or within such longer period as the Chairman of a Division of the Tribunal may allow in exceptional circumstances, the applicant shall—

(a) File with the Tribunal such particulars as will fully and fairly inform the other parties to the inquiry of the nature and substance of the applicant's case; and

(b) Serve a copy of those particulars on every body which and person who has advised the Tribunal under section 8 (4) of this Act of its or his intention to be present at the inquiry.

(6) Every such inquiry shall be held in public.

(7) The holding of the inquiry, and the making of a report and recommendation, shall have priority over every other matter before the Tribunal (except any other application before it under this Act).

(8) The Tribunal shall conduct the hearing at the nearest place to the proposed location of the work which the Tribunal considers convenient.

(9) For the purposes of conducting the inquiry and making a report and recommendation, the Chairman of a Division of the Tribunal may in his discretion appoint as assessors not more than 2 persons who, in his opinion, have the ability to assist the Tribunal by virtue of their skills or qualifications or of their knowledge of the area in which it is proposed to construct the work.

(10) An assessor appointed under subsection (9) of this section shall not be a member of the Tribunal but may sit with the Tribunal and assist it in the preparation of the report and recommendation.

(11) There shall be paid, out of money appropriated by Parliament for the purpose, to every assessor appointed under subsection (9) of this section remuneration by way of fees, salary, or allowances, and travelling allowances and expenses, in accordance with the Fees and Travelling Allowances Act 1951; and the provisions of that Act shall apply accordingly as if the assessor was a member of a statutory Board.

(12) Notwithstanding the provisions of subsections (6) and (7) of this section, if it is intended that any land be taken under the Public Works Act 1928 for a public work to which the provisions of this Act have been applied and any person has objected to the taking under section 22 of that Act, the inquiry by the Tribunal under section 22A of that Act may be conducted at the same time as or in conjunction with the inquiry under this section.

**8. Persons entitled to be heard**—(1) The following bodies and persons shall have the right to be present and be heard at every inquiry conducted by the Tribunal under this Act:

- (a) The applicant;
- (b) The Minister of Works and Development, where the subject-matter of the inquiry is a private work;
- (c) Any local authority within whose district it is proposed to construct the work or whose district will be directly affected by the proposed work;
- (d) The Commissioner for the Environment;
- (e) Any body or person affected by the proposed work;
- (f) Any body or person representing some relevant aspect of the public interest.

(2) Every statutory authority which would normally grant the consents set out in the application referred to the Tribunal shall be represented at the inquiry and be available for cross-examination, and may call evidence based on but not restricted to the recommendation given to the Tribunal under section 6 of this Act.

(3) The Minister of Works and Development and the Commissioner for the Environment shall be represented at the inquiry and be available for cross-examination.

(4) Every body and person intending to be present or represented at the inquiry shall notify the Tribunal and the applicant in writing of that intention not later than 5 weeks

before the date on which the inquiry will commence or such later date as the Chairman of a Division of the Tribunal allows in exceptional circumstances.

(5) If at any time during the inquiry the Tribunal considers that 2 or more parties entitled to appear under either paragraph (e) or paragraph (f) of subsection (1) of this section are presenting a similar case, the Tribunal may order that a single cross-examination be conducted on behalf of those parties.

(6) Any body or person entitled or required to be present at the inquiry may be represented by counsel or by any duly authorised representative.

**9. Matters to be taken into account**—(1) The matters to be taken into account, recognised, and provided for by the Tribunal in conducting the inquiry and making the report and recommendation to the Minister shall be those matters that would have been taken into account, recognised, and provided for if the applicant had applied in the normal way for the consents set out in the application referred to the Tribunal.

(2) The Tribunal shall not be concerned to inquire into the criteria set out in section 3 (3) of this Act.

**10. Tribunal to report to Minister, etc.**—(1) On completion of the inquiry, the Tribunal shall prepare and submit to the Minister a written report and recommendation on the application referred to it, which shall include the reasons for the recommendation.

(2) When the report and recommendation have been submitted to the Minister, the Registrar of the Tribunal shall forthwith—

- (a) Forward a copy of the report and recommendation to every body which or person who entered an appearance at the inquiry;
- (b) Make the report and recommendation available for publication; and
- (c) Give public notice of the fact that he has made the report and recommendation available for publication.

(3) Every such recommendation shall—

- (a) Specify the term or period of time for which the Tribunal considers each consent set out in the application referred to the Tribunal should be granted

if the work proceeds, if there would normally be a discretion exercisable in that respect; and

- (b) Specify the conditions, restrictions, and prohibitions (if any) which the Tribunal considers should be imposed in respect of each such consent granted, if the work proceeds—

being in each case a term or period of time, and conditions, restrictions, and prohibitions, that could have been granted or imposed if the consent had been granted in the normal way.

(4) Every such recommendation shall also state whether the work should proceed as proposed, or proceed in a modified form, or not proceed at all.

**11. Work may be declared to be of national importance and consents granted**—Not earlier than 28 days after the date of the public notice referred to in section 10 (2) (c) of this Act, the Governor-General in Council, after taking into account the report and recommendation of the Tribunal and further considering the criteria set out in section 3 (3) of this Act, may declare the Government work or private work concerned to be a work of national importance, grant such of the consents set out in the application referred to the Tribunal as he thinks fit, and shall—

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

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

being in each case a term or period of time, and conditions, restrictions, and prohibitions that must or could have been lawfully granted or imposed if the consent had been granted in the normal way.

**12. Orders in Council to be laid before Parliament, etc.**—

- (1) Every Order in Council made under section 11 or section 16 (2) of this Act shall be laid before Parliament within 14 days after the date on which it was made if Parliament is then in session, and, if not, shall be laid before Parliament within 14 days after the date of the commencement of the next ensuing session.

(2) If the provisions of any such Order in Council differ from the recommendation of the Tribunal, the Minister shall lay before Parliament, at the same time as the Order in Council is so laid, a written statement setting out the reasons for the difference.

(3) Every Order in Council made under section 11 or section 16 (2) of this Act shall be deemed to be a regulation for the purposes of the Regulations Act 1936.

**13. Effect of granting consents**—(1) On the coming into force of an Order in Council made under section 11 of this Act, every consent granted by the Order in Council shall have the same force and effect as if it had been granted in the normal way.

(2) Subject to subsection (4) of this section, on the coming into force of such an Order in Council, the provisions of each Act under which each consent granted by the Order in Council would normally have been granted shall, so far as is practicable and with the necessary modifications, apply in respect of that consent as if it had been granted under that Act.

(3) If, under any such Act, it is necessary for a consent to be registered or dealt with in any other way, a copy of the Order in Council printed by the Government Printer shall be deemed for that purpose to be the consent that would normally have been granted.

(4) Except as otherwise provided in this Act, there shall not be any right of review of, objection to, or appeal against the grant of a consent, or the imposition, variation, or cancellation of any condition, restriction, or prohibition, under section 11 or section 16 of this Act.

**14. Application for further consents**—(1) Where any work has been declared to be of national importance under section 11 of this Act and the applicant wishes to obtain a consent not specified in the application originally referred to the Tribunal, he may apply to the Minister for the matter to be referred to the Tribunal.

(2) Subject to subsection (3) of this section, in any such case the provisions of this Act (other than section 3) shall, with the necessary modifications, apply in respect of the application as if it had been made under section 3 of this Act.

(3) The provisions of section 3 (2) (e) of this Act shall apply to every application made under subsection (1) of this section.

**15. Application for variation or cancellation of conditions or imposition of new conditions—**(1) Where a consent has been granted under section 11 of this Act, the applicant and the statutory authority which would normally have granted the consent may apply to the Minister for the variation or cancellation of any condition, restriction, or prohibition imposed in respect of the consent or for the imposition of a new condition, restriction, or prohibition.

(2) On receiving an application under subsection (1) of this section, the Minister shall forthwith refer it to the Tribunal.

(3) On receiving the application the Tribunal shall consider whether or not the variation or cancellation or the new condition, restriction, or prohibition sought is of such significance as to justify conducting a full inquiry.

(4) If the Tribunal considers that a full inquiry should not be conducted, it shall call for written submissions from the applicant and the statutory authority which would normally have granted the consent and, after considering those submissions, prepare and submit to the Minister a recommendation as to whether or not the variation or cancellation sought or the new condition, restriction, or prohibition sought should be granted or imposed.

(5) If the Tribunal considers that a full inquiry should be held, it shall so advise the Minister, and in any such case the provisions of this Act (other than sections 3 and 11) shall, with the necessary modifications, apply in respect of the application as if it had been an application made under section 3 of this Act.

**16. Variation or cancellation of conditions and imposition of new conditions—**(1) The Governor-General in Council may, after taking into account the recommendation of the Tribunal made under section 15 (4) of this Act, vary or cancel the condition, restriction, or prohibition, or impose the new condition, restriction, or prohibition.

(2) Not earlier than 28 days after the date of the public notice given under section 10 (2) (c) of this Act (as applied by section 15 (5) of this Act), the Governor-General in

Council, after taking into account the report and recommendation of the Tribunal, may vary or cancel the condition, restriction, or prohibition or impose the new condition, restriction, or prohibition.

(3) The provisions of section 13 of this Act shall, with the necessary modifications, apply in respect of every Order in Council made under this section as if it were an Order in Council made under section 11 of this Act.

**17. Review of proceedings before Tribunal, etc.**—(1) No proceeding before the Tribunal shall be held bad for want of form, or be void or in any way vitiated by reason of any informality or error of form.

(2) If, in relation to any proceeding before the Tribunal under this Act, any person wishes to apply for a review under Part I of the Judicature Amendment Act 1972 or bring proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or an injunction, the provisions of subsections (5) to (9) of this section shall apply.

(3) If any person wishes to bring proceedings which challenge or call in question the validity of any Order in Council made or purporting to be made under this Act, the provisions of subsections (5) to (9) of this section shall apply.

(4) If, in relation to any decision to—

- (a) Grant or refuse to grant a consent; or
- (b) Impose or refuse to impose any condition, restriction, or prohibition in respect of a consent; or
- (c) Vary or cancel or refuse to vary or cancel any condition, restriction, or prohibition in respect of a consent—

relating to a work of national importance, under any statutory provision whatsoever, any person wishes to apply under Part I of the Judicature Amendment Act 1972 for a review of, or bring proceedings appealing against or objecting to, the decision, or seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or an injunction, relating to the decision, the provisions of subsections (5) to (9) of this section shall apply.

(5) Notwithstanding anything in any other Act or rule of law, every application or proceedings referred to in subsection (2), subsection (3), or subsection (4) of this section shall be made to or brought in the Court of Appeal—

- (a) Not later than 21 days after the date of the public notice given under section 10 (2) (c) of this Act if the application or proceedings relate to any proceedings before the Tribunal under this Act;
- (b) Not later than 21 days after the date on which the Order in Council came into force if the proceedings relate to the validity of an Order in Council made or purporting to be made under this Act; or
- (c) Not later than 21 days after the date of the decision if the application or proceedings relate to a decision given in respect of a work of national importance—and the Court shall not entertain any application or proceedings made or brought after that period has elapsed.

(6) Section 10 of the Judicature Amendment Act 1972 (as substituted by section 14 of the Judicature Amendment Act 1977) shall apply to the Court of Appeal, to a Judge thereof, and to any application or proceedings to which subsection (2), subsection (3), or subsection (4) of this section applies, and that section shall be read as requiring the Judge to direct the holding of a conference of parties or interested parties, or their counsel, within 21 days after the commencement of proceedings. At such conference the Judge presiding shall fix a time and place for the hearing, being not later than 28 days after the date of the conference.

(7) Subject to the provisions of subsections (5) and (6) of this section, the Court of Appeal or a Judge thereof may at any time and after hearing such persons, if any, as it or he thinks fit, give such directions prescribing the procedure to be followed in any particular case under this section as it or he deems expedient having regard to the exigencies of the case and the interests of justice.

(8) So far as is practicable the Court of Appeal shall give priority to the hearing of the proceedings and the giving of judgment over every other civil matter before it so that an early decision may be given.

(9) The decision of the Court of Appeal on any such matter shall be final and conclusive, and there shall be no right of review of or appeal against the Court's decision.

(10) If the Court of Appeal considers that any proceedings to which subsection (4) of this section applies will not materially affect or delay the construction or operation of the work, it may direct that the provisions of this section shall not apply in respect of the proceedings.

(11) If the Tribunal, in any proceedings before it under this Act, wishes to state a case on any point of law that arises in those proceedings, the provisions of section 161 of the Town and Country Planning Act 1977 shall be read as if references to the Supreme Court and to the Administrative Division of the Supreme Court were references to the Court of Appeal, and the provisions of subsections (8) and (9) of this section shall apply in respect of the case.

**18. Certain Acts to be read subject to this Act, etc.—**

(1) Except as otherwise provided in this Act, nothing in this Act shall derogate from or affect the statutory rights, functions, powers, duties, and responsibilities of any body or person in respect of the construction, undertaking, or operation of any work to which the provisions of this Act have been applied.

(2) The specified provisions of the Acts set out in the Schedule to this Act and the provisions of every regulation, rule, Order in Council, Proclamation, notice, or bylaw in force under any of those provisions shall be read subject to the provisions of this Act so far as is necessary to give effect thereto.

**19. Amendments to Town and Country Planning Act 1977—(1)** Section 116 (1) of the Town and Country Planning Act 1977 is hereby amended by omitting the words “Subject to subsection (2) of this section, where”, and substituting the word “Where”.

(2) Section 116 (2) of the Town and Country Planning Act 1977 is hereby repealed.

(3) Section 128 (2) of the Town and Country Planning Act 1977 is hereby amended by omitting the figure “3”, and substituting the figure “4”.

(4) The said section 128 is hereby further amended by repealing subsection (3), and substituting the following subsection:

“(3) The 4 Divisions of the Planning Tribunal shall be known as the Number One Division, the Number Two Division, the Number Three Division, and the Number Four Division, respectively.”

(5) Section 134 (1) of the Town and Country Planning Act 1977 is hereby amended by omitting the figure “3”, and substituting the figure “4”.

- (6) Section 136 of the Town and Country Planning Act 1977 is hereby amended—
- (a) By omitting from subsection (1) the figure “3”, and substituting the figure “4”;
  - (b) By omitting from subsection (2) the figure “3”, and substituting the figure “4”.
- (7) The Town and Country Planning (Planning Tribunal) Order 1978 is hereby revoked.
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#### SCHEDEULE

Sections 3 (2) (e) and 18 (2)

- The Clean Air Act 1972: Sections 8, 10, 13, 18, 23 to 26, 28, 29, 31, and 55.
- The Coal Mines Act 1979: Part III and section 266.
- The Electricity Act 1968: Sections 20, 21, and 55.
- The Forests Act 1949: Sections 30 to 33 and 72.
- The Geothermal Energy Act 1953: Sections 6 and 9.
- The Harbours Act 1950: Parts IV (other than sections 150 and 175 (1)) and VI, and sections 241, 241A, 241B, and 241C.
- The Historic Places Act 1954: Sections 9F and 9L.
- The Land Act 1948: Sections 60, 77, 80, 89, 93, and 165.
- The Local Government Act 1974: Parts XX and XLIII.
- The Marine Pollution Act 1974: Sections 22 and 68.
- The Mining Act 1971: Part IV and section 233.
- The National Parks Act 1952: Sections 32, 33 (2), and 63.
- The Petroleum Act 1937: Sections 5, 12, 47M, 50, 55, 70, and 85.
- The Reserves Act 1977: Sections 48, 106, 109 (3), and 123.
- The Soil Conservation and Rivers Control Act 1941: Sections 149, 150, and 166.
- The Soil Conservation and Rivers Control Amendment Act 1959: Section 34.
- The Town and Country Planning Act 1977: Parts I to VI, and section 175.
- The Tramways Act 1908: Sections 3 (1), 16, and Second Schedule.
- The Tramways Amendment Act 1910: Section 5.
- The Tramways Amendment Act 1911: Section 6.
- The Water and Soil Conservation Act 1967: Sections 21, 23, 24, 24B, 26L, 34A, and 37.
- The Water and Soil Conservation Amendment Act 1973: Section 4.
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This Act is administered in the Ministry of Works and Development.

THE NATIONAL DEVELOPMENT AMENDMENT ACT 1981

1981

*National Development Amendment*

No. 130



## ANALYSIS

Title	7. Tribunal to report to Minister, etc.
1. Short Title	8. Work may be declared to be of national importance and consents granted
2. Environmental impact report and audit	9. Review of proceedings before Tribunal, etc.
3. Inquiry by Planning Tribunal	10. Savings and transitional provisions
4. Requirements may be waived, etc.	11. Amending Local Government Act 1974
5. Persons entitled to be heard	
6. Matters to be taken into account	

1981, No. 130

**An Act to amend the National Development Act 1979***[23 October 1981]*

BE IT ENACTED by the General Assembly of New Zealand, in Parliament assembled, and by the authority of the same, as follows:

**1. Short Title**—This Act may be cited as the National Development Amendment Act 1981, and shall be read together with and deemed part of the National Development Act 1979 (hereinafter referred to as the principal Act).

**2. Environmental impact report and audit**—Section 5 (3) of the principal Act is hereby amended by omitting the words “give his opinion on the environmental implications of the work in the form of an audit”, and substituting the words “audit the environmental impact report by examining and giving his opinion on the accuracy and adequacy of the report in so far as it relates to the proposed work”.

**3. Inquiry by Planning Tribunal**—Section 7 of the principal Act is hereby amended by adding the following subsection:

*Public*—130*Price 40c*

"(13) The Tribunal may at any time before or after making its report and recommendation—

- "(a) Order the applicant to pay to any statutory authority which would normally grant the consents inquired into by the Tribunal such costs and expenses directly related to the consents sought (including survey, investigation, and research costs, consultants' fees, legal fees, and expenses of witnesses) as it considers reasonable;
- "(b) Order any party to the inquiry to pay to any other party such costs and expenses (including expenses of witnesses) as it considers reasonable, and may apportion any such costs between the parties or any of them in such manner as it thinks fit."

**4. Requirements may be waived, etc.**—The principal Act is hereby further amended by inserting, after section 7, the following section:

"7A. In conducting any inquiry under this Act, the Tribunal, on application to it in that behalf, may, if there is any omission from or delay or inaccuracy in any information, report, or recommendation required to be supplied, or in any step required to be taken, in respect of the inquiry,—

- "(a) Waive compliance with the requirement in respect of any such omission or delay or inaccuracy; or
- "(b) Direct that any such omission or delay or inaccuracy be rectified upon such terms as to adjournment, service of documents, costs, or other thing as shall in its opinion be appropriate to the circumstances—if it is satisfied that no party to the inquiry will be prejudiced by the waiver or direction."

**5. Persons entitled to be heard**—(1) Section 8 of the principal Act is hereby amended by repealing subsections (2) and (3), and substituting the following subsections:

"(2) Every statutory authority which would normally grant the consents set out in the application referred to the Tribunal shall be represented at the inquiry, and may call evidence based on but not restricted to the recommendation given to the Tribunal under section 6 of this Act.

"(3) The Minister of Works and Development and the Commissioner for the Environment shall be represented at the inquiry, and shall adduce such evidence and make available for cross-examination such witnesses as he or his representative considers will assist the Tribunal."

1981, No. 130      *National Development Amendment*      3

**6. Matters to be taken into account**—Section 9 of the principal Act is hereby amended by repealing subsection (2), and substituting the following subsection:

“(2) The Tribunal shall not have regard to the criteria set out in section 3 (3) of this Act except to such extent as is necessary in order to comply with subsection (1) of this section.”

**7. Tribunal to report to Minister, etc.**—(1) Section 10 (1) of the principal Act is hereby amended by inserting, after the words “report and recommendation on”, the words “the matters relevant to the consents set out in”.

(2) The said section 10 is hereby further amended by inserting, after subsection (2), the following subsection:

“(2A) Every such report shall recommend whether each consent set out in the application referred to the Tribunal should be granted, granted in a modified form, or not granted.”

(3) Section 10 (4) of the principal Act is hereby repealed.

**8. Work may be declared to be of national importance and consents granted**—(1) Section 11 of the principal Act is hereby amended by omitting the words “application referred to”, and substituting the words “report of”.

(2) The said section 11 is hereby further amended by adding the following subsection:

“(2) A copy of every plan referred to in any Order in Council made under subsection (1) of this section shall be kept at such place or places as may be specified in the Order in Council, and shall be available for public inspection without fee during office hours at that place or those places.”

**9. Review of proceedings before Tribunal, etc.**—(1) Section 17 of the principal Act is hereby amended by inserting, after subsection (4), the following subsection:

“(4A) If any person wishes to bring any proceedings in any Court, or make an application to any Court, which in any way touch or touches upon or relate or relates to—

“(a) Any application made under section 3 (1) of this Act; or

“(b) The exercise or performance of any power, function, or duty under section 4 of this Act; or

“(c) Any environmental impact report forwarded to the Commissioner for the Environment under section 5 of this Act or the audit of it by that Commissioner under that section; or

“(d) Any investigation or recommendation made under section 6 of this Act; or  
 “(c) Any consent in respect of which the Tribunal is to conduct an inquiry under section 7 of this Act—and the provisions of subsection (2) or subsection (3) or subsection (4) of this section are not applicable to the proceedings or application, the provisions of subsections (5) to (9) of this section shall apply.”

(2) Section 17 (5) of the principal Act is hereby amended—  
 (a) By omitting the words “or subsection (4)”, and substituting the words “subsection (4), or subsection (4A)”:  
 (b) By omitting from paragraph (c) the word “importance—”, and substituting the words “importance; or”.

(3) The said section 17 (5) is hereby further amended by inserting, after paragraph (c), the following paragraph:

“(d) Not later than 7 days before the date on which the inquiry under section 7 of this Act is to commence, if subsection (4A) of this section is applicable—”.

(4) The said section 17 (5) is hereby further amended by adding the words “or after that date, as the case may be”.

(5) Section 17 (6) of the principal Act is hereby amended by omitting the words “or subsection (4)”, and substituting the words “subsection (4), or subsection (4A)”.

(6) All proceedings which have been brought in the High Court or District Court, and every application which has been made to the High Court or District Court, before the commencement of this section, to which section 17 of the principal Act (as amended by this section) would have applied if this section had been in force before the proceedings were brought or the application made, are or is hereby removed into the Court of Appeal subject to such directions relating to the procedure for such removal as may be given by the Court of Appeal or a Judge thereof; and the proceedings or application shall thereafter be dealt with in accordance with the said section 17.

**10. Savings and transitional provisions—**(1) Every inquiry which has been commenced under the principal Act before this Act came into force and which has been wholly or partly heard by the Tribunal, shall be continued and completed as if this Act (other than section 9) had not been enacted.

(2) Subject to subsection (1) of this section, the provisions of the principal Act shall apply in respect of any application made under section 3 of the principal Act, before the commencement of this Act, as if this Act (other than section 2) had been in force when the application was made.

**11. Amending Local Government Act 1974—Section 294A** of the Local Government Act 1974 (as inserted by section 12 of the Local Government Amendment Act 1981) is hereby amended by adding the following subsections:

“(10) Subject to subsection (11) of this section, the united council or regional council, in determining the amount of any development levy payable under this section, shall deduct from the levy that would otherwise be payable the amount of any costs and expenses ordered to be paid by the owner under section 7 (13) (a) of the National Development Act 1979.

“(11) The united council or regional council shall not deduct from the development levy calculated under this section an amount that would reduce the development levy payable in respect of the development to an amount that is less than the development levy that would otherwise be payable on the first \$50 million of the assessed value or actual capital value of the development.”

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This Act is administered in the Ministry of Works and Development.

APPENDIX III.CHRONOLOGY.

=====1969=====

Mar. Maui gas field discovered.

=====1970=====

=====1971=====

=====1972=====

7 Aug. CFE established.

=====1973=====

1 Oct. Final contract between government and Shell-BP-Todd consortium on development of Maui gas field signed.

Nov. EPEP approved by Cabinet.

=====1974=====

1 Mar. 1973 EPEP came into effect.

May. ICOP formed.

=====1975=====

May. Mobil suggested synthetic petrol plant to government.

June. ICOP report released.

Aug. Petrochemical project proposals invited by government.

=====1977=====

July. Discussions on petrochemical project proposals began.

=====1978=====

Feb. Discussions on petrochemical project proposals came to no definite conclusions.

1 Apr. Ministry of Energy formed.

7 June. Cabinet informed of surplus in hydro-electricity generating capacity.

31 Oct. LFTB established.

=====1979=====

- Jan. Mobil approached government with proposal to manufacture synthetic petrol from Maui gas.
- 31 May. First gas flowed ashore from Maui field.
- 30 June. Mobil's proposal for a synthetic petrol plant made public.
- 29 July. National Party Conference speech by Mr Brill advocated a faster planning process.
- 10 Aug. BP sent letter to Mr Brill with its proposals for a speeded up planning process.
- 31 Aug. LFTB's first report - recommendations included making Maui gas available for methanol and synthetic petrol production.
- 11 Sept. Cabinet accepted LFTB's recommendations. Discussions began with Petrocorp and BP consortiums on prospective methanol plant.
- 5 Oct. ND Bill introduced to Parliament and referred to a select committee. Public submissions called for.
- 29 Oct. Closing date for public submissions on ND Bill.
- 31 Oct. LFTB's second report recommended Mobil process for synthetic petrol production.
- 13 Nov. Cabinet accepted LFTB's recommendation on synthetic petrol plant and began negotiations with Mobil.
- 30 Oct. Select Committee began to hear submissions on ND Bill.
- 26-27 Nov. Government and Mobil establish key commercial elements for synthetic petrol venture.
- 27 Nov. Select Committee finished hearing submissions - before all

submissions are heard.

- 3 Dec. Cabinet approved commercial elements for synthetic petrol venture.
- 4 Dec. ND Bill referred back to Parliament.
- 5 Dec. ND Bill received a second hearing, debate adjourns at midnight.
- 7 Dec. Second hearing continued, concluded at midnight.
- 11 Dec. Parliament went into committee to consider ND Bill, finished at 3.50am.
- 12 Dec. ND Bill received a third reading, debate concluded at 2.00am.
- 14 Dec. Royal Assent given. ND Bill became ND Act.

=====1980=====

- Feb. "Growth Opportunities in New Zealand" published.
- 31 Mar. Cabinet chose Petrocorp proposal for methanol plant.
- 1 Apr. Government and Mobil signed Memorandum of Understanding to develop synthetic petrol project to contract signing stage.
- 18 July. ND Act application for methanol plant filed with Minister for National Development.
- 22 July. Cabinet decided that Fletcher-CSR-Alusuisse consortium would build and operate second aluminium smelter.
- 20 Aug. ND Act applied to methanol plant by Order in Council and application for planning consents referred to Planning Tribunal.

21 Aug.      Methanol plant EIR released by Commissioner for the Environment. Public submissions called for.

2 Sept.      Memorandum of Intent for second aluminium smelter signed.

16 Sept.      NZSFCL incorporated.

24 Sept.      Motunui selected as preferred site for synthetic petrol plant.

19 Nov.      Commissioner for the Environment completed audit for methanol plant.

22 Dec.      ND Act application for synthetic petrol plant filed with Minister for National Development.

22 Dec.      Aramoana chosen as site for second aluminium smelter.

=====1981=====

4 Feb.      ND Act application for synthetic petrol plant withdrawn as consents for a barging jetty no longer wanted.

9 Feb.      Amended ND Act application for synthetic petrol plant filed with Minister for National Development.

17 Feb.      Planning Tribunal hearing for methanol plant began.

24 Feb.      ND Act applied to synthetic petrol project by Order in Council.

26 Feb.      Synthetic petrol plant ND Act application for planning consents referred to Planning Tribunal.

27 Feb.      Synthetic petrol plant EIR released by Commissioner for the Environment. Public submissions called for.

6 Mar.      Planning Tribunal hearing for methanol plant concluded.

13 Mar.      Gas Sale and Purchase Contract for methanol plant signed.

- 26 Mar. Planning Tribunal sent its report on methanol plant consents to Minister for National Development.
- 27 Mar. ND Act application for Aramoana aluminium smelter filed with Minister for National Development.
- 29 Apr. ND Act applied to Aramoana smelter by Order in Council.
- 30 Apr. Aramoana smelter ND Act application for planning consents referred to Planning Tribunal.
- 29 May. Planning consents for methanol plant granted by Order in Council.
- 4 June. Original claim against synthetic petrol plant proposed outfall filed with Waitangi Tribunal.
- 5 June. Commissioner for the Environment completed audit for synthetic petrol plant.
- 12-15 June. EDS v South Pacific Aluminium No 1 case heard by Court of Appeal.
- 23-24 June. EDS v South Pacific Aluminium No 2 case heard by Court of Appeal.
- 30 June- CREEDNZ Inc. v Governor General case heard by Court of  
-15 July. Appeal.
- 4 July. Aramoana smelter EIR released by Commissioner for the Environment. Public submissions called for.
- 6-15 July. EDS v South Pacific Aluminium No 3 case heard by Court of Appeal.
- 23 July. JEC report on synthetic petrol plant.
- 4 Aug. Planning Tribunal hearing for synthetic petrol plant began.
- 1 Sept. ND Amendment Bill introduced to Parliament and referred to

select committee.

- 11 Sept. Cabinet approved synthetic petrol project.
- 1 Oct. Alusuisse withdraw from Aramoana smelter consortium.
- 1-16 Oct. EDS v South Pacific Aluminium No 4 case heard by Court of Appeal.
- 2 Oct. Mobil deferred signing contracts on synthetic petrol project until after general election (27 Nov 1981).
- 8 Oct. ND Amendment Bill referred back to Parliament.
- 8 Oct. Planning Tribunal hearing for synthetic petrol plant concluded.
- 13 Oct. ND Amendment Bill read for a second time.
- 13 Oct. Commissioner for the Environment completed audit for Aramoana smelter.
- 22 Oct. Parliament went into committee to consider ND Amendment Bill, then read it for third time.
- 23 Oct. ND Amendment Bill became law.
- Oct. Work began on methanol plant site.
- Nov. Cabinet revised 1973 EPEP.
- 3 Dec. Planning Tribunal sent its report on synthetic petrol plant to Minister for National Development.

=====1982=====

- 12 Feb. Contracts for synthetic petrol plant signed.
- 25 Feb- North Taranaki Environment Protection Association Inc. v  
-5 Mar. Governor-General case heard by Court of Appeal.
- 12 Mar. Planning consents for synthetic petrol plant granted by Order in Council.

9 Mar. Intended date for beginning of Aramoana smelter Planning Tribunal hearing but ND Act application was withdrawn.

25 Mar. Further particulars of claim against synthetic petrol plant proposed outfall filed with Waitangi Tribunal.

5 July. Waitangi Tribunal hearing on synthetic petrol plant outfall begins.

30 Sept. Clutha Development (Clyde Dam) Empowering Act passed.

19 Oct. Aramoana smelter proposal finally abandoned.

26 Nov. Waitangi Tribunal hearing on synthetic petrol plant outfall concluded.

Dec. Legislation drafted to provide a second fast track process by amending Town and Country Planning Act.

=====1983=====

17 Mar. Waitangi Tribunal sent its report on synthetic petrol plant outfall to Minister of Maori Affairs.

22 Nov. Synthetic Fuels Plant (Effluent Disposal) Empowering Act passed.

=====1984=====

31 Jan. Methanol plant officially opened.

26 July. Labour Government elected - election promises included repealing ND Act.

=====1985=====

22 Aug. ND Act Repeal Bill read for first time.

=====1986=====

27 Feb. Synthetic petrol plant officially opened.

Note: Under section 2(4) of the ND Act no account is to be taken of the period between 20 December and 20 January when computing time periods for the purpose of the Act. Dates for the Orders in Council are when they came into force.

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