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IS JUDICIAL REVIEW BEING
WATERED DOWN?
THE JUSTIFICATION FOR
JUDICIAL REVIEW AND ITS
APPLICATION IN RECENT
NEW ZEALAND DECISIONS

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*Te Whare Wananga
o te Upoko o te Ika a Maui*



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Abstract

This paper looks at the justification for judicial review and assesses its recent application in three New Zealand decisions. These decisions involved applications for the judicial review of bodies which fall outside those traditionally considered to be reviewable under the *ultra vires* rule, including a body exercising prerogative power, a state-owned enterprise and a private agency. The place of the *ultra vires* rule is considered and it is argued that judicial review has moved beyond this doctrine in such a way that the nature of the power, rather the source of the power, is now the factor which determines reviewability. The different standards of review being applied by the courts are considered, and the potential for judicial review actions based on the New Zealand Bill of Rights Act 1990 is addressed.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13,530 words.

I Introduction

There are a number of controls on the exercise of public power in New Zealand today. These include the ombudsmen, auditors, the official information, privacy and human rights legislation and of course, direct political control. However, the focus of this paper is judicial review, which remains an important means by which to check the use of power.

The majority of judicial review cases involve the review of decisions which are sourced directly from government power. Increasingly however, plaintiffs are asking that other types of decisions be reviewed. One reason for this is that the government has divested much of its power. The line between public and private bodies has been blurred by the introduction of hybrid "public-private" bodies such as stated-owned enterprises.¹ In addition, since the *Council of Civil Service Unions*² decision which allowed judicial review of a prerogative power for the first time, there has been a move toward making decisions based on the nature of the power used or abused, rather than the source of the power. This approach has had the effect of opening up the scope for judicial review.

Part II of this paper looks at the justification for judicial review. A number of topics are covered within this part, including consideration of: the traditional basis for judicial review - the *ultra vires* rule; the Judicature Amendment Act 1972; the academic debate about the basis of judicial review; the place of the Rule of Law; and the need for principled decision-making.

Parts III, IV and V assess the merits of cases which have allowed, at least in principle, judicial review of non-traditional bodies. By "non-traditional bodies" I mean bodies which exercise powers that are not directly sourced from government. In particular, three New Zealand decisions are studied in detail. These are:

¹ Hereafter "SOEs".

² *Council of Service Unions v Minister for the Civil Service* [1984] 3 All ER 680; [1985] AC 374; [1984] 3 WLR 1174 (HL) [CCSU].

- (a) *Butler v Attorney-General and Refugee Status Appeals Authority*³ in which a body exercising the prerogative power was judicially reviewed;
- (b) *Mercury Energy v Electricity Corporation of New Zealand*⁴, in which a state-owned enterprise - a "public-private" body - was found, in principle, to be amenable to judicial review; and
- (c) *Electoral Commission v Cameron*⁵ in which a private body was judicially reviewed.

These cases were chosen for several reasons. First, they cover a range of types of bodies which have been traditionally been subject to judicial review. Second, they are relatively recent, thereby giving an indication of the Courts' current approach and thinking. Third, they are New Zealand decisions: this paper focuses on the status of judicial review in New Zealand.

The rationale for these decisions is looked at, and I ask whether the broadening of the range of bodies subject to judicial review is causing the grounds of review to be watered down. In particular, the courts appear to be applying different standards depending on the type of body or the act performed by that body. This is seen most clearly in *Mercury* and *Cameron*. On this basis, it seems that, despite the fact that a body is more likely to be found to be reviewable in principle, a successful review is likely to be achieved in fewer cases. I aim to look at reasons why this is happening, its effect, and some alternative options.

II JUSTIFYING JUDICIAL REVIEW

The traditional defence of judicial review of administrative action rests on the *ultra vires* doctrine. Judges must ensure that public officials do

³ Unreported, Keith J, Court of Appeal, CA181/97, 13/10/97 [*Butler*].

⁴ [1994] 2 NZLR 385 [*Mercury*].

not stray beyond the legal limits of their statutory authority. In recent years there has been some academic debate about the place of the *ultra vires* rule in today's judicial review actions. This debate is discussed below.

It is argued that the basis of judicial review now firmly lies with the nature of the power exercised rather than its source. When assessing whether or not a decision should be reviewable, the judiciary must look at whether or not a public function was exercised by the decision-maker. Another factor to consider is whether or not there is an alternative form of redress. Administrative law's purpose should be to provide a remedy for abuse of public power. At the very least, the availability of judicial review should provide a check on the exercise of public power. In each situation the facts must be considered and an assessment made about whether or not the decision is one which should be open to review.

This Part begins by defining the scope of judicial review and looking at the place of the Judicature Amendment Act. Following this is a discussion of some of the academic debate centering on the basis of judicial review, and a consideration of the place of the Rule of Law. The final section looks at the need for principled decision-making.

A Defining the scope of Judicial Review

The *ultra vires* rule, stated briefly, is as follows:⁵ A public body that has been granted powers, whether by statutes, Orders in Council or some other instrument, must not exceed the powers so granted. A body will have exceeded its powers if either:

⁵ [1997] 2 NZLR 421 [Cameron].

⁶ This definition is taken from Oliver "Is the Ultra Vires rule the basis of judicial review" [1987] PL 542, 544. Oliver's article is discussed below.

- (a) it has done, or decided to do, an act that it does not have the legal capacity to do. In other words it has exceeded its powers in the narrow⁷, or strict⁸ sense; or
- (b) in the course of doing or deciding to do something that is *intra vires* in the strict or narrow sense, it acts improperly or “unreasonably” in various ways. These ways include: disregard of the rules of natural justice; unfairness; taking into account irrelevant considerations or ignoring relevant considerations; bad faith; fettering discretion and so on.

The first limb of the rule stems from Dicey’s Rule of Law.⁹ The second limb has its root in the *Wednesbury Corporation*¹⁰ case and *Ridge v Baldwin*¹¹, and rests on the interpretation of the instrument granting the power. Parliament, or the “donor” of the power, is presumed not to have intended that the authority should act in breach of the principles of good administration.

In New Zealand, as elsewhere, numerous authorities have been created and adopted by the state to achieve ends conceived to be for the public good. Duties are imposed and powers conferred upon these public authorities to enable them to achieve these ends. For example, government departments and local authorities are created by or under statute, they are endowed with statutory powers and they are funded by the public for conferring what are conceived to be benefits upon the community, or a section thereof. These authorities easily fit within the *ultra vires* rule.

⁷ For the use of this term see Lord Reid in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171.

⁸ For this expression see Mervyn Davies J in *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust* [1987] 1 All ER 281, 285-286.

⁹ The Rule of Law is discussed below.

¹⁰ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 [*Wednesbury Corporation*].

¹¹ [1964] AC 40.

However, the *ultra vires* rule does not go far enough today. As will be discussed below, a strict interpretation of the rule places too many bodies outside the scope of judicial review despite the fact they carry out similar functions to those that fit within the rule. When determining whether judicial review should be available it is important to distinguish between the nature of the *body* and the nature of the *act* performed by that body. For example, a public body exercising public powers is clearly reviewable, but the line becomes less clear when that same body exercises private power. Private bodies performing private acts are not subject to judicial review, but where the act includes an element of public function, judicial review may be appropriate. This tension between public and private power has become more pronounced in recent years as more public functions are carried out by private agencies (often established by government) and as the ineffectiveness of the *ultra vires* rule has been highlighted.

The judiciary has recognised this and, over time, a function based approach to determining the scope of judicial review has become more common. The questions asked by the courts in recent judicial review actions tend to focus on the nature of the power exercised by the decision-maker, rather than the source of the power. For example, in *R v Panel of Takeovers and Mergers, ex parte Datafin*¹² Lord Diplock, in assessing what should be taken into account in deciding whether a body is subject to judicial review, said:¹³

The only essential elements are what can be described as a public element, which can take many forms, and the exclusion from jurisdiction of bodies where the sole source of power is the consensual submission to its jurisdiction.

This statement indicates the approach the United Kingdom courts generally take today. In New Zealand however, it does not appear that the courts have fully embraced this method in every instance. This is discussed in the sections on review of prerogative power and review of

¹² [1987] 1 QB 815 [*Datafin*].

public-private bodies below. In both these areas there has been a tendency toward focusing on the source of the power rather than its nature. It is argued that this tendency is stopping New Zealand law on judicial review from developing in a principled manner. One reason for the concentration on sources of power is found within the Judicature Amendment Act 1972. This is discussed in the next section.

B The Judicature Amendment Act 1972

New Zealand has a unique feature in its legislation which complicates assessing whether or not a body should be amenable to judicial review. Judicial review is theoretically available both pursuant to common law and under the Judicature Amendment Act 1972. However, the existence of this Act has meant that the common law action has been largely neglected in recent years.¹⁴ Before actions of a decision-maker can be reviewed under the Act there must have been an exercise or a purported exercise of a "statutory power" as defined in section 3:

"Statutory power" - means a power or right conferred by or under any Act [or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate] -

- (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
- (b) To exercise a statutory power of decision; or

¹³ *Datafin* above n 12, 838.

¹⁴ Note however that common law review is still used in New Zealand. Rule 626 of the High Court Rules sets out the procedure for bringing an action for certiorari and in some situations it is simpler to bring review proceedings under this Rule than under the Judicature Amendment Act 1972.

- (c) To require any person to do or refrain from doing the act or thing that, but for such requirements, he would not be required by law to do or refrain from doing; or
- (d) To do any act or thing that would, but for such power or right, be a breach of the legal right of any person; [or
- (e) To make any investigation or enquiry into the rights, powers, privileges, immunity, duty, or liability of any person.]

The section 3 requirement that a power or right be conferred by or under any Act or under the governing instrument of any body corporate has meant that some judges have placed great emphasis on the source of power as opposed to its nature. This has influenced justiciability issues when the courts have been called upon to review decisions, particularly where review of commercial decisions is sought. Specifically, the Judicature Amendment Act does not encourage the judiciary to look at the nature of a power has been exercised at first instance. Rather, the technical requirements of the source of the power are concentrated on to begin with. It is submitted that this part of the Judicature Amendment Act 1972 is no longer adequate and further review is necessary.¹⁵

Alternative bases for justifying judicial review are discussed in the next sections which cover some of the academic debate surrounding judicial review, the place of the Rule of Law, and the need for principled decision-making.

C Academic debate

In recent years there has been considerable academic debate about the basis of judicial review and, in particular, the place of the *ultra vires* rule. A number of writers have considered ways in which judicial

¹⁵ A full review of this Act is beyond the scope of this paper.

review can be justified. In this section I will consider three articles which show different approaches to this issue. I will also consider the importance of principled decision making.

The first article written by Dawn Oliver in 1987 is titled 'Is the *ultra vires* rule the basis of judicial review?'¹⁶ This article challenges the use of the *ultra vires* rule and proposes that the nature of the power exercised should be concentrated on, rather than the source of the power. Following this I look in some detail at Christopher Forsyth's article 'Of fig leaves and fairy tales: the *ultra vires* doctrine, the sovereignty of parliament and judicial review'¹⁷ which defends the *ultra vires* rule. Lastly, I consider David Dyzenhaus' article 'Reuniting the Brain: the Democratic Basis of Judicial Review'¹⁸ which was written in response to Forsyth's paper. Dyzenhaus is critical of Forsyth's approach, and sets out his theory that the problems with the doctrine stem from its basis in positivist legal theory: in his view, a theory of judicial review must be anti-positivist.

These articles are by no means the only ones written on the topic, but they represent a range of views, and in this respect they complement each other. However, before looking at these articles the history of judicial review deserves to be considered because the current debate about the place of the *ultra vires* rule belies the fact that the rule is a modern concept.

1 *Ultra vires is a modern concept*

Paul Craig, in his text *Administrative Law*, looks at the history of judicial review and notes that "the courts have, ever since the origins of judicial review, exerted control over the discretion exercised by tribunals, agencies and the like, in order to prevent that power from being misused or abused."¹⁹ This is illustrated by the early decision in

¹⁶ [1987] PL 542 [Oliver].

¹⁷ [1996] CLJ 122 [Forsyth].

¹⁸ To be published in a forthcoming issue of Public Law [Dyzenhaus].

¹⁹ Paul Craig *Administrative Law* (3 ed, Sweet & Maxwell, London, 1994), 400 [Administrative Law].

*Rooke's Case*²⁰ where the Commissioners of Sewers had repaired a river bank and charged Rooke for the whole amount despite the fact that other landowners had also benefited from the work. The Commissioners had a discretion as to the levying of the money, but the Court struck their decision down by holding that the discretion had to be exercised according to reason and law and it was unreasonable for Rooke to bear the whole burden. These Commissioners were not exercising delegated powers from parliament but were held to be subject to judicial review. *Ultra vires* has only been used relatively recently to determine the scope of review.

Craig notes that the motivation behind early judicial review was twofold, principally the desire to ensure the predominance of the High Court over "inferior jurisdictions", and to provide remedies to those whom the established judiciary felt had been unjustly or illegally treated by such authorities.²¹ Judicial review was slowly transformed in the nineteenth century. The rationale for early judicial review continued to exist, but this was supplemented by a growing tendency to relate the exercise of judicial power to the will of Parliament. In this way, the *ultra vires* doctrine became the justification for judicial intervention.

This historical account of the development of judicial review shows how the cause of action has changed significantly since its beginnings. It indicates that *ultra vires* has never been the sole justification for judicial review. On this basis it seems natural that the cause of action will continue to develop beyond *ultra vires*. The rest of this section focuses on three articles which proffer different theories about the basis of judicial review today.

²⁰ (1598) 5 Co. Rep. 99b. See also, *Hetley v Boyer* (1614) Cro. Jac. 336; *R v Askew* (1768) 4 Burr. 218; and *Leader v Moxon* (1773) 2 WB1. 924.

²¹ *Administrative Law* above n 19, 6.

2 *Protection from abuse of power*

In 1987 Dawn Oliver opened the current debate on the place of the *ultra vires* rule in modern judicial review.²² Her basic theory is that judicial review has moved on from the *ultra vires* rule to a concern for the protection of individuals, and/or the control of *power*, rather than *powers*, or *vires*. In Oliver's view, public bodies should be subject to at least the same degree of judicial supervision as private bodies. For example, private bodies are subject to extensive contractual checks. Since the source of a power is irrelevant, property and contracting powers may be subject to judicial review. Oliver goes on to give examples of instances where courts have been flexible in allowing judicial review.

Oliver uses Galbraith's analysis of the anatomy of power²³ to cast light on the issues underlying the question of whether, and if so, when, the courts should concern themselves with the exercise and abuse of power. Galbraith identifies three instruments of power as being condign power, compensatory power, and conditioned power. In a legal sense, condign power is the use of coercive legislation backed up by powers of punishment imposed through the court. Compensatory power is the power to win submission by the offer of an affirmative reward, usually through the deployment of money or property, but also through the grant of licenses and other privileges. Conditioned power is the influence that a ruler or other individual or organisation derives from public benefit and his or her authority. These instruments of power can be distinguished from the sources of power, which Galbraith identifies as property, organisation and personality.

Where one of these instruments of power is being exercised, in theory judicial review should be available. If the judiciary begins from this premise rather than starting by looking at the source of power, a more equitable system of judicial review will be achieved.

²² Oliver above n 16.

²³ As set out in his book *The Anatomy of Power* (1983).

Oliver's article convincingly argues that the traditional bounds of judicial review no longer fit and she has rightly identified *power* as an important factor in identifying instances in which judicial review should be available. She concludes that "[o]nce the nature and problem of power are recognised, the courts will be in a better position to develop a supervisory jurisdiction designed to prevent the abuse of power".²⁴

3 *In defence of the ultra vires rule*

In his article²⁵, Christopher Forsyth rejects Oliver's thesis and defends the *ultra vires* doctrine. His argument is that *ultra vires* is a "gentle but necessary discipline" against which judges should not "chafe".²⁶ He takes on two common criticisms of the doctrine, namely:

- (a) *ultra vires* cannot explain the whole of the judicial review (especially the extension to review of non-statutory bodies); and
- (b) the concept of *ultra vires* can play no part in determining whether non-statutory bodies which exercise no legal powers at all are subject to judicial review.

Forsyth argues that the *ultra vires* doctrine retains its central position because the majority of cases still fit within the rule. Courts can control the abuse of monopolies by their Common Law power as the Common Law draws no distinction between monopoly powers that exist by virtue of some government intervention and those that exist as a matter of fact. This is true, but it would be more effective if the law of judicial review was not separated out into different doctrines in

²⁴ Oliver above n 16, 569.

²⁵ Forsyth above n 17.

²⁶ Forsyth above n 17, 137.

an arbitrary way. Basing eligibility for review on the nature of the power is a more logical approach.

In particular, Forsyth is concerned that abandoning the *ultra vires* doctrine implies the abandonment of legislative supremacy. He argues that such a profound change in the constitutional order should not be undertaken by the judiciary of their own motion. Certainly Forsyth is correct in stating that the judiciary should not make fundamental constitutional changes of its own volition. However, it is somewhat extreme to argue that changing the basis of judicial review falls into this category. As was noted above, the *ultra vires* rule has not always been the basis of judicial review. In fact, it seems likely that it was the judiciary who initially developed the doctrine. Given this, it does not seem inherently wrong that the judiciary should continue to develop judicial review to better fit today's systems of government and power structures.

4 A democratic basis for judicial review?

Most recently, David Dyzenhaus has argued that the *ultra vires* rule is not sufficient basis for today's judicial review.²⁷ His article, 'Reuniting the Brain: the Democratic Basis of Judicial Review' directly challenges Forsyth's theory. He deems Forsyth's defence of the rule incoherent and instead offers a value based, democratic approach to justifying judicial review.

Dyzenhaus argues that the *ultra vires* doctrine is not consistent with judicial review where there is no statutory basis for review. Rules of manner and form have been too heavily relied upon in the past and in order to move beyond this, the intrinsic problems of *ultra vires* should be addressed. These problems stem from the doctrine's basis in positivist legal theory: a theory of judicial review must be anti-positivist. The doctrine relies on an impoverished understanding of democracy. A modern theory of judicial review must reunite legal and political theory by incorporating democratic values. In Dyzenhaus'

view, this approach will show how the common law and statute are best understood as the expressions of fundamental legal values. These values aim to provide justice in a democratic way.

Dyzenhaus' article offers a quite different approach to either Oliver or Forsyth. His theory suggests a fundamental change in the way we view judicial review, is needed. This shift may be seen over time, and no doubt some members of the judiciary will place greater emphasis on these types of issues than will others.

D The rule of law remains central

As was noted above, the element of the *ultra vires* rule which states that a decision-maker must not do anything beyond its powers stems from Dicey's Rule of Law. In its most simple formulation, the Rule of Law contains three propositions: certainty, generality and equality. The law should be certain so the people are protected from arbitrary decision-making. The law should apply to everyone, and the law should apply to everyone equally.

In my view, the *ultra vires* rule is no longer the basis of judicial review but, despite this, the Rule of Law retains its central position. The Rule of Law justifies judicial action and gives a framework from which to explain the way in which judicial review has developed. It does not preclude judicial review developing beyond the *ultra vires* rule to allow the nature of the power to be assessed in determining reviewability. In fact, it follows that the Rule of Law encourages such a development by its recognition of the concepts of generality and equality in particular.

At least one member of New Zealand's judiciary has directly noted this point. Justice Baragwanath, in his recent decision *Patel v Chief Executive of the Department of Labour* said "the Rule of Law justifies the judicial creation of the concept of legitimate expectation which is

²⁷ Dyzenhaus above n 18.

central to many judicial review actions".²⁸ In *Patel's* case the appellant, a resident of India who had applied for a residence permit to enter New Zealand, sought judicial review of the New Zealand Immigration Service's decision not to grant him and his family a residency permit. This decision involved an exercise of the prerogative so the power did not fall easily within the scope of the *ultra vires* rule. Justice Baragwanath was satisfied that the decision was not made in accordance with law and referred the matter back to the Residence Appeal Authority with directions as to the matters to be considered. The following comments were made:²⁹

The rule of law requires that a person whose factual situation is indistinguishable from another should be given like treatment: *Commissioner of Inland Revenue v Wilson* (1996) 17 NZTC 12,512. There is no justification for applying different constructions of a rule which purports to be of general application.

This application of the Rule of Law highlights the need for consistency of decision-making. For decisions to be consistent, there must be some degree of principle exercised. This is discussed in the next section.

E Principled decision-making: Is judicial review being watered down?

It is often said that judicial review is intolerably uncertain and amounts to little more than a licence for judges to interfere arbitrarily with the machinery of government and administration. As Brennan has written:³⁰

²⁸ [1997] 1 NZLR 102, 110 [*Patel*].

²⁹ *Patel* above n 28, 111.

³⁰ G Brennan. "The purpose and scope of judicial review" in Michael Taggart (ed), *Judicial Review of Administrative action in the 1980s* (Oxford University Press, Auckland 1986) 18.

The political legitimacy of judicial review depends, in the ultimate analysis, on the assignment to the Courts of that function by the general consent of the community . . . judicial review has no support other than public confidence.

Judicial review needs to maintain a degree of public confidence and, as such, it should be available in a range of situations. These situations should not be limited to the traditional areas, defined by the *ultra vires* rule, in which only decisions made by the government were amenable to review. That is too limited a view now. It is a positive move to allow judicial review more often as the previous distinctions were often arbitrary and are totally unworkable today now that more public powers are exercised without being sourced directly from government.

In many instances the Courts have recognised this and have used different standards to justify judicial review.³¹ In my view, it is necessary to look at the types of bodies which should be reviewable by virtue of the nature of the power they exercise. A principled approach to this development is required. It is argued that this has been lacking in many decisions made in recent times.

The rest of this section discusses the need for some degree of certainty in judicial review and the reasons why actions are brought in judicial review. Following this, I consider why the courts are allowing different standards of review for different types of actions and the merits of this approach.

1 The need for certainty

The articulation of reasons is an essential element of the judicial process. Judges' decisions are expected to apply legal rules to a particular, and often complicated, set of facts. If these rules become so generalised as to lose real meaning or predictable application it

³¹ A selection of these decisions is discussed in Parts III, IV and V of this paper.

becomes necessary to refine them into a useful format. A recent New Zealand decision traversed this issue in the area of the law of trusts. Justice Fisher found little guidance from stock phrases common to this area of law. In the course of his decision he commented that³²:

the fact that at the end of the road there is an unavoidable leap into robust assessment does not exempt one from traversing a series of principles in order to reach the right point from which to launch into space. Nor does it simply imply that one's trajectory during flight will be wholly uninfluenced by preconceived considerations. No one doubts that the facts of each case will be unique, that no single rule could hope to govern all cases, that flexibility must be preserved, and that the final step will be the exercise of a value judgment. But considerations like these - not for the first time proffered to justify a judicial *carte blanche* - have never been accepted in the long term for abandoning the search for coherence and stability.

These considerations are equally applicable to the law of judicial review. There has been a judicial tendency to decide cases based on what "feels right", but it is arguable that this does not help the future of the law. Principled decision making is essential in our precedent based jurisdiction and without it there is no way to predict how decisions will be made in future. Such unpredictability is difficult for both the public and the judiciary.

However, this argument must be tempered by looking at the nature of judicial review actions. Administrative law cases tend to be difficult cases.³³ Often an issue is brought as a judicial review proceeding because it does not fit another cause of action, despite the fact that the overall justice of the case indicates that a remedy (or at least a

³² *Bank of New Zealand v NZ Guardian Trust Co Ltd* (22 April 1998) unreported, High Court, Auckland Registry, CP 431/94; Noted in (1998) 21 TCL 22, 1.

³³ R Cooke 'The Struggle for Simplicity in Administrative Law' in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland 1986) 1, 2-3.

hearing) is deserved. The very nature of the decisions being reviewed tends toward a different style of judgment to that used in many other areas of law and each set of facts will be unique. However, the fact that the issue is difficult does not mean that the principles applied in deciding the cases need be difficult too.

2 *Why Judicial Review?*

The reasons why judicial review is sought can also shed light on the way cases are decided. Many judicial review actions seek interim orders because an immediate stay of events is required. Often, the cases do not end up going to a full hearing. At other times, the way in which a case is pleaded can affect the way in which the judiciary makes its decision. There can be problems with a paucity of facts, especially where an interim order is reconsidered in the Court of Appeal.³⁴ It is certainly arguable that more full pleadings should be allowed at this point, especially if the case is one which holds potential to form new law. Without this, the decision cannot really be considered relevant as it is based on a poor interpretation of the facts.

It seems natural that if more decision-makers are being found to be reviewable in principle, more plaintiffs will bring actions in judicial review against decisions which adversely affect their interests. However, the fact that decision-makers are reviewable in principle, does not mean that the decision is found to be wrong in every instance. In light of this, the concept of "success" must be considered. In some instances a party may never expect to win the case on judicial review but the surrounding publicity or the delay caused may be deemed enough. A normative view of "success" could be too narrow in this area: it is trite that the chances of effecting a judicial review and gaining a remedy is slight. In addition, you would think that the costs of bringing such actions would be prohibitive. Yet, despite this, many actions are brought each year, so it would seem that other agendas are working behind the scenes. In some cases people will try every

³⁴ This problem was illustrated in *Butler* (discussed in Part III) where the Court did not have the full facts before it.

avenue they can, especially in areas such as immigration where the vast majority of judicial review actions are taken against the Crown.³⁵

Judicial review has, to some extent, always acted more as a prophylactic than as a cure as the chances of successfully reviewing a decision have never been especially high. However, it is certainly arguable that the way the law is moving at present means the chances of success are slimmer than ever. More types of bodies are reviewable than in the past, but it is increasingly difficult to make out a ground of review.

Arguably, this (lack of) direction opens up potential for abuse of power. The bullish advisor could say to the decision maker, "just go ahead, make the decision", because the likelihood of being reviewed, and subsequently being required to revisit the decision, is so slight. However, this idea needs to be tempered with political reality. The media, for example, wields enormous power which could be used to curb the decision-maker's approach. Few politicians would be prepared to run a high risk on this front. In addition, there are other controls such as the ombudsmen, the official information, privacy and human rights legislation, and the hope that the majority of those holding power do intend to use it fairly.

3 Different standards of review depending on the decision-maker

As we have seen, judicial review is available against more decision-makers, more often than it was historically. Does this mean that more plaintiffs gain judgment in their favour on the substantive merits of their case? It appears that different standards of review, and consequently different chances of success, apply depending on the situation or body being review. For example, commercial decisions of

³⁵ Ministry of Justice *A quantitative analysis of judicial review files in New Zealand - Jan 1992 - March 1997* (Wellington, 1998). This report shows that of 505 judicial review files surveyed, 61% of files were brought by immigrants.

bodies with some statutory powers (discussed in part IV) appear only to be reviewable where there has been "fraud, corruption or bad faith" - a very high standard. Conversely, decisions which have a strong public element but which are made by non-statutory bodies may be more readily found to have acted unreasonably. The Court hinted at this in *Cameron*³⁶ where the "reasonableness" of a decision was assessed.

Classic definitions of unreasonableness set very high standards like: "so unreasonable that no reasonable authority could ever have come to it"³⁷; the decision-maker has "taken leave of his senses"³⁸; or the decision elicits exclamations like, "my goodness, that is certainly wrong!"³⁹ or, "this is unacceptable"⁴⁰. However, this high standard is not a universal, across the board standard. The Court generally expresses deference to administrative decision-makers, but the exact amount of deference necessarily varies depending on the status of the decision-making body and, it would appear, the nature of the interest at issue.

In *Cameron* the Court of Appeal indicated that the application of a lower threshold of unreasonableness than the high *Wednesbury* threshold would be appropriate. This is discussed in more detail in Part V. Arguably it is appropriate to apply different standards depending on the nature of the decision-maker and the decision. Such different standards are not unusual in the law. For example, in tort law a lower duty of care is sometimes applied where government is involved. The rationale behind this seems to be that it would be too

³⁶ *Cameron* above n 5.

³⁷ *Wednesbury Corporation* above n 10.

³⁸ *R v Secretary of State for the Environment, ex parte Notts CC* [1986] 2 AC 240, 247-248.

³⁹ *R v Devon CC, ex parte G* [1988] 1 WLR 49,51.

⁴⁰ Paul Walker "What's Wrong with Irrationality?" [1995] *Public Law* 556, cited in *New Zealand Federation of Commercial Fishermen (Inc) v Minister of Fisheries* (24 April 1997) unreported, High Court, Wellington Registry, CP 237/95.

expensive to find the government liable on a regular basis. In judicial review, the rationale for such distinctions could be the desire to avoid unnecessary intervention where the decision-maker and the person affected by the decision have equal power, and the wish to allow greater intervention when the decision-maker is wielding a public power, the abuse of which could bring about adverse effects.

F Interim conclusion

This section has outlined the fact that the traditional justification for judicial review has changed. Academic debate has brought about a number of theories about the basis of judicial review and its place in today's legal system. In assessing the place of judicial review today it is important to consider the role the cause of action plays in bringing redress for plaintiffs and the reasons why such actions are brought to court. Judicial review is available in more situations, and depending on the nature of the power exercised by the decision-maker, the courts are using different standards to determine the merits of the individual cases.

The following Parts focus on three recent decisions of the New Zealand Courts which involved the judicial review of non-traditional bodies. They illustrate the need for principled decision making which takes into account the realities of the difficulties of judicial review cases, and the different ways in which the issues surrounding the availability of judicial review can be approached.

III REVIEW OF PREROGATIVE POWER: BUTLER v RSAA

This section considers how the New Zealand Court of Appeal recently dealt with an application for judicial review of a body exercising its power under the prerogative. Review of the prerogative has, in recent years, been one of the least contentious developments in the expansion of judicial review. However, the decision in *Butler*⁴¹ has cast doubt on the area. At the very least a real opportunity to develop some principles in this area was given away.

This part begins by looking at the way in which review of the prerogative has been handled by the courts, both in New Zealand and in Britain. Following this, the facts of *Butler* are noted and the Court of Appeal's decision scrutinised.

A Review of the Prerogative

Traditionally, the exercise of prerogative power was not judicially reviewable because the power is not sourced from statute and, therefore, it does not fit easily within the ultra vires doctrine. Prerogative power is recognised by the common law and is not "granted" by any donor whose intentions as to its proper use can be implied.⁴²

However, the issue came under scrutiny in *CCSU*.⁴³ In this case, Great Britain's Prime Minister indirectly exercised the prerogative and issued an instruction under the Civil Service Order in Council.⁴⁴ This instruction unilaterally revoked the right to trade union membership in Britain's security intelligence organisation. There had been a practice of prior consultation with the union before changes were made to member's conditions of service, and the union sought review

⁴¹ *Butler* above n 3.

⁴² Oliver above n 16, 546.

⁴³ *CCSU* above n 2.

⁴⁴ The Order in Council was made under the prerogative.

of the instruction alleging the Minister had breached the duty to act fairly.

It was found that some prerogative powers are subject to judicial review in principle. The majority in the House of Lords decided that 'the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.'⁴⁵ However, in this case the Crown showed that there were national security concerns, and their Lordships held that it was for the government and not the courts to decide when those concerns outweighed those of fairness.

The *CCSU* case also established that not all exercises of the prerogative are reviewable. This idea has been developed in subsequent decisions. In *R v The Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*⁴⁶ Taylor LJ distinguished those acts at "the top of the scale of executive functions under the prerogative" involving "high policy", which were not justiciable, from "administrative decisions affecting the rights of individuals and their freedom to travel", which are justiciable. This case involved the power to issue passports.⁴⁷

New Zealand finally took the opportunity to endorse this English development in 1992 in *Burt v Governor-General*⁴⁸. The applicant was a convicted murderer who sought judicial review of the Governor-General's refusal to exercise the prerogative of mercy. The Court of Appeal established the reviewability of the prerogative on ordinary common law principles but dismissed Burt's application on its merits.

⁴⁵ *CCSU* above n 2, 399 (per Lord Scarman). See also Lord Diplock at 409 and Lord Roskill at 417.

⁴⁶ [1989] QB 811.

⁴⁷ This is a statutory power in New Zealand and as such the issue of the prerogative would not arise in this situation. However, the principle relating to the nature of the prerogative power is the same.

⁴⁸ [1992] 3 NZLR 672.

Since *Burt* was decided, other New Zealand cases have allowed review of prerogative power. Some of these decisions have included a principled approach to this area of review. For example, in Patel's case Justice Baragwanath set out the court's role in reviewing the prerogative:⁴⁹

Where there is conduct which is irrational or unfair in a way inexplicable by criteria of broad policy the Courts will [intervene]. It is their function to determine the scope of a decision maker's authority even when expressed in the widest terms.⁵⁰ Such function imports an obligation to state the law, not only the meaning of a statute but also the scope of the prerogative, the lawfulness of which is to be assessed by settled norms accepted in New Zealand including those of the rule of law. Prerogative powers should be confined within limits which it is the function of the Courts to identify.

In *Butler*, however, the Court of Appeal did not identify any such functions. As will be seen below, the issue of review of the prerogative was not concentrated on in any detail.

B Facts of Butler

Danny Butler became a well known figure in New Zealand during the 1990s as he fought to gain refugee status and remain in the country, rather than face deportation to Ireland. Butler claimed he was entitled to refugee status under the 1951 Convention relating to the Status of Refugees to which New Zealand is a signatory. He contended, in terms of the Convention, that owing to well founded fear of being persecuted for reasons of political opinion, he was outside the countries of his nationality (Great Britain and Northern Ireland, and the Republic of Ireland), and that, owing to this fear, he was unable to return to those countries.

Officials of the New Zealand Immigration Service (NZIS) declined Butler's application for refugee status and the Refugee Status Appeals

⁴⁹ *Patel* above n 28, 110.

Authority (RSAA) dismissed his appeal from that decision. Butler sought judicial review of the RSAA's decision and he sought an order requiring the RSAA to consider the appeal afresh on a different basis from that which it was said to have adopted.

Robertson J, in the High Court, dismissed the application. Issues of law were raised in the Court of Appeal but the five judges hearing the case were unanimous in their decision that the RSAA did not err in law and the appeal was dismissed. Keith J delivered the judgment of the Court of Appeal.

C The decision

The decision began with an outline of the issue and the proceedings. It was noted that the grounds for the challenge to the RSAA's decision as presented to that court were markedly different from those argued in the court below. The definition of refugee was set out and following this a description of the facts was given.

Next, the decision of the RSAA was described and the alleged errors of law addressed. Only after this was the issue of whether or not the RSAA was in fact reviewable considered. This was not a logical way to approach the case. In an action for judicial review the reviewability of the body alleged to have exercised its power improperly is a central question and as such it should not be relegated to a few paragraphs at the end of a judgment. If the availability of review is clear cut, that part of the proceeding may be swiftly dealt with, but if there is a real issue to consider - as was the case in Butler - this should be acknowledged before (for example) the fairness of the way in which the power was actually exercised is decided upon.

When the issue of reviewability was finally addressed, the Court of Appeal sat on the fence. It did not express a final view on whether or not the decisions of the RSAA are reviewable. Justice Keith stated

⁵⁰ See *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997.

that this was "because the issue was not fully argued and because of the conclusions reached on the substance."⁵¹

The fact that the issue was not fully argued is a problem with the nature of this type of appeal, where the court will not necessarily be presented with all the facts. This issue is discussed in general terms in Part II above. Butler's case illustrates the fact that there is a need in some instances to encourage full pleadings at the appeal level. Despite lacking the full facts, the Court in this case could have been more express in its treatment of the reviewability issue. The judgment refers to the fact that the parties agreed that the Courts have the power to review determinations of the RSAA for error of law. Given this, it seems unusual that, if the judges had serious doubt about the availability of review, they were not more open to discussing their reasons for this doubt. Clearly the exercise of a power to determine a person's freedom to stay in New Zealand is the sort of administrative matter which should be reviewable.⁵² As the situation was left, there is now doubt about the reviewability of the prerogative where there had been none before. The Court of Appeal missed an opportunity to add further certainty to this area of judicial review.

Following the brief discussion of whether the RSAA's exercise of power was reviewable, Justice Keith comments that it would be helpful if Parliament would clarify the issue by passing legislation covering this area:⁵³

Legislation, such as that enacted in Australia, Canada and the United Kingdom - or in New Zealand in respect of other immigration matters - would remove any doubts about reviewability and could be expected as well to regulate aspects of the courts' powers, for instance by way of rights of appeal to them.

⁵¹ *Butler* above n 3, 20.

⁵² An analogy can be drawn here to the reasoning of Lord Justice Taylor in *Everett's* case: above n 46.

⁵³ *Butler* above n 3, 20.

However, legislation should not be required in every area of law. The common law is quite settled on the matter of review of the prerogative and provides adequate recourse where a power is alleged to have been exercised improperly.

The Court of Appeal's consideration of Butler's case has unwittingly cast doubt on what had until then seemingly been a settled area of law. Prerogative powers are reviewable in New Zealand. Parts IV and V discuss more contentious areas for judicial review.

IV REVIEW OF PUBLIC-PRIVATE BODIES: *MERCURY v ECNZ*

New Zealand has been undergoing major change in its public sector since the mid-1980s as successive Governments have undertaken a process of privatisation and corporatisation. A number of state owned, public-private, bodies have been set up including SOEs, Crown Research Institutes, Regional Health Authorities and Crown Health Enterprises.⁵⁴

The majority of these public-private bodies are set up by statute as commercial entities aiming for profit. Prior to being privatised their functions were administered by government departments. These departments were subject to judicial review not least because they fell within the scope of the *ultra vires* rule. In addition, these departments clearly exercised "public functions" so, where this basis of allowing judicial review was used by the courts, the exercise of public power was clearly reviewable in principle.

The introduction of these public-private bodies has influenced the development of judicial review in New Zealand. This section focuses on the way in which applications for review of commercial decisions of these bodies are being dealt with by the Courts. Commercial decisions

⁵⁴ RHAs and CHEs have recently undergone yet more restructuring. The RHAs have been combined into one Health Funding Authority and as of 1 October 1998 CHEs will once again be called Hospitals. The "for profit" model has been modified to a degree.

cause the most difficulty in judicial review proceedings. This is because the bodies are exercising powers which have previously clearly fallen within the realm of 'public function'. In particular it has taken (and continues to take) the public a good deal of time to get used to the idea of such powers essentially being privatised. Different agendas affect the way in which the powers are viewed in each instance.

A The courts' decisions in *Mercury*

The *Mercury Energy* case arose after the Electricity Corporation of New Zealand (ECNZ) gave twelve months notice of its decision to terminate a local supply contract. This decision affected the Auckland Electric Power Board (a local supplier) who sought a declaration and injunction against ECNZ. The High Court held that the judicial review action should be struck out and this decision was appealed to the Court of Appeal.⁵⁵ The Court of Appeal dismissed the appeal, and held that the decision by ECNZ was not amenable to judicial review. The Court of Appeal focused on the question of justiciability in relation to SOEs.

The essence of the Court of Appeal's decision was that ECNZ was a corporation incorporated under the Companies Act 1955 and it derived its powers to terminate supply contracts from the common law of contract, not from statute. This source of power meant the decision was not amenable to judicial review. A line of New Zealand cases, starting with *New Zealand Stock Exchange v Listed Companies Association Incorporated*⁵⁶ state that the exercise of contractual rights are outside the scope of powers derived from statute and as such are not able to be challenged in judicial review proceedings under the Judicature Amendment Act 1972. The Court of Appeal in *Mercury* said that it was not possible to isolate particular acts in the conduct of the business of the SOEs as the exercise of a statutory power of

⁵⁵ *Auckland Electric Power Board v Electricity Corporation of New Zealand* [1994] 1 NZLR 551 [Auckland Electric].

⁵⁶ [1984] 1 NZLR 699 (CA).

decision in terms of the Act.⁵⁷ This is a prime example showing that the Judicature Amendment Act 1972 no longer provides a good basis from which to determine whether or not judicial review should be available.⁵⁸ The source of the power was focused on to too great an extent.

On appeal to the Privy Council⁵⁹, their Lordships moved away from the Court of Appeal's narrow interpretation of statutory power. The nature of the power exercised was assessed and it was held that judicial review was available in principle⁶⁰:

A state owned enterprise is a public body, its shares are held by Ministers who are responsible to the House of Representatives and accountable to the electorate. The corporation carries on its business in the interests of the public. Decisions in the public interest by the corporation, a body established by statute, may adversely affect the rights and liabilities of private individuals without offering them any redress. The Lordships take the view that in these circumstances the decisions of the corporation are in principle amenable to judicial review both under the Act of 1972 and under the common law.

This statement broadened the notion of statutory power to include state owned enterprises. However, *Mercury*⁶¹ was not able to establish a ground for review. In what has become a well known judicial statement, the Privy Council said⁶²:

It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to

⁵⁷ *Auckland Electric* above n 55, 558-559.

⁵⁸ The Judicature Amendment Act is discussed in more detail in Part II above.

⁵⁹ *Mercury* above n 4.

⁶⁰ *Mercury* above n 4, 388.

⁶¹ *Mercury Energy Limited* is the new name for the Auckland Electric Power Board, which was itself corporatised in the early 1990s.

⁶² *Mercury* above n 4, 391.

supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption, or bad faith.

This sentence has been seized upon in subsequent cases. It has been viewed as an unequivocal statement that commercial decisions of SOEs cannot be subjected to judicial review unless there has been fraud, corruption or bad faith. However, this is arguably too broad an interpretation of the Privy Council's statement as will be discussed below. First however, it will be helpful to look at examples of how the statement has been interpreted in subsequent cases.

B Interpretation of *Mercury*

In *New Zealand Private Hospitals Association and Others v Northern RHA*.⁶³ Blanchard J interpreted the *Mercury* decision as stating that decisions to enter into or determine commercial contracts could never be reviewed. The case challenged the development of a policy by the RHA to determine the merits of rest homes and their services on a competitive basis. The policy aimed to counter the over-supply of rest homes in the Northern RHA area. The Private Hospitals Association brought an action to review that policy alleging breach of a number of administrative law grounds. In his judgment Blanchard J stated⁶⁴:

I bear in mind the advice of the Privy Council in *Mercury Energy Limited* that it does not seem likely that a decision by a state owned enterprise to enter into a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud corruption or bad faith.

Mr Harrison argued that this could be seen as being restricted to a comment on an attack based on unreasonableness or irrationality. He was arguing that their Lordships were saying only that a decision to enter into or determine a commercial contract to supply goods or services

⁶³ (7 December 1994) unreported, High Court, Auckland Registry, CP 440/94. [*Private Hospitals*].

⁶⁴ *Private Hospitals* above n 63, 37.

would not be set aside for unreasonableness or irrationality in the absence of fraud, corruption or bad faith. But I think that Lord Templeton's words were intended to be of more general application.

Blanchard J declined to find a cause of action challenging the unfairness of the process of the RHA. He stated⁶⁵:

Here it seems to me that the defendant, in carrying out its functions of purchasing health services and disability services by means of purchase agreements or otherwise (section 33), is not exercising a power conferred by statute as it would be, for example, if the statute in question gave an express power to enter into contracts of particular kinds and laid down criteria and procedures relating to them.

Here Blanchard J reverted back to the emphasis on assessing reviewability based on whether a statutory power of decision was exercised. This method was effectively overturned by the Privy Council in *Mercury*.

This interpretation of *Mercury* was also used by McGechan J in *Gregory v Rangitikei District Council* where the judge stated that the Privy Council in *Mercury* had placed "a severe discretionary limitation" on any review of commercial decisions.⁶⁶ Likewise, in *Lawson v Housing New Zealand and Others*⁶⁷, Williams J declined to review the decision of Housing New Zealand because it was a purely commercial decision and there was an absence of fraud, corruption or bad faith.

These cases show that in a number of cases the interpretation of the Privy Council's statement in *Mercury* has been that purely commercial decisions are never reviewable in the absence of fraud, corruption, or bad faith. However, a less strict interpretation has been adopted in other cases.

⁶⁵ *Private Hospitals* above n 63, 42.

⁶⁶ [1995] 2 NZLR 208, 237.

⁶⁷ [1997] 2 NZLR 474.

C *Alternative Arguments*

One of the first decisions to consider the Privy Council decision in *Mercury* was *Napier City Council v Healthcare Hawkes Bay Ltd, Central RHA and Attorney-General*⁶⁸. Healthcare Hawkes Bay's decision to establish a regional acute hospital at Hastings and to reduce services at Napier was challenged. The Napier City Council applied to have the decision set aside and to be given a further opportunity to consult before any decision was made. The orders were granted by Ellis J. He interpreted the Privy Council in *Mercury* as having restricted judicial review of SOEs only to situations in which the merits of a decision are being reviewed. He distinguished *Mercury* in the following way:⁶⁹

Here the decision goes to the very heart of HCHB's undertaking and has very heavy social and political content. Here too it is procedural fairness that is in issue, not the merits of the decision. Further, the procedure in question is the subject of clear legal guidelines. It is those that are an issue not the palpable but unjusticiable elements of "social responsibility."

In *Southern Community Laboratories Limited v Healthcare Otago Limited*⁷⁰, Healthcare Otago sought to rely on the Privy Council's problematic sentence to support their argument that their actions were not reviewable. Eichelbaum CJ struck out the plaintiff's actions but introduced the idea of commercial decisions falling along a continuum.⁷¹

[i]n relation to a CHE due allowance has to be made for the considerations of social responsibility in the interests of the community. These however are relative rather than absolute

⁶⁸ (15 December 1994) unreported, High Court, Napier Registry, CP29/94, [*Napier City Council*]. Healthcare Hawkes Bay is a CHE.

⁶⁹ *Napier City Council* above n 68, 29.

⁷⁰ (19 December 1996), unreported, High Court, Dunedin Registry, CP30/96 [*Southern Community Laboratories*].

⁷¹ *Southern Community Laboratories* above n 70, 16-17.

concepts. They may be seen as a continuum where a decision having major impact on the community...was very much at the upper end of the scale whereas minor supply contracts relating to CHEs would be at the other end.

In this way, a line can be drawn when assessing whether or not commercial decisions should be reviewable. Clearly it would be impractical to have every minor purchase of a body open to review, but where a major contract is under consideration, and the outcome of the decision will affect a significant section of the public, judicial review should be an option. In these cases, the standard of reviews should not be made so high that only extreme "unreasonable" acts provide grounds for review. Judicial review should be an active remedy.

Another alternative view was raised by Rodney Harrison, QC as counsel for the plaintiffs in the *Private Hospitals*⁷² case. The argument was rejected by Blanchard J, but is nonetheless a solid approach. As noted above, Harrison argued that the Privy Council's statement regarding fraud, corruption and bad faith was only intended to apply to judicial review actions alleging unreasonableness or irrationality. Illegality or procedural impropriety were not intended to be included.

The argument can be justified in the following way: allegations of unreasonableness or irrationality get very close to the merits of the decision, and Courts are generally reluctant to judge such matters in judicial review actions. For this reason, the Privy Council said that allegations of unreasonableness or irrationality will only be allowed where there is fraud, corruption or bad faith. Where an SOE has acted illegally or has failed to follow required procedural steps it seems reasonable that the courts should intervene, just as they will where a government body acts in a procedurally unfair manner.

This alternative approach would avoid the watering down of judicial review, at least within the context of public-private bodies. In addition to being available in principle, judicial review would also be available

⁷² *Private Hospitals* above n 63.

in substance in some situations where so called "commercial decisions" are made. This approach also provides a principled method of distinguishing between a review of the process by which a decision is made and a review of the merits of that decision. Commercial decisions of SOEs and similar bodies have the potential to impact heavily on the public interest. For this reason, the procedural aspects should be amenable to judicial review more often than where there is proved to be fraud, corruption or bad faith.

The Privy Council in *Mercury* quoted extensively from the *Wednesbury*⁷³ decision before stating that judicial review would be unlikely to be available in the absence of fraud, corruption or bad faith.⁷⁴ Their Lordships did not take the opportunity to develop a set of rational principles which would assist future courts to determine situations in which judicial review should be available.

The issue of the reviewability of commercial decisions of public-private bodies is likely to continue in the future as more government bodies are made into crown entities such as SOEs. In addition, there have been moves to sell some of these bodies to the private sector. Despite this, the functions of the entities will remain more or less the same, meaning that judicial review should continue to be available where there is question about the exercise of a public function. The reviewability of decisions made by fully private bodies is discussed in the next section.

V REVIEW OF PRIVATE BODIES: *ELECTORAL COMMISSION v CAMERON*

This section examines a third area in which judicial review proceedings have been brought against a body which does not fit within the traditional bounds of judicial review. In *Cameron*⁷⁵ a non-

⁷³ *Wednesbury Corporation* above n 10.

⁷⁴ This approach by the Privy Council was criticised by Michael Taggart in his article "Corporatisation, Contracting and the Courts" [1994] PL 351.

⁷⁵ *Cameron* above n 5.

statutory body was found in principle to be open to judicial review. In the event, the Court relied on the Declaratory Judgments Act to give appropriate recourse for the applicant, so the discussion of the availability of judicial review under the Judicature Amendment Act 1972 is technically *obiter*. Despite this, the case is important in that it involves review proceedings of a non-statutory body which wields considerable public power. Comments made in the judgment give some indication of where the Courts may head in the future and the case also opens up scope for consideration of the impact of the New Zealand Bill of Rights Act.

This part begins by looking at the facts of *Cameron*. Following this, the Court's decision is assessed and the impact of that decision is considered. Finally, the place of the New Zealand Bill of Rights Act in judicial review proceedings is looked at.

A Facts of Cameron

In this proceeding the Electoral Commission (Commission) sought review in the Court of Appeal of a decision of the Advertising Standards Complaints Board (ASCB), through its chief executive, Cameron. The ASCB is an unincorporated body constituted under the rules of the Advertising Standards Authority Incorporated (ASA) which represents organisations of the major industry interest groups. The ASA set up the Advertising Codes of Practice and established the ASCB to rule on complaints made by reference to the codes.

The ASA and the ASCB perform very similar functions in the area of advertising as does the Broadcasting Standards Authority in relation to public broadcasts generally. The Broadcasting Standards Authority also promulgates codes to be adhered to. The primary difference between the two authorities is that the Broadcasting Standards Authority was set up under statute, whereas the ASA and ASCB were developed by an industry group. The advertising sector set these agencies up in response to a fear that if the industry did not set up some form of self regulation the government would do it for them.

Cameron is an unusual case in that the Crown, on behalf of the Commission, was able to argue that the body it was suing should be reviewable. Generally the Crown is trying to protect itself from such review. The case was brought in response to a decision made by the ASCB in regard to a complaint lodged with the ASCB against two advertisements published by the Commission. The Commission is a Crown entity set up under the Electoral Act 1993 and at that time had the principle function of promoting public awareness of the new electoral system of Mixed Member Proportional Representation (MMP). In accordance with its mandate, the Commission published advertisements designed to convey the major elements of the MMP electoral system. The complaint against these advertisements was that although they were correct for some scenarios, they did not acknowledge the many possible circumstances when they would be inaccurate.

The ASCB found that the advertisements were in breach of the Advertising Codes of Practice: they were not truthful presentations because they did not refer to the possible exceptions and qualifications to the statements of general principle contained in the advertisements. The Commission brought an action in judicial review to determine whether its advertising, carried out in the exercise of its statutory functions, was subject to the jurisdiction of the ASCB.

B The Court's approach

This section assesses the Court's approach in deciding *Cameron*. The issue as to whether decisions of the ASCB were reviewable was discussed. Following this the grounds of review were considered. In the end, the Court did not use the principles of judicial review to decide the case in the Commission's favour.

1 *Reviewability*

In *Cameron*, the Court addressed the issue of whether decision's of the ASCB could be reviewed. There was unanimity between the parties that in general they are. The Solicitor-General, on behalf of the Commission, argued that the ASA and the ASCB exercise public power by imposing collective standard-setting upon the Commission and other advertisers, essentially across all major media groups. This broad regulatory regime with coercive effect, derived from collective practice, was compared with the United Kingdom's Takeovers Panel which was held to be exercising public powers and to be amenable to judicial review in *R v Panel on Takeovers and Mergers, ex parte Datafin*.⁷⁶ The Court accepted the Solicitor-General's argument but also noted the existence of a more direct route to judicial review, via the Judicature Amendment Act 1972.

Since the 1977 amendment to the Judicature Amendment Act 1972, judicial review of private bodies has technically been available in New Zealand providing the body can be said to have exercised a "statutory power". As outlined in Part II above, section 3 of the Act defines a statutory power of decision as including a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate to do a number of things.

This is a fairly broad definition, but in reality, few decisions which are not made under legislation have been reviewed. The Courts have only found non-statutory bodies to be reviewable where there has been a strong public element. Examples of these cases include: *Finnigan v New Zealand Rugby Football Union*⁷⁷ where the national importance of the Union opened it up to review proceedings; *Atkinson v New Zealand Kennel Club Inc*⁷⁸ where a kennel club was found to be reviewable; and

⁷⁶ *Datafin* above n 12.

⁷⁷ [1985] NZLR 159.

⁷⁸ (15 April 1983) unreported, High Court, Auckland Registry, A 609/81.

*Beagle v Petone Workingmen's Club and Literary Institute*⁷⁹ where review proceedings were launched against a workingmen's club.

In *Cameron*, the Court found that the decisions made by the ASCB under the Advertising Codes of Practice fell within the definition of "statutory power of decision". There was little doubt that the ASCB's functions were of a public nature and this was evidenced by the fact that the regulatory role of the ASCB has statutory recognition in the Broadcasting Act 1989. The Court noted that:⁸⁰

The significance of this statutory recognition of the board is to confirm, if that is necessary, that the board has a role of a public nature in regulating advertising equivalent in part to that of the statutory Broadcasting Standards Authority.

The decisions of the ASCB were held to be reviewable in principle. The Court commented that:⁸¹

It would be a strange result indeed if it were held that decisions of the board were not amenable to review while decisions of the Broadcasting Standards Authority, exercising cognate jurisdiction under the Broadcasting Act plainly are reviewable.

2 The grounds of review

After determining the issue of reviewability, the Court of Appeal considered the grounds upon which it would be appropriate to allow judicial review. (This was despite the fact judicial review was not used in the end.) The Court noted that:⁸²

Decisions of unincorporated bodies exercising public regulatory functions may not easily fall for examination on conventional grounds of illegality, irrationality and procedural impropriety.

⁷⁹ (31 May 1985) unreported, High Court, Wellington Registry, A 325/82.

⁸⁰ *Cameron* above n 5, 424.

⁸¹ *Cameron* above n 5, 429.

⁸² *Cameron* above n 5, 430.

The Court said that in a case such as this it would be prepared to apply a "more flexible approach" than is traditional in judicial review. That was because the ASCB was a non-statutory body which nevertheless had claimed its own jurisdiction to wield wide public powers. In particular, the Court was prepared to relax the *Wednesbury* threshold of unreasonableness and invoke Lord Donaldson MR's "innominate" ground from *R v Panel on Takeovers and Mergers, ex parte Guinness plc*.⁸³ It was noted that:⁸⁴

...the legitimacy of the exercise of the powers should be scrutinised not narrowly by reference to that jurisdiction but rather more broadly as indicated by Lord Donaldson in the *Guinness* case. For instance, it would seem entirely appropriate in such circumstances to have regard to any encroachment upon statutory functions and powers conferred on public authorities and to apply a somewhat lower standard of reasonableness than "irrationality" in the strict sense.

This last sentence shows that it was material that this case involved a non-statutory body interfering with a statutory body. The Court said:⁸⁵

The line may not be easy to draw in particular instances. But the standing and responsibilities of the commission justify a conservative approach to interference with its functions.

It remains to be seen whether this lower standard of reasonableness will be applied in future decisions involving review of non-statutory bodies who have exercised power over other non-statutory bodies. This issue is discussed below in regard to the impact of the decision.

⁸³ [1990] 1 QB 146, 159-160.

⁸⁴ *Cameron* above n 5, 433.

⁸⁵ *Cameron* above n 5, 434.

3 *The decision*

It appears the Solicitor-General was concerned to present the case in a judicial review context to ensure a clear distinction between the right of any individual publisher to reject advertisements in the exercise of freedom of expression (which he did not wish to encroach upon), and the collective exercise of industry regulation effectively to prevent dissemination of particular advertisements so as to impede the exercise by the Commission of its statutory functions.⁸⁶ This distinction is made clear if the focus is on the ASCB's powers and the exercise of those powers in relation to the Commission.

However, in the end, judicial review was not used to decide the case in the Commission's favour. Instead, the Court issued a declaration, under the Declaratory Judgments Act 1908, that the board has no authority to make rulings in relation to advertisements of the commission published in the exercise of its statutory public awareness functions. The next section assesses the impact of that decision and, in particular, the Court's *obiter* comments about the reviewability of the ASCB.

C *Impact of the decision*

Cameron gives a strong indication of where the Court is likely to head in deciding future cases where judicial review proceedings are brought against non-statutory bodies. It is an emphatic, unanimous decision of a five-judge Court of Appeal. In the end, because the Court relied on the Declaratory Judgments Act in making its final decision, its comments on the reviewability of the ASCB were *obiter*. However, the Court of Appeal has endorsed its comments in *Cameron* in *Waitakere City Council v Lovelock*⁸⁷ and the case seems likely to hold considerable sway as a precedent in future judicial review actions involving non-statutory bodies.

⁸⁶ *Cameron* above n 5, 430.

⁸⁷ [1997] 2 NZLR 385, 403, 420 [*Waitakere*].

1 *Successful review in subsequent cases?*

The facts of *Cameron* were unique in that the case involved a non-statutory body making a decision which adversely affected a statutory body. The standing of the Commission was material:⁸⁸

...the standing and responsibilities of the commission justify a conservative approach to interference with its functions. They are, after all, at the heart of our democratic system.

More commonly, bodies such as the ASCB will be subject to judicial review proceedings where they have made decisions affecting other private bodies. As an example, consider corporate advertisers. The majority of these advertisers could not claim to hold a vital democratic status, and as such may not be able to invoke the lower standard of reasonableness applied in the Commission's case. However, there is an alternative view. Thomas J reflecting on *Cameron* in *Waitakere City Council v Lovelock* interpreted the reasoning as follows:⁸⁹

...this Court adopted a different standard of reasonableness in [*Cameron*] but that adjustment resulted from the fact that the body which had allegedly exceeded its powers was a non-statutory body exercising public power and not from the gravity of the decision in issue. (emphasis added)

This indicates that the reasoning in *Cameron* was simply that the ASCB was a private body which claimed its own right to wield significant public power and set its own jurisdiction and, as such, it should be scrutinised closely. Given this, it seems likely that future cases involving the judicial review of non-statutory bodies will allow review even where the plaintiff is a private body.

⁸⁸ *Cameron* above n 5, 434.

⁸⁹ *Waitakere* above n 87, 419.

2 *Private bodies' rule-making*

The consequence of finding a body such as the ASCB reviewable in principle opens up issues about the flexibility of the rules promulgated by such bodies. The ASCB enforces Codes set by the ASA but that body is not subject to any real restrictions in its setting of those rules. If judicial review proceedings find that a decision has been made by the body in an inappropriate way, there is nothing to stop the body changing the rules or its procedure to avoid the impact of the Court's decision. In this sense, judicial review is a somewhat weak form of redress in this context.

Of course, where judicial review of a statutory body finds that body liable, the legislature can certainly legislate to avoid the "problem". The difference is that the legislature is subject to many more checks on its powers than are private bodies. For example, the members of Parliament responsible for changing the laws are open to direct challenge from opposition members. In addition, the select committee process ensures that proposed legislation is analysed by a range of members and public submissions are received. If regulations are considered to be unreasonable they may be referred to the Regulations Review Committee. Government officials are subject to scrutiny by the ombudsmen and in most situations must comply with the requirements of the Official Information Act 1982, the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. Up until now, none of these checks have been imposed on private bodies even if they are exercising public power. However, there may be scope under the New Zealand Bill of Rights Act to control some actions of private bodies. This is discussed in the next section.

D *The New Zealand Bill of Rights Act*

Since its introduction in 1990 the New Zealand Bill of Rights has primarily been used in criminal and blood alcohol cases⁹⁰, evidential

⁹⁰ The most well known case is *Noort v Ministry of Transport* [1992] 1 NZLR 743;

matters⁹¹ and matters of statutory interpretation.⁹² It has been commented that the Bill has not had the impact that was expected⁹³ and there is considerable untapped potential. Taggart notes that if we follow the Canadian Charter experience the next area likely to be targeted by Bill of Rights arguments is administrative law.⁹⁴

1 *Application*

The Bill of Rights has a different focus to administrative law, and it is applied differently. In simple terms, where the Bill of Rights is used, the starting point is the right allegedly infringed by the exercise of discretionary power by a public authority. Following this, there is an inquiry into whether the right has been reasonably or justifiably limited. If it has not, then the public authority must decide in accordance with the Bill of Rights. The decision-maker is prevented from exercising the discretionary power in a way that infringes the Bill of Rights. In comparison, there is a hierarchy of considerations in administrative law's control of discretionary power.

However, a precondition of using the Bill of Rights is that the decision-maker falls within the ambit of the Act. Section 3 is the application section and reads as follows:

3. *Application*—

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or

⁹¹ For example, *R v Kifiri* [1992] 2 NZLR 8; and *R v Butcher* [1992] 2 NZLR 257.

⁹² See *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439.

⁹³ Philip Joseph, 'Constitutional Review Now' [1988] NZLRev 85, 119.

⁹⁴ Michael Taggart - "Tugging on Superman's Cape: Lessons from experience with the New Zealand Bill of Rights Act 1990" [1998] PL 266, 275 [*Superman*].

- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Where a body can be fitted into the application section, and a plaintiff has had an actionable right breached by the responsible body, there is potential to use the Bill of Rights as the basis of a ground of judicial review. This could be used alone or brought along with other grounds such as procedural unfairness, unreasonableness or illegality. The issue therefore, is how far the application of the Bill of Rights reaches.

The Court in *Cameron* held that the ASCB exercised a public function. On this basis there is room to include this sort of body within section 3(b) of the application section. In the case of the ASCB, the fact that its powers are recognised in the Broadcasting Act 1956 may be sufficient to cover the requirement that the body's powers or duties be conferred or imposed pursuant to law. Taking this further, it may be possible to argue that incorporated bodies' powers or duties are conferred or imposed pursuant to the companies legislation. This interpretation would significantly broaden the application of the Bill of Rights. It would go some way toward ensuring that bodies wielding public powers do not abuse them, and it would make available a remedy which sounds in damages.⁹⁵

When looking for guidance as to the interpretation of the New Zealand Bill of Rights Act it is common to look at the Canadian experience in part because the Canadian Charter of Rights and Freedoms was heavily leaned upon in the drafting of New Zealand's Bill of Rights. The Charter's application section is narrower than the New Zealand's version as it only applies to the Federal Parliament and government, and the provincial legislatures and governments. However, the Canadian Courts have adopted an expansive approach to the

⁹⁵ Since *Baigent's* case it has been clear that damages for breaches of the Bill of Rights will be available in some situations (*Simpson v Attorney-General* [1994] 3 NZLR 667).

Charter's application. A "control test" has been applied by the Canadian Courts. Where it is found that a body exercises significant control over an area of public power or a right set out in the Charter, the body is often found to be subject to the Charter. For example, adjudicative tribunals and municipal government have been found subject to the Charter⁹⁶ and in the case of *Eldridge v Attorney General of British Columbia*⁹⁷, a Hospital Board (which was not set up directly under statute) was found to be reviewable under the Canadian Charter. It seems therefore, that there is some precedent for extending the interpretation of New Zealand's Bill of Rights so it applies to more bodies which exercise public power.

The New Zealand Bill of Rights Act 1990 may extend even further where a body fits within section 3(a). There is a strong argument that every act performed by such a body is covered by the Bill of Rights, irrespective of whether it is a public act or a private transaction. If this is the case, the Act extends the potential grounds of review where a "government" power is in issue. Employment contracts between an individual and a government body, would possibly be open to challenge under the Bill of Rights despite the fact that this area of law is usually considered to be private.⁹⁸

3 Specific breaches of the Bill of Rights

If private bodies exercising public power can fit within the ambit of the Bill of Rights there are a number of rights set out in Part II of the Act which could potentially be breached by such a body. For example, the ASCB could be found to have breached the section 14 right to freedom of expression if it unreasonably stopped advertisers broadcasting. This would open up considerable scope for advertisers to check the ASCB's power to censor. Another source of redress may be section 27 which protects the right to natural justice and holds considerable

⁹⁶ Philip Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1993), 854.

⁹⁷ (1995) 125 DLR (4th) 323; (1997) 3 BHRC.

⁹⁸ A full analysis of this possible extension to the law of judicial review is beyond the scope of this paper.

potential for decisions of bodies to be reviewed, especially where due process has not been followed.

There is scope for the Bill of Rights to develop the law in some areas. Shortly after its introduction the prima facie rule excluding evidence obtained in breach of the Bill of Rights was embraced by the courts.⁹⁹ A similar development could come about in the area of judicial review by allowing redress where a private body is exercising public power. Of course there is the danger that the law could be pushed too far in one direction.¹⁰⁰ However, the legislature could check such extremes by amending the law if it is deemed to be causing a significant problem.

VI CONCLUSION

Judicial review remains an important form of redress where a decision-maker in a position of public power exercises its power in a way that negatively affects an individual or organisation. However, the type of bodies open to judicial review has changed significantly in recent years. The law has moved away from requiring strict adherence to the *ultra vires* rule in the sense that the source of the power is the first consideration, toward a greater focus on the function and nature of the power exercised by the decision-maker. This development has not been fully embraced by the New Zealand courts, in part because of the structure of the Judicature Amendment Act 1972. However, the increased corporatisation and privatisation of previously government owned entities has sped up the process of change. This is particularly seen in the decisions in *Mercury* and *Cameron*.

⁹⁹ Superman above n 94, 274.

¹⁰⁰ It is arguable that this happened with the evidence rules: relative technicalities were stopping prosecution of otherwise clearly guilty parties. Recently there has been a move away from such extreme use of the Act. This is noted by Taggart in Superman above n 94, 275.

A number of theories regarding the justification for judicial review have been put forward. Some advocate a move away from the *ultra vires* rule while others believe that doctrine must remain at the core of the cause of action. It seems clear that there has been a shift in the basis of judicial review so the task now is to ensure the developments proceed in a principled way so as to encourage a useful working tool which can effectively check abuse of power.

Opening judicial review to a broader range of bodies has led to the grounds of judicial review being watered down in some instances. Different standards of unreasonableness have been held to apply depending on the nature of the power exercised. This approach has advantages and disadvantages. It poses some problems when trying to ascertain certainty for future cases but allows greater flexibility in a complex field. Judicial review cases must be determined on their unique facts.

In New Zealand the introduction of the Bill of Rights Act 1990 has brought with it potentially new grounds for judicial review. This scope is yet to be tested but it seems probable that it will be used in future as a check on public power. It is an attractive option given that damages are sometimes available if a breach is found. This is one way in which judicial review will continue to develop as further cases come before the courts. The move away from the doctrine of *ultra vires* is but part of judicial review's continuing evolution. If judicial review is to remain useful, this development must continue.

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