LIAM D MASON

JUDICIAL REVIEW OF THE NEW ZEALAND SECURITIES COMMISSION AND THE NEW ZEALAND STOCK EXCHANGE

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LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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CONTENTS

ABSTRACT

This paper aims to explore the role of judicial review as a control on the use of discretionary powers by regulators in the securities markets, and has two main conclusions.

The first is that the powers of both the Securities Commission and the New Zealand Stock Exchange can be characterized as public law powers, and will thus be subject to administrative law controls in appropriate cases.

The second is that the case law in New Zealand and overseas indicates that courts will be reluctant to exercise their jurisdiction in a manner which may interfere with the workings of these markets, except in extreme cases.

As a result of this passive participation by the courts it is expected that judicial review will not have a negative effect on the smooth running of the markets. Rather, a guiding role by the courts may serve to increase investor confidence by guarding the rights of market participants and by acting as a moderator on the powers of the regulators.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and abstract) comprises approximately 14, 940 words.

I INTRODUCTION

Securities law is concerned with regulating offers of securities to the public and trading in publicly offered securities. This is an inherently commercial field, and it is not surprising that there is a lot of debate surrounding the subject of securities regulation. This debate revolves around economic arguments addressing the issues of investor protection and capital attraction. These arguments have in various ways affected the structure and practice of securities regulation in NZ, resulting in regulation by both government bodies and industry representatives. In both cases the regulators possess considerable discretionary powers to aid them in overseeing the conduct of the markets.

It is a function of judicial review to ensure that public law powers are exercised lawfully, fairly and reasonably. In recent years the courts have increasingly been asked to apply this jurisdiction in commercial situations where public law issues are at stake. The purpose of this paper is to examine the present possibilities for application of judicial review to the securities markets. This will include an examination of both the scope of judicial review in this area, and the way in which this flexible jurisdiction is and may be applied to discretionary decisions of securities regulators. The paper will also consider the effect that the exercise of administrative law controls is having and may have on the securities markets.

In examining judicial review in this field the paper will focus firstly on the general oversight functions of the Securities Commission under the Securities Act 1978. The paper will then examine the use of judicial review in relation to the regulation of investment prospectuses under the Securities

Act, and to the regulation of secondary dealing in securities by the New Zealand Stock Exchange.

II JUDICIAL REVIEW

Before examining the application of judicial review with respect to securities regulation it is useful to provide a brief summary of judicial review itself. This part of the paper will outline the purposes and aims of judicial review, and will describe the scope of the jurisdiction, the principal grounds on which a decision may be reviewed, and the remedies available to a court when granting review.

Briefly stated, the purpose of judicial review is to provide a means by which the judiciary can act as a check on the exercise of discretionary public power.[1] In New Zealand applications for judicial review may be brought under the Judicature Amendment Act 1972 (JAA) in situations where review is sought of an exercise of statutory power as defined in that Act.[2] Review may still be obtained through the prerogative writs under the High Court Rules.[3] Additionally the courts can exercise a supervisory role in terms of the Bill of Rights Act 1990, which will apply to any exercise of a function, power or duty conferred by or pursuant to law. The common law jurisdiction has been little used since the advent of the JAA, a fact that has been criticized, particularly in relation to commercial activities.[4] This jurisdiction may well provide a means for supervising public law powers exercised other than pursuant to a statutory power.

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1 M Chen & G Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993), 927.

2 Judicature Amendment Act 1972 ss 2, 4.

3 High Court Rules Part VII.

4 M Taggart "State Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Recent Law Review 343, 356-359.

The classic statement of the grounds upon which judicial review may be sought is that of Lord Diplock in the GCHQ case. These grounds are illegality, irrationality and procedural impropriety.[5] In reality these heads often overlap, and a decision may be reviewable under more than one ground. Additionally there are a number of other potential grounds for review that are less well established than these three.

A challenge for illegality may include claims that the decision was made for an improper purpose,[6] that the decision-maker either took into account irrelevant factors or failed to take into account relevant matters,[7] that the decision was made under the influence of a factual error,[8] or that the decision-maker fettered their discretion unlawfully.[9]

Irrationality in judicial review may also be referred to as unreasonableness. In this context a decision might be called irrational if the decision is so unreasonable that no reasonable authority could ever have come to it.[10] Unlike most other grounds of judicial review, this requires an examination of the merits of the decision. The reluctance of the courts to be seen to do this on review may account for the very high standard that must be met.

The ground of procedural impropriety is concerned entirely

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5 *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

6 *Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62.

7 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

8 *NZ Cereal Foods Ltd v Minister of Customs* Unreported, High Court Wellington 11 May 1987, CP 193/87 Greig J.

9 G Taylor *Judicial Review: a New Zealand Perspective* (Butterworths, Wellington, 1991) 344-346.

10 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 KB 223 (CA), 228-229.

with the decision-making process. There are two aspects to this ground. The first, often referred to as natural justice is that a decision-maker must conform to any procedural rules required by law, such as the provision of a hearing or notice of intended action.[11] A similar requirement is found in s 27(1) of the Bill of Rights Act 1990, concerning decisions in respect of a person's "rights, obligations, or interests protected or recognised by law." The second part of procedural impropriety is the rule that a decision-maker must not be biased in their decision. The standards to be met will vary according to the nature of the tribunal in question, with the aim being to not only prevent actual bias in decision-making, but to maintain public confidence in the impartiality of decision-makers.

It is suggested above that other grounds for review may exist beyond the three considered so far. These grounds include proportionality and mistake of fact. Just as the established grounds may sometimes overlap, so these "new" grounds are sometimes considered to be no more than facets of the established grounds of review. Thus the ground of proportionality has been treated as merely a consideration for the court in deciding whether a decision is unreasonable.[12] Equally review for mistake of fact may be considered an aspect of illegality, though this ground has received acceptance as a ground on its own.[13]

An important aspect of judicial review is the discretionary nature of the remedies. This discretion has permitted the

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11 *South Australia v O'Shea* (1987) 163 CLR 378, per Mason CJ at 386.

12 *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606; *R v Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 2 WLR 588, per Lord Roskill at 594.

13 *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA).

judicial review jurisdiction to be exercised with great flexibility, and means that the jurisdiction can be shaped to fit differing circumstances. Where review is granted, remedies available to the court include quashing the decision under review, issuing an injunction or declaration, or referring a decision back to the decision-maker with directions for its reconsideration.[14] It is not generally possible to gain damages in proceedings for judicial review. However, in *Baigent v Attorney -General*[15] the majority of the Court of Appeal held that monetary compensation can be available where a person brings an action based on a breach of the Bill of Rights Act 1990. It has since been held that damages may be recoverable for loss of future earnings stemming from such a breach.[16] This fact may have some impact for those affected by unlawful actions of regulators in the securities area and may in some circumstances provide an alternative to proceedings in tort, as was the case in *Baigent.*

III THE SECURITIES COMMISSION

The main legislation in this area is the Securities Act 1978 (the 'Act'). The Act provides a definition of 'security' and sets out a regulatory framework for the initial offering of securities to the public, and for the oversight of the markets generally.

The body created to oversee the implementation of the Act is the Securities Commission (the "Commission"). This body acts to protect investors by monitoring compliance with the Act and bringing prosecutions for breaches of some areas of

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14 Judicature Amendment Act 1972 s 4.

15 [1994] 3 NZLR 667 (CA).

16 *Jackson v Attorney-General* Unreported High Court, Auckland Registry, 20 November 1995, CPA 2/95.

securities law.[17] It has additional functions which bring it into direct contact with the securities market and issuers of securities as a monitor and enforcer of the Act.

The Commission was established under s 9 of the Act. The Commission's functions include both general functions relating to securities regulation and specific functions to do with the disclosure regime in Part II of the Act.

A General Functions and Powers

The general functions of the Securities Commission are to "keep under review the law relating to bodies corporate, securities, and incorporated issuers of securities"[18] and "to keep under review practices relating to securities",[19] and to recommend changes to the Minister. Further it must co-operate with overseas securities commissions, and promote understanding of the law and practices relating to securities.[20] These functions indicate at first sight that the principal role of the Commission is to be a monitoring body in the securities field.

It was obviously the intention of Parliament that in relation to its general oversight functions the Commission should not be hindered in its attempts to monitor the markets. Section 17 of the Act confers upon the Securities Commission such powers as are reasonably necessary or expedient to enable it to carry out its functions, and s 15 allows the Commission generally to regulate its own procedure. These general grants of power should in themselves be considered pro forma, and

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17 See for instance *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7.

18 Securities Act 1978 s 10 (b).

19 Securities Act 1978 s 10 (c).

20 Securities Act 1978 s 10 (ca), (d).

do not endow the Commission with any unusual influence. The scope of the Commission's power has been determined more by the broad expression of its functions and the interpretation of these functions by the courts. Additionally the Act confers a number of specific powers upon the Commission to aid it in keeping under review the law and practices relating to securities.

The Commission may summon persons to appear before it to give evidence on oath and to produce any documents required by the Commission in relation to any matter before it.[21] The only procedural requirement placed on the Commission is that any such summons must be delivered at least 24 hours before the attendance is required. This section does not provide a right to counsel where a person is summoned, nor is there any further natural justice requirement in relation to this section. Failure to answer a summons from the Commission is an offence.[22]

Another power of considerable interest to issuers and of possibly wide effect is provided in s 28A. This provides that the Commission may publish any report or comment made by it in the course of the exercise or intended exercise of its functions. This power provides the Commission with the ability to have considerable impact on the securities market, as adverse comment on a particular company or area of practice could have considerable negative effect on the response of investors. These general functions of the Commission are not limited to oversight of the primary market, but encompass the stock exchange and other secondary trading arenas.

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21 Securities Act 1978 s 18.
22 Securities Act 1978 s 32 (a).

B Judicial Review of the General Powers

It seems reasonably clear that in carrying out its general functions the Commission is exercising statutory powers in terms of the JAA. In principle at least then, decisions or exercises of power by the Commission under the Securities Act will be amenable to review under the JAA. The next task is to examine the extent to which the courts are willing to exercise this jurisdiction in relation to actions of the Commission, and the grounds upon which actions may be reviewed.

1. Scope of Judicial Review

The courts have widely interpreted the extent of the Securities Commission's role under its general functions. In *City Realties v Securities Commission*[23] the Court of Appeal indicated that a generous interpretation of the Commission's powers under the general functions was in keeping with the policy of the Act:

> ...it would not be surprising if Parliament had seen fit to set up the Commission with what Quilliam J calls a watchdog role, as well as a law reform one, extending to the review of specific takeovers, whether accomplished or proposed.[24]

The policy intentions of the Securities Act were used as the yardstick for establishing the limits of the Commission's powers. Cooke J noted that traditional company law doctrines had not been effective in protecting shareholders, particularly minority shareholders, and ascribed to Parliament the intention of remedying this deficiency.[25] The Commission's review function under s 10 was described as "very wide indeed."[26]

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23 [1982] 1 NZLR 74.
24 Above n 23, 78.
25 Above n 23, 78.
26 Above n 23, 79.

It is clear from the *City Realties* judgment that the Securities Commission will be given considerable discretion in deciding which areas of securities law and practice to investigate, and where and when inquiries should be conducted. It was established that the s 10 functions empowered the Commission to carry out inquiries into specific transactions. The court held that these decisions were essentially matters within the Commission's own discretion.[27] However it was not disputed that the exercise of power by the Commission in carrying out its functions may be judicially reviewed if these powers are exercised unlawfully. In respect to the scope of judicial review of the Commission's general powers the courts will be slow to impose restrictive parameters on the Commission's powers, but may nevertheless be prepared to review the Commission's actions where these powers are exercised unreasonably or unfairly.

2. *Procedural Fairness*

The power to summon witnesses and order disclosure of documents to aid the Commission in its general functions is not accompanied by any procedural restrictions except that 24 hours notice must be provided to any person summoned. An important point is that the Commission has no binding powers resulting from its general functions, and so in a narrow sense no situation is created in which a person's rights may be affected by the Commission's actions. This fact was commented upon by the Court of Appeal in the *City Realties* case, where Cooke J noted that stricter procedural requirements existed in relation to proceedings of the Commission where binding powers existed. This was contrasted with the right of the Commission to regulate its own procedure under the general functions.[28] It seems

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27 Above n 23, 80.
28 Above n 23, 77.

unlikely then that any procedural requirements will be read into the Commission's powers to obtain evidence.

Where the Commission intends to make adverse comments about any body it will be required to give the person concerned an opportunity to put their side of the case before any comment or recommendation is published. This was recognized by the Commission and endorsed by Cooke J in the *City Realties* case.[29] Such a restriction would probably lie in any event, as it may be considered a general principle that where Parliament grants a power it intends for that power "to be used fairly and with due consideration of rights and interests adversely affected."[30]

3. Illegal Use of Power

It is noted above that a wide interpretation is to be given to the functions of the Securities Commission. The question of who may be subject to investigation lies within the discretion of the Commission. However, while this discretion is broadly expressed, it is not absolute, but is bounded by the functions of the Commission under s 10. Any exercise of power by the Securities Commission must be carried out for the purpose of keeping under review the law and practice relating to securities. This restriction relates to the powers to conduct investigations, obtain evidence, and report either to the Minister or to "any appropriate body".[31] Any action that could not be reasonably described as being in furtherance of these functions would be reviewable as an improper exercise of power as the powers of the Commission are expressly granted to enable it to carry out its functions.[32] Alternatively

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29 Above n 23, 78.

30 H Wade & C Forsyth *Administrative Law* (7th ed Clarendon Press, Oxford, 1994) 42.

31 Securities Act 1978 s 10 (d).

32 Securities Act 1978 s 17.

this could be phrased as placing a requirement on the Commission to consider its functions under s 10 before embarking on any exercise of its power.[33]

In determining whether the Commission is acting in accordance with its functions the courts may look to the stated policy of the Act.[34] The policy and object of the Securities Act is the protection of investors in the securities markets.[35] Any examination of an exercise of statutory power by the Commission may look to this policy as a guide, as well as to the functions of the Commission.

The requirement that the Commission work in accordance with its functions and the policy of the Act will be useful in determining whether the recipient of a comment or report from the Commission constitutes "any appropriate body" in terms of s 10 (c). It may be expected that the Commission would again be given a wide discretion to determine what bodies are appropriate, within the confines of its functions and the policy of the Act.[36] These confines will prevent the Commission from being able to comment to any body where the receipt of such information by that body cannot reasonably be for the purposes of the Act. Additionally, where the Commission does comment to a body which could be an appropriate body, but does so with its dominant purpose being other than one identifiable as carrying out the policy of the Act, this will be reviewable. An example of this situation would be if the Commission commented to a Minister for

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33 See above n 9, 336.

34 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL), 1030.

35 *Re AIC Merchant Finance Ltd (in rec)* [1990] 2 NZLR 385 (CA), 391.

36 For a non-exhaustive list of "appropriate bodies" see above n 23, 79. For an example of bodies considered appropriate by the Commission see Securities Commission, *Report of an Inquiry into Aspects of the Affairs of Regal Salmon Limited Including Trading in its Listed Securities* (The Commission, Wellington, 1994), p 198.

political reasons rather than for the purpose of eliciting action to protect investors.[37]

4. Unreasonable use of Power

So long as the Commission holds the opinion in good faith that it is acting in pursuance of the Act's policy objectives, then the determination of what actions further the objects of the Act will essentially be a matter for its own discretion.[38] The exception to this will be where an action can be characterised as irrational.

Judicial review for unreasonableness is likely to be available against all actions of the Commission. In determining whether an action may be described as unreasonable, the focus may be placed on various aspects of that action, such as where evidence is called from a patently irrelevant source or if the Commission were to make some comment which was unjustified by any evidence before it. As is mentioned above,[39] review for unreasonableness could look also to whether the effects of an action are disproportionate in the circumstances. However, while the effects of an inquiry may be considerable, the court in *City Realties* clearly felt that in the normal course the public interest in investor protection would outweigh any such concern.

C Private Law Actions

An important issue for any person aggrieved by an action of the Securities Commission will be consideration of the best forum or form of proceeding to take in order to gain some remedy. Judicial review, even where it is available, may

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37 Above n 34, 1032.
38 Above n 23, 80.
39 Above Part II.

not always be the most advantageous proceeding. Additionally, where a private law remedy is available there may be a reluctance on the part of courts to intervene by way of judicial review.[40]

The Securities Commission and its members enjoy partial privilege in the exercise of their functions, which may limit the choices for proceedings against the Commission. Actions may lie in tort where the Commission can be shown to have acted in bad faith or without reasonable care.[41] Action may also lie against any individual member of the Commission who acts in bad faith, or in certain circumstances, without reasonable care.[42] The limited nature of this protection does leave open the possibility for proceedings in tort where a person suffers damage through some action of the Commission.

1. Defamation

Comments made by the Commission in the course of exercising its functions are treated as official reports of a person holding an inquiry under the authority of Parliament.[43] This protects the publication of such comments where it is in the public interest, unless the predominant motive is ill will toward any person.[44] This privilege is generally for the benefit of third parties who may publish the Commission's comments.[45] The statutory protection enjoyed by the Commission will apply to any defamation proceedings against it, so an actionable comment would need to be proven

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40 See Rt Hon Lord Woolf of Barnes "Droit Public - English Style" Public Law, Spring 1995 57, 60.

41 Securities Act 1978 s 28 (1).

42 Securities Act 1978 s 28 (2), (3).

43 Securities Act 1978 s 28 (7).

44 Defamation Act 1992, ss 17, 19.

45 See S Todd and others *The Law of Torts in New Zealand* (The Law Book Company Ltd, Sydney, 1991) 734.

to be made either in breach of a duty of care or in bad faith. Comments or reports made by the Commission to the Minister under s 10 (b) may enjoy absolute privilege as statements by one officer of state to another.[46] These restrictions appear to limit the scope for action in defamation to the most extreme cases.

2. *Negligence*

The principal avenue through which a person affected by the Commission's actions may be able to gain redress will be through proceedings for negligence, though other tortious remedies may be available, particularly where bad faith can be proven. The greatest obstacle to an action in negligence may be establishing a duty of care on the part of the Securities Commission.

The range of participants in the markets to whom the Commission can be said to owe a duty of care may be considerably smaller than the range of people affected by its actions. As a matter of policy there has been some reluctance on the part of courts to hold such a duty incumbent upon government bodies, as to do so could hamper executive decision-making or produce a flood of litigation.[47] This concern was expressed in relation to the Commission in *Fleming v Securities Commission*,[48] where the Court of Appeal held that the Commission did not owe a duty of care to members of the public as potential investors, even where the Commission is aware of a breach of the Act.

Both judges in *Fleming* expressly differentiated between potential investors and issuers or companies. In *City Realties*

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46 *Lindisfarne Landscapes Ltd v Consumer Council* Unreported High Court, Wellington, 10 August 1983, A49/83.

47 *Rowling v Takaro Properties Ltd* [1987] 2 NZLR 700 (PC).

48 [1995] 2 NZLR 514.

Cooke J had cited the liability of the Commission in negligence as a safeguard for persons affected by the exercise of the Commission's powers, and presented this as a partial justification for the court's liberal interpretation of the Commission's powers.[49] In *Fleming* Cooke P reiterated this comment.[50] Richardson J appears to have agreed with this assessment, noting that the Commission "may owe such duties to those it investigates."[51]

It is submitted that this distinction in relation to the duties owed by the Commission is a valid one. Whereas the situation in *Fleming* has the potential to present the Commission with indeterminate liability, this argument cannot apply where the Commission of its own volition undertakes to inquire into the affairs of a specific issuer. On the causation issue there is also rather stronger potential for liability where an investigation or comment jeopardizes the success of a securities issue or a takeover bid.

3. Other Tortious Actions

Where an issuer or other person is affected by the actions of the Commission there may be potential for actions in tort apart from those in negligence or defamation considered already. However these would mostly occur only where the exercise of power by the Commission could be categorized as being in bad faith. Where the Commission or a member of the Commission has acted in bad faith proceedings may be possible (depending on the circumstances of each case) for such torts as deliberate interference by unlawful means with the trade or business of another, interference with

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49 Above n 23, 77.
50 Above n 48, 519.
51 Above n 48, 530.

contractual relations,[52] or even misfeasance in a public office.[53] A further basis for liability may be the tort of breach of statutory duty. This tort does not require intent or bad faith on the part of the defendant, but may be limited by the same issues regarding duties of care as are found in an action for negligence.[54]

D Remedies

Apart from the relative difficulties establishing duties of care, or wrongful exercises of power the major factor in deciding whether to proceed against the Commission by way of private or public law proceeding will be the matter of the remedies available in each action. The principal difference between the two types of action is the ready availability of damages in tort, which is not a traditional remedy in judicial review proceedings.

If the Commission were to publish some adverse comment relating to any person without providing a right to be heard, then this action could have considerable commercial impact, and an action by way of judicial review might provide little effective relief for the person affected. This shortcoming of public law remedies has been recognised in relation to the Australian Securities Commission.[55] In such a situation proceeding by way of tort could potentially provide the plaintiff with a more tangible remedy. The exception to this may be where the Commission denies a person's natural justice rights in breach of the Bill of Rights Act as mentioned above. Conversely, where an exercise of power by the

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52 On the torts of interference with economic relations see generally, above n 45, ch 13.

53 *Takaro Properties v Rowling* [1978] 2 NZLR 314 (CA).

54 Above n 45, 340.

55 *Johns v Australian Securities Commission* (1993) 178 CLR 408.

Commission has yet to bear economic consequences, the speed and flexibility of judicial review proceedings might serve better to prevent any loss, for instance where the Commission has not yet published a report, but intends to, or where an inquiry or an aspect of an inquiry might be challenged as unreasonable or illegal from the outset. In these cases the public law remedies may in fact provide preferable outcomes.

IV PUBLIC ISSUES OF SECURITIES

This part of the paper considers the functions and powers of the Securities Commission and the Registrar of Companies in relation to the registration and monitoring of prospectuses and advertisements for the issue of securities. Both the Commission and the Registrar have binding powers of decision vested in them for these purposes. The exercise of these powers will have the greatest impact on issuers of securities. This part of the paper examines how issuers might be able to use administrative law remedies to challenge decisions of the Registrar or the Commission in relation to their functions under Part II of the Act.

A Prospectus Requirements

Section 33 of the Act states that no security may be offered to the public for subscription unless it is either made in or accompanied by a registered prospectus, or made in an authorised advertisement. Debt securities must have appointed trustees and registered trust deeds,[56] and participatory securities must have a statutory supervisor and a deed of participation.[57]

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56 Securities Act 1978 s 33 (2).
57 Securities Act 1978 s 33 (3).

In order to qualify for registration a prospectus must conform with the form and content requirements of s 39 and s 41 of the Act. Basically these sections require that the prospectus contain certain information, the details of which are set out in the Act and in the Securities Regulations 1983. The principal theme for prospectuses is relevant disclosure of information relating to the proposed security.

B The Role of the Registrar

When a proposed prospectus is submitted for registration the Registrar must determine certain matters. These matters decide whether the prospectus must be registered, may be registered, or must not be registered. The Registrar may refuse to register a prospectus if:

(a) It does not comply with the Act; or

(b) It contains any misdescription or error or any matter that is not clearly legible or is contrary to law; or

(c) The prescribed amount payable on registration is not paid.[58]

The Registrar must not register a prospectus if:

(a) The date of registration would be earlier than the date of the prospectus; or

(b) He is of the opinion that the prospectus contains a statement that is false or misleading on a material particular or omits any material particular.[59]

If neither of these provisions apply then the prospectus must be registered forthwith.

In order to ascertain the matters needing to be considered the Registrar is given certain powers to require production of and to inspect documents relevant to the proposed securities, and may refer the findings of such inquiries to appropriate bodies.[60] These powers may only be exercised at the request

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58 Securities Act 1978 s 42 (2).
59 Securities Act 1978 s 42 (3).
60 Securities Act 1978 s 67.

or with the approval of the Commission. The Registrar's refusal to register a prospectus may be appealed to the Commission, and from there to the High Court on a question of law. Decisions of the Registrar in relation to the powers of inspection may be directly appealed to the High Court. Such decisions will also be subject to review on similar grounds to those examined in relation to the Commission's powers of inquiry.[61]

The initial question that arises in relation to judicial review of the powers of registration relates to the availability of appeal to the Securities Commission. Before considering the grounds upon which a refusal to register a prospectus may be challenged it is useful to address two questions: the first is whether review will be available notwithstanding the presence of a statutory appeal, and the second is which avenue might be the most advantageous one to take in any situation.

1. Appeals to the Securities Commission

The JAA expressly provides that judicial review may be granted notwithstanding the existence of appeal rights.[62] The fact that an applicant chooses to seek review of the Registrar's decision rather than follow the statutory appeal process may be a factor to be taken into account by the court in determining whether to grant relief.[63] It has been suggested that the most important factor to be considered is the subject matter of the application, and that a court should be willing to grant review where the application for review deals with the manner in which the decision complained of was reached rather than attempting to challenge the merits of the

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61 *Coopers & Lybrand v Minister of Justice* [1985] 2 NZLR 437 (HC), 462 (CA).

62 Judicature Amendment Act 1972 s 4 (1).

63 *Ansell v Wells* (1982) 63 FLR 127 (FCA).

decision.[64]

An appeal to the Commission from a refusal of the Registrar to register a prospectus has certain advantages over court action. The foremost of these is that the procedure laid down in the Act will almost always provide a more cost-effective and a faster means of resolving the issue than will a High Court action. The issue of speed must be emphasized in relation to registration. Most prospectuses are aimed for release at a particular date, and failure to obtain registration can put sufficient pressure on the time constraints to jeopardize the entire issue process. Thus a process which allows for a quick resolution of the issues must be seen as an attractive option. On an appeal from a determination of the Registrar the Commission may hear the full matter, and may give such directions or make such determinations as it sees fit.[65] Balanced against this however, is the fact that the Commission cannot be seen as the final determinant on matters of law, and where an appeal revolves principally around questions of law it may be in the greatest interest of the issuer to have these questions determined at the earliest possible opportunity.

So where an issuer has some objection to the merits of the Registrar's decision an appeal to the Commission will provide a relatively quick and cost-effective means of challenging the decision. Where however the complaint regards either the procedure adopted by the Registrar, or an issue relating to the legality of the Registrar's decision, it may be most advantageous to proceed directly by way of an application for review, which would enable the question of law to be determined conclusively by the courts.

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64 Above n 9, 55.
65 Securities Act 1978 s 69.

2. Grounds for Judicial Review

There have been no cases of review of a Registrar's decision to refuse registration of a prospectus. However it appears that there is scope for review despite the appeal process mentioned above. The grounds for review may be ascertained principally from the statutory language of s 42 of the Act, which sets out the Registrar's powers to refuse registration.

As is mentioned above, s 42 provides for three grounds upon which the Registrar may refuse registration, and a further two upon which he or she must refuse to register a prospectus. It may be inferred that these grounds make up a series of mandatory considerations for the Registrar. The other mandatory considerations will be the exceptions to refusal detailed in s 42 (4). As there is a duty on the Registrar to register the prospectus in all other cases,[66] these considerations may be regarded as exclusive. Thus, refusal to register a prospectus for any other reason or failure to take into account the relevant exceptions will be reviewable on grounds of illegality.

Some of the grounds upon which a prospectus may be refused refer to a discretion on the part of the Registrar. This discretion produces a more difficult issue regarding judicial review. The sections are worded to provide a wide discretion to the Registrar: in s 42 (2) the Registrar "may refuse" registration, and in s 42 (3) (b) the Registrar must refuse where "he is of the opinion" that a falsehood or misleading feature in the prospectus concerns a "material particular." Obviously in relation to s 42 (3) (b) the Registrar must hold

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66 Securities Act 1978 s 42 (1).

such an opinion in good faith, and such opinion must not be one that no reasonable person could hold. Where the evidence supports such a conclusion, refusal under s 42 (2) may also be challenged if the decision is unreasonable. However given the substantive nature of the questions which would arise under this head of review, this may be an example of an occasion where appeal on the merits to the Commission would provide greater scope for argument, and certainly a lower threshold for the issuer to prove.

The discretion in s 42 (2) contains no guidelines. It is noted above that the Registrar must consider the ground upon which refusal is based. Once this has been done, it is submitted that the Registrar should be required to give thought to the policy and purposes of the Securities Act in determining whether to exercise the discretion, in much the same way as the Commission must in exercising its general powers. So, where a prospectus fits into one of the criteria in s 42 (2) the Registrar may only refuse to register the prospectus if such a refusal would further the objects and policies of the Securities Act.

The Act sets no procedural requirements on the Registrar in considering a prospectus. A question of interest is whether it may be possible to infer a right to be informed and to be heard where the Registrar is intending to refuse registration. Justification for such a right may be found in the general common law rule discussed above in relation to the Securities Commission's general powers to comment, and referred to by Cooke J in the *City Realties* case. The power of the Registrar to refuse registration may be assumed to have been granted with the intention that the power be used with consideration

for rights and interests adversely affected.[67] The costs of preparing an issue can run to over 30% of the gross proceeds of the public offering,[68] and the critical nature of timing has been addressed above. In assessing the extent of natural justice rights that may be inferred from a statute a court will consider the nature and extent of the rights and interests affected by the decision. It seems strongly arguable then that the power of the Registrar to refuse registration may well contain a right for the issuer to be heard. Failure to provide such an opportunity will be susceptible to review. Further, as the determination of the Registrar may affect a person's interests "protected or recognised by law" it may be possible to gain review based on a breach of the Bill of Rights Act, with the potential for an award of damages that this could carry.[69]

C The Role of the Securities Commission

Many of the points regarding review of the Registrar's powers to refuse registration will also be applicable also to the Securities Commission's powers under Part II of the Act. These powers enable the Commission to suspend or cancel a registered prospectus on certain grounds.[70] Similar powers exist in relation to advertisements and contributory mortgages under ss 44A and 44B. The Commission may suspend or cancel any prospectus that in the opinion of the Commission:

a) is false or misleading as to a material particular; or
b) omits any material particular; or
c) does not comply with the Act or

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67 Above n 30.

68 G Walker "Five Phases of an Initial Public Offering in New Zealand" in G Walker & B Fisse (ed) *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland, 1994) 327, 331.

69 Above Part II.

70 Securities Act 1978 s 44.

regulations.[71]

As with appeals from the Registrar, the Commission's decision is final except for appeal on a question of law. The Act sets out a number of procedural requirements in relation to suspension and cancellation of a prospectus.

The major differences in approach between attempting to gain review of a decision of the Registrar and one of the Commission are firstly the policy considerations inherent in an action to cancel a prospectus in force, and secondly the different appeal procedure from decisions of the Commission.

1. Policy Considerations

The power to suspend or cancel concerns prospectuses that have already been approved and registered under the Act. Thus these powers will usually be invoked in response to a change in circumstances relating to the issuer, or the uncovering of facts not known when the prospectus was first tendered. Given the drastic effects of cancelling a prospectus that is already in circulation, and which may already have attracted contributions, it is not surprising that these powers are infrequently used. The potential for harm to an issuer is reflected in the procedural requirements placed upon the Commission in the Act. However, the desire to protect investors remains the key consideration and aim of the Act, and the provisions allowing the Commission to suspend and cancel prospectuses that threaten to endanger investors must reflect this aim. Thus the Act provides the Commission with the ability to act swiftly where necessary to provide protection, and any challenge to an action will be considered in light of the policy objectives of the power.

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71 Securities Act 1978 s 44 (1).

2. The Appeals Process

Appeal from determinations of the Securities Commission under Part II is to the High Court by way of case stated. Under this procedure the appellant lodges a notice of appeal with the Commission, and then states a case to the Commission setting out the facts and grounds of the determination and specifying the question of law on which the appeal is made. The Chairman of the Commission must then settle the case, sign it, and forward it to the High Court.[72] The case stated procedure was historically a form of review for error on the face of the record, and required a writ of certiorari.[73] The procedure is now controlled by the Part XI of the High Court Rules and s 107 of the Summary Proceedings Act 1957. Importantly, the grounds on which a case may be stated are now largely the same as those on which review may be obtained.[74] The case stated procedure is used for appeals from a number of tribunals and inferior courts in New Zealand, including some appeals from the District Court to the High Court.[75] In a number of instances judicial review has been allowed to proceed as an alternative process to appeal by case stated. These cases generally deal with complaints alleging procedural impropriety on the part of the inferior tribunal,[76] as this is not a ground upon which appeals by case stated have traditionally been brought, and may not be considered a question of law.[77] However the supervisory jurisdiction of the High Court in such cases extends to all grounds of review, notwithstanding the existence of appeal

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72 Securities Act 1978 s 26.

73 Above n 30, 731. A writ is no longer required in case stated proceedings; Summary Proceedings Act 1957 s 110.

74 De Smith, Woolf & Jowell *Judicial Review of Administrative Action* (5th ed Sweet & Maxwell, London, 1995) 685.

75 Summary Proceedings Act 1957 s 107.

76 See *Terry v District Court at Greymouth & Anor* (1992) FRNZ 135; and generally, above n 9, 20.

77 *Countdown Properties (Northlands) Ltd & Ors v Dunedin City Council & Anor* [1994] NZRMA 145 (HC).

rights.[78] It should be noted however that a court may refuse to exercise its discretion where it considers that the proceedings should have been brought under the appeal procedure.[79]

The practical effect of this is that the major grounds for review may be adequately addressed by following the statutory procedure, and an application for judicial review is likely to be permitted where the grounds fall outside the definition of a question of law. A concern that has been raised regarding the procedure is that appellants and authorities are sometimes unable to agree on the terms of the case to be stated. In such a case the appellant may seek judicial review of the authorities action or inaction and the court may order the terms upon which the case is to be stated.[80] Equally where an inappropriate challenge is made by case stated the court may amend the proceedings to an application for review where this will provide an expeditious means for resolution of the issues.[81]

D Challenges to Suspension and Cancellation

The power to suspend a prospectus is intended to allow the Commission to move swiftly to protect investors, and thus contains few procedural constraints. The discretion given is again phrased broadly. Once the Commission is of the opinion that the prospectus meets one of the three initial requirements for suspension, then

> If [the Commission] considers that suspension of the registration of the registered prospectus is desirable in the public interest, the Commission may suspend the registration

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78 *Martin v Ryan & Ors* [1990] 2 NZLR 209 (HC).
79 Above n 78.
80 *Boulton v Social Security Appeal Authority* (1991) NZAR 343.
81 Above n 80.

thereof for a period not exceeding 14 days.[82]

The Act sets out no requirement for prior notice, which is in keeping with the intent of the power outlined above. Once a prospectus has been suspended the Commission must follow the procedure set out in s 44. The issuer must be notified "forthwith", and must be given reasons for the suspension.[83] The Commission and its employees are under a duty not to divulge the fact of suspension unless and until the prospectus is cancelled.[84] The Commission must act to cancel the prospectus within 14 days, after which time, if no cancellation has been made, the suspension will lapse. On the part of the issuer, once a prospectus is suspended, no further allotments of securities may be made.

If the Commission intends to cancel a prospectus it must give the issuer not less then 7 days notice of the meeting at which the matter will be considered.[85] At that meeting the issuer may appear and may be represented by counsel.[86] The issuer may also apply for the proceedings to be held in public, or for an order prohibiting publication of details of the proceedings.[87]

Suspension of registration is a power of only temporary effect. Notwithstanding this, it has immediate effect on an issuer, and it is likely that exercise of the power will be reviewable in limited circumstances. If an issuer wishes to challenge a decision to suspend a prospectus the appropriate proceeding would almost certainly be judicial review, as the proceedings may be more quickly brought before the court, and interim orders may be made if necessary to preserve the applicant's

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82 Securities Act 1978 s 44 (1) (a).
83 Securities Act s 44 (2) (a).
84 Securities Act 1978 s 44 (2) (b).
85 Securities Act 1978 s 44 (1) (b).
86 Securities Act 1978 s 19 (1).
87 Securities Act 1978 s 19 (5).

position.[88] The speed with which a case can be stated to the High Court depends to a large degree on the Commission itself. Thus the procedure is perhaps not ideal for urgent applications. Where the Commission has proceeded to cancellation its grounds may be challenged by the procedures outlined above. Breach of the procedural requirements in s 19 of the Act will also provide ground for review.

1. Procedural Fairness

Given the statutory scheme it is unlikely that any natural justice requirements could be inferred from the suspension procedure. The situation here is analogous to that found under the Education Act 1964 and considered in *Furnell v Whangarei High Schools Board*,[89] in that suspension is the first step in a statutory procedure, and the Securities Act does provide a thorough procedural fairness requirement on the Commission for the steps following suspension. Thus from the ruling in *Furnell* and from the policy objectives of the Act it may be inferred that Parliament has deliberately omitted any natural justice duties at this initial stage.

The rigid procedure in relation to cancellation was noted by Cooke J in the *City Realties* case, and it was suggested there that failure by the Commission to adhere to this statutory scheme will be reviewable.[90] Once again, however, it is extremely unlikely that a court would add to these requirements.

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88 Judicature Amendment Act 1972 s 8.
89 [1973] AC 660.
90 Above n 23, 77.

2. Illegality and Unreasonableness

The factors to be taken into account by the Commission in suspending or cancelling a prospectus are the same, with the added requirement in the case of suspension that such drastic action must be in the public interest. Where no such public interest is found, the Commission must proceed to cancellation on notice, leaving the prospectus in force for the meantime. The discretion open to the Commission is similar both in scope and in its policy considerations to that of the Minister of Justice in deciding to place a company in statutory management under the Corporations (Investigation and Management) Act 1989 (CIMA). This legislation obviously concerns companies that are in desperate trouble, and situations where there is an acute need for investor protection. There are then some parallels to be drawn, particularly with the suspension power of the Commission.

As with the power of the Commission, exercise of the Minister's discretion regarding suspension is dependent upon him or her forming an opinion as to the desirability of the proposed action in the public interest.[91] In *Hawkins v Minister of Justice*[92] the Court of Appeal held that the large policy content and the wide scope for judgment in such a decision means that it will not be for the court to enquire as to the existence of the facts precedent to the decision.[93] With a decision to suspend a prospectus the facts precedent will be the existence of one or more of the three criteria listed in s 44 (1) of the Act. The Commission may be expected to have the required expertise to judge these matters itself.[94] However, one of the three grounds is that the prospectus does not comply with the Act or regulations made under the Act. In

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91 Corporations (Investigation and Management) Act 1989 s 3 (4).
92 [1991] 2 NZLR 530 (CA).
93 Above n 92, 536.
94 Above n 92, 538.

the *Hawkins* case Cooke P noted that even such a discretion as that available under the CIMA would not allow the administrative authorities to conclusively determine any point of law.[95] It may be supposed then that review will be possible where the alleged fault in the prospectus is a failure to comply with the law, and where an issuer wishes to challenge the Commission's finding on the basis of error of law.

Although the court will not look at the correctness of the conclusion reached by the Commission, it will review the decision on the basis that the Commission failed to consider the public interest in reaching its decision, just as in *Hawkins* it was held that the Minister must consider whether exercise of the discretion was desirable in the public interest or in the interest of shareholders and creditors.[96] Further, all three judges in *Hawkins* allowed for the exceptional case in which a decision could be called unreasonable in the administrative law sense.[97]

What may be taken from this is that notwithstanding the urgency that could no doubt surround the exercise of the power to suspend, the Commission will still be expected to turn its mind to the issue of whether suspension is in the public interest. The Commission will be subject to review where it misconstrues the subsection or the legal question of whether a prospectus breaches the Act or where it suspends a prospectus for reasons other than those found in s 44, and its decision will be examinable on the grounds that it is unreasonable. The latter two grounds will apply equally to the power to cancel a prospectus, which will additionally be

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95 Above n 92, 534.
96 Above n 92, 538.
97 Above n 92, per Cooke P at 534, Richardson J at 538, Hardie Boys J at 540.

reviewable on the grounds that the Commission failed to observe the natural justice rights set out in the legislation.

V THE SECONDARY MARKET

The secondary market concerns trading in securities once they have been issued. The largest market for this is the share market and any form of security may be listed for trading in this market.[98] In addition to the organised stock exchange the secondary market includes private trading and trading on overseas markets, or on other exchanges such as the New Zealand Futures Exchange Ltd. However, the largest forum for the trading of securities in NZ, and the most powerful participant in this market, is the New Zealand Stock Exchange (the "Exchange").

The secondary market is quite different from the primary in its mode of regulation. The Securities Commission retains an oversight role as part of its general functions, but in terms of specific administration and regulation of the market and its participants, the theme is one of self-regulation. The principal regulator is the Exchange, which has been described as "the only effective regulator in the securities area."[99] The role of the Commission in overseeing aspects of this market, and the role which judicial review may play in supervising this function have been examined above. The actions of the Exchange will frequently affect a range of participants in the secondary market, as the purview of its listing rules includes applications for listing, takeover actions, trading behaviour, disclosure requirements and enforcement of the rules. The exercise of these functions may affect both listed companies

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98 New Zealand Stock Exchange *Listing Rules* (NZSE, Wellington, 1994) ("Listing Rules"), s 1.1.2.

99 P Fitzsimons "The New Zealand Securities Commission: Rise and Fall of a Law Reform Body" (1994) 2 WLR Taumauri 88, note 7.

and their shareholders. This part of the paper will consider the availability of judicial review as a means of controlling the power of the Exchange, the application of judicial review, and the possible effects of the supervisory jurisdiction on the market and its participants.

VI STRUCTURE OF THE STOCK EXCHANGE

A *The New Zealand Stock Exchange*

The Exchange was established by the Sharebrokers Amendment Act 1981 (SAA). This Act created one exchange to take the place of the several regional stock exchanges. The functions and powers of the Exchange are set out in s 4 (1) of the SAA. These are:

> (a) To operate a national stock exchange...
>
> (b) To promote and specify the conditions and terms of listing and trading of securities on its exchange:
>
> (c) To regulate and promote uniformity in the conduct of its members and of business by its members:
>
> (d) To promote the interests of its members and members of the public in relation to the listing, trading, underwriting, and marketing of securities.

Section 4 (2) states that the Exchange shall have all such powers as are reasonably necessary or expedient to carry out its functions. Section 7 sets out a specific power to make rules "for the conduct of its members and for the conduct of business on its exchange." Any such rules must be approved by the Governor-General in Council and published in the *Gazette*.[100]

The Exchange maintains that investors to a large extent must accept responsibility for their own investment decisions, and has stated that its policy in this respect is very much one of

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100 Sharebrokers Amendment Act 1981 s 7 (3).

caveat emptor.[101] The Exchange states that compliance with its rules is mandatory, and it will attempt to enforce them. However it further states that "risk of non-compliance with the Rules is one of many risks market participants must assess in valuing investments."[102] This approach is markedly different from that followed by the Securities Commission. The Exchange does however subscribe to the use of disclosure requirements in order to minimise risk. It has established practices and rules regarding its members which are aimed to reduce the agency risk to investors.[103]

The Exchange maintains relationships with both its members, who are sharebrokers, and with the companies who are listed on the exchange. There is no direct relationship between the Exchange and investors in the market. The regulatory aspect of the Exchange's operations is largely delegated to subsidiary bodies created by the Exchange. These bodies exercise the powers of the Exchange under the Listing Rules and Members Rules.

The Listing Rules are the main tool for controlling conduct of listed companies. Each company, upon applying for listing, enters into a deed of agreement with the Exchange whereby it agrees that it will at all times comply with the obligations of the Listing Rules.[104] Any listed company may be censured, suspended or delisted by the Exchange "at any time, and in its absolute discretion...without giving any reasons and without giving any prior notice."[105]

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101 New Zealand Stock Exchange Listing Rules 1989, foreword.
102 Listing Rules Foreword para 2.
103 NZSE "Investor Protection" (NZSE, Wellington, 1996).
104 Listing Rules s 2.2.2.
105 Listing Rules s 5.4.2.

B The Market Surveillance Panel

The Market Surveillance Panel (MSP) was established by the Exchange in 1989 as an independent body charged with administration and enforcement of the Listing Rules. The MSP was set up in response to concerns that there was no impartial arbiter in the relationship between the Exchange and listed companies. It is the hope of the Exchange that the establishment of the MSP will forestall any moves for greater government regulation of the market.[106]

1. Composition of the Panel

The provisions in the Listing Rules for the constitution of the MSP indicate the lengths that the Exchange has gone to to create an enforcement authority independent of the Exchange in its functioning. While the Board of the Exchange appoints the members of the panel, it has no right to remove them.[107] A majority of members of the MSP must not be members of the Exchange.[108] The current membership of the MSP is nine, of which only one is a member of the Exchange.[109]

2. Functions and Powers

The Exchange may delegate many of its powers, rights or discretions under the Listing Rules to the MSP.[110] As the MSP itself sees it, its functions are to monitor the enforcement and administration of the Listing Rules, and the exercise by delegation of the rights and powers of the Exchange. It has a further oversight function of

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106 NZSE Listing Rules 1989, foreword.
107 Listing Rules Appendix 3, paras 2, 12.
108 Listing Rules Appendix 3, para 3.
109 Market Surveillance Panel Annual Report 1996 4.
110 Listing Rules s 2.4.1 (a), s 2.5.1.

recommending changes to the Listing Rules.[111]

In practice this has resulted in the MSP becoming the principal body enforcing the Listing Rules, with the focus of its activities predominantly on the compliance of listed companies. In line with the objective of encouraging voluntary compliance on the part of listed companies the MSP has generally preferred to use its specific power to make public announcement and censure rather than its powers to suspend the listing of companies, though it has on occasion exercised this power also.[112]

Other powers exercised by the MSP concern the interpretation and application of the Listing Rules. Under these rules the Exchange has the sole right of interpretation of the rules.[113] On request or on its own motion it may also issue rulings stating the application of any rules, which are binding on listed companies.[114] Finally, the Exchange has the power to waive application of the rules in any case.[115] These powers are exercised by the MSP. The Exchange considers the power to make rulings and waivers to be vital to the efficient running of the market, and states that listed companies should be aware that any rights and entitlements conferred under the Listing Rules should be read "subject to the possibility of exercises of the powers and discretions reserved to the Exchange."[116]

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111 Above n 109, 3.
112 Market Surveillance Panel Annual Report 1992 3.
113 Listing Rules s 1.4.
114 Listing Rules s 1.6.
115 Listing Rules s 1.7.
116 Listing Rules, note accompanying s 1.6.1.

VII REVIEW OF THE STOCK EXCHANGE

It may be immediately observed that the Listing Rules give the Exchange and the MSP a series of wide discretions allowing them to alter, waive and enforce the rules, and to list, suspend or de-list any company. These discretions are apparently unfettered. It has been noted by the MSP that suspension or de-listing have the ultimate effect of "penalising shareholders by denying them a market for their shares."[117] This can be a cause for concern for shareholders who, as has been noted already, have no direct relationship with the Exchange. Whether shareholders or listed companies may invoke administrative law remedies where they consider the Exchange or MSP have acted unlawfully is not as clear as is the case with review of the Securities Commission. The predominant issue there was determining in what circumstances a court would permit review given the nature of the statutory powers granted to the Securities Commission. With the Exchange there is a very real doubt that such statutory powers exist in relation to the Listing Rules. Thus the initial question must consider whether there is a reviewable power in this context.

It should be noted firstly that the Exchange has consistently argued against the application of judicial review to its Listing Rules. In the opinion of the Exchange:

> The Exchange does not believe that the commercial interests in speed, certainty, efficiency and minimisation of cost in reaching decisions, can co-exist with the full range of procedures developed in the context of administrative law controls on governmental and tribunal processes.[118]

This comment highlights some valid concerns that must be weighed against the public interest in investor protection through judicial intervention, and the often expressed

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117 Market Surveillance Panel Annual Report 1992 3.
118 Listing Rules, Foreword para 12.

concerns of allowing a private body to make and enforce rules which "lie at the very heart of the regulation of the secondary market in securities."[119]

A The Exchange and the JAA

The position at present is that decisions of the Exchange and its subsidiaries taken under the Listing Rules are not amenable to judicial review under the JAA. This question was determined by the Court of Appeal in *New Zealand Stock Exchange v Listed Companies Association.*[120] The court held that the power to make rules set out in s 7 of the SAA referred only to Members' Rules, and that the function of the Exchange in s 4 (b) to promote and specify the conditions and terms of listing and trading of securities could not be linked to the s 7 requirement to make rules.[121] The court considered that Parliament intended that the Exchange should carry out this function by entering into contracts with listed companies.[122]

This case was in effect an appeal from a High Court case which had held that the Exchange's decisions in relation to the Listing Rules were reviewable.[123] In the *Forest Products* case Barker J observed that the Exchange is

> a statutory body charged by the legislation with a number of public interest duties. It cannot be imagined that the legislature would have authorised it to act in a wholly capricious manner...[124]

This concern is similar to that voiced by the Hon Geoffrey Palmer when the Sharebrokers Amendment Bill was before

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119 Hon G Palmer, (1981) 441 NZPD 3601.
120 [1984] 1 NZLR 699.
121 Above n 120, 703.
122 Above n 120, 703.
123 *New Zealand Forest Products Ltd v New Zealand Stock Exchange* (1984) 4 NZCLC 99, 051.
124 Above n 123, 99, 064.

the House.[125] This consideration was rejected by the court in the *Listed Companies* case, Woodhouse P observing that the content of the listing rules could not remain static in a changing commercial climate and still remain fair to buyers and sellers.[126]

At the centre of the Court of Appeal's reasoning for not allowing review of the Exchange is the nature of the empowering Act. The respondents relied on remarks of Cooke J in *Webster v Auckland Harbour Board*,[127] in which he stated that while a public body could enter into a contract, it could be restricted in the exercise of its rights under the contract by its public law responsibilities. The court in the *Listed Companies* case distinguished this decision. The main reason for this distinction is that the statute mentioned in *Webster*, the Harbours Act 1950, specifically empowers Harbour Boards to grant foreshore licences.[128] However, the SAA, it was held, does not empower the Exchange to make listing rules. Rather it states that the making of listing rules shall be a *function* of the Exchange. This was the court's emphasis: that the making of listing rules was a statutory function, not a statutory power, and so could not be reviewed under the JAA.

B Further Developments

There have been no further attempts to gain review of the Exchange's powers under the Listing Rules. A recent Australian attempt to gain review of actions of the Australian Stock Exchange ("ASX") under its listing rules also failed, the court holding that such decisions were not made "under an

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125 Above n 119.
126 Above n 120, 705.
127 [1983] NZLR 646 (CA).
128 Harbours Act 1950 ss 156-159.

enactment."[129]

The decision of the Court of Appeal in the *Listed Companies* case has drawn comment for its impact on self-regulatory bodies in New Zealand,[130] particularly in light of the subsequent decision of the Court of Appeal in *Webster v Auckland Harbour Board* ("*Webster (No 2)*"),[131] and that of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand*.[132]

The main point from *Webster (No 2)* is Cooke P's upholding of his earlier decision, and his reiteration that a statutory body can be in a different position from a private citizen in relation to the exercise of contractual rights:

> I believe that Sir William Wade is correct in the opinion quoted: that unfettered discretion is wholly inappropriate to a public body.[133]

It has been commented that this decision is at odds with that in the *Listed Companies* case, and that it formed the basis for a "decade-long difference of judicial opinion in New Zealand" regarding the justiciability of commercial actions of statutory bodies.[134] This may be a slight overstatement, at least if based solely on the judgments in the *Listed Companies* and *Webster* cases. It is worth noting that all three judges in *Webster (No 2)* based their finding on the particular empowerment of the Harbour Board by sections 156-159 of the Harbours Act.[135] From this Taylor has adopted the reasoning from the *Listed Companies* case to state that while a statutory power will be reviewable, a statutory function will

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129 *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 21 ACSR 295 (FCA), 303.

130 See M Taggart "Corporatisation, Contracting and the Courts" Public Law Autumn 1994 351.

131 [1987] 2 NZLR 129.

132 [1994] 2 NZLR 385.

133 Above n 131, 131.

134 Above n 143, 355.

135 Above n 131, per Casey J at 134, Bisson J at 142, Cooke P at 131.

not be.[136] Within the parameters of the definition of statutory power in the JAA this seems a feasible approach, and the difference in the two cases should not be exaggerated. Certainly the decision in *Webster (No 2)* should not be relied upon in an attempt to have the questions in the *Listed Companies* case revisited. Its importance lies rather in the holding that even where a contract exists a body exercising public law powers may be constrained in its actions by administrative law principles.

However, the decision of the Privy Council in *Mercury* does bring fresh possibility for the application of public law remedies to actions of the Exchange or the MSP. This possibility is best examined in light of recent English decisions relevant to judicial control of securities regulation, which may suggest that some degree of judicial review may be available under the Extraordinary Remedies provisions of the High Court Rules.

VIII REVIEW UNDER THE HIGH COURT RULES

It is noted in Part II of this paper that the provisions for judicial review in the JAA are intended to be complementary to the inherent supervisory jurisdiction of the High Court. In certain instances review may be possible under the High Court Rules where it is not available under the JAA. Two recent English decisions have held that in principle judicial review may be available of the City Panel on Takeovers and Mergers (the "Panel"), an unincorporated body which exercises regulatory power over the field of takeovers activity in the English securities markets. Some of the important findings which allowed the English Court of Appeal

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136 Above n 9, 35.

to come to this conclusion were expressed by the Privy Council in *Mercury*. The question then is whether this will permit decisions of the New Zealand Stock Exchange to be challenged on administrative law grounds, and if so, how the courts are likely to exercise a supervisory function in relation to such decisions.

A Review of the Panel on Takeovers and Mergers

The Panel exercises jurisdiction in relation to the City Code on Takeovers and Mergers. Like the Exchange, the Panel has roles as legislator, interpreter and enforcer of the rules relating to its area of practice.[137] The Panel of course has a considerably narrower focus than the Exchange, as it does not deal with listing and delisting decisions in relation to the London Stock Exchange. The Listing Rules of the London exchange are made by that exchange under the Financial Services Act 1986,[138] and have the status of delegated legislation.[139] There is then a much clearer picture regarding review of decisions of the London exchange than is the case with its New Zealand counterpart. This was not the case with the Panel, however, which exercises no statutory authority.

The question of whether review of the Panel's decisions could be available arose in *R v Panel on Takeovers and Mergers, Ex parte Datafin PLC & Anor.*[140] The decision in question was the refusal of the Panel to uphold a complaint by one company that another had breached the City Code. The applicants sought review by way of certiorari to quash this decision, and by mandamus to force the Panel to reconsider the matter.

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137 See *R v Panel on Takeovers and Mergers, Ex parte Guinness Plc.* [1990] 1 QB 146, per Lord Donaldson of Lymington MR at 157-158.

138 Financial Services Act 1986 (UK) s 142 (6).

139 Financial Services Act 1986 (UK) ss 144-156.

140 [1987] 1 QB 815 (CA).

The crucial question in this case concerned the power exercised by the Panel. Sir John Donaldson MR described the Panel as a body that "oversees and regulates a very important part of the UK financial market...without visible means of legal support."[141] In considering the applicability of the prerogative writs to exercises of the Panel's power the Master of the Rolls reviewed the case law on the court's jurisdiction, and concluded:

> Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.[142]

It may be seen immediately that this represents a quite different approach to the question of availability of judicial review from that required under the JAA, where the source of the power is the foremost consideration. Lloyd LJ stated that while the source of the power in question may often be the decisive factor, it is not the sole test of whether a body is subject to judicial review. There are situations, where the source of the power is unclear, in which it is helpful to look at the nature of the power under consideration.[143]

When applied to the activities of the Panel the court found that there was a public element to the power exercised by that body. The Panel plays an important role in the UK securities market, and operates with the aid and support of the London Stock Exchange and the Department of Trade and Industry. The Master of the Rolls noted that the creation of the Panel was an "act of government" that decided there should be a "central self-regulatory body which could be supported and sustained by a periphery of statutory powers and

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141 Above n 140, 824.
142 Above n 140, 838.
143 Above n 140, 847.

penalties."[144]

The argument that the Panel was a model of self-regulation and thus immune to review received little sympathy. Lloyd LJ stated that the fact that the Panel is self-regulating, and thus, presumably, not subject to regulation by others, made it even more appropriate that its decisions should be subject to judicial review.[145] The lack of an alternative remedy was cited as an important reason for allowing judicial review, as the alternative would be a body quite above the law.[146]

The ratio of the decision in *Datafin* has been refined to some degree by subsequent decisions. The phrase "public law consequences" in relation to an exercise of power has been interpreted to mean more than simply that the decision is of great interest or concern to the public. Such a decision making power must have a governmental interest, and should be "a part of a regulatory system...supported by statutory powers and penalties."[147] This has also been expressed as a requirement that the body whose decision is under review should be identifiable as woven into a system of governmental control.[148] It has also been emphasized that judicial review would not attach to a body where the affected person's submission to the body's authority was solely by consent under a contract.[149]

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144 Above n 140, 835.
145 Above n 140, 845.
146 Above n 140, 828.
147 *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1993] 2 All ER 249, 254.
148 *R v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan* [1993] All ER 853, 867.
149 Above n 148.

B Implications for New Zealand

In 1994 the Privy Council ruled in *Mercury* that decisions of the Electricity Corporation were in principle amenable to judicial review.[150] The reasoning given for this decision was that the Corporation is a public body, carrying on its business in the public interest, whose decisions may adversely affect the rights and liabilities of private individuals without affording them any redress.[151] The basis for judicial review was not fully argued in *Mercury*, with Lord Templeman firstly accepting the Corporation's concession that review was available at common law notwithstanding the JAA, and then holding that review would be available both under the JAA and at common law on the grounds noted above. These grounds may be observed to be similar to the principles enunciated in the *Datafin* decision.

The *Mercury* decision has been heralded as settling the difference in approach found in the *Listed Companies* and *Webster* decisions in favour of *Webster*.[152] However the judgment contains no specific reference to the issue of statutory power as defined in the JAA. So while it is possible to assert that this judgment implicitly over-rules the notion of a function/power divide postulated by the court in the *Listed Companies* case, it is equally possible to propose that the question was not considered by the Privy Council, which approached the issue of judicial review in terms of the public nature of the power being examined. It should be remembered that in order to gain judicial review under the JAA in any situation an applicant will have to demonstrate both that there has been an exercise (or purported exercise) of

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150 Above n 132, 388.
151 Above n 132, 388.
152 Above n 130, 356.

a statutory power, and that the situation is such that the applicant would be entitled to relief in proceedings for one of the prerogative writs. It is submitted then that the decision in *Mercury* throws most light on the nature of judicial review under the High Court Rules, and that in the absence of any comment on the point it should not be interpreted as having over-ruled the decision of the Court of Appeal in the *Listed Companies* case.

Even if it is assumed that this case does not over-rule the *Listed Companies* decision, it is likely to have implications for review of the New Zealand Stock Exchange. The Exchange is a statutory body charged with acting in the public interest.[153] Certainly its actions can directly affect the rights and liabilities of individuals who may not, especially in the case of shareholders, have any alternative form of redress.

Similar arguments apply in respect of the MSP, which is primarily responsible for enforcement of the Listing Rules. It is apparent that the public nature of these powers should satisfy the test from *Datafin*. The powers of the MSP are held via delegation from the Exchange, and include powers to interpret, enforce or waive the Listing Rules. The MSP co-operates with various statutory bodies, including the Securities Commission, the Serious Fraud Office and the Commercial Affairs Division of the Ministry of Justice.[154] The results of its investigations are at times passed on to these bodies, who may bring prosecutions where necessary.[155] Thus the MSP appears to fulfil the requirements from *Mercury* and *Datafin* of being a public body in the sense that it is the "centrepiece" of regulation in the secondary market.

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153 Sharebrokers Amendment Act 1981 s 4 (1) (d).
154 Market Surveillance Panel Annual Report 1994 2.
155 Market Surveillance Panel Annual Report 1993 1.

International experience suggests that "but for" the regulatory powers being exercised by the MSP and the Exchange this area would have to be subject to direct governmental regulation. This premise is strengthened by the existence of statutory bodies regulating other parts of the securities industry.

The second element in *Datafin* was that judicial review should not be available where submission to the power is purely consensual. The Court of Appeal in the *Listed Companies* case alluded to the fact that any listed company may terminate the agreement at any time, and was thus bound only by its consent.[156] However, the question arises as to how free this consent is. While it is possible to trade privately in shares, the potential for capital value increase for a company from participation in a continuous auction market can only be realised by listing with the Exchange. In this respect the Exchange might be described as having a near monopoly on the facilities required for a company to participate in this market. The position of the Panel in relation to market participants was described by Lloyd LJ as "not a club which one can join or not at will."[157] The position of the Exchange is similar, and with listing comes submission to the powers of the Exchange and MSP. De Smith suggests that the existence of a contract ought not to be a bar to the availability of judicial review where "the person is left with a stark choice of either submitting himself to the control of the body or not participating in the activity concerned."[158] It is arguable on this basis that the "consensual" nature of the listing arrangement should be viewed rather as a requirement for companies wishing to actively participate in the secondary

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156 Above n 120, 701.
157 Above n 140, 846.
158 Above n 74, 172.

market.

The view that listing is an entirely consensual act ignores also the position of shareholders, and in particular minority shareholders, who are unable to influence the decisions of the company board in any real way. For these people at least there appears to be little consent, yet they are very much affected by the exercise of the MSP's powers, as that body has recognised, and as was emphasized by Barker J in the *Forest Products* case.

From the above points it would appear to be an arguable premise that the exercise of its powers by the MSP is in principle reviewable. When the MSP was created in 1989 the Exchange stated that it hoped the courts would afford this new body the sort of independence given to the Panel by the English courts.[159] It could be that this signals some realization on the part of the Exchange that the *Datafin* decision might spell an end to the Exchange's immunity from judicial oversight. However, while the Exchange and its subsidiaries may be subject to review in principle, it remains to examine the degree to which the courts would be willing to review decisions of this body, and what remedies may be most appropriate.

C Scope of Review

There are strong similarities between the MSP and the Panel in terms of the type of power wielded by each body, and in the type of functions each has to fulfil. However these similarities should not be overstated. There are several areas in which these bodies differ, notably in the range of areas

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159 NZSE Listing Rules 1989, foreword.

under their control, and in the nature of their enforcement powers. Thus while guidance may be obtained from the English approach in *Datafin* and *Guinness*, the approach adopted in those cases may not always be the most appropriate for review of the MSP. The overriding principle in *Datafin* was that the role of the court should be "historic rather than contemporaneous."[160] Adoption of this principle is in keeping with the sometimes delicate nature of the securities markets, and requires that in most cases relief would be declaratory, the court serving as a guide rather than an intervening body.

The Master of the Rolls in *Datafin* divided the operations of the Panel into three sections: legislative, interpretative, and enforcement. This is also a convenient division for the purposes of the MSP, whose scope of operation encompasses all three areas.

1. Legislative Functions

The MSP reviews the Listing Rules and recommends changes to the Exchange, which has power under the Listing agreements to alter the rules.[161] It was emphasized in the *Listed Companies* case that this is a necessary power to allow the Exchange to adjust to changing circumstances. This is undoubtedly true, but it is arguable whether such a complete freedom is required. By comparison, changes to the Listing Rules of the ASX must be approved by the Attorney-General.[162] The Master of the Rolls in *Datafin* considered that there would be few grounds on which to challenge legislative activity of the Panel unless it made rules in violation of its proclaimed principle of doing equity among

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160 Above n 140, 842.
161 NZSE Listing Agreement cl 3 (a).
162 Corporations Act 1989 (Cth) s 774.

shareholders.[163] While this would be a fine principle for the MSP also, the ideal of equity among shareholders is one most often pursued in the context of takeovers regulation.[164]

The general approach, however, is appealing. In the context of the Exchange it could look to the functions of the Exchange in the SAA, noting the requirement that the Exchange promote the interests of its members and members of the public in the listing, trading, etc. of shares.[165] These functions are reprinted in the Members Rules as the Objects of the Exchange.[166] The functions are sufficiently broad that it would seem to place little restriction upon the Exchange's legitimate activities to require that its rules be made in consideration of its statutory functions, and that they be reasonably in keeping with these functions. Such an approach would be similar to that proposed above in relation to the Securities Commission's functions under s 10 of the Securities Act.

2. Interpretative Functions

The roles of the MSP and the Panel are very similar in this area, as they both interpret their respective rules. The MSP can issue rulings definitively stating the application of any listing rule. In respect of this function it was suggested that the Panel be given "considerable latitude," for two reasons. The first is that as legislator, it could change the rules at any time. In the case of the MSP its rulings are to be treated as a part of the rules.[167] The second reason given was

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163 Above n 140, 841.

164 B Wilkinson & A Mandelbaum "The Takeover Debate in the COntext of Securities Regulation in New Zealand: A Law and Economics Perspective" in G Walker & B Fisse (ed) *Securities Regulation in Australia and New Zealand* (Oxford University Press, Auckland, 1994) 783, 810.

165 Sharebrokers Amendment Act 1981 s 4 (1) (d).

166 New Zealand Stock Exchange Members Rules, r 2.

167 Listing Rules s 1.6.

that the rules were intended to be applied in spirit as much as to the letter.[168] While this same argument received little support from Barker J in the *Forest Products* case,[169] it is consistent with the comments of Woodhouse P in the *Listed Companies* case. Such references to the spirit of the rules are in effect pleas for a flexible approach to interpretation. The need for such flexibility has been stressed by the MSP.[170] It is conceivable that an inflexible approach to the Listing Rules could as often as not produce inequity for investors given the diverse needs of minority or majority and individual or institutional shareholders. Such flexibility may currently be achieved through the waiver procedure, which is closely allied to the interpretative function.

The Master of the Rolls was of the opinion that a court might intervene only on the grounds of irrationality, where an interpretation was so far from the natural meanings of the words that an ordinary user of the market might be misled. In relation to the waiver power, which involves an individual company, exercise of the power might be tested also against the statutory functions of the Exchange to ensure that the waiver is not issued for an improper purpose, or is not unreasonable in relation to the functions of the Exchange.

3. Enforcement Functions

The greatest potential for disruption to the market, and certainly to individual companies and shareholders lies in the use of the MSP's enforcement powers. It is also in this respect that the MSP differs most sharply from the Panel. While both bodies can issue censures against companies, the MSP has delegated authority to suspend or de-list a company. The

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168 Above n 140, 841.
169 Above n 123, 99, 055.
170 Market Surveillance Panel Annual Report 1994, 3.

Panel, by contrast, must rely upon the Council of the Stock Exchange, which may expel members or de-list companies who breach the Code.[171] An important difference to be noted here is that the Council's power to de-list securities is a statutory power, and may only be exercised where there exist "special circumstances which preclude normal dealings in the securities."[172] The SAA contains no such restrictions on the Exchange's power. Thus while it may be noted that it was in this area that the approach in *Datafin* was most cautious, stating that the court would be reluctant to intervene in the absence of mala fides, the Panel in this area has fewer powers than does the MSP, and the exercise of its delisting power by the London Stock Exchange would be reviewable by the court as an exercise of statutory power.[173]

The Master of the Rolls added that the court might intervene where the Panel acted in breach of natural justice. In carrying out its enforcement role the MSP is certainly in a position to affect the rights and liabilities of others, and this is a strong argument for reading some natural justice rights into the suspension and de-listing procedures. If the powers of the MSP are accepted as public powers then this would be in line with the approach taken by the courts to the general functions of the Securities Commission. In practice the MSP is reluctant to suspend or delist companies, and does provide an opportunity for a company to state its case in the course of an investigation. This fact raises the possibility that companies may have a legitimate expectation in relation to their listing status that they will be heard before adverse action is taken. Where a particular case required urgent action by the MSP this could be accommodated in any

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171 Above n 140, 826.

172 Financial Services Act 1986 (UK) s 145 (1).

173 At the time of the *Datafin* case, exercised under the Stock Exchange (Listing) Regulations 1984.

litigation by exercise of the court's discretion to refuse relief.

IX THE EFFECTS OF JUDICIAL REVIEW

The conclusions reached thus far indicate that in general terms actions of both the Securities Commission and the Stock Exchange may be subject to judicial review. It has been stated above that the purpose of judicial review is to provide a check on the exercise of public power. However, it is equally clear that this supervision cannot be extended so far that the markets cannot be efficiently administered. In the context of the securities markets it is important that any judicial intervention strike the balance between insufficient supervision of public power and over-intervention in the securities market. While there is a particular need for protection of small investors, which may be provided by judicial oversight, it must be noted that around 88% of the NZ sharemarket capitalization comes from institutional investors, so the market must remain attractive to these participants. The Securities Commission has identified the New Zealand approach to the securities markets as one of "light-handed" regulation.[174] From the cases examined above it is possible to draw some conclusions about the effect that judicial review may have on the securities markets.

A The Securities Commission

In relation to exercise of its general powers, the judgment in the *City Realties* case has demonstrated that the courts have no intention of interfering with the Commission's function of monitoring the securities market. The Commission has acknowledged that a decision on its part to

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174 Securities Commission Annual Report 1996 (Securities Commission, Wellington, 1996) 6.

conduct an inquiry or issue a report can be disturbing to those subject to an inquiry, and further it "recognises the effect that any determination made by the Commission will have on market participants, particularly those associated with the inquiry."[175] In these situations it is issuers, promoters and listed companies who are most affected by the Commission's activities.

It has been commented that the Commission is considered to be "restrained" procedurally compared to its equivalent regulatory bodies in other jurisdictions.[176] The Commission itself has pointed out that it is an independent authority whose membership all have experience in the market rather than a strictly governmental body, and that this fact allows it to be aware of the concerns of market participants.[177] This awareness has in turn caused the Commission to handle its powers with sensitivity. For instance it has become common for the Commission to issue confidentiality orders where this is requested by a party to an inquiry,[178] and to state a case to the High Court before taking suspension action where a contentious issue is involved.[179] The Commission's awareness of the ramifications of its inquiries has already been noted.

One possibility that must be mentioned is that the current good practices of the Commission is due in part to its awareness of the court's supervisory jurisdiction, in which case it may be observed that judicial review is having a positive impact on the markets. Just as the Commission has observed that the mere existence of its power to conduct

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175 Above n 174, 6, 7.
176 S Franks "Securities Market Regulation: The Emperor's New Clothes" (NZLS Conference Paper, Dunedin, 1996), 7.
177 Above n 174, 5.
178 Above n 174, 19.
179 Securities Act 1978 s 25.

inquiries is good incentive for market participants to observe good practices, so the mere existence of judicial supervision can serve to keep the Commission straight in its dealings with the market.

Concern has been voiced that the Securities Act provisions regarding prospectuses are wide enough to permit the registrar to "sink time into merit pre-vetting of securities offerings if and when political demands, or its resources, require or permit."[180] It is noted above that use of the powers in the Securities Act for political purposes should be reviewable. The considerable powers given to the Registrar and the Commission for the protection of investors and the efficient running of the securities markets may not be used for other purposes, and in this respect judicial review may provide an invaluable tool to prevent such occurrences.

B The Stock Exchange

Unlike the Securities Commission which appears to approve of oversight for self-regulatory bodies, the Exchange has stated its objections to the application of administrative law jurisdiction, as cited above. In assessing the likely impact of judicial review on this area of the market it will be important to return to these fears of the Exchange to see to what extent they may be borne out.

The first point to be made is similar to that made above in relation to the Commission: indications from both New Zealand and English cases are that courts will be reluctant to interfere in this market. Even in Australia, where there is statutory provision for the enforcement of the Listing Rules,

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180 Above n 176, 7.

the courts have sometimes been slow to involve themselves.[181] It does appear that a "light-handed" approach may be predicted here as well. As is noted above the Exchange may in fact accept that some degree of judicial supervision is likely. This may indicate that the very peripheral role accepted by the Court of Appeal in the *Datafin* case may be acceptable to the Exchange, and may cause little anxiety.

The specific concerns voiced by the Exchange identified the issues of speed, certainty, efficiency and minimisation of cost as reasons against the application of administrative law controls. If an approach similar to that taken by the English Court of Appeal were to be adopted towards the Exchange then these fears could to some extent be allayed. The adoption by the courts of an essentially historic role in supervising the Exchange would mean that decisions of the Exchange could be accepted and applied with confidence in most circumstances, rendering the first three objections nugatory. Where an action of the Exchange were to lead to an application for judicial review it cannot be denied that the concern regarding minimisation of cost may be affected. This cannot be avoided in High Court proceedings. However, the volume of litigation is not likely to be very great, and in relation to the amount of money at stake in any decision of the Exchange the cost of litigation cannot be viewed as a decisive concern.

There are a few situations identified above where a court may intervene in a specific decision of the Exchange or the MSP and decide to grant substantive relief. Undoubtedly such an action could have a marked effect on the market. The

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181 *Kalmet Resources NL v Australian Stock Exchange* Unreported, Federal Court, No. WA G80/1992 Fed No. 505, per French J at para 41.

guideline laid down by Lord Donaldson MR in the *Guinness* case was that in that context an appropriate approach would be to consider the case as a whole and ask "whether something had gone wrong of a nature and degree which required the intervention of the court."[182] It may be argued that where this is the case then the public interest, which the Exchange must promote, is better served by remedying the defect in the exercise of power than in allowing it to stand. Woolf LJ in the same case stated that:

> the court is concerned as to whether what has happened has resulted in real injustice. If it has, then the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice on those who operate in the market which it oversees.[183]

It must be noted that such intervention should not be anticipated as a common event. The court is not likely to be as reluctant to interfere with decisions of the Exchange as the Privy Council stated it would be in relation to State Owned Enterprises, as the Exchange is not subject to the political controls mentioned as restraining factors in the *Mercury* case.[184] However the reluctance of the court to interfere with decisions of the Exchange seen in *Listed Companies* should continue in force, while the "non-nuclear deterrent"[185] of judicial review should encourage the Exchange to closely observe the limits of its powers and procedures.

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182 Above n 137, 160.

183 Above n 137, 194.

184 Above n 132, 391.

185 Sir John Donaldson MR cited in Rt Hon Lord Justice Woolf *Judicial Review in the Commercial Arena* (Denning Lecture 1987, Bar Association for Commerce, Finance and Industry), 12.

X CONCLUSION

While the sources of the regulatory powers exercised in the securities markets may vary, it seems possible to conclude that both the Securities Commission and the New Zealand Stock Exchange can be characterized as exercising public law powers, in terms of the context within which these powers are exercised, and the effects on the rights and liabilities of individuals and the public at large that their decisions may have. It follows that these powers may be subject to the supervisory jurisdiction of the High Court.

From the case law in this area it may be concluded also that the courts are willing to take note of the specialist nature of the regulatory bodies. The wide purview of the Securities Commission in its oversight of the markets will not be hampered by the application of judicial review. Likewise in relation to specific issues confronted by both the Commission and the Exchange there seems little likelihood of a court disregarding the expertise of these bodies. In this respect judicial review is likely to play a non-interventionist role.

Due to the nature of the securities markets the form that judicial intervention will take may vary, and may on occasion consider that the good of the market demands that relief be merely declaratory, so that the jurisdiction of the court can serve as a guide for the regulatory bodies. It may be that in relation to both the Commission and the Exchange the appropriate test for direct intervention will be that of whether the present case has resulted in an injustice to any person. It is to be expected that judicial control of these bodies will be administered with a light hand, and it is essential that this is the case. Over-intervention by the courts will serve to reduce confidence in the markets, in turn reducing their appeal to

investors. Such action could cause more harm than good to the securities markets.

There is currently considerable debate regarding the best approach to securities regulation, with a strong argument existing for less rather than more regulation. In considering where judicial review fits into such arguments it is necessary to view the manner in which the jurisdiction is most likely to be exercised, and the likely effects of judicial supervision. While extension of judicial review to include the securities markets is in a sense an extra form of regulation for the markets, it is regulation of the regulators. Allowing judicial review of the Securities Commission and the Exchange is a means of ensuring that these regulators exercise their powers within the policy constraints of the securities legislation, and without unlawfully affecting the rights and fortunes of market participants. This extra form of regulation can act to limit the excesses of the regulators, and exercised with restraint, can ensure that the efforts of the regulators are properly focussed and properly exercised, thus serving to protect the interests of all market participants.

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