K-43 KETTLE, H.C. Judicial review and the N.Z. fishing industry.

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JUDICIAL REVIEW AND THE NEW ZEALAND FISHING INDUSTRY

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ABSTRACT

This research paper examines the role of judicial review in the New Zealand fishing industry, and in particular whether it is successful in acting as a judicial balance upon regulation in this segment of the commercial arena. The effect of judicial review on five separate aspects of the industry is considered, with the areas being the quota management system, the challenge to principal legislation, the challenge to subordinate legislation, the forfeiture regimes, and Maori commercial fishing interests. The differences between the exercises of administrative power challenged in each of these areas are such that judicial review has played several disparate roles. It is concluded that judicial review has acted as an effective mechanism for defining rights and obligations, informing administrative decision making, and bringing problems in the legislation to the attention of Parliament. In these varied roles, the impact of judicial review upon the New Zealand fishing industry has been a positive one.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography, and annexures) comprises approximately 13200 words.

I INTRODUCTION AND METHODOLOGY

New Zealand's fisheries are one of its most important natural resources. Around 100 commercially significant species are spread throughout an exclusive economic zone covering 15 times the area of New Zealand's land mass. From the Hauraki Gulf to the remote Chatham Islands, hundreds of thousands of tonnes of fish are caught annually.[1] The fishing industry provides a major export earner for New Zealand's economy, and provides a livelihood for thousands, from small family owned operations to corporate giants. The industry has been strictly regulated by the legislature from the outset, with Fisheries Acts being passed in 1908, 1983, and 1996, along with important amendment Acts in 1986 and 1992. This legislation is notable for its complexity, with the most recent Fisheries Act running to over 400 pages. This complexity is added to by the masses of Regulations that govern specific aspects of commercial fishing in New Zealand.

Where industry and regulation collide, legal issues invariably arise. The fishing industry is no exception to this. This paper considers the role of judicial review in responding to these issues, and whether its availability has had any wider impact upon the actions of administrators and other stakeholders within the industry. As noted, the industry is extremely heavily regulated, and the consideration of the role of judicial review will of necessity be broken down into different areas. These areas are as follows:

1. The Quota Management System
2. The Challenge to Principal Legislation
3. The Challenge to Subordinate Legislation
4. Other Administrative Powers: The Forfeiture Regimes
5. Maori and the New Zealand Fishing Industry

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[1] Total allowable commercial catch was 598 244 tonnes in 1994, and 475 596 tonnes in 1995. See *New Zealand Official Yearbook 1996* (99 ed, Statistics New Zealand, Wellington, 1996) 403-405.

The role of judicial review will be considered individually in each of these areas. The legislative background and relevant decided cases will be discussed, before concluding at the end of each section upon the effects of judicial review in that particular area. This paper is based upon the provisions of the Fisheries Act 1983. Where appropriate, each section will contain comment on the potential effect of the Fisheries Act 1996, which is yet to come into force, and will do so on dates set by Order in Council. A final section will attempt to draw the strands together and conclude as to the effects of judicial review on the industry as a whole.

In 1949 Lord Denning anticipated the need for judicial review, calling for the replacement of the prerogative remedies with "new and up to date machinery." As picks and shovels were no longer suitable for the winning of coal, neither were the procedures of mandamus, certiorari, or actions on the case suitable for the "winning of freedom in the new age."[2] In 1987 Woolf L J (as he then was) agreed with Lord Denning's earlier assessment of the need for change, but argued that the procedure of judicial review developed by the courts in the latter half of this century had modernised these prerogative remedies so as to provide the "new machinery" called for.[3] In concluding his lecture, Woolf L J stated:[4]

> Lord Denning referred to the need for new machinery in 1949, but *certiorari* and the other prerogative remedies have proved to be not picks and shovels but, as they were described by the present Master of the Rolls in the course of a recent lecture on judicial review, a "non-nuclear deterrent" well capable of meeting the challenge set by Lord Denning of protecting our freedom in the new age. It must not be forgotten that for every case in which the court intervenes there are many more where it does not have to because of this non-nuclear deterrent. Judicial review is doing and will do its job in the commercial arena well.

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[2] Rt Hon Lord Denning, Inaugural Hamlyn Lecture "1949 - Freedom Under the Law", quoted in Woolf "Judicial Review in the Commercial Arena" (The Bar Association for Commerce, Finance, and Industry, The Denning Lecture 1987) 1.

[3] Woolf, above n 2, 2.

[4] Woolf, above n 2, 12.

The role of judicial review in the New Zealand fishing industry will be considered in the light of these comments. In particular, the efficacy of judicial review in protecting or defining the rights of those aggrieved by administrative decisions in specific areas of the industry will be examined. The wider effects of judicial review will also be discussed, including the legislative reaction to successful judicial review applications, and the effect of the availability of judicial review upon administrative decision making.

II THE QUOTA MANAGEMENT SYSTEM

The New Zealand fishing industry is largely regulated by the Quota Management System (QMS). This system was introduced by the Fisheries Amendment Act 1986, a piece of legislation described at the time to be "as important to fisheries as the land title system is to land."[5] Under the QMS persons are allocated provisional maximum individual transferable quotas (PMITQ) on the basis of their commercial fishing history, with the possibility of adjustment on certain grounds of unfairness.[6] The size of the quota allocated or the non-allocation of quota can be the subject of appeal to the Quota Appeal Authority (QAA), at the suit of either the person affected by the determination or the Director-General of Fisheries. The QAA is established by s 28A Fisheries Act 1983, and consists of three members: the Chairperson, being a barrister and solicitor of not less than 7 years' standing, a member appointed by consultation with the Fishing Industry Board, and another member who shall not be an employee of the Ministry.[7] It has the sole function of hearing appeals and making decisions under ss 28H, 28HA, and 28I of the Act. The QAA is obliged to inform the parties concerned in each case of its decision and, importantly, of

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[5] Hon D Kidd, MP (1986) 471 NZPD 2379.

[6] The criteria for the allocation of PMITQ and grounds for adjustment are considered in detail below.

[7] This was a departure from the original flawed idea of having the Director-General both as a party to all proceedings in the QAA and as appointing one of the members.

the reasons for its decision.[8] Such decisions are not appealable, and are final unless challenged by application for review under Part I of the Judicature Amendment Act 1972.[9]

A The Role of Judicial Review

1 The significance of an exclusive right of review

As noted above, decisions of the QAA are not appealable and the only way in which they can be questioned in Court is by review. The exclusive right of judicial review from a determination of the QAA, as expressed in s 28I(3) appears to be unique in New Zealand law. Other statutory appeal authorities and review authorities purport to make final decisions, or allow for a general or specific right of appeal to the High Court.[10] British enactments commonly contain a right of "statutory review", but this is conceptually different and narrower than full judicial review.[11] Statutory review provisions generally relate to areas such as town planning or compulsory acquisition of land where the certainty of a determination is of great importance. They are strictly limited in time and an order quashing the decision reviewed is the only remedy available.[12] Following the implementation of the QMS, with the initial allocations of PMITQ and decisions of the QAA, a large number of decisions were challenged by review in the High Court. Due to perceived negative effects on the fishing industry, legislation was passed reducing the scope of such reviews

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[8] Section 28I(2).

[9] Section 28I(3). This section acts as a partial ouster clause, a type which is enforced without judicial resistance. See H W R Wade, *Administrative Law* (7 ed, Clarendon, Oxford, 1994) 741.

[10] See Legislation Advisory Committee Report No. 3: *Administrative Tribunals* (Department of Justice, Wellington, 1989) Appendix 3 for modes of appeal from such tribunals.

[11] Law Commission Report No 226 *Administrative Law: Judicial Review and Statutory Appeals* (HMSO, London, 1993) paras 12.12, 12.13.

[12] Law Commission Consultation Paper No. 126 *Administrative Law: Judicial Review and Statutory Appeals* (HMSO, London, 1992) Annex 2 for a full list of provisions.

and limiting the time available for their initiation.[13] This has brought the procedure for judicial review of QAA decisions more into line with the policy behind the English system of statutory review.

2 Reasons for judicial review rather than appeal

Whether the QAA should be subject to review or appeal was not debated in Parliament, and was undoubtedly dealt with at select committee.[14] Review may have been seen as more appropriate due to the narrow originating grounds under which quota may be allocated, and the desirability of certainty in allocation. The QAA determines an appeal from the Director-General by a hearing de novo, which may be challenged on any of the usual grounds of review. As stated by the Court of Appeal in the leading case of *Jenssen v Director-General of Agriculture and Fisheries*:[15]

> ... the legislature has stopped short of giving an appeal to the Courts, so ensuring a considerable measure of conclusiveness to the Appeal Authority's decisions. As every lawyer knows but is not always understood by non-lawyers, this is narrower than appeal. Broadly it is review to ensure that the Authority acts in accordance with law and principle, in accordance with natural justice as far as procedure is concerned, and on an assessment of the facts that is open to a reasonable Authority.

In practice, at least until the 1992 amendment, QAA decisions failed to provide any real conclusiveness. The legislative decision to provide a right of review rather than a right of appeal did not inhibit further litigation; it merely changed the form of the pleadings.

B The Legislation

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[13] Fisheries Amendment Act (No 3) 1992. See below, Part III.

[14] At the first reading of the 1986 Bill Hon M McTigue MP raised the question of whether the QAA would be subject to appeal: (1985) 468 NZPD 8969. Select committee discussion was not reported.

[15] *Jenssen v Director-General of Agriculture and Fisheries* Unreported, 19 September 1992, Court of Appeal, CA 313/91, 2-3.

At this stage the quota allocation procedure originally introduced by the Fisheries Amendment Act 1986, and the litigation resulting therefrom, is considered. The original system allowed the greatest scope for the exercise of administrative discretion, which culminated in a substantial number of applications for review. As will be seen below, the Act was further amended in 1992, which led to a more restricted role for judicial review in this area.

The original criteria enabling the Director-General to grant PMITQ are contained within s 28E, the first three subsections of which are set out below:

[28E. Criteria for granting provisional maximum individual transferable quotas--(1) Where any declaration is made under section 28B of this Act, the Director-General shall make an allocation of provisional maximum individual transferable quotas in accordance with this section, using as a base the proportion that the commercial catch of the person in that quota management area of that species of class of fish as shown in the fishing returns of that person bears to the total commercial catch in that quota management area of that species or class of fish in previous years.

(2) Allocations may be made under subsection (1) of this section only to --

(a) Persons who are holders of fishing permits issued under this Act at the date of the declaration under section 28B of this Act; and

(b) Persons who have held such permits within the previous 12 months or such longer period as the Director-General considers appropriate for special reasons relating to any particular case.

(3) In determining any provisional maximum individual transferable quota the Director-General may, where the Director-General is satisfied in a particular case that the provisional maximum individual quota determined under subsection (1) of this section would be unfair having regard to--

(a) The commitment to, and dependence on, the taking of fish of that species or class in that quota management area by the person at that date of the declaration under section 28B of this Act, and

(b) The other provisional maximum individual transferable quota (if any) allocated to that person, --

allocate a different provisional maximum individual transferable quota to the person.

This section has provided the basis for most of the applications for review of QAA decisions considered in this paper. It contains mandatory considerations (the applicant's formal fishing history) followed by a discretion to vary any allocation on the grounds of unfairness. The criteria set out in s 28E are equally applicable to decisions of the QAA as to determinations of the

Director-General.[16] The efforts of the courts to deal by way of judicial review with decisions made under this section are considered below.

C Judicial Review of PMITQ Allocations

1 Determinations under section 28E

Where an applicant for a PMITQ had an uninterrupted and unhindered fishing history in the relevant QMA during the years prior to it becoming subject to the QMS, the allocation may be made with relative ease by applying s 28E(1) to the applicant's individual circumstances. However, the infinite vagaries of fishing and weather conditions, equipment problems, and personal circumstances meant that in a large number of cases, an applicant would not be satisfied with quota allocations arising from such a mechanical process. In recognition of this the Director-General retained a twofold discretion: to allocate PMITQ to past holders of fishing permits, and to allocate a different quota if a determination under s 28E(1) would be "unfair".

Review of the exercise of this discretion does not require consideration of the usual preliminary issue of whether Parliament intended to empower the administrator or tribunal to make a conclusive determination.[17] Parliament undoubtedly contemplated such decisions being subject to review by providing an express right of review pursuant to s 28I. The issues relate to the actual exercise of the discretions contained in the section by the QAA.

The questions that have come before the Courts most frequently relate to the QAA's application of s 28E(3), which enables a different quota to be allocated on grounds of unfairness, having regard to the applicant's "commitment to, and dependence on" the taking of fish of a particular class.

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[16] Any reference to the exercise of a discretion in this section of the paper could equally apply to the Director-General or the QAA.

[17] Eg *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 534, 536; *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129, 133-135.

The most authoritative interpretation of these terms is that of the Court of Appeal in *Jenssen*, where it was stated:[18]

> The words chosen by the legislature are obviously deliberately wide. We think that the true interpretation is that `commitment' extends to a firm intention to fish for a species, evinced by the taking of significant practical steps to that end; and that dependence refers to the economic significance of the species in the person's fishing history or plans.

In that case, it was held that the QAA had not focused adequately on whether expenditure of more than $50 000 outfitting the applicant's vessel with deep water winches would have been incurred but for a firm intention to fish for orange roughy.[19] At first instance McGechan J had held that the phrase "having regard to" in s 28E(3) meant "having regard only to."[20] However, this was not followed in the Court of Appeal judgment and was expressly rejected by Robertson J in *Ruocco v QAA*.[21] In the earlier case of *McLean & Wylie v Director-General of Agriculture and Fisheries* Heron J stated that "In my view [s 28E(3)(a)] places only a modest fetter on the general discretion open to the Appeal Authority to cure injustice by allocating different quota."[22] It is clear that the question of whether an allocation is unfair is to be given a wide consideration.

2 Grounds of review

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[18] Above n 15, 10.

[19] Above n 15, 8-9.

[20] *Jenssen v Director-General of Agriculture and Fisheries* Unreported, 14 October 1991, High Court, Wellington Registry, CP 1035/90, 25.

[21] *Ruocco v QAA* Unreported, 1 March 1996, High Court, Wellington Registry, CP 1094/90, 8. In this respect Ellis J took the wrong approach in *Robinson v QAA* Unreported, 18 May 1993, High Court, Napier Registry, M 116/91, 14.

[22] *McLean & Wylie v Director-General of Agriculture and Fisheries* Unreported, 18 March 1992, High Court, Wellington Registry, CP 892/90, 16.

The background circumstances of cases such as those that have led to review proceedings in the High Court are complex. The Director-General's and then the QAA's discretion is exercised after reference to the applicant's fishing history, along with various other related factors relied on by the applicant, or by counsel before the QAA, as establishing unfairness. However, the courts have preferred not to place weight upon previous determinations made under s 28E(3), apart from on the interpretation of the section in *Jenssen*. As Robertson J stated in *Ruocco*:[23]

> Arguments which were advanced on the basis of the treatment of other individuals appear to me to have little substance. The statutory framework envisaged an individualised but consistent approach. ...[T]he purpose of [s] 28E(3) was to ensure individual justice in individual cases. So long as there is proper attention to all relevant factors under that section, endeavouring to draw analogy from other cases is less than productive.

It has been emphasised by the courts that the exercise they are conducting is review and that the merits of a case are not to be considered.[24] The cases decided thus far have not concerned the challenge of decisions on procedural grounds; they have all been based on what Taylor refers to as errors in the deliberative process.[25] Decisions of the QAA have been held bad due to their misinterpretation of the section or their failure to correctly apply it to the facts as proved. The Courts have not appeared overly concerned with "compartmentalising" the grounds of review once the broad failings of the QAA have been made out. The expressed grounds of review have often been in combination, usually combining error of law with failure to take account of

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[23] Above n 21, 14.

[24] See *Jenssen*, above n 15, 2-3; *Ruocco*, above n 21, 7, 11; (particularly) *Pohio v Director-General of Agriculture and Fisheries* Unreported, 1 September 1993, High Court, Wellington Registry, CP 463/90, 2.

[25] G D S Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) para 11.2.

relevant considerations or taking account of irrelevancies.[26] This holistic type of approach is encapsulated in the statement of the Court of Appeal in *Jenssen*, where it was said that "the grounds of failure to take into account an essential consideration and error of approach or unreasonableness overlap, as is often the case in administrative law."[27]

It is noteworthy that the courts have not been tempted to review the unfairness-based discretion in s 28E with reference to substantive unfairness in the administrative law sense, despite the requests of counsel.[28] In this context any "unfairness" is unrelated to legitimate expectation. It would only add to the existing grounds of review if Cooke P's formulation in *Thames Valley Electric Power Board* is followed: that substantive unfairness "is a legitimate ground of judicial review, shading into but not identical with unreasonableness."[29] As yet the Courts have had little difficulty in reviewing QAA decisions within more established grounds, even if these have not always been defined with precision. It is submitted that, at least in this particular area, reliance upon substantive unfairness should be avoided. Reviewing a discretion based on statutory unfairness with reference to the substantive unfairness of that decision would

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[26] Eg *Robinson*, above n 21, taking account of irrelevancies; *Ruocco*, above n 21, error of law/unreasonableness; *Pohio*, above n 24, error of law; *Mclean & Wylie*, above n 22, error of law/failure to take account of relevant considerations; *Montgomery v Attorney-General* Unreported, 28 March 1988, High Court, Auckland Registry, CP 1445/86, unreasonableness/failure to take account of relevant considerations; *Austro Seafoods (Fishing) Ltd v QAA* Unreported, 3 May 1993, High Court, Wellington Registry, CP 1007/89, error of law/taking account of irrelevancies.

[27] Above n 15, 10. The decisions in *Jenssen* and *Pohio*, above n 24, have been seen as applications of an unreasonableness concept wider than the traditional *Wednesbury* standard. See J Caldwell "Judicial Review: Review of the Merits?" [1995] NZLJ 343, 345.

[28] For example *Ruocco*, above n 21, 14. The discussion of substantive unfairness by McGechan J in *Destounis v Minister of Fisheries* Unreported, 11 February 1993, High Court, Wellington Registry, CP 1/87 has been largely eclipsed by later developments.

[29] *Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641, 652. See M Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] NZ Law Review 426.

blur the boundaries of judicial review, in these circumstances, to a hopeless extent. As stated recently by Fisher J:[30]

> Litigants constantly try to persuade the Courts to revisit the merits of a dispute under the guise of judicial review. ... The High Court is not an administrative appeal tribunal. I might add that the recognition of substantive unfairness as an untrammelled ground for review would only feed that misconception.

3 Is review appropriate?

There is no problem in theory with a Court conducting a review of a statutory discretion based on unfairness. In particular, the Court does not have to determine whether or not there was actually "unfairness", in coming to its decision. Relevant considerations upon which the discretion can be exercised may be ascertained partly through the express terms of the section, partly through implication, and partly through legislative context.[31] Issues of irrationality and error of law can be determined in the normal manner. As noted earlier, the rationale for the discretion in s 28E to extend a PMITQ was to ensure the provision of individual justice.[32] PMITQ allocations are vital to the economic viability of every fisher's operation. Nevertheless, the QAA has consistently taken over 2 years to decide appeals from determinations of the Director-General.[33] As stated in *Jenssen*:[34]

> The delay reflects a system of hearing all or a large number of appeals before deciding any. It was a system possibly better calculated to produce fairly uniform results than to do justice in the particular circumstances of individual cases.

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[30] *Waitakere City Council v Waitemata Electricity Shareholders Society Inc* Unreported, 18 March 1996, High Court, Auckland Registry, M 1524/95, 15.

[31] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 183; *Hawkins v Minister of Justice*, above n 17, 536.

[32] See text accompanying note 23.

[33] Eg in *Ruocco*, above n 21; *Jenssen*, above n 15; *Austro Seafoods*, above n 26.

[34] Above n 15, 6.

This does not accord with the focus on individual fairness and, as discussed below, is not a problem created by the use of the judicial review jurisdiction; nor could the use of judicial review redress it. The problems were inherent within the administrative system created to regulate the QMS.

D The QMS and the Fisheries Act 1996

The QMS has been retained under the new Act but with notable alterations. Quota are allocated on the basis of an individual's provisional catch history, which is assessed in accordance with previous individual catch entitlements or the fisher's eligible catch from the previous year, depending upon the type of fishery.[35] Each fishery stock is divided into 100 000 000 shares, and an individual is allocated shares, the quota weight equivalent to that person's provisional catch history.[36] The QAA will be abolished and replaced with the Catch History Review Committee (CHRC), which is entitled to hear appeals relating to both catch history and quota allocations.[37] Any person refused quota by the Chief Executive on the grounds that they were an "overseas person" can apply directly to the High Court for a declaration as to whether this is correct.[38] The CHRC is established by s 283, and is made up of barristers and solicitors of at least 7 years standing who are not employees of the Ministry. Similarly to the QAA, the CHRC has broad powers to regulate its own procedure, and must provide written decisions stating reasons. Equally, its decisions are to be final unless challenged by application for review under Part I Judicature Amendment Act 1972.[39] Any application in respect of a "decision or purported decision" of the CHRC must be made within 3 months of that

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[35] Sections 29-41.

[36] Section 47(1).

[37] Section 51.

[38] Section 51(2)(a).

[39] Section 293(4).

decision.[40] The grounds of "commitment and dependence" as a basis for quota allocation are not repeated in the new Act, removing the most difficult provision dealt with by the QAA. Due to the wholly mechanical nature of the allocation process under the new legislation, decisions of the CHRC under s 51 are more likely to involve matters of fact or quantum, rather than matters of law. With less contentious issues arising before the Review Committee, it is probable that the role of judicial review in this area will be reduced correspondingly.

E Conclusion

The amount of litigation concerning quota allocations is an indication of the sorry state of this area of the law. The problems are deep seated: the allocation mechanism itself, with an inflexible history-based allocation being supplemented with the amorphous concept of "commitment and dependence", and the length of delay before the issue of QAA decisions. While ensuring that these decisions are made in accordance with administrative law principles, judicial review has not succeeded in bringing order to this area of the industry, except indirectly: the legislature were so concerned with the effect that the decision in *Jenssen* would have on the industry that it amended the Fisheries Act to *require* a fishing permit to be held before quota could be allocated.[41] Judicial review cannot be seen as acting as a "non-nuclear deterrent" within this area of the industry: applications for review were rife and continuous until the change in the substantive grounds for quota allocation. The amendments also served to reduce the role that the QAA would play in QMS regulation. As well as providing a substantive reduction in the grounds of quota allocation, they increased administrative efficiency by minimising the scope for hearings before the QAA. This removal of the main discretionary basis for the decision has led to a corresponding decline in applications for review. The spectre of review did not lead to any ascertainable improvement in QAA decisions, and the limited scope of review as opposed to a more general appeal did not deter aggrieved

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[40] Section 293(5).

[41] See below, Part III.

parties seeking to improve their allocations. This may be seen as more of a reflection on the economic matters at stake and the regulating legislation than as any failing within the judicial review jurisdiction.

III THE CHALLENGE TO PRINCIPAL LEGISLATION

A Cooper & Others v Attorney-General

Judicial review has been used on a number of occasions to challenge perceived abuses of executive power which have impacted upon the fishing industry. This has included challenges to the validity of regulations made under the Act, and even a challenge to amending legislation itself. *Cooper & Others v Attorney-General*[42] was a test case representing 18 claims of fishers whose ability to seek judicial review of QAA decisions was effectively removed by the Fisheries Amendment Act (No 3) 1992.[43] Section 28ZGA(1) Fisheries Act 1983, as inserted by the amending Act, provides:

28ZGA. Limitations on powers of Quota Appeal Authority and courts in certain cases ---

(1) Notwithstanding anything in this Act or any other enactment or rule of law, in respect of any proceedings concerning any species of fish subject to a quota management system at the commencement of this section,--

(a) Neither the Quota Appeal Authority nor any court shall, in respect of any proceedings whatever filed on or after the 16th day of September 1992, have power-

(I) To allocate to any person any provisional maximum individual transferable quota, guaranteed minimum individual transferable quota, or individual transferable quota for any species of fish in any quota management area; or

(ii) To make a declaration or decision concerning the right of any person to such an allocation, -

unless that person was, immediately before the date of the relevant declaration under section 28B of this Act, lawfully entitled, through the holding of a fishing permit and all other necessary authorities at that date, to take fish of that species in that area:

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[42] *Cooper & Others v Attorney-General* Unreported, 7 May 1996, High Court, Auckland Registry, CP 1400/92.

[43] The amendment Act received the royal assent on 18 December 1992.

(b) No court or tribunal shall, in respect of any proceedings whatever filed on or after the 16th day of September 1992, review, quash, or call into question-

(I) Any decision of the Director-General made before that date under section 28E(3) of this Act; or

(ii) Any decision of the Quota Appeal Authority made under or in respect of section 28I of this Act insofar as the decision relates to any decision of the Director-General under section 28E(3) of this Act:

...

This restriction applied to any proceedings filed on or after 16 September 1992, the date of the Court of Appeal judgment in *Jenssen*.[44] Indeed, the intention expressed in Parliament was that the amendment was designed to "ameliorate the impact"[45] of the decisions in *Gunn*[46] and *Jenssen.* Quota could no longer be allocated on the grounds of "commitment and dependence" alone, as was contemplated by the Court of Appeal in *Jenssen*; an existing fishing permit would be necessary before such matters could be given consideration.

The Crown conceded that Mr Cooper's case was indistinguishable in principle from that in *Jenssen*.[47] However, his application for review of the QAA's decision was destined to fail unless s 28ZGA(1) was not given effect. Counsel contended that the amending Act had purported to deprive their clients of access to the Court to secure a declaration concerning claimed substantive rights, infringing a fundamental constitutional principle.[48] They relied upon dicta and academic writing of Lord Cooke of Thorndon[49] in support of this contention, particularly his statement in *New Zealand Road Carriers* that:[50]

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[44] Above n 15.

[45] Hon Paul East, Attorney-General, (1992) 531 NZPD 12534.

[46] *Gunn v Quota Appeal Authority* [1993] NZAR 102.

[47] Above n 42, 29.

[48] Above n 42, 3.

[49] Particularly *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398; Sir R Cooke "Fundamentals" [1988] NZLJ 158.

[50] Above n 49, 390.

> ...we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights.

The amending legislation is drafted in a clumsy fashion, and on a literal reading could provide support for the plaintiffs' contention, that it deprived them of access to the courts. Baragwanath J drew a distinction between the apparent and the actual meaning of the section. His reasoning was heavily reliant on Parliament's intention as evinced in the Hansard reports quoted extensively within the judgment. As a matter of construction, Baragwanath J held that "... the true purpose and effect of [the] amending legislation was not to deprive the parties of access to the Court to secure enforcement of legal rights, but rather to remove the rights themselves."[51] There was no means to challenge such an action judicially under New Zealand law. This reasoning appears sound in respect of s 28ZGA(1)(a), which in substance changes the criteria for the allocation of quota, but not in respect of s 28ZGA(1)(b), which is a full ouster clause. The two paragraphs overlap in effect, and on a literal reading either could have been used to dispose of the applicant's claims. Baragwanath J did not distinguish between the different paragraphs of s 28ZGA(1) in allowing the strike-out application, but should be taken to have relied on s 28ZGA(1)(a). As discussed below, different considerations are applicable with regard to the ouster clause.

Regardless of the construction issue, the likelihood of the court accepting the argument of the plaintiffs and granting the relief sought, a declaration that the amending legislation was of no effect, was minimal. As recently stated by Forsyth, a judge striking down legislation by reference to its merits was repugnant to the principle of parliamentary sovereignty and "would cast the judiciary into a maelstrom from which it would not emerge unscathed."[52] As to the amending Act's retrospective effect, Baragwanath J held that very

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[51] Above n 42, 4.

[52] C Forsyth "Of Fig Leaves and Fairy-Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament, and Judicial Review" (1996) 55 CLJ 122, 139.

clear construction would be required for an Act to be given such effect, but that in the present case such a conclusion was inescapable.[53] Section 28ZGA was given effect to its full tenor, which resulted in the claims of the applicants being struck out.

The amending legislation also added s 28I(4) to the original Act, a time-limited ouster clause which requires applications for review of QAA decisions to be issued within 3 months of the parties notification of the QAA decision. Of more concern is s 28ZGA(1)(b), the full ouster clause set out above and repeated here for ease of reference:

> (b) No court or tribunal shall, in respect of any proceedings whatever filed on or after the 16th day of September 1992, review, quash, or call into question-
>
> (I) Any decision of the Director-General made before that date under section 28E(3) of this Act; or
>
> (ii) Any decision of the Quota Appeal Authority made under or in respect of section 28I of this Act insofar as the decision relates to any decision of the Director-General under section 28E(3) of this Act:

The original form of the amending clause was:[54]

> (b) No court shall, in respect of any proceedings filed on or after the 16th day of September 1992, review, quash, or call into question any decision of the Director-General made before or on or after that date under section 28E of this Act.

This provision was examined in Parliament by the Attorney-General, who considered it to be a prima facie breach of s 27(2) New Zealand Bill of Rights Act 1990. He recommended that it be amended so as not to preclude review of decisions made after the judgment in *Jenssen*, in order to justify it as a reasonable limitation pursuant to s 5 of that Act.[55] The amendment as

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[53] Relying on *L'Office Cherifen Des Phosphates & Another v Yamashita Shinnion Steamship Co Ltd* [1994] 1 AC 486, 524.

[54] Finance Bill (No. 6) 1992, amendments contained in Supplementary Order Paper No. 165, 19 November 1992.

[55] Hon Paul East, Attorney-General, (1992) 531 NZPD 12534-12535.

eventually passed was substituted following a brief select committee hearing which was roundly criticised for its procedure by members of the House.[56] It was not further discussed in the Parliament, and was passed in its current form on 8 December 1992. In his judgment in *Cooper* Baragwanath J noted that "[t]he [B]ill was amended as the Attorney proposed."[57] Whether the amendment actually addressed the problem with which the Attorney-General was concerned is questionable. Subsection (1)(b)(ii) is not limited in time; it purports to remove the right to review any decision of the QAA relating to s 28E(3) of the Act, regardless of when the decision was made. In the light of the decisions discussed in the previous section, it will be obvious how central s 28E(3) has been in fishers' challenges to determinations of the Director-General. The removal of the right to review such determinations on the ground of "commitment and dependence" deprives litigants of the fundamental basis for judicial review in this context. The Attorney-General was concerned that the proposed amendment was not a justified limitation of the right to apply for judicial review affirmed in s 27(2) of the New Zealand Bill of Rights Act 1990. The amendment as passed is open to the same criticism as the original, representing an infringement upon the right to judicial review which, although limited to impact upon only one subsection of the Act, will have a dramatic practical effect on the utility of judicial review in this area.

Section 28ZGA(1)(b)(ii) is a privative clause, attempting to oust the jurisdiction of the High Court to consider issues of law. The modern approach to such clauses in New Zealand relies heavily upon the intention of Parliament in enacting the particular provision.[58] As Cooke P stated in the leading New Zealand case, *Bulk Gas Users Group v Attorney-General*,[59] an administrative tribunal can be empowered to conclusively determine questions of law. This empowerment must be clearly given, and there is a presumption against

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[56] For example, (1992) 532 NZPD 12689, 12694, 13088.

[57] Above n 42, 19.

[58] As compared with the earlier "jurisdictional" approach typified by the judgment of Lord Reid in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[59] [1983] NZLR 129.

Parliament derogating from the general courts' function of interpreting legislation.[60]

That Parliamentary debates may be used as an aid to the interpretation of statutes in case of ambiguity is now well established.[61] In the present situation, the debates show that the provision as originally introduced was held not to be a justified limit of the right in s 27(2) New Zealand Bill of Rights Act 1990, in preventing judicial review without any time limitation. The provision was amended, but without removing the mischief identified by the Attorney-General. Given the traditional reluctance of the courts to give effect to privative clauses,[62] coupled with the weight to be given to s 27(2) New Zealand Bill of Rights Act 1990, it may be arguable that s 28ZGA(1)(b)(ii) should be read down to include a time limitation as proposed by the Attorney-General.[63] As yet the subsection has not been interpreted by any court. If given effect to its full tenor it will, in practice, allow the QAA to make conclusive determinations in the vast majority of cases. In any event, the effect of the amendment will be that determinations will be more mechanical, with the factors of "commitment and dependence" being supplementary rather than grounds for allocation in their own right. As will be obvious from the previous section, these grounds provided the basis for the challenge of the QAA's determinations in virtually all cases. The amendment has provided administrative certainty at the cost of individual fairness.

Cooper was a test case in the truest sense of the phrase. As a striking out application involving clear statutory terms, the issues could have been resolved shortly. However, Baragwanath J recognised the importance of the

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[60] Above n 59, 136. Cooke P was strongly influenced by the approach of Lord Diplock in *Re Racal Communications* [1981] AC 374 and *O'Reilly v Mackman* [1983] 2 AC 237.

[61] See J Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 136-140; *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264, 293, 338-339; *Pepper v Hart* [1993] AC 593.

[62] See Wade, above n 9, 729.

[63] The problem may lie in finding an ambiguity in the section, in order to justify the inclusion of the Parliamentary debates as an aid to interpretation. A counter argument is that by ignoring the Attorney-General's advice, Parliament implicitly accepted that the New Zealand Bill of Rights Act 1990 should be breached.

judgment as a means of explaining to the litigants how Parliament had exercised its sovereignty in removing their rights, and issued a fully reasoned judgment to this effect.[64] Judicial review provided an opportunity for the final definition of the respective rights and obligations of the parties. There is a clear analogy to be drawn between this decision and that in the cases involving the implementation of the Maori fisheries settlement:[65] the real difficulties are factual, social, and political. The administrative law issues are separate, stemming from statutory interpretation, but must be seen in this wider context.

IV THE CHALLENGE TO SUBORDINATE LEGISLATION

While the Fisheries Act 1983 provides the framework for the regulation of the New Zealand fishing industry, much of the substance is provided by subordinate legislation. Over 30 sets of principal Regulations and Notices, and their amendments, govern matters such as the physical boundaries of QMAs, seasonal and other types of restrictions, reporting and record-keeping requirements, and other matters incidental to the industry. As such, they contain the most important restrictions upon fishers' daily activities, and are also of interest to others such as environmental pressure groups. Due to the prevalence of such regulations and their import for the industry, it is unsurprising that litigants have challenged their validity on a number of occasions.

One of the fundamental roles of judicial review is as a tool to prevent the abuse or misuse of administrative power. As Wade states, "It is axiomatic that delegated legislation in no way partakes of the immunity which Acts of Parliament enjoy from challenge in the courts, for there is a fundamental difference between a sovereign and a subordinate law-making power."[66] Nevertheless, Parliament may legislate to make challenges to the substance of subordinate legislation very difficult. This is commonly achieved by granting

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[64] Above n 42, 7.

[65] Below, Part VI.

[66] Wade, above n 9, 875. See also P P P P Craig *Administrative Law* (2 ed, Sweet & Maxwell, London, 1989) 186-188.

extremely wide powers to make Regulations pursuant to the empowering Act, rather than by clauses attempting to oust the jurisdiction of the courts.[67] The Fisheries Act 1983 is no exception. Section 89 of the Act provides that regulations may be made for the purposes of "Generally regulating fishing in New Zealand and New Zealand fisheries waters"[68], and goes on to provide a list of specific subject areas which may be subject to regulation.[69] Regulations and Orders made under this provision have been challenged on substantive and procedural grounds, both by way of originating application and collateral challenge. The decisions are considered below.

A Substantive Challenges

The phrase "substantive challenges" is used herein to describe challenges to the content of regulations on administrative law grounds. The plaintiffs in *Sanford (South Island) v Mole & Others*[70] sought a declaration that r 4B Fisheries (South East Area Commercial Fishing) Regulations 1988 Amendment No. 3 was made ultra vires the Fisheries Act 1983. This amounted to a substantive challenge to the regulations in the sense that the plaintiffs argued that the substance of the disputed provision was outside the powers to regulate conferred by the Act. The effect of the regulation was to ban trawlers of over 23 metres in length from fishing in a certain area off Banks Peninsula for 2 ½ months per year. This measure, designed to protect salmon returning to spawn, prevented the plaintiffs targeting red cod and barracuda in the area at the height of the season. McGechan J noted the wide ambit of the power to regulate contained in s 89, but held that this right must be reconciled with the

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[67] Wade, above n 9, 888.

[68] Section 89(1)(a).

[69] Section 89(1)(b)-89(1)(n).

[70] *Sanford (South Island) v Moyle & Others* Unreported, 10 November 1989, High Court, Wellington Registry, CP 3/89.

requirements of the QMS and the rights conferred upon quota holders.[71] The power to "regulate" contained in s 89 did not necessarily bestow the power to prohibit.[72] In particular, s 28B(5) expressed that no area could be removed from a QMA except by Act of Parliament. Although fishing permits issued under the Act were to be exercised in accordance with conditions and limits imposed (s 28ZA(3)), McGechan J held that "... regulations cannot be made under s 89 which go so far as to render *ineffective* rights conferred under the QMS by ITQ holders."[73] However, the present regulation, limited as it was in time, area, and class of fishers affected, did not fall outside the right to regulate conferred by s 89(1)(a). The decision in *Sanford* shows that the courts will be willing to impose restrictions upon regulations made under s 89 in some circumstances, but emphasises the difficulties a litigant will face in convincing a judge to do so. The question of what would need to be contained within regulations to render an applicant's ITQ rights "ineffective" in terms of McGechan J's judgment remains open, but it is obvious that the threshold will be a high one. As recognised by Robertson J in *Leigh Fishermans Association Inc v Minister of Fisheries*[74], s 89 is an "extraordinarily wide" provision, which will plainly authorise the vast majority of regulation in this area. A successful claim that Regulations were made ultra vires this section, it is submitted, will be immensely difficult to fulfil.

Gallagher v Attorney-General[75] included a challenge to the substance of the Fisheries (Commercial Fishing) Regulations 1986, Amendment No 2. Ellis J heard argument on the issue of whether the content of the Regulations could be reviewed on the grounds of unreasonableness, although there was ample

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[71] Above n 70, 7, 8.

[72] Above n 70, 6.

[73] Above n 70, 9 (emphasis added).

[74] *Leigh Fishermans Association Inc v Minister of Fisheries* Unreported, 15 December 1995, High Court, Wellington Registry, CP 266/95, 3.

[75] *Gallagher v Attorney-General* Unreported, 28 July 1988, High Court, Wellington Registry, CP 402/88.

authority at the time against this proposition.[76] Although he found that the case before him was not an appropriate one for the Court to do so, he saw the possibility of the Court reviewing the substance of regulations on grounds of unreasonableness as "attractive in a general way".[77] That regulations could be successfully challenged on the ground of unreasonableness was accepted by McGechan J in *Turners & Growers Exports Ltd v Moyle*, where he stated that "In principle ... regulations can be challenged as ultra vires an empowering statute if the regulations are so unreasonable that their making would not have been contemplated by parliament as empowered by that statute."[78] McGechan J emphasised the extremely high threshold of unreasonableness that would be required to invalidate regulations as ultra vires.[79] The unequivocal recognition of unreasonableness as a ground for the review of regulations represents a significant advance from the earlier position in New Zealand, and vindicates the stance taken in de Smith: that there is no basis in principle for precluding review on such grounds.[80] In the context of the fishing industry, unreasonableness of regulations was again argued in *Leigh Fishermans Association Inc v Minister of Fisheries*.[81] Robertson J granted an interim order restraining the Crown from taking any actions for breach of the Regulations on the basis of what he saw as the main issue - breach of a duty of consultation. He left the questions of

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[76] Eg *Carrol v Attorney-General* [1933] NZLR 1461; *Kerridge v Gurling Butcher* [1933] NZLR 646; *Cossens & Black v Prebble* Unreported, 11 August 1987, High Court, Wellington Registry, A 318/84, 5. Compare this with the English approach to Bylaws, which have long been reviewable on grounds of unreasonableness, eg *Kruse v Johnson* [1898] 2 QB 91; *Arlidge v Islington Corporation* [1909] 2 KB 127. See P Walker "Irrationality and Proportionality" in M Supperstone and J Goudie (eds) *Judicial Review* (Butterworths, London, 1992) 119, 120, 132-134.

[77] Above n 75, 27.

[78] *Turners & Growers Exports Ltd v Moyle* Unreported, 15 December 1988, High Court, Wellington Registry, CP 720/88, 49.

[79] Above n 78, 53-54, citing Cooke P in *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131-132.

[80] S A de Smith (J Evans, ed) *Judicial Review of Administrative Action* (4 ed, Stevens & Sons Ltd, London, 1980) 354-355.

[81] *Leigh*, above n 74, 2-5.

alleged unreasonableness, irrelevant considerations, and improper purposes open for resolution in a substantive hearing.

B Procedural Grounds

"Procedural grounds" is taken to mean errors in the administrative process leading up to the issue of Regulations, including breaches of any natural justice or legitimate expectation rights, and failure of the consultative process. The challenge to subordinate fisheries legislation on procedural grounds has been more successful than on substantive grounds such as unreasonableness. The nature of these challenges is such that the statements of claim often allege errors of both substance and procedure, leading to an overlap with the cases considered in the previous section. Applications for review of decisions made under, or subordinate legislation authorised by, the Fisheries Act 1983 have been at the leading edge of this aspect of administrative law in New Zealand over the last decade.

1 Natural justice and common law consultation

There is no general right to natural justice in respect of the making of subordinate legislation. Nevertheless, a duty to consult may be imposed upon a decision maker due to the past practice and conduct of that person, any promise of consultation made, and through the implicit meaning or express wording of a statute.[82] As Taylor states, "The long standing practice of consulting interest groups in the development of subordinate legislation makes application of a legal duty to consult almost inevitable."[83] Difficulties may arise concerning which interest groups should be granted the legal right to be consulted, and in considering whether consultation or adequate consultation actually took place.

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[82] Taylor, above n 25, 13.59-13.61. See also Wade, above n 9, 897.

[83] Taylor, above n 25, 13.63.

In *Fowler & Rodrique Ltd v Attorney-General*,[84] the applicant fishing company sought a declaration that the Controlled Fisheries (Fouveaux Strait Dredge Oyster Fishery) Notice 1979 was invalid insofar as it fixed the maximum number of licences for that fishery at 23.[85] The background to the proceedings was complex, revolving around the attempts of the applicants to procure a permit to dredge for oysters in an area ("H, K, & L") outside that defined as a special area by s 10A Fisheries Act 1908. This permit was eventually issued in March 1979, 4 years after the original application was made. On the same day all vessels licensed to fish in the special area had their permits extended to include areas H, K & L, while the applicant's vessel was limited to the latter area. In November 1979 s 10A was repealed, and both areas were declared to be a controlled area pursuant to the Regulation challenged. Licences for the fishery were limited to 23, with the Minister issuing a policy directive that only vessels currently authorised to fish in both areas should be issued the permits. The applicants brought review proceedings, based mainly upon an alleged breach of the requirements of natural justice, which were dismissed in the High Court by Cook J. The principal judgment in the Court of Appeal was delivered by Somers J, who outlined in detail the history of the legislation and the convoluted dealings between the applicants and the Ministry.[86] His Honour emphasised that there was no general obligation upon the Minister to call for submissions when exercising his powers under the Act, but that circumstances may dictate an individual should be given the opportunity to be heard. He stated:[87]

> If the exercise of the power is likely to affect the interests of an individual in a way that is significantly different from the way in which it is likely to affect the interests of the public generally, the person exercising the power will normally be expected to have regard to the rights of the individual before it is exercised. Where a person having no

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[84] [1987] 2 NZLR 56.

[85] Above n 84, 59.

[86] Above n 84, 59-69.

[87] Above n 84, 74.

> legal right to the renewal of the licence or permit has a reasonable and legitimate expectation of renewal the Court will normally intervene to protect that expectation by judicial review.

The circumstances of the case were such that the applicants should have been afforded the natural justice rights to make submissions or to be heard in the process leading up to the issue of licences.[88] Nevertheless, the Court of Appeal exercised its discretion in refusing to make a declaration of invalidity. By the time of judgment the notice restricting the number of licences in the fishery had been revoked, and the Fisheries Act 1908 replaced by the 1983 Act, as amended in 1986. As Somers J stated, a declaration would "achieve nothing other than a peg upon which to hang costs."[89]

Similar reasoning was applied in *Gallagher v Attorney-General*,[90] where Regulations changing the method of lobster measurement were promulgated. The plaintiff was a representative of southern fishers, who statistics showed would be more adversely affected by the changed system than other fishers throughout the country. Ellis J held that the group had a legitimate expectation that they would be consulted before the current, long-standing, system was changed. Looking at the situation on the whole, however, and with particular regard to the urgency of introducing the new system, the applicants were held to have been given sufficient opportunity to make submissions, and no remedy was granted.[91]

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[88] Above n 84, 74 (per Somers J), 78 (per Casey J). See S France "Legitimate Expectations in New Zealand" (1990) 14 NZULR 123, 140.

[89] Above n 84, 74.

[90] Above n 75.

[91] Above n 75, 29.

The duty of consultation at common law[92] was also in issue in *Leigh Fishermans Association Inc*,[93] an application for an interim injunction under s 8 Judicature Amendment Act 1972 restraining the Crown from instituting any proceedings for breaches of r 4(f)(1) Fisheries (Auckland and Kermadec Areas Commercial Fishing) Regulations 1986, as amended. The threshold issues of whether there was a duty to consult at all, and with this party, were established by the conduct of the Ministry. In that case the Ministry confirmed that it intended to consult with the applicant, but arguably did not carry out this process adequately. A prima facie case of such failure to consult adequately was held to be a sufficient ground to support the issue of an interim injunction.[94]

2 Statutory submissions or consultation

The other source of a consultation requirement, howsoever limited, is the Fisheries Act 1983 itself. Various decisions made under the Act contain an express requirement for the making of submissions or consultation, which obviously becomes a mandatory consideration for the Minister in the decision-making process.[95] Such a requirement is limited by the terms of the statute.

New Zealand Fishing Industry Association v Ministry of Agriculture and Fisheries[96] concerned the validity of the Fisheries (Resource Rentals Variation) Order 1987, which increased total resource rental payable by fishers. This variation had been authorised by s 107G, subsection 6 of which required the Minister to invite submissions from the applicant and others. Cooke P, adopting

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[92] For discussion of the concept of consultation see *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671.

[93] Above n 74.

[94] Above n 74, 8-9.

[95] See the provisions listed in *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53, 62.

[96] [1988] 1 NZLR 544 ("*NZFIA*"). This case is better known for the comments of Cooke P regarding mistake of fact as a ground of review; see T Jones "Mistake of Fact in Administrative Law" [1990] PL 507.

in part the judgment of McGechan J in the High Court, noted that the right to make submissions was narrower than that of consultation. The statutory duty to "have regard to" such submissions was satisfied by giving them genuine attention and thought. Due to the scheme of s 107G, and the originating policy content of the decision, this did not even require a completely open mind on the part of the Minister. This was qualified by the statement that "A considered predilection is not to become predetermination."[97]

Greenpeace New Zealand Inc v Minister of Fisheries[98] involved a challenge to the TACC set under s 28D of the Act. This contained a duty of consultation more in line with that at common law, requiring the Minister to consult with the Fishing Industry Board and such other interested parties as was seen fit before any recommendation or decision was made. However, the consultation in that case was seen to be genuine and the decision could not be impugned for failure in the consultative process.[99]

C Collateral Challenge

As well as originating applications, the validity of Fisheries Regulations has been questioned by way of collateral challenge. The label "collateral challenge", according to Wade, "appl[ies] to proceedings which are not themselves designed to impeach the validity of some administrative act or order."[100] In *MAF v Caldwell*,[101] the defendant was charged with being in possession of Rock Lobsters that were carrying external eggs, in breach of cl 13(a) Fisheries (Fish Species Restrictions) Notice 1983. The District Court Judge held that the charge was proved, but on the defendant's request deferred

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[97] Above n 96, 551.

[98] Unreported, 27 November 1995, High Court, Wellington Registry, CP 492/93.

[99] Above n 98, 17.

[100] Wade, above n 9, 321.

[101] *Ministry of Agriculture and Fisheries v Caldwell* Unreported, 27 March 1988, High Court, Christchurch Registry M 505/85.

entering the conviction and stated a case to the High Court questioning the validity of the Regulations. The notice was held to be intra vires s 89 Fisheries Act 1983, with Holland J stating that to hold otherwise would involve a very narrow or restricted interpretation of the provision.[102] Taking the same generous approach, and relying on ss 28(2) and 28(3) Evidence Act 1908, he held that certain irregularities in the publication of the notice did not affect its validity.[103] Accordingly, the case stated affirmed the validity, and the matter was referred back to the District Court for the entry of a conviction.

D Regulations under the Fisheries Act 1996

The Fisheries Bill, as originally introduced, contained an empowering provision as wide and general as that in s 89(1)(a) Fisheries Act 1983. The Regulations Review Committee was of the opinion that this regulation-making power was too broad,[104] and it was accordingly broken down into specifics.[105] These specifics, when read together, provide such wide coverage of aspects of the fishing industry likely to be subject to regulation that it is hard to accept that the powers conferred are actually any narrower in substance. The move from general to specific drafting is unlikely to make applications for judicial review on the ground that the Minister was acting outside the ambit of the Act any more likely to succeed.

The Act also contains a specific provision entitling regulations to be made prescribing transitional and saving provisions relating to its coming into force, which may be in addition to or in place of any of the current transitional provisions.[106] This has the effect of allowing Regulations to amend, add to, or

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[102] Above n 101, 6.

[103] Above n 101, 7-9.

[104] Report of the Primary Production Committee on the Fisheries Bill, xxxvi.

[105] Section 297(1)(a). Other specific regulation making powers are conferred by ss 297(1)(b)-(y), 297(2), 298, 299, and 354.

[106] Section 354. This power expires on 30 September 2000, or sooner if provided by Order in Council.

repeal primary legislation.[107] Judicial review of such Regulations is available on the normal grounds.

E Conclusion

1 Substantive challenges

The cases have shown that substantive challenges to Fisheries Regulations are possible, but are seriously restricted by the width of s 89, the empowering provision, and the consistently generous approach given to this by the courts. Unreasonableness has also been established as a ground of challenge, although this may be of more theoretical than practical benefit. These grounds overlap: it is unlikely that a regulation would be struck down as unreasonable if it was within the power conferred by s 89.

2 Procedural challenges

The common law duty of consultation appears to be a more efficacious means of challenging the validity of regulations than similar statutory obligations imposed under the Fisheries Act 1983. The duty of consultation may be imposed upon a decision maker due to the legitimate expectation of an individual arising because of special circumstances, such as in *Fowler & Rodrique*,[108] with the corresponding focus on the rights of the individual. While the distinction may be a fine one, a decision such as that made under s 107G in the *NZFIA* case, is more likely to fall within the realms of pure ministerial policy making. That section, in particular, allowed the Minister to develop a policy or strategy before the duty to call for submissions arose. Cooke P stated in that case: "As this case should demonstrate yet again, the courts recognise

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[107] Above n 104, xxxviii. This is an example of a "Henry VIII clause", which Wade sees as tolerable due to the intricacy of modern legislation. See Wade, above n 9, 863-865.

[108] Above n 84.

that they should not trespass into the legitimate policy making sphere of Ministers."[109]

Common law consultation arises in the process because of the effect a ministerial decision will have upon an individual,[110] while that imposed by statute arises by process, regardless of what the effect will be. Particularly at the interim stage, the courts have been concerned with the effect on the litigants of a decision. In considering an application for an injunction, the Court will be more likely to find that the balance of convenience favours the applicants if they can show actual negative effects that will flow from the decision under scrutiny.

The discretionary nature of administrative law remedies has been an important influence in this area of the fishing industry. The courts have been more willing to find a breach of the applicants rights than to actually award a remedy. In acting thus, the courts have been influenced by essentially practical considerations.[111]

V OTHER ADMINISTRATIVE POWER: THE FORFEITURE REGIMES

An important aspect of the Fisheries Act 1983 is its use of forfeiture provisions to penalise violations of the Act. These provisions vary in content depending upon the mischief they are aimed at preventing. On conviction of a quota management offence or an offence relating to returns and records, any property used in respect of the offending, fish or proceeds thereof received, and any quota held by the offender at the time of the offence, is forfeit to the Crown. The Court retains a discretion to order otherwise "for special reasons relating to the offence."[112] For less major offences the regime is relaxed somewhat: for

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[109] Above n 96, 554.

[110] This effect may have led to the original practice of consultation, which in turn may give rise to the duty, or may be sufficient in itself to raise "special circumstances".

[111] In *Fowler & Rodrique*, above n 84, for example, the law had subsequently changed to render any declaration or injunction meaningless. See *Gallagher*, above n 75, where a natural justice right was held to be outweighed by the urgency of the regulation.

[112] Section 107B(2).

unspecified offences punishable by a fine of over $5 000 the Court has a discretion as to whether to order the forfeiture of quota, and where the maximum fine is under $5 000, quota is not forfeit.[113] On application, the Minister may order the release of forfeited property to those interested, and may order payment for release of up to the property's market value.[114] Forfeiture is also the result of the breach of the foreign control and anti-aggregation provisions of the Act. This may be remedied, on the Minister's discretion, by an order under s 28U. This section examines the availability of judicial review as a means of challenging forfeiture under the Fisheries Act.

A General Breaches of the Act

Conviction for a quota management offence or a returns and records offence leads to forfeiture of quota, fish and proceeds thereof, and property used in committing the offence. This occurs by automatic operation of law; it does not involve the exercise of any form of decision-making power, and is not subject to judicial review. More interesting is the issue of the court's discretion to waive forfeiture "for special reasons relating to the offence."[115] The refusal of a District Court Judge to exercise this discretion has been held not to be subject to appeal, as it does not involve the court in making an "order".[116] As Taylor states, judicial review will not often be entertained in respect of decisions of inferior courts. It is a matter for the discretion of the superior court, and may be considered more appropriate if third party rights are at stake.[117] Third party

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[113] In both cases fish and proceeds remain forfeit, along with property in some circumstances: See s 107C(3), (4).

[114] Section 107C(2).

[115] For the meaning imputed to this phrase, contained in s 107B, see *MAF v Schofield* [1990] 1 NZLR 210.

[116] *Hare v Ministry of Agriculture and Fisheries* Unreported, 17 December 1991, High Court, Wellington Registry, AP 12/91, 10. See M Briggs "Mistake of Law and Mitigation: Forfeiture under the Fisheries Act 1983" [1996] NZLJ 145.

[117] Taylor, above n 25, 1.27.

rights may be at stake in cases such as those presently under consideration, although it has been held that the rights of innocent part owners of forfeited property cannot be considered as "special reasons" under s 107B(2).[118] The lack of an appeal right alone may be seen as justifying the High Court in hearing a judicial review application under this section, but such an application does not appear to have been made thus far.

The question of whether such a decision is reviewable becomes less of a concern when the alternative procedure for the recovery of forfeited assets is considered. Under s 107C(2) any party having a legal or equitable interest in forfeited property may apply to the Minister for its release. With regard to forfeited property, with the exception of quota, the Minister's discretion to release it is not fettered by the statute. Section 107C(3) sets out a list of mandatory considerations to be given regard by the Minister in deciding whether to release forfeited quota. In performing this function, the Minister is undoubtedly exercising a statutory power of decision, reviewable under the Judicature Amendment Act 1972. In *Roach v Kidd*, the applicants had been convicted of offences against the Fisheries Act, had forfeited property and quota, and had applied to the Minister for their return.[119] The Minister refused to return either, and his decision not to exercise his power to do so was challenged by the applicants.[120] The grounds for review claimed were that the Minister had acted unreasonably and on errors of law and fact in coming to his decision.[121]

A preliminary point was the Minister's use of the matters set out in s 107C(3). These were mandatory considerations in relation to quota, and he expressed that they were used as a "useful checklist" in relation to the other property forfeited. Without deciding, McGechan J was of the opinion that considerations in respect of other property, upon which the statute was silent,

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[118] *Basile v Atwill* [1995] 2 NZLR 537, 539. Third party rights can be considered under s 107C(2).

[119] Unreported, 12 October 92, High Court, Wellington Registry, CP 715/91.

[120] The Minister set out his grounds for refusal in full: see above n 119, 9-11.

[121] Above n 119, 13.

would be wider than these specifics.[122] This seems a sensible approach from an administrative law standpoint; failure to consider wider relevant factors than those expressed in the subsection may lead to review on grounds of error of law.

McGechan J accepted that mistake of fact was available as a ground for review in situations such as the present, quoting Cooke P in *NZFIA,*[123] where he stated "... the failure to consider statutory criteria extends to facts so plainly relevant to those criteria that Parliament would have intended them to have been taken into account and a reasonable Minister would not fail to do so."[124] However, the applicants argument, that the Minister acted under a mistake of fact in treating Rig as a "stressed species" in coming to his conclusion, failed to convince McGechan J. The main error of law alleged was that the reference to "previous offending history" in s 107C(3) related only to previous convictions, and that the Minister had interpreted this wrongly. It was held that the phrase included convictions, but also offences which could be clearly established to have occurred, while not having lead to conviction.[125] Accordingly, this ground of review also failed.

Section 107C(3) states that the Minister may give such weight as he sees fit to the matters set out therein. One of the factors to be considered is the "social and economic effects on the person who held the quota."[126] In the present case the Minister evaluated these consequences for the applicants as "drastic", but then stated that "those impacts should have been foreseen" and gave the consequences little or no weight in coming to his decision.[127] It was held that the failure to give the factors more than minimal weight was an approach not open at law, and rendered the decision unreasonable.

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[122] Above n 119, 11.

[123] Above n 96, 552.

[124] Above n 119, 17.

[125] Above n 119, 24, 26-27.

[126] Section 107C(3)(g).

[127] Above n 119, 31.

In coming to this decision, McGechan J read in the requirement that the weight given to these factors must be "within the limits of reason."[128] This phrase, in this context, originates from Cooke P in *NZFIA*,[129] where the statute was silent on the question of the weight to be given to the factors set out in s107G(7) (a)-(e). An attack on the weight attached by a decision maker to a relevant consideration is a somewhat controversial ground of review.[130] McGechan J's approach in the present case would, practically, include insufficient weight as a factor leading to unreasonableness rather than as a ground of review in its own right. Taylor criticises this type of approach, preferring to keep weight as a discrete ground of review, applying the narrower test of "effectively no weight" being placed on the relevant consideration.[131]

B Breaches of the Foreign Control Restrictions

Forfeiture by automatic operation of law also occurs where a quota holder breaches the foreign control restrictions contained in the Act. This takes place when a quota holder becomes subject to greater than 25% control from a person or body corporate not ordinarily resident in New Zealand, and fails to dispose of the quota within 3 months of this occurring.[132] The Director-General may permit the acquisition or continued holding of quota by persons otherwise prohibited, and also retains a broad discretion to transfer quota to any person that he/she sees fit.

Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries[133] arose from changes in the share holding in Carter Holt Harvey, owners of the Sealord group of companies, which took the fisheries companies

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[128] Above n 119, 31.

[129] Above n 105, 31.

[130] Taylor, above n 25, 14.31.

[131] Above n 130.

[132] Section 28Z(1), (2), (3), (8), (11).

[133] [1993] 2 NZLR 53.

over the proscribed foreign holding threshold. This came to the attention of the Director-General more than 3 months after the changes had taken place, and he entered into a deed with Sealords purporting to grant them permission to continue to hold quota pursuant to s 28Z(9) or, alternatively, if the quota was held to have been forfeited, retransferring it under s 28U.[134] These decisions of the Director-General were challenged by the applicants. It was held that forfeiture was automatic upon the expiry of the 3 month period, and that this could not be remedied by a retrospective extension of time. However, the Director-General had evidently been advised of this possibility, and the alternative retransfer of quota under s 28U was effective.[135] Although effective in law, this decision was further challenged on the grounds that it was made under a mistake of fact, that there was a legitimate expectation of consultation, and that it was unreasonable in acting contrary to the purposes and spirit of the Act. None of these grounds were accepted by the court, in a decision notable as a further example of judicial restraint from interfering with executive policy making.[136] As Cooke P noted, "National economic considerations being involved, it is obvious that no Court would find such a decision unreasonable except on very strong grounds."[137]

The same provision was in issue in *Director-General of Agriculture and Fisheries v Saragossa Holdings Ltd*,[138] although in a different context. The respondents had sold quota to Australians, masked by the use of a company issuing "unit licences" to complete the transactions, and were held in the District Court to have breached s 28Z Fisheries Act. The judge did not enter convictions immediately, on the grounds that there may be alternative options for resolution, prompted by the fact that forfeiture under s 107B(2) would automatically follow conviction. Before the judge could make further orders, the respondents were

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[134] Above n 133, 57.

[135] Above n 133, 60-61.

[136] Another example in this area is the *NZFIA* case, above n 96.

[137] Above n 133, 62.

[138] Unreported, 9 December 1994, Court of Appeal, CA 4/94.

informed that their quota had been forfeited under s 28Z(11). Following this, the respondents were discharged without conviction under s 19 Criminal Justice Act 1985.[139] The respondents sought relief from this forfeiture by way of judicial review, upon which application Ellis J granted an interim order that the quota be deemed registered in the name of the respondents pending the resolution of substantive proceedings.[140] The Crown appealed.

The Court of Appeal distinguished between the actual forfeiture of quota and the Director-General's duty to record transfers in the register established by s 28P. It was held that the duty to record the transfer may not be a "statutory power of decision" as defined in s 3 Judicature Amendment Act 1972, but was at least a statutory power within the meaning of s 4(1) of that Act. The exercise of the power to alter the register was therefore reviewable, and the High Court did have jurisdiction to provide interim relief. Further, it was held that "The registration is inseverable from the underlying quota, and to be effective the interim injunction must extend to the later also."[141] The court's reasoning was further buttressed by its reference to s 27(2) New Zealand Bill of Rights Act 1990: the DIrector-General's action under s 28P was seen as a "determination" as referred to in that subsection, on the generous construction to be given to that statute. [142]

On the merits, the injunction was to be maintained. In the Court's view, the decisive factor was the Ministry's procedure in pursuing the claim. The Ministry had elected to prosecute the applicants under a quota management offence, rather than rely upon automatic forfeiture. It was stated by the court that "If the Ministry does elect the course of a prosecution, we think that to make the Act work as Parliament must have intended the question of forfeiture must be treated as submitted to the Court."[143] The forfeiture regimes under

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[139] Above n 138, 3-9.

[140] Above n 138, 2.

[141] Above n 138, 12.

[142] Above n 138, 12.

[143] Above n 138, 16.

these provisions were different: the effect of s 28Z could be ameliorated by a decision of the Director-General under that section, while the court had similar powers under s 107B. It was held that the scheme of the legislation was such that the more general s 107B(2) took precedence over s 28Z in the case of any conflict.

C Forfeiture under the Fisheries Act 1996

The general forfeiture provisions under the 1996 Act are similar to those currently in place, linking the level of forfeiture with the seriousness of the offence. Section 255 operates in the same manner as s 107B(2) of the 1983 Act; forfeiture follows conviction by operation of law, unless the court sees fit to order otherwise for special reasons relating to the offence. A person whose property is forfeit may apply to the High Court, rather than the Minister, for its release. The court is bound to take a list of factors into account, similar to that in 107C(3), in relation to both quota and property. This avoids the uncertainty as to the extent of mandatory considerations that occurred in *Roach*,[144] although the transfer of the decision-making power from the Minister to the court removes the determination from the ambit of judicial review in any event.

The forfeiture regime for breaches of the foreign holding provisions have been made more certain under the new Act. If the Chief Executive believes on reasonable grounds that the provision has been breached, he may direct that a caveat be lodged against the alleged offender's quota in the register established by Part VIII of the Act.[145] Upon notification, the owner has a specified period of not less than 60 days to apply to the High Court for a declaration that they are not an overseas person within the meaning of the Act. If such application is not made within the limitation period, the interest to which the notice referred is forfeited by operation of law. Where the court declares the person to be an overseas person, and finds that they had actual or constructive knowledge of this and failed to apply for permission to continue to hold quota,

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[144] Above n 119.

[145] This, and the following observations, are taken from s 58.

an order of forfeiture without compensation will be made. In any other case, the court has a discretion whether to order forfeiture or whether to order the overseas person to dispose of their interest. The practical effect of this is that the Ministry has no need to prove a breach of the provision; the onus, and expense, of obtaining a declaration is upon the quota holder. Failure to apply for a declaration leads to automatic forfeiture, without the need for the Ministry to take any formal legal steps. The uncertainty that led to the litigation discussed in Part V B, above, has been removed. However, judicial review may still have a part to play in this area. The Minister's decision to order the issue of a caveat is a statutory one, to be exercised on reasonable grounds, and may be subject to review on the same reasoning as that applied in *Saragossa*.[146]

D Conclusion

The effectiveness of judicial review as a means for challenging forfeiture is restricted by the nature of the forfeiture itself, occurring as it does by operation of law. Nevertheless, the Court of Appeal in *Saragossa* showed its creativity, finding itself able to get around this problem by allowing review of the attached duty to record transfers. This sends a clear signal to the Ministry that the use of forfeiture provisions contained in the 1983 Act will be subject to judicial scrutiny, regardless of the apparent form of the statute. As has been seen, different forfeiture provisions contain different means for ameliorating the harshness of the penalty: the discretion of either the court or the Minister. The Minister's decision is undoubtedly subject to review, while the court's is potentially so.

There has been only limited litigation in this area. A trend that has emerged is that the forfeiture cases to reach the courts have been, to some extent, test cases.[147] These judicial review cases have served to define the duties of the Minister, which offers invaluable guidance for future decisions made under similar provisions. It could be argued that the courts have taken a

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[146] Text accompanying above n 138.

[147] See *Southern Ocean Fisheries Ltd*, above n 133, 56; *Roach v Kidd,* above n 119, 35.

more proactive role than is usual in this area of the industry. *Roach v Kidd* and *Saragossa* give a strong indication of the court's willingness to intervene in this area, and that Ministerial decisions will be carefully scrutinised. The decision in *Saragossa* borders on interfering with Ministerial policy: the practice of issuing informations against an offender, and relying upon a finding of guilt to justify the application of the specific forfeiture provision in s 28Z, was not accepted. However, wider policy directions of the Ministry, such as in *Southern Ocean Trawlers Ltd*, were deferred to. It may be that these decisions have resulted in a higher standard of Ministerial decision making, which would explain the relative dearth of challenges.

VI MAORI AND COMMERCIAL FISHING IN NEW ZEALAND

A Introduction

An examination of the role of judicial review within the New Zealand fishing industry would not be complete without consideration of the issues which have arisen for Maori. The area of fisheries has always been a vital one for Maori, with voluble complaints over legislative interference with their traditional rights continuing since at least 1879.[148] A presumption made in New Zealand's earliest fisheries Act[149] continued in legislation for over a century: "that Maori fishing has no commercial component and grounds reserved must be for personal needs."[150] This came to an end with the enactment of the Maori Fisheries Act in 1989, and subsequently with the landmark Sealord deal between the Crown and Maori in 1992.

This section of the paper outlines the provisions of the deal in its context as a disposition of a significant proportion of the available commercial fishing rights in New Zealand, and considers the continuing problems in its

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[148] *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, Waitangi Tribunal, Department of Justice, Wellington 1988) 222 (`Muriwhenua Report').

[149] Fish Protection Act 1877.

[150] Muriwhenua Report, above n 148, 222.

implementation from an administrative law perspective. The issue of the interface between the principles of the Treaty of Waitangi and Acts of the New Zealand Parliament is one of the most important to ever arise before the courts of this country, but is severable from the administrative law problems which arise.[151] The Treaty issues arising from the Sealord deal are not considered here; although they are of fundamental importance, the questions are more constitutional than administrative, and are outside the scope of this paper. The earlier issues of Maori grievances under the Treaty of Waitangi and the convoluted processes that culminated in the Sealord deal are well covered elsewhere.[152] Further Treaty issues have arisen in the recent cases considered below, but are not focused on here. These involve the question of the meaning of "iwi", including the issue of the entitlement of urban Maori,[153] and whether special consideration should be given to the claims of Chatham Island Maori and Moriori.[154] What is focused on is the role of judicial review in defining the jurisdictions of the various bodies interested in administering the fisheries Settlement.

B The Sealord Deal

The Maori Fisheries Act 1989 established the Maori Fisheries Commission, later renamed as the Treaty of Waitangi Fisheries Commission

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[151] See the landmark case of *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

[152] For comprehensive coverage of these issues see P McHugh "Sealords and Sharks: The Maori Fisheries Agreement 1992" [1992] NZLJ 354; A Waetford "Treaty of Waitangi (Fisheries Claim) Settlement Act 1992" (1993) 7 Auck U L R; M Robinson "The Sealord Fishing Settlement: An International Perspective" (1994) 7 Auck U L R 557; (especially) J Munro "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389. See also *Te Runanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

[153] See *Hauraki Maori Trust Board v Treaty of Waitangi Fisheries Commission* 12 February 1996, High Court, Auckland Registry, CP 562/94, noted in [1996] Maori L R (Feb) 4; *Te Runanga O Muriwhenua v Te Runanganui O Te Ika Assoc Inc* Unreported, 30 April 1996, Court of Appeal, CA 155/95, 165/95, 184/95, 25-29.

[154] *Te Runanga O Muriwhenua*, above n 153, 20-21.

("the Commission").[155] The Commission was transferred, in instalments, 10 percent of existing quota under the QMS, along with $10 000 000.[156] This was to be applied in pursuance of the functions set out in s 5 of the Act, with the general purpose of furthering the development of Maori commercial fishing interests. The Maori Fisheries Act 1989 offered only a temporary solution.[157] The opportunity for final settlement of the fisheries grievances of Maori arose when Sealord Fisheries Ltd, the major player in the New Zealand fishing industry, was put on the market in 1992.[158] After intense negotiations, the Crown and representatives of Maori entered into a Deed of Settlement.[159] This involved the Crown purchasing a half share of Sealords on behalf of Maori, and undertaking to allocate 20 percent of any new quota to Maori. These assets were to be held by the Commission. In return, specified civil proceedings were to be discontinued,[160] and the jurisdiction of the Waitangi Tribunal to hear claims relating to commercial fishing was removed.[161] This deal was legislatively confirmed by the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 ("the Settlement Act").

The effect of the Settlement is that about 36 percent of current quota, and at least 20 percent of all new quota issued, is held by Maori interests.[162] This entitlement is divided into the assets transferred under the Maori Fisheries

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[155] Section 4 Maori Fisheries Act 1989, as amended by s 14 Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

[156] Maori Fisheries Act 1989 ss 40, 45.

[157] Munro, above n 152, 407.

[158] This sale was due to Carter Holt Harvey, the parent company, infringing the foreign control restrictions contained in s 28Z Fisheries Act 1983. See above, Part V.

[159] The Deed is set out in *Te Runanga O Wharekauri Rekohu Inc,* above n 152, 311-321.

[160] Those specifically listed in s 11 Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

[161] Section 40. See *Fisheries Settlement Report* (Waitangi Tribunal Report No 307, Wellington, 1992) 9-10 for a criticism of the Deed's effect on claims under the Treaty of Waitangi.

[162] *Hauraki Maori Trust Board v Waitangi Tribunal* Unreported, 31 July 1995, High Court, Wellington Registry, CP 171/95, CP 154/95, 12.

Act 1989, and those conferred under the Sealord deal. The later deal in particular was controversial, although the chances of a transaction which acted as full and final settlement of all Treaty fisheries claims being met with consensus agreement were minimal. Dissenting Iwi sought relief from the enactment of the Settlement Act finalising the deal. It was held by Cooke P, delivering the judgment of the Court of Appeal, that there was an "established principle of non-interference by the Courts in Parliamentary proceedings",[163] and that accordingly the courts should refrain from prohibiting a Minister from introducing a Bill into Parliament. For the appellants, the proper time for challenging an Act, through any relevant limitations, was after the enactment.[164] As noted above, the Act was passed in December 1992.

C Problems of Allocation.

The Commission has, as one of its statutory functions, the responsibility to develop a procedure for identifying beneficiaries under the Settlement Act and a procedure for allocating the benefits bestowed by the Settlement to such beneficiaries.[165] This is to be achieved in the form of a new Maori Fisheries Act. The model to be used for the allocation of these resources is of fundamental importance to the potential beneficiaries. The proposed mana whenua, mana moana system ("authority over the land carries authority over the sea") is a substantial reason for the split between Maori interest groups. This method of allocation would give coastal Iwi all Maori quota for inshore fishing, and 50 percent of the corresponding deepwater areas. It is contended that it would unfairly disadvantage inland Iwi such as Muriwhenua, while providing an unfair advantage for Iwi with authority over a long stretch of coastline, such as Ngai Tahu.[166] In light of this type of concern several groups of Maori commenced

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[163] *Te Runanga O Wharekauri Rekohu Inc*, above n 152, 307.

[164] *Te Runanga O Wharekauri Rekohu Inc*, above n 152, 308.

[165] Section 6(e) Maori Fisheries Act 1989, as amended by s 15 of the Settlement Act.

[166] See above n 142, 33-34. In *Te Runanga O Muriwhenua v Te Runanganui O Te Ika Assoc Inc*, above n 153, it was stated that the mana whenua, mana moana model would give

proceedings before the Waitangi Tribunal asking it to define how the Commission was to proceed in accordance with the principles of the Treaty. In a contested hearing, the Tribunal held that it had the jurisdiction to make such recommendations, and set down a date for the hearing of the substantive proceedings.[167]

The Waitangi Tribunal was established by the provisions of the Treaty of Waitangi Act 1975. Its jurisdiction to consider claims is conferred by s 6, to which s 6(7) was added by the Settlement Act:

...

(7) Notwithstanding anything in this Act or any other Act or rule of law, on and from the commencement of this subsection the Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding of recommendation in respect of, --

(a) Commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or

(b) The Deed of Settlement between the Crown and Maori dated the 23rd day of September 1992; or

(C) Any enactment to the extent that it relates to such commercial fishing or commercial fisheries.

Section 9(b)-(c) of the Settlement Act provides:

(b) The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights or interests of Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori referred to in paragraph (a) of this section; and

© All claims (current and future) in respect of, or directly or indirectly based on, rights and interests of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

Muriwhenua an average of $203.92 per person, as compared with $4533.24 for Ngai Tahu.

[167] Waitangi Tribunal Report 447, as cited in *Te Runanga O Muriwhenua*, above n 153, 22-23.

In holding that the Tribunal would have the jurisdiction to entertain the applicant's claims, as far as they related to a policy or practice of the Crown,[168] Ellis J relied heavily on the context of the legislation. He stated:[169]

> In my view the principles of the Treaty and the resolve by the Crown and Maori to settle fishing claims once and for all in a spirit of cooperation and good faith must guide the interpretation of the 1992 Act and the amendments made to other Acts affected. ... [It] is for this reason that I prefer [counsel for the third defendants] submissions rather than the more straightforward approach of the plaintiffs.

He saw s 6(7) as preventing any challenge to the Settlement itself, but not precluding an interpretation of the rights and obligations under the Treaty applicable by those administering the Settlement.[170] Such an extreme gloss on the natural meaning of the subsection was seen as justified on the exceptional contextual grounds. Although s 6(7) is not, strictly speaking, an ouster clause, the approach taken by Ellis J in the present case represented a greater move away from Parliament's express intention than that exemplified in cases considering such clauses.[171] However, it was held that in the present situation the applicants' claim to the Tribunal was premature. The "policy" which the Waitangi Tribunal would have jurisdiction to consider would exist at the end of the Commission's deliberations, upon its report to the Minister, but not before. The Tribunal was therefore barred from inquiring into the Commission's processes, and the claim was prevented from continuing.[172]

The applicants in the High Court appealed to the Court of Appeal. The Court, the judgment of which was delivered by Lord Cooke of Thorndon, differed from the decision of Ellis J. The Court also focused on the Deed and the other relevant background to the legislation, but held that as part of the

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[168] In terms of s 6(1)(c) Treaty of Waitangi Act 1975.

[169] Above n 162, 36.

[170] Above n 162, 37.

[171] Eg *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[172] Above n 162, 37, 48.

Settlement between the Crown and Maori, it had been agreed that the Tribunal would have no further jurisdiction over commercial fishing matters.[173] Section 6(7) accurately reflected this:[174]

> There is no need for the Court to be astute to avoid placing on s 6(7) its natural and ordinary meaning. In legal terms it is to be seen more realistically as a demarcation clause than as a privative one. Parliament was establishing what is essentially another body to safeguard Maori interests. The intention reasonably to be inferred is that in the special field the more general Tribunal was no longer to operate by way of considering claims under s 6 of the Treaty of Waitangi Act.

The court also drew a distinction between s 6(7) and s 9(b) of the Settlement Act. Section 9(b) was a "true privative clause", and although it overlapped the subject matter of s 6(7), its effect on High Court proceedings would fall to be interpreted in accordance with *Anisminic* principles.[175] It was accepted that the Commission was subject to judicial review of its determinations, and the court appeared to assume that s 9(b) would not preclude review of such a determination.[176] It also follows that s 9(b) would not prevent review of any consideration by the Tribunal of any Bill referred to it under s 8 Treaty of Waitangi Act 1975.

The Court of Appeal has subsequently granted leave to appeal to the Privy Council; it is likely that the case will be heard in January 1997.[177] It is argued that this appeal is unlikely to succeed, at least in regard to the jurisdictional issues that have been considered herein. Both the High Court and the Court of Appeal considered the legislation with particular reference to its contextual background, as was their duty. The Court of Appeal felt that it was

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[173] *Te Runanga O Muriwhenua*, above n 153, 22; *Fisheries Settlement Report,* WTR 307, above n 161, 1.

[174] *Te Runanaga O Muriwhenua*, above n 153, 23.

[175] *Te Runanga O Muriwhenua*, above n 153, 24.

[176] *Te Runanga O Muriwhenua*, above n 153, 25.

[177] *Te Runanga O Muriwhenua & Ors v Te Runanganui O Te Upuko O Te Ika Assoc Inc & Ors* Unreported, 26 June 1996, Court of Appeal, CA 155/95, 165/95, 184/95, 7.

able to give the relevant phrases their natural meaning without relying upon context to twist the legislature's intention as Ellis J had done in the High Court. The natural meaning of the phrases considered was not inconsistent with the Settlement between the Crown and Maori. As stated in the Court of Appeal, "Complex though the underlying problem assuredly is, the issues ... are broad and we can determine them by quite broad and simple reasoning."[178] This approach seems preferable, in recognising the demarcation between strictly legal questions and those with broader implications.

D Maori and the Fisheries Act 1996

The 1996 Act provides for the Commission to be allocated 20% of all new quota issued, as was contemplated by the Deed of Settlement. Section 5 provides that the Act is to be interpreted, and powers under the Act are to be exercised consistently with, New Zealand's international obligations and the provisions of the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992. Section 9 of the 1992 Act expresses that the agreement reached is a full and final settlement of all Maori claims in respect of commercial fishing, howsoever founded. Decisions under the 1996 Act will not necessarily require any further reference to Maori interests other than those expressly required.[179] However, s 10 of the 1992 Act preserves Treaty obligations relating to non-commercial Maori fishery rights and interests, which will be read as incorporated into the 1996 Act for decisions relating to such matters.[180]

E Conclusion

The area of Maori commercial fishing rights is of the utmost national importance, both economically and constitutionally. As will be apparent from the preceding discussion, and as recognised by the Court of Appeal, the actual

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[178] *Te Runanga O Muriwhenua*, above n 153, 15.

[179] For example, consultation with Maori on sustainability issues is required by s 12.

[180] See also Part IX of the Act for coverage of Maori customary fishing rights.

administrative law questions raised are subordinate to the problems inherent in the subject matter, while the constitutional matters at stake provide a unique challenge for our courts. The difficulties in this area are more political: the difficulties of attempting to implement the Settlement provisions while alienating as few groups as possible. Judicial review has played a significant role in this area, in providing a means for the litigants to air their grievances in the superior courts. This may be seen as an important aspect of the process as a whole. On a more practical level, judicial review has been effective as a means of defining the roles of the bodies involved, the Tribunal and the Commission. This provides a framework by which, following the exhaustion of appeal rights, the Settlement will finally be concluded.

VII CONCLUSION

The role of judicial review in each of the specific areas considered has been summarised in the conclusions at the end of each section, and will not be repeated here in full. This conclusion seeks to evaluate the impact of judicial review on the fishing industry as a whole, in the light of the comments of Lord Woolf set out above.[181] In the same lecture, Lord Woolf noted that "Until recently, the area of commerce, finance, and industry would not have been regarded as obvious fields for the use of the public law remedy of judicial review."[182] Within the New Zealand fishing industry, it has been in areas where an administrative decision directly impacts upon an individual's commercial interests that the High Court has shown itself most likely to intervene.[183] This focus upon the interests of individual entities rather than wider groups was a theme that emerged particularly clearly in the context of challenges to statutory

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[181] Above, text accompanying n 2.

[182] Above n 2, 2.

[183] For example the cases decided relating to quota allocation, above Part II, and those involving forfeiture of quota, above Part V.

Regulations.[184] This distinction fits in with the unwillingness of the courts to intervene within the "legitimate policy making sphere of Ministers";[185] broader decisions, affecting a wider range of groups within the industry, are more likely to fall within this inviolable sphere.[186]

Judicial review has also provided a mechanism by which interested parties could achieve definition of their contested rights and obligations, therefore informing future decision making. *Cooper* was a test case, as were *Saragossa*, *Roach,* and the cases concerning the implementation of the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992. Apart from where decisions provide mandatory orders, it is impossible to quantify exactly what effect successful judicial review applications have on future Ministerial or departmental decisions; this is where judicial review acts as a "non-nuclear deterrent". It is certain, however, that the legislature pays close attention to the effect of judicial intervention within the industry. The enactment of s 28ZGA Fisheries Act 1983, in express and direct response to the Court of Appeal's decision in *Jenssen*, is an example of this. The Fisheries Act 1996 also contains measures which could be seen as reactions to judicial decisions: the regulation of the QMS is further tightened, while changes to the forfeiture regimes remove the uncertainties that gave rise to litigation in that area.

These legislative changes will serve to reduce the scope for judicial review of administrative action within the fishing industry. Review under the 1996 Act is likely to be much less commonplace than when the QMS was introduced in 1986. This is not necessarily a bad thing. Judicial review has served its purpose of defining rights and obligations, and informing decision making. This has prompted the legislature to intervene in areas which judicial review applications had shown were ill-defined or administratively inefficient. Administrative efficiency in an industry as highly regulated as that under

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[184] Compare, for example, *Fowler & Rodrique*, above n 84, with *Greenpeace (NZ) Inc*, above n 98, and *NZFIA*, above n 96.

[185] *NZFIA*, above n 96, 554.

[186] Compare this with the use of prosecution to justify automatic forfeiture in *Saragossa*, above n 138, which was not seen as legitimate Ministerial policy.

consideration can only be beneficial to all parties. It is fair to say that in this segment of the commercial arena, judicial review has done its job well, and will continue to do so in the future if needed.

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