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AN END TO FUTILITY: A REAPPRAISAL OF PRIVATIVE PROVISIONS IN NEW ZEALAND LAW

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TABLE OF CONTENTS

I PROLOGUE

On the third of December, 1992, the Minister of Fisheries introduced the Treaty of Waitangi (Fisheries Settlement) Bill to the House.[1] The Bill was intended to implement an agreement for the resolution of commercial fishing claims arising under the Treaty of Waitangi. In return for the transfer to Maori of money, fishing quota and shares in the Sealords fishing company, the settlement of all claims and the extinguishment of rights to fish resources under the Treaty was intended. To this end clause 8 of the Bill provided that the obligations of the Crown in regard to commercial respectively were declared to be "fulfilled, satisfied and discharged." Clause 9 of the Bill stated that non-commercial rights were no longer of legal effect.[2] Court action, whether to enforce such rights and obligations or to dispute the settlement reached, would be rendered impossible.

Reference was made to the need for settlement, following the success of the New Zealand Maori Council in the Courts,[3] in order to "get the matter out of the courts" and allow for more certain economic development.[4] Court action was regarded as an unnecessary and unacceptable delay:[5]

> "Do we want forever to beat a track to the High Court, the Appeal Court, and the Waitangi Tribunal? Do we not want to resolve this issue? What gain is there in litigating endlessly, to paying lawyers, to dividing the nation?"

As might be expected, the Bill was highly controversial. Whilst there was considerable concern over the accountability of those involved in the settlement and over its precise content and structure, criticism of the provisions of the Bill precluding legal action was particularly strong:[6]

> "Not since I have been in the House have measures been brought in that tell people, particularly Maori people: 'Well, you can't come to the court; you can't go to the Waitangi Tribunal; and you can't come to the Crown'"

> "Parliament has no right whatsoever to take away from Maori their rights to go to the courts of New Zealand."

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[1] NZPD, vol 532, 12816, 3 December 1992 (Hon. D L Kidd MP).
[2] Above n. 1, 12819 - 12820.
[3] Above n. 1. The decisions referred to are *New Zealand Maori Council* v. *Attorney-General* [1987] 1 NZLR 641, [1989] 2 NZLR 142, [1991] 2 NZLR 129 (No. 1), [1991] 2 NZLR 147 (No. 2), and [1992] 2 NZLR 576.
[4] Above n. 1, 12817.
[5] Above n. 1, 12827.
[6] Above n. 1, 12821 and 12833.

At least in part in response to such comments, the Bill was subsequently amended to provide simply that claims arising from rights under the Treaty would be deemed settled, while the rights themselves would be unaffected.[7] However, the amendment failed to assuage the concern of many members:[8]

> "[One] of the most basic rights of any citizen of New Zealand is the right of access to the courts. That right is entrenched in the English constitution ... The only preservation of rights in the Bill is contained in clause 9, but the rights are said to be of no legal effect at all."

Perhaps the strongest concern over the removal of such rights was expressed by the Hon. Peter Tapsell MP:[9]

> "kia ngaro nga ture tawhito o te tangata whenua, kia ngaro te iwi Maori"
>
> "If the old laws of the people of the land disappear, the Maori people will disappear."

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[7] NZPD, vol. 532, 12929, 8 December 1992. For the amended provisions as enacted (note that a section was added prior to the passage of the Bill), see Appendix III.
[8] Above n. 7, 12938.
[9] Above n. 7, 12944.

II INTRODUCTION: STATUTORY RESTRICTION OF REVIEW

Although few government actions are as momentous as the Treaty of Waitangi settlement described above, it may be seen that throughout the process of government there is a considerable tension between the desire for conclusive decisions and the need to protect the rights of those affected.[10] Although there are many means by which a compromise may be found, ranging from informal negotiation to judicial review, the question of where such a line may be drawn and by whom remains.

In most instances of administrative, as opposed to legislative, decision-making,[11] individuals affected by an action may apply for judicial review of its legality. Such proceedings may give rise to a considerable number of remedies, including the quashing of the action concerned.

Such consequences are understandably of concern to governments, particularly where the need for conclusive decisions is perceived to be particularly great. In addition to attempts to ensure that statutory authority is exercised responsibly,[12] the statutory provisions may themselves be so drafted as to limit the possibility of review or preclude it altogether. Such provisions take a variety of forms.

Perhaps the simplest is the conferral of extremely broad authority. Such provisions are of course not necessarily enacted so as to restrict review: the complex and extensive nature of modern government often requires the grant of wide authority.[13] However, given that review of administrative actions is founded in the doctrine of ultra vires, it would seem logical that the potential for review reduces in inverse proportion to the breadth of the authority conferred.[14] Where exercise of the power is contingent on some subjective determination by the person exercising it,[15] the scope of review is further

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10 T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon, Oxford, 1993), 65.

11 The possible existence of a judicial power of statutory review has been mentioned in the New Zealand Courts: *Fraser* v. *State Services Commission* [1984] 1 NZLR 116, 121 per Cooke J. Statutory review is a fundamental element of the constitutional systems of the United States, Australia and Canada (see text at n. 202, 206 & 211 below).

12 M Sunkin and A P Le Sueur "Can Government Control Judicial Review?" (1991) 44 CLP 161.

13 H W R Wade, *Administrative Law*, (6ed Clarendon, Oxford, 1988) 24.

14 J M Evans, H N Janisch, D J Mullan and R C B Risk, *Administrative Law: Cases, Texts and Materials* (2ed Ermond Montgomery, Toronto, 1984), 531.

15 For example the grant of authority on the condition that the person or body exercising it "is satisfied" that it is necessary. For an examination of the effect of such provisions, see *Secretary of State* v. *Tameside Metropolitan Borough Council* [1977] AC 1014, 1047.

restricted, although the action must still be reasonably capable of falling within the terms of the statute.[16]

Another way in which review may be restricted is to provide that a particular action is final.[17] Such provisions are fairly common.[18] Such provisions have generally been interpreted to prevent appeals,[19] and to have no effect whatsoever on review.[20] In the absence of an appeal right such provisions may thus be wholly superfluous.[21]

A more drastic means of restricting review is to provide that a decision shall be treated as part of the relevant legislation. Although such provisions have been strongly criticised,[22] and have been held not preclude review altogether,[23] they continue to be given effectual interpretation by some Australian provincial courts.[24] There are apparently no such provisions in force in New Zealand law.[25]

The English Court of Appeal has accorded greater effect to "conclusive evidence" provisions,[26] to the extent of allowing them to preclude review of the matter in question altogether.[27] It is however reasonable to suggest that such provisions may be treated more restrictively by the New Zealand courts.[28]

Review may also be restricted by the provision of alternative remedies which must be exhausted prior to any proceedings.[29] In addition to the delay

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16 *Reade* v. *Smith* [1959] NZLR 996.

17 For example, the Wild Animal Control Act 1977, s. 25(4).

18 There are at least 255 finality provisions currently in force according to the STATUS statute database. Note, however, the limited accuracy of figures obtained by database searches. There is a considerable possibility that some provisions have been overlooked, either by reason of unusual statutory drafting or through their accidental omission from the database.

19 Although note *Tehrani* v. *Rostron* [1972] QB 182, in which appeal by way of case stated was permitted despite the presence of a finality clause.

20 *R* v. *Medical Appeals Tribunal ex p. Gilmore* [1957] 1 QB 574, 585.

21 For example *R* v. *McMillan; ex p. Metropolitan Milk Board* 41 WALR 110, 115 per Northmore C J; "it is difficult to understand the object of finality clauses."

22 Donoughmore Committee on Ministers Powers, Cmd 4060.

23 *Minister of Health* v. *R ex p. Yaffe* [1931] AC 494.

24 *Attorney-General for Victoria* v. *Geelong City* [1989] VR 641 (FC).

25 There is, of course, some degree of uncertainty inherent in the database searches made in the course of this paper, for a number of reasons. These include the high probability of unconventional statutory formulae as well as difficulties relating to legislation which is no longer considered to be in force but which has not been repealed.

26 For example, the Video Recordings Act 1987, s 29(1): "Subject to subsection (2) of this section and to sections 30, 36, and 41 of this Act, a subsisting decision of the Authority ... shall be conclusive evidence in any proceedings...."

27 *R* v. *Registrar of Companies, ex p. Central Bank of India* [1986] QB 1114.

28 G D S Taylor, *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington,1991), 69.

29 For example, the Casino Control Authority Act 1990, s. 98: "No person who has a right of appeal under section 95 of this Act ... shall be entitled - (a) To make an application

inherent in such a requirement, it would seem likely that there would be a substantial degree of attrition among potential plaintiffs.

Perhaps most explicit, however, of the means of limiting review is the express exclusion of review proceedings by "privative" or "ouster" provisions. Statutory exclusion may take various forms, including clauses providing that a decision "shall not be questioned"[30] and the specific removal of remedies.[31] Several different formulae may be employed in a single provision.[32] Aside from the "as if enacted" provisions discussed above, which are of little contemporary interest, such provisions are the clearest indication of a legislative intent to preclude review. It is for this reason, in addition to the demands of brevity, that this paper is primarily concerned with these provisions.

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for review of that decision under Part I of the Judicature Amendment Act 1972 ... unless and until that party exercises that right and the appeal is finally determined."

[30] For example, the Marketing Act 1936, s. 23.

[31] For example, the New Zealand Security Intelligence Service Act 1969, s. 4A(6)(b): "The issue of the warrant shall not be subject to judicial review under Part I of the Judicature Amendment Act 1972 or otherwise."

[32] For example, the Arbitration Act 1901 (NSW), s. 32: "Proceedings in the Court shall not be removable to any court by certiorari or otherwise; and no award, order,or proceeding of the Court shall be vitiated by reason only of any want of form or liable to be challenged, reviewed, quashed, or called in question by any court of judicature on any account whatsoever."

III THE CURRENT POSITION

A The Approach of the Courts

It is not coincidental that the clearest expression of preclusive intent has given rise to the strongest judicial response. The position of the courts of New Zealand and of the United Kingdom[33] is perhaps most readily seen in the statement of Lord Atkin in *Ras Behari Lal* v. *King-Emperor* that "finality is a good thing but justice is better."[34] Whilst Lord Atkin was referring specifically to a finality provision in that case, it is submitted that the restrictive interpretation of privative provisions reflects a general conviction that the restriction of review must necessarily result in a poorer and less just decision. Furthermore, restriction has a broader and potentially more serious effect of hampering the maintenance of the rule of law through the courts[35] and so undermining their constitutional position. However, although restrictive interpretation of privative provisions has been analysed and justified on these grounds,[36] the approach taken by the courts has been substantially more complex and more subtle.

The leading case considering privative provisions, *Anisminic Ltd.* v. *Foreign Compensation Commission,*[37] has been described as a landmark on repeated occasions.[38] Its significance is not, however, in its unfavourable treatment of a privative clause: the restrictive interpretation of such provisions has a long history in English law.[39]

The revolutionary nature of the decision of the House of Lords is instead to be found in the broad assessment of when a decision may been made in excess of statutory jurisdiction. Prior to *Anisminic* the validity of a decision made under statutory authority depended upon whether the deciding body had jurisdiction to enter into the inquiry.[40] The approach taken by Lord Reid,

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[33] See text at n. 197 - 207.

[34] (1933) 60 IA 354, 361.

[35] *R* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] QB 574, 586 per Lord Denning MR: "If tribunals were at liberty to exceed their jurisdiction without check by the court, the rule of law would be at an end."

[36] See below n. 138.

[37] [1969] 2 AC 147.

[38] *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129, 133; *In re Racal Communications Ltd.* [1981] AC 374, 382G.

[39] For example, *Smith's Case* (1670) 1 Vent. 66.

[40] *R* v. *Bolton* (1841) 1 QB 66.

subsequently described as "a strain on the language used"[41] was rather more extensive:[42]

> "[T]here are many cases where, although the tribunal had jurisdiction to enter into the inquiry, it has done or failed to do something in the course of its inquiry that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of its inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

It would seem clear the definition of jurisdiction is so broad as to permit of review in almost any instance.[43] The unpredictability and potential for vagueness of such an approach has been strongly criticised.[44] It has further been suggested, both by members of the judiciary[45] and elsewhere,[46] that it allows for substantial judicial manipulation.

The effect of the privative provision contained in section 4(4) of the Foreign Compensation Act 1950 (UK) would appear to have been largely if not wholly removed. Although reference was made to the authority of the Foreign Compensation Commission to make errors within its jurisdiction,[47] it is difficult to conceive of an error which could not conceivably satisfy such a broad definition of the term.[48] It would thus seem, given that review is of course limited to questions of law, that privative provisions may be deprived of most if not all of their effect.[49] Certainly it is difficult not to accept that the interpretation reached by the majority in *Anisminic* was quite contrary to

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[41] Above n. 13, 44.

[42] Above n. 37, 171.

[43] D M Gordon "What did the *Anisminic* case decide?" (1971) 34 MLR 1, 6.

[44] J A Smillie "Privative Clauses and Judicial Review" [1981] NZLJ 274, 274.

[45] *Pearlman* v. *Keepers and Governors of Harrow School* [1979] 1 QB 57, 70, per Lord Denning MR: "So fine is the distinction that in truth the High Court has a choice before it whether to interfere...."

[46] H W McLauchlan "Judicial Review of Administrative Interpretations of Law: How much formalism can we reasonably bear?" (1986) 36 UTLJ 343, 369 - 370: Tests for jurisdiction are "little more than a rhetorical flourish where a court has otherwise made up its mind to revise an administrative decision."

[47] Above n. 8, 171 (per Lord Reid), 195 (Lord Pearce).

[48] As was noted in the dissenting judgment of Lord Morris of Borth-y-Gest, above n. 42, 187- 188. See also H W R Wade "Constitutional and Administrative Aspects of the *Anisminic* Case" (1969) 85 LQR 198, 211 and B C Gould "Anisminic and jurisdictional review" [1970] PL 358, 361.

[49] Above n. 13, 727

legislative intent,[50] despite Lord Wilberforce's "brave"[51] contention to the contrary.[52]

The abandonment of jurisdictional review was proposed in the later judgment of Lord Denning MR in *Pearlman* v. *Keepers and Governors of Harrow School*, who, having noted the fineness of the distinction, suggested that review be available for any error of law "on which the decision of the case depends",[53] Whilst it is possible that the requirement of dependence leaves some scope for the operation of privative provisions, it is not unreasonable to suggest that the intended function of such provisions is completely frustrated.[54]

Although the approach of Lord Denning MR was not followed by either of the other members of the Court of Appeal, it would appear to have been accepted by Lord Diplock three years later in *In re Racal Communications Ltd.*[55] Lord Diplock held that the presumption in favour of review, upon which the restrictive interpretation of privative provisions was based, applied only to the decisions of administrative tribunals and authorities and not to courts of law.[56] Although the approach was followed only by one other member of the court,[57] it would appear to have been adopted unanimously by the House of Lords in *O'Reilly* v. *Mackman*.[58]

The Privy Council has expressly rejected the abandonment proposed in *Pearlman*.[59] The most recent Court of Appeal decision in the area of privative provisions, *Bulk Gas Users Group* v. *Attorney-General*, would however appear to follow Lord Diplock's reasoning, distinguishing the Pricy Council ruling on the basis of the "special considerations" and "legislative policy" related to industrial courts.[60]

Although the abandonment of the jurisdictional approach to review removes much of the obscurity from review proceedings, the problem of legislative intent becomes similarly more apparent. Although Lord Diplock gave literal

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50 Wade, above n. 48, 201.
51 Above n. 13, 728.
52 [1969] 2 AC 147, 208.
53 Above n. 48, 70.
54 H W R Wade, "Anisminic ad Infinitum" (1979) 95 LQR 163, 166.
55 [1981] AC 374, 378. Note, however, Lord Diplock's assertion, following his article "Judicial Review Reviewed" (1974) 33 CLJ 233, 243, at 383 that the distinction between jurisdictional and non-jurisdictional errors of law had "for practical purposes" been abolished in *Anisminic*.
56 [1981] AC 374, 382.
57 Above n. 59, 391 per Lord Keith of Kinkel.
58 [1983] 2 AC 237, 277.
59 *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, 370.
60 [1983] NZLR 129, 133.

application to the "unqualified language" of the statute in *Racal* in determining the authority of an inferior court,[61] it is not clear that the "clear words" required to preclude review of an administrative body exist.[62] As was noted by Sir Thaddeus McCarthy in *Bulk Gas*, the prospect of review for any error of law "raises important questions of judicial policy relating to the proper boundaries of judicial and legislative functions within the State."[63]

A further criticism of Lord Diplock's approach is that it merely replaces the obscure test of jurisdiction with equally difficult determinations of the distinction between administrative authorities and inferior courts[64] and of the existence of error of law. The difficulty of the former was made clear in *Attorney-General* v. *British Broadcasting Corporation*,[65] while the latter may permit considerable expansion of review through such developments as the classification of mistake of fact as a reviewable error of law.[66]

It is thus clear that the judicial interpretation of privative provisions is extremely flexible and may, in its apparent inconsistency and complexity, appear to reflect less a move towards systematic rules of interpretation than an arguably sophist defence[67] of the authority of the courts to review where they see fit, regardless of the presence of a privative provision.[68]

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61 [1981] AC 374, 380.

62 R S French "The Rise and Rise of Judicial Review" (1993) 23 UWALR 120, 123.

63 Above n. 63, 139. Note also the reference to unspecified limits on the authority of the legislature to preclude review in the judgment of Cooke J [1983] NZLR 129, 136.

64 Note that Lord Diplock did not exclude inferior courts in the affirmation in *O'Reilly* [1983] 2 AC 237, 278 of his approach in *Racal*.

65 [1981] AC 303. As an illustration of the difficulty, note the comment by J A Smillie (above n. 44, 277) that the Foreign Compensation Commission had been described as an administrative tribunal by Lord Diplock 1981] AC 374, 382, and as "a truly judicial body" by Lord Denning MR in *R* v. *Secretary of State, ex parte Ostler* [1977] QB 122, 135.

66 *Daganayasi* v. *Minister of Immigration* [1980] 2 NZLR 130, 147 - 148.

67 Above n. 49.

68 J Beatson "The scope of judicial review for errors of law" (1984) 4 OJLS 22, 22: "There is increasing evidence that such strains are caused by the deliberate manipulation of the doctrine [of ultra vires] in order to achieve what they see as the desirable amount of intervention."

B Privative Enactments in New Zealand Law

There are currently at least forty-one privative provisions in force in New Zealand law,[69] of which almost one third have been enacted in the past decade. Given the improbability of effectual interpretation it is not unreasonable to suggest that they are now of limited interest.[70] The surprising number of extant provisions, and particularly of provisions enacted since 1984, together with the broad range of activities to which they relate, would appear to indicate otherwise. Further reason may be found in the favourable interpretation accorded certain provisions by the courts,[71] and also by the continued judicial recognition of the at least theoretical possibility of effective statutory preclusion of review regardless of such context.[72]

There would thus appear to be strong justification for an examination of current provisions, particularly in relation to the nature of the bodies and decisions to which they apply, to the justifications which may be made for such provisions, and to their probable or actual judicial interpretation. The particular phrasing of the provisions, which has proved largely irrelevant in terms of their legal effect,[73] will not be considered except where it is of particular interest.

In addition to the privative provisions identified, a number of other provisions intended to restrict review in very similar areas will be considered by way of contrast.[74]

The largest group of current provisions are those which concern the exercise of statutory authority by specified courts. Whilst a number of these involve the High Court,[75] Justices of the Peace,[76] and the courts of Niue and

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[69] See Appendix I. The number given is the result of analysing the provisions found in the STATUS statute database by a number of searches for standard privative formulae. See above n. 25 as to the accuracy of such searches.

[70] Above n. 28, 63.

[71] *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129; *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-metallic Mineral Products Manufacturing Employees Union* [1981] AC 363; *In re Racal Communications Ltd* [1981] AC 374.

[72] *Anisminic* v. *Foreign Compensation Commission* [1969] 2 AC 147, 207; *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129, 136 "It is generally accepted ... that Parliament *can* empower an administrative tribunal to determine some questions of law, typically questions of statutory interpretation, conclusively. I will assume that to be so - at least within limits that need not here be explored." Note, however, the increasing reserve of the New Zealand Court of Appeal in comparison to *Attorney-Gerneral* v. *Car Haulaways (NZ) Ltd* [1974] 2 NZLR 331, 340.

[73] P P Craig, *Administrative Law* (2ed Sweet and Maxwell, London, 1989), 438.

[74] See Appendix II.

[75] Electoral Act 1956, s.168.

[76] Pawnbrokers Act 1908, s. 41.

Australia,[77] the majority are related to the decisions of the District Court.[78] Such provisions would appear to assuage many of the concerns expressed over the "unlawful" nature of preclusion in so far as the decision remains within the court system, albeit subject to certain limits.

The exercise of unreviewable authority by a court rather than an administrative authority is arguably less objectionable for two reasons: firstly, the rule of law is largely maintained, and secondly, the courts are less likely, by reason of their nature, visibility, and duty to give reasons, to abuse such authority.[79] This distinction between courts and administrative authorities has been recognised both by the House of Lords[80] and by the New Zealand Court of Appeal,[81] and it would therefore seem probable that such provisions are likely to be accorded favourable interpretation, as has occurred on at least one occasion.[82]

There is moreover substantial practical appeal in the limitation of review proceedings and the consequent reductions in cost and delay which would seem likely in some instances to frustrate the purpose of the legislation entirely.[83]

However, there remains one substantial cause for doubt as to the necessity of such provisions: that of the likelihood, at least in part for the reasons which have been given, that the courts would in such instances exercise their discretion against review.[84] Whilst it is clear that review of the decisions of District Courts and more frequently of those of Justices of the Peace would be granted in extreme cases, such as patent absurdity, it would seem improbable that a privative provision could prevent review in such circumstances. Where the decisions of the High Court and particularly those

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[77] Niue Act 1966, s. 25 and Judicature Act 1908, s. 56N.

[78] Of fifteen such provisions identified, nine are related to decisions of the District Court.

[79] "[T]he least dangerous branch of government" Alexander Hamilton, *The Federalist: A Commentary on the Constitution of the United States* (Modern Library, New York, 1961), 77.

[80] *In re Racal Communications Ltd* [1981] AC 374, 382 - 383 per Lord Diplock.

[81] *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129, 135 per Cooke J.

[82] In *Single* v. *District Court* (Unreported, 23 August 1993, High Court, Napier Registry CP 22/93) Justice Neazor interpreted s. 108 of the Local Elections and Polls Act 1976 to preclude review, noting the "wide jurisdiction" of the District Court.

[83] Such proceedings are likely to favour those who have the time or money to enter into them over those who do not. (D Pearce, "Judicial Review of Tribunal Decisions: the Need for Restraint", (1981) 12 Federal LR 167). An example of such effects frustrating the purpose of the legislation may perhaps be found in the Machinery Act 1950. The Act is based upon nineteenth century industrial safety enactments intended to permit wealthy factory owners to be penalised.

[84] Above n. 28, 20.

of the courts of other jurisdictions are concerned, review will almost certainly not be granted.[85]

The decisions of a number of arguably quasi-judicial bodies are also subject to privative provisions, ranging from specialised courts such as the Employment Court[86] to bodies such as the Office of the Ombudsman.[87] The former provision is of particular interest as in addition to including substantial appeal rights, the legislation itself defines the circumstances in which the Court is without jurisdiction, following the approach of the courts prior to *Anisminic*.[88] Similar provision was made in the Labour Relations Act 1987.[89] Thus although industrial relations courts have typically enjoyed substantial judicial deference,[90] there would seem to be a consistent effort to safeguard that position by statute.

It is also interesting that the privative provision found in the Ombudsman Act[91] does not apply to the actions of the Ombudsman under the Official Information Act. The reason for the distinction would appear to be the passage of seven years between the two acts: the Committee on Official Information suggested that section 25 was of a type "not now normally used in legislation."[92]

The Official Information Act 1982 does however retain the exhaustion provision found in the Ombudsman Act.[93] Provisions of this type are fairly common in tribunal legislation,[94] as are conclusive evidence provisions.[95]

The intended function of such provisions would appear to be the isolation of the bodies to which they relate from the courts. Such protection may be justified for reasons of substance, such as the specialist nature of employment

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85 *In re Racal Communications Ltd.* [1981] AC 374, 384.
86 Employment Contracts Act 1990, s. 104.
87 Ombudsman Act 1975, s. 25.
88 See above n. 41.
89 Sections 279(6) and 279(7).
90 For example, *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129, 133.
91 Above n. 88.
92 *Towards Open Government: Supplementary Report* (Government Printer, Wellington, 1981), 12.
93 Section 34.
94 For example, the Casino Control Act 1990 s. 98 and the Sale of Liquor Act 1989, s. 148.
95 This would seem particularly true in the area of censorship: see the Indecent Publications Act 1963, s. 12 and the Video Recordings Act 1987, s. 29, perhaps reflecting the specialised but lay nature of the decisions of such bodies.

law,[96] for reasons of procedure,[97] or in the case of the Ombudsman Act, for reason of the potentially controversial nature of decisions.[98]

The probability of favourable interpretation of such provisions in the courts is likely to depend upon the extent to which the body in question resembles a court[99] and also upon the particular nature of the decisions which it makes. On this basis the probability of review of the decisions of the Employment Court[100] (even disregarding the presence of extensive statutory appeal provisions) is substantially smaller than review of the decisions of the Ombudsman.[101]

Again, it would seem clear that the extent to which a privative clause would receive favourable interpretation in the courts is largely a reflection of the courts' degree of deference to the body to which it relates rather than a response to the provision itself.

Where provisions related to the conduct of international relations are concerned,[102] the position is again complex. Whilst such matters fall within the prerogative, it would seem clear that that status does not of itself preclude review.[103] What may do so, however, is the likelihood that decisions taken in relation to such matters may involve the development and application of government policy and the consideration of issues ill-suited to court examination.[104] The fact that the provisions relate to the statutory authority of a Minister would further indicate a strong policy content. There would thus appear to reasonable justification for such enactments.

As is the case in other areas, however, the courts would seem very likely to place considerable restrictions on review proceedings for precisely these

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96 *South East Asia Fire Bricks Sdn Bhd.* v. *Non-metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, 373.

97 Although note the improbability of review for want of form.

98 Above n. 54, 8: "[The courts would have] to rule on matters with strong political and policy implications. That is not a normal or traditional function of the courts of New Zealand."

99 "Perhaps an implication [of authority to determine questions of law conclusively] might be established a little more readily in the case of a tribunal whose function and status more closely resembled that of a court" *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129, 136 per Cooke J.

100 Above n. 56.

101 For example, review was permitted in *Commissioner of Police* v. *Ombudsman* [1985] 1 NZLR 578, Justice Jeffries having noted that the office of Ombudsman is not one which requires legal qualifications.

102 For example, the Territorial Sea and Exclusive Economic Zone Act 1977, s. 21 and the Diplomatic Privileges and Immunities Act 1968, s. 20(5).

103 *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 411 and *Burt* v. *Governor-General* [1992] 3 NZLR 672, 678.

104 C Walker "Review of the prerogative: the remaining issues" [1987] PL 62, 67 suggests that the distinction is of little effect. For an analysis of the procedural requirements of review see G D S Taylor "The Limits of Judicial Review" (1986) 12 NZULR 178.

reasons.[105] Nevertheless, where individual rights are the primary consideration review may be granted more readily.[106] One such issue may be the grant of visas,[107] in relation to which the English Court of Appeal granted review in *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p Everett.*[108]

The probable exercise of judicial discretion would also seem likely to render the privative enactments contained in the New Zealand Security Intelligence Service Act 1969[109] similarly pointless.[110] Whilst there is reason for considerable concern where such matters are involved, given the potentially grave consequences of abuse,[111] the British judiciary have in the past indicated a reluctance to intervene. The decision of the House of Lords in *Secretary of State for Defence* v. *Guardian Newpapers Ltd.* that a plea of national security must be substantiated may indicate some change in judicial attitudes.[112]

Conclusive evidence provisions are also employed in international relations statutes[113] and security legislation[114]. The former would appear to reflect consideration of the competence of the courts to determine the existence of a state of affairs which involves the conduct of foreign relations.[115] The latter would seem principally to be concerned with maintaining confidentiality in court proceedings.[116]

Although the privative provision relating to the Serious Fraud Office is phrased in similar terms to the security provisions discussed, it is unlikely to

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105 *Cameron* v. *Minister of Foreign Affairs* Unreported, 9 August 1990, Court of Appeal, CA 11/90.

106 *Burt* v. *Governor-General* [1992] 3 NZLR 672, 679 & 683.

107 Immigration Act 1987, s. 10.

108 [1989] QB 811.

109 Sections 4A & 20. It is of interest that the latter section, which is related to the actions of the Commissioner for Security Appeals, was amended by the NZSIS Amendment Act 1977 to allow review for want of jurisdiction.

110 Above n. 28, 29: "[Security and defence are] largely under the prerogative in which no Court has intervened, or is considered likely to intervene, other than in personnel matters."

111 *Liversidge* v. *Anderson* [1942] AC 206, 244 per Lord Atkin. See also J M Hlophe "South African ouster clauses - meaning and effect" (1986) 45 CLJ 369 discussing *Hurley* v. *Minister of Law* [1985] 4 SA 709 (D) and a number of oppressive state security provisions.

112 [1985] AC 339.

113 Consular Privileges and Immunities Act 1971, s. 9.

114 New Zealand Security Intelligence Service Act 1969, s. 4A(7).

115 Although note the practice of the New Zealand government of not making conclusive statements in such areas: *Attorney-General for Fiji* v. *Robt Jones House Ltd* [1989] 2 NZLR 69, 75.

116 "Where it is necessary to prove in any proceedings that any person was acting at any time pursuant to an interception warrant, it shall not be necessary to produce the warrant to the Court, but a certificate by the Attorney-General as to any matters specified in the warrant shall be conclusive evidence as to all such matters so certified."

receive similarly favourable treatment.[117] Whilst there is a superficial resemblance in the need for confidentiality in both areas, it would seem clear that the courts are not prepared to intervene extensively in matters of national security. Where commercial sensitivity is concerned, the courts would seem likely to intervene in the confidence that such demands may be accommodated by procedural flexibility.[118]

A further group of provisions which would appear to be rendered superfluous by judicial discretion are those purporting to preclude review for want of form. Although such clauses were among the earliest and most useful of privative provisions, their effect is now expressly provided for by section 5 of the Judicature Amendment Act 1977.[119] Such provisions, which are concerned with actions of the District Court[120] and of various authorities such as the Ombudsman[121] and the Race Relations Conciliator,[122] would appear to be intended as recognition of the particular status of the body concerned. The intended effect of such provisions would seem likely to be to allow for procedural flexibility.

However, although many of the provisions identified would appear to be rendered largely if not wholly unnecessary through the exercise of judicial discretion, there are a number for which this is not the case. Most commonly the provision relates to statutory authority conferred upon a Minister, and is for that reason less likely to be reviewed.[123] Such restraint would seem more likely to be a reflection of the potentially high policy content in such decisions. For the same reason, deference would seem even more likely where the power concerned is exercised by Order in Council.[124]

A further group of very recent clauses relate to transitional provisions. The most recent relates to the decisions of the Maori Land Court and as such would seem likely to be followed, although again on the basis of the nature of

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117 Serious Fraud Office Act 1990, s. 20.

118 *R* v. *Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815, 842.

119 "On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit."

120 For example, the District Courts Act 1947, s.64, the Summary Proceedings Act 1957, s. 204 and, surprisingly given the passage of the Judicature Amendment Act in 1972, the Children, Young Persons and their Families Act 1989, s. 440.

121 Above n. 54.

122 Section 19, Race Relations Act 1971.

123 *Padfield* v. *Ministry of Agriculture, Fisheries and Food* [1968] AC 997. An example of such a section may be found in the Public Bodies Leases Act 1969, s. 3.

124 Marketing Act 1936, s. 23.

the body concerned rather than the presence of the privative clause.[125] Other provisions relating to the decisions of a Minister[126] and of various administrative decisionmakers[127] would seem less likely to receive favourable interpretation in the courts. Whilst the transitional nature of the provisions may indicate that their intent is to ensure an uninterrupted passage from one statutory regime to another, such practical requirements are likely to be considered by the courts to be better accommodated by choice of procedure and remedy than through restriction of review.[128]

The approach of the courts may be more favourable in regard to section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1993, as it is in effect a decision of the legislature itself rather than an administrative decision in any normal sense, suggesting that review would be strongly restricted.[129] It may further be suggested that the Act indicates a legislative policy of the type referred to in *Bulk Gas Users Group*.[130] It would also seem wholly anathematic to the Act to find exceptions to the settlement which it implements, and furthermore the settlement itself would seem particularly ill-suited to court determination.[131] The courts have furthermore indicated a strong preference to allow negotiated settlements of Treaty claims to stand.[132]

In addition to the theoretical desirability or otherwise of the provisions identified, it is perhaps helpful to consider their continuing utility. Whilst, as has been noted, privative provisions have continued to be enacted, thirty-three of the provisions currently in force are more than ten years old. Of these only one has been considered in a case reported in the New Zealand Law Reports in the past thirty years. No extant provision has ever been reported in the ten years since the New Zealand Administrative Reports began to report cases.[133] It may also be argued that the five recent transitional provisions are of limited enduring interest.

It would thus seem that a number of privative provisions are without justification and that the justifications which can be made are well served by

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[125] Maori Land Act Te Ture Whenua Maori 1993, s. 348.
[126] Resource Management Act 1991, s. 423.
[127] Resource Management Act 1991, ss. 391 and 422 and the Fisheries Act 1983, s. 28ZGA (inserted by the Fisheries Amendment Act (no. 3) 1992).
[128] Above, n. 115.
[129] *R* v. *Secretary of State for the Environment, ex p. Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597.
[130] *Bulk Gas Users Group* v. *Attorney-General* [1983] 129, 133. Note, however, that such a "policy" was found in relation to an employment court rather than an administrative body.
[131] See Taylor, above n. 50.
[132] *New Zealand Maori Council* v. *Attorney-General* [1987] 1 NZLR 641, 719.
[133] Two cases have been reported since 1984, both related to legislation which has since been repealed.

judicial discretion. Further, many of the provisions identified are now obsolescent, and effectual interpretation of even recent provisions would seem at best uncertain.[134]

[134] Law Commission (UK) Working Paper No. 40, *Remedies in Administrative Law*, 117.

III THE DIRECTION OF REFORM

It has been noted that the enactment and interpretation of privative provisions is an element of the process of compromise inherent in the administration of government. However, as has been seen in the actions of both the courts and the legislature, neither the extent of the current compromise nor the rational justification for it are clear.

One means by which the respective positions of the legislature and the courts might be made more clearly apparent is through the hypothetical assignment of complete responsibility to one body to the exclusion of the other by according privative provisions either literal effect or no effect whatsoever.

Although such extreme positions are not, as will be seen, desirable, it is submitted that they provide a clear indication of the factors which must be considered in establishing the necessary degree of compromise.

It is clear that these factors may be broadly categorised as firstly, the substantive elements of the constitutional positions of Parliament and the courts, and secondly the procedural or functional qualities which each demonstrates as a decision-making body. It is submitted that through the examination of these categories in each hypothesis an appropriate balance between the demands of administration and of supervision may be found.

A Should Privative Provisions be Disregarded?

1 Constitutional considerations

The principle of a single general court system determining the legality of the actions of both individuals and authorities has long been held to be a tenet of English constitutional law,[135] and arguably unalterable for that reason.[136] In the exercise of that function the courts may be seen to provide the ultimate safeguard for the fundamental elements of the legal system.[137]

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135 A V Dicey *The Law of the Constitution* (10ed 1959) (ed E C S Wade) 193 - 195.

136 H W R Wade, *Constitutional Fundamentals* (Stevens, London, 1981), 66 and R B Cooke "The struggle for simplicity in administrative law" in *Judicial Review of Administrative Action in the 1980s* M. Taggart (ed.) (Auckland 1986, Oxford/Legal Research Foundation), 1, 10: "[W]e are on the brink of open recognition of a fundamental rule of our mainly unwritten constitution, namely that determination of questions of law is the ultimate responsibility of the Courts of general jurisdiction."

137 *Fraser* v. *State Services Commission* [1984] 1 NZLR 116 per Cooke J: "it is arguable that some common law rights go so deep that even Parliament cannot be accepted by the courts to have destroyed them." See also A Dicey *The Law of the Constitution* ed. E C S Wade (10ed 1959) and, very similarly Cooke, above n. 5, 10.

In this context the effect of a privative provision is not only the protection of decisions which are "wrong", in the sense that they differ from the courts' authoritative interpretation of law,[138] it is also an attempt to avoid the rule of law by removing the action to which the provision relates from the overview of the courts.[139]

The principal argument in favour of complete judicial disregard for privative provisions is thus appealing in its simplicity: there is a very real sense of absurdity in conferring limited authority by statute and in the same enactment permitting the empowered body or individual to breach those limitations.[140]

However, the authority claimed for the courts would appear predicated on the contention that the ultimate determination of legality must in all instances rest with the courts. Whilst it is an important and complex contention of long standing, it is submitted that it provides neither an accurate description of the role of the courts nor a viable basis for administrative law.

It would seem clear that many government actions involve determinations of law, fact and policy. Many such actions may be subjected to review. Some, except perhaps in extraordinary circumstances, cannot, and have been recognised as such by the courts in the exercise of their discretion. It would however appear absurd to contend that such actions are either illegal or beyond the law, or that they are uncontrolled. It would seem reasonable to suggest that such actions are in fact overseen by other elements of government, including the legislature itself.[141] Although responsibility to Parliament has been expressly rejected as a substitute for review by at least one eminent member of the English judiciary,[142] review has been held to be severely restricted and possibly barred altogether by an express, rather than implicit, requirement of parliamentary approval.[143]

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138 Hon. R B Cooke, "Administrative Law: the Vanishing Sphinx" [1975] NZLJ 529, 530. See also H W R Wade above n. 48, 200 - 201.

139 *R* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 QB 574, 586 per Denning LJ.

140 "What would be the point of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?" *Anisminic* v. *Foreign Compensation Commission* [1969] 2 AC 147, 208 per Lord Wilberforce.

141 M Aronson & N Franklin, *Judicial Review of Administrative Action* (2ed Law Book, Sydney, 1987), 671.

142 "[It is not] a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way they carry out their functions." *Inland Revenue Commissioners* v. *National Federation of Self-Employed & Small Businesses Ltd.* [1982] A.C. 617, 644. Note, however, the differing view taken by the Supreme Court of Canada in *Toronto Newspaper Guild* v. *Globe Printing Co.* [1953] 3 DLR 561, 573.

143 *R* v. *Secretary of State for the Environment, ex p. Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597.

While the limitations of direct parliamentary control are clear,[144] it is undeniable that legislation empowering administrative bodies is not interpreted by the courts alone. Whilst interpretations reached by other bodies may be considered an inadequate assurance of legality,[145] it is not unreasonable to suggest that in some instances the interpretation of law reached by the courts is not necessarily superior to that reached by the body under review itself[146] or where appropriate by a supervisory authority other than the courts.[147]

The enactment of a privative provision may thus be considered to be an implicit legislative undertaking that legality of the actions to which it relates will be ensured by legislative or executive control.[148] Such provisions may therefore be regarded not as an abandonment of legality but rather as the statutory expression of a choice between two potentially differing interpretations of the law.[149] It would also seem clear that in some instances there is no single correct interpretation, as has been noted Justice Dickson of the Supreme Court of Canada: "The ambiguity of [section] 102(3)(a) is acknowledged and undoubted. There is no interpretation which can be said to be 'right.'"[150]

It may further be suggested that by continuing to enact privative provisions despite the restrictive interpretation accorded them the legislature has recognised the fundamental nature of review and accepted that restriction.[151] In light of the apparently ineffectual interpretation accorded many such provisions, it may be suggested that privative clauses are inherently obsolescent.[152]

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144 G L Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" (1982) PL 451, 464.

145 Above n. 10, 65.

146 P C Weiler "Judges and Administrators: an issue in constitutional policy" in *Proceedings of the Administrative Law Conference* (Faculty of Law, University of British Columbia, Vancouver, 1979), 383. It is of course important not to confuse the action of a statutory authority in carrying out its function as a whole with the determination of the extent of its powers, as is noted in M Burrowes, "Privative and Time Clauses" (Unpublished LLM Research Paper, Victoria University, Wellington, 1981) 60.

147 C Harlow & R Rawlings *Law and Administration* (Weidenfield and Nicolson, London, 1984), 97 - 98.

148 B Laskin "Certiorari to Labour Boards: The apparent futility of privative clauses" (1952) 30 Can. Bar Rev. 986, 1000.

149 P P Craig *Administrative Law* (2ed Sweet and Maxwell, 1989), 438.

150 *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation* [1979] 2 SCR 227, 237.

151 Above n. 55, 239.

152 A Hutchinson "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 MLR 293, 314, has described privative clauses as the legislative equivalent of "what the Maginot Line was to military tactics ... And now it has suffered the same fate."

There would, however, appear to be a number of more probable explanations for the continued enactment of potentially ineffectual provisions.[153] Firstly, it may be unreasonable to assume informed acceptance of the approach taken in the courts. Privative enactments are, as has been noted, typically phrased in unequivocal terms which may make their restrictive interpretation seem highly improbable to Members of Parliament.[154] Further, the means by which the legislature might seek to challenge such interpretations is not clear, given that extremely strong statutory provisions have proved ineffectual.[155] It would also seem clear, judging by the fierce and ultimately effective opposition to attempts to strengthen the Foreign Compensation Act 1950 (UK) in response to *Anisminic,* that such reaction may be politically impossible.[156]

A further ground upon which the courts might base a refusal to implement privative provisions may be found in section 27(2) of the New Zealand Bill of Rights Act 1990:

> "Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."

The restrictive interpretation of privative clauses may arguably be required by section 6 of the Act: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."[157]

Section 4, which requires that other enactments may not be held invalid simply by reason of the Act,[158] would however appear to prevent such an approach. It would seem difficult in most instances to infer any ambiguity from privative provisions, particularly given that interpretations applied under

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153 See text at n. 33.

154 Above n.149, 439, noting that the "bulk of legislators are laymen [sic]."

155 Above n. 62.

156 Above n. 13, 728 - 729.

157 W G Liddell, "Administrative Law Review" [1990] NZ Recent LRev 279, 293. For a more extensive discussion of the effect of the Act on judicial review in general, see M Chen "Judicial review of state-owned enterprises at the crossroads" (1994) 24 VUWLR 51, 75 and J N Hay "Section 27 of the New Zealand Bill of Rights Act 1990, The Right to Justice: Something Old, Something New" (Unpublished LLM Research Paper, Victoria University of Wellington, 1991), 29 - 35.
Note that reference has been made to the Act in the course of Parliamentary debate on privative enactments. For example NZPD vol. 532, 12832 4 December 1992 (Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) and, in a less extraordinary case, NZPD vol. 532, 12989 19 December 1992 (Finance Bill (No. 6) 1992 (inserts s. 28ZGA Fisheries Act)). See below n. 166.

158 "No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), – (a) Hold any provision of the enactment to be impliedly repealed or revoked, or in any way to be invalid or ineffective; or (b) Decline to apply any provision of the enactment - by reason only that the provision is inconsistent with any provision of this Bill of Rights."

section 6 must be reasonable.[159] It is possible that the past treatment of privative provisions may be held to create such an ambiguity.

A further problem may arise from the inclusion of the phrase "in accordance with law" in section 27(2), which could reasonably be interpreted to include the terms of privative enactments.[160] There may also be some objection to establishing a broad power to disregard privative enactments on the declaratory legislation,[161] although this has not proved an obstacle to innovative application of the Act in other areas.[162]

The extent to which a privative clause might be regarded by the courts as a "reasonable [limit] prescribed by law as can be demonstrably justified in a free and democratic society"[163] and so escape restriction under the Act would also seem limited given the fundamental importance accorded the right to review.[164] The suggestion that the courts should accord greater weight to the legislative expression of the will of a "democratic society" would seem unlikely to be followed, given that such recognition would presumably entail unrestricted application of privative provisions.[165]

It would seem clear however that the Attorney-General considers that the restriction created by privative provisions either is capable of such justification or does not infringe the Act.[166]

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159 *Ministry of Transport* v. *Noort* [1992] 3 NZLR 260, 272.

160 Note the explanation of s. 27(2) given in "A Bill of Rights for New Zealand" (White Paper, 1985), 10.172, although note that had the Act been enacted as superior legislation as was proposed many privative provisions might be implicitly repealed.

161 New Zealand Bill of Rights Act 1990, s. 2: "The rights and freedoms contained in this Bill of Rights are affirmed."

162 For example, the decision of Cooke P. in *Baigent Estate* v. *Attorney-General* Unreported, 29 July 1994, Court of Appeal, CA 207/93, 11: "the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law when necessary. Such a measure is not to be approached as if it did no more than preserve the status quo."

163 New Zealand Bill of Rights Act 1990, s. 5.

164 See text at n. 35, above. Canadian experience would suggest that the section would be particularly difficult to satisfy where legal rights are concerned. (P Monahan, *Politics and the Constitution: the Charter, Federalism and the Supreme Court of Canada* (Carswell, Toronto 1987), 41 - 42.)

165 T G Ison "The Sovereignty of the Judiciary" (1986) 10 Adelaide LR 1, 18.

166 For example, in the debate on the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992, the Rt. Hon. D Lange MP suggested that the Attorney-General was required to notify the House under s. 7 of the New Zealand Bill of Rights Act 1990 . The Attorney-General stated that such notification was not required as, if the Bill did breach any of the provisions of the Act, s.5 of the Act applied (NZPD vol. 532, 12832 & 12840, 4 December 1992).

2 *Functional considerations*

In addition to the less immediate benefits of equality and universality of law which would appear to stem from the unrestricted availability of review, there are significant practical reasons for disregard of privative provisions. These include the specialised legal skills which the courts are able to apply and at the same time the broad perspective which a body of general jurisdiction may develop.[167] Furthermore there is strong justification for allowing the courts unrestricted jurisdiction and so develop the law in a consistent and systematic manner.[168] Even ignoring the constitutional grounds for disregarding privative clauses, the approach taken by Lord Diplock in *Racal* that no administrative authority be permitted to make an unreviewable error of law thus has considerable appeal.[169]

Although it has been seen that there are strong arguments that the interpretation of law by administrative bodies are in some specific instances superior to, or at the very least no less correct than, those determined by the courts, there would seem to be substantial benefit in the preservation and development of broad general principles which the courts may ensure.[170] It is however clear that the involvement of the courts in a limited role of this sort is not dependent upon complete disregard for privative provisions.

A further function of review which may be enhanced through the disregard of privative enactments is that of remedy. Through judicial review the aggrieved individual may seek resolution of the grievance by the broad variety of means available to the reviewing court. Furthermore the administrative practice which caused the difficulty may be altered. The effect of privative enactments is necessarily to remove this right of recourse and its effect on the administrative process.[171]

However, although there may be doubt as to the efficacy of alternative means for the determination of legality, it would seem clear that aggrieved individuals can and do make extensive use of many alternative remedies,[172] often for reasons of the cost or delay inherent in almost all review

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[167] P W Hogg, "Judicial Review: How much do we need?" (1974) 20 McGill LJ 157, 174.
[168] Above n.13 , 24.
[169] Above, text accompanying n. 55.
[170] H W Arthurs "Protection from judicial review" [1983] Can. Bar Rev. 277, 284 -285.
[171] *Report of the McRuer Commission: Inquiry into Civil Rights No. 1* (1968) Vol. 1, 279.
[172] For example, the Office of the Ombudsman considered 3053 complaints between 1 July 1992 and 31 June 1993 (*Report of the Ombudsmen* [1993] AJHR A. 3).

proceedings.[173] Furthermore, the solution produced by court intervention may in fact be inferior to that produced by a less confrontational process.[174] The effect of review proceedings on administrative conduct is also arguably overstated.[175]

A further argument in favour of the abandonment of privative provisions is that the legislature can and does have recourse to other means of limiting review, some of which have been accorded more favourable interpretations in the courts.[176] It would seem nonetheless that privative provisions are the most unambiguous legislative expression of preclusive intent. Whilst their use should be sparing as a consequence of the strength of such provisions, such clear statements should not be disregarded.

B SHOULD ALL PRIVATIVE PROVISIONS BE ACCORDED LITERAL EFFECT?

1 Constitutional considerations

The simplest argument in favour of the literal interpretation of privative provisions is that such interpretation implements the clear intent of the legislature.[177] To do otherwise would seem to ignore the will of a democratically elected body.[178] Whilst it is clear that the process of statutory interpretation necessarily involves more than literal application,[179] it would seem that the meaning given many provisions is less a refinement than a denial of legislative intent.[180] Although the availability of review may be regarded as a basic requirement of our unwritten constitution, it may be suggested that the supremacy of a representative body is still more

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[173] P W Hogg, "The Supreme Court of Canada and Administrative Law 1949 - 1971" (1973) 11 Osgoode Hall LJ 187, 188.

[174] H W Arthurs, "Recognising administrative law" in *Proceedings of the Administrative Law Conference* (Faculty of Law, University of British Columbia, Vancouver, 1979) 2, 9.

[175] C Harlow "Administrative Reaction to Judicial Review" (1976) PL 116, 116 and H W Arthurs *Without the Law* (University of Toronto, 1985), 200.

[176] As was seen in section II B above.

[177] *Smith* v. *East Elloe Rural District Council* [1956] AC 736, 751 per Viscount Simonds: "It is our plain duty to give the words of an Act their proper meaning..."

[178] "[W]hat to an outside observer looks like persistent thwarting of the will of Parliament." J Anderson, "Parliament v. Court: The effect of legislative attempts to restrict the control of supreme courts over administrative tribunals through the prerogative writs." (1950) 1 UQLJ 39, 40.

[179] "[J]ustice shall be so administered only 'after the laws and usages of this realm' ... The phrase 'usages of this realm' means the customary procedures." Bennion *Statutory Interpretation: A Code* (2ed Butterworths, London, 1992) 62, quoting Blackstone's Commentaries ed. Kerr (4 ed 1876) iii 22.

[180] For example, with reference to *Anisminic*, S A de Smith "Judicial Review: The Ever-open Door?" (1969) 27 CLJ 161, 163.

fundamental.[181] Repeated suggestions that sufficiently clear statutory provisions have yet to be drafted[182] would appear absurd given the strong terms which have already been used. The approach taken by the courts in such instances would appear to bear a strong resemblance to that taken by Chief Justice Coke in the 17th century:[183]

> "the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it."

It is clear that Parliament may often act hastily[184] and without regard for the systematic development of the law,[185] and that divisions within the legislature and between legislature and executive no longer provide an adequate check on legislation.[186] It would seem however that such concerns would appear better served by the establishment of a superior court[187] or by reforms to electoral and governmental structures rather than by court intervention which may be of limited general effect.[188]

It may be further be suggested that in interpreting privative provisions restrictively the courts themselves exceed their jurisdiction,[189] and may, in doing so, weaken their overall authority.[190] The courts may also be adversely affected by well-justified criticism of the often tortuous reasoning employed in relation to such provisions.

It is however difficult to accept that legislative intent is clearly expressed by many privative provisions. The strong phrasing of many clauses would, if interpreted literally, preclude review in all instances, including patently unreasonable actions and those taken in bad faith. Even provisions permitting review for want of jurisdiction would not, on a restrictive definition of the

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181 Above n. 148, 990. See also above n. 13, 729: "the courts have now gone to length of making ouster clauses meaningless, inconsistent though this is with the constitutional position of the judiciary."

182 *Anisminic* v. *Foreign Compensation Commission* [1969] 2 AC 147, 170 per Lord Pearce.

183 *DrBonham's Case* 77 Eng. Rep. 646, 652 KB (1609)

184 B Schwartz & H W R Wade, *Legal Control of Government* (Clarendon, Oxford, 1972), 297.

185 Above n. 13, 728.

186 P Cane, *An Introduction to Administrative Law* (Clarendon, Oxford, 1992), 343.

187 Such a body has been proposed by Lord Scarman ("The Development of Administrative Law: Obstacles and Opportunities" [1990] PL 490, 493), who made the observation that the members of such a court would have a more controversial role than that of currently played by the judiciary.

188 Above n. 175.

189 L Bélanger "Corps administratif: bref de prérogative" (1964) 10 McGill LJ 217, 231.

190 Justice S D O'Connor "Reflections on the preclusion of judicial review in England and the United States" (1986) 27 William & Mary LR 643, 655: "Pretense surely weakens the institutional authority of the judiciary, and hence victories such as *Anisminic* may not come without cost." See also Lord Devlin's reference to "judicial dynamism" which undermines public confidence "Judges and Lawmakers" (1976) 39 MLR 1, 5.

term,[191] permit review in all such instances. It is possible that the preclusion of review on any ground is intended in exceptional cases.[192] However, in most instances the strong terms of privative enactments would seem to reflect legislative attempts to overcome restrictive interpretation, rather than a broad intention to prevent review completely.[193]

It is furthermore not unreasonable to suggest that the strength of intention which privative enactments should reflect is not present in all the clauses which are currently in force. In some instances repeal would appear suitable; in others more moderate restrictive provisions should be substituted for the privative enactment. It would however seem difficult, given the unhappy history of privative provisions in the courts, to draft a provision which would of itself dependably permit of review only in extreme circumstances.

2 *Functional considerations*

Whilst many justifications may be made and disputed for privative enactments, ranging from the avoidance of delay to the preservation of agency autonomy,[194] it is submitted that these are largely irrelevant when considering the literal interpretation of such provisions. It is clear that review will not be available in some instances, whether by reason of a privative clause or through the exercise of judicial discretion. As has been seen, the wishes of the legislature and the courts often coincide. However, the approach taken by the courts to some privative enactments indicates that they do not always do so. It has been seen that in most instances of disagreement the judicial assessment of the desirability of review has taken precedence.

In addition to the constitutional objections to such precedence, there is a strong functional argument in favour of legislative determination of the limits of review. Such determination will in most instances involve the evaluation of policy and of the broad effect of review. Whilst judicial decisions in such matters may be intended to reflect the public interest,[195] the extent to which the judiciary are qualified to do so is open to question.[196] Such decisions are, by contrast, a function to which the legislature is particularly accustomed.

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191 See above n. 40.

192 For example, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s. 9(b) (see Appendix III).

193 Above n. 167, 174.

194 See, for example, above n. 171, 275 - 276.

195 Above n. 28, 3.

196 J A G Griffith, *The Politics of the Judiciary* (Manchester University, 1977) 193: "These judges have, by their education and training and the pursuit of their profession as

V APPROACHES TO REFORM

A Judicial Compromise

It has been seen that the approach to privative provisions necessarily involves both the courts and the legislature. It would also seem that the current position of both is unsatisfactory and in need of reform. Although the courts must retain a supervisory function which permits them to safeguard the most basic elements of the constitution, their role should be tempered by greater respect on the part of the courts for legislative intent.

A generally more effectual approach to the interpretation of privative provisions has been applied by both the Australian and Canadian courts The Australian approach dates from the decision in *R* v. *Hickman; ex p. Fox and Clinton.*[197] In essence Justice Dixon held a privative clause to be effectual "provided always that the decision is a bona fide attempt to exercise the power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."[198] The test was extended by *R* v. *Murray, ex p. Proctor* to require that the exercise not be in breach of a statutory requirement so important that the legislature could not have intended it to be disregarded.[199]

The *Hickman* approach has however been criticised for its complexity, which may permit some degree of unpredictability[200] or manipulation, particularly in the application of the supplementary principle.[201] It would however appear to afford some degree of variance from the judicial interpretation of the relevant legislation whilst allowing control of extreme or wilful abuse.

It must be noted in considering this approach that the Australian Federal courts have recourse in some instances to section 75(v) of the Australian Constitution,[202] which has been held to confer a power of review despite the presence of a privative clause in *R* v. *Coldham; ex p. The Australian*

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barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest."

197 (1945) 70 CLR 598.

198 Above n. 197, 615.

199 (1949) 77 CLR 387.

200 Above n. 28, 67.

201 Above n. 141, 698.

202 "In all matters - ... (v) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: ... The High Court shall have original jurisdiction."

Workers' Union.[203] Whilst it is possible that the greater constitutional authority of the Australian courts may mean that they have little cause to adopt a more restrictive approach to privative provisions,[204] the long history of the *Hickman* approach would appear to indicate that such is not the case. It must also be noted that the Court in *Coldham* approved *Hickman*.

The Canadian judiciary have if anything taken a more positive approach, holding review in the presence of a privative clause to be available only in cases of patent unreasonableness.[205] The Canadian courts also enjoy a constitutionally protected right of review of provincial administrative bodies,[206] although as in Australia the more favourable interpretation of privative provisions preceded and followed the recognition of that right. Recent decisions indicate a still more literal approach than that seen in Australia.[207]

Review of administrative actions in United States courts also employs a rationality test with reference to some statutes. A distinction is made between a general standard of reasonableness in those areas where statutory ambiguity may be considered to be a deliberate conferral of broad jurisdiction,[208] and a rigid standard where ambiguity appears not to be so intended.[209] Despite, or perhaps more accurately because of,[210] the existence of substantial constitutional powers,[211] American courts have, at least in recent years, taken a deferential attitude to administrative decisions.[212]

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[203] (1983) 153 CLR 415, 418. Note, however, that the approach taken by Dixon J. in *Hickman* was cited with approval.

[204] Above n. 144, 467.

[205] *Canadian Union of Public Employees* v. *New Brunswick Liquor Corporation* [1979] SCR 227. Note, however, the decision of the Manitoba Court of Appeal in *Re Fisher and Manitoba Workers Compensation Board* (1991) 82 DLR (4th) 104 in which patent unreasonableness was held to include bad faith, the taking into account of irrelevant considerations or the failure to consider relevant material, breach of natural justice and misconstruction of empowering legislation. This view is evidently not universally held: in *Macdonald* v. *Commissioner of Business Franchises* [1992] 1 VR 611 (AD) a privative clause was held to preclude review except where the nature of the decision indicated an "untenable and absurd" view of the facts.

[206] In *Crevier* v. *Attorney-General for Quebec* [1981] 2 SCR 220 the review of jurisdictional error was held to be fundamentally guaranteed by s. 96 of the Constitution Act. The decision of the Supreme Court has been described by one leading constitutional scholar as "strained". (P W Hogg, *Constitutional Law of Canada* (3ed Carswell, Toronto 1992), 196).

[207] For example, in *Re Artex Manufacturing Partnership and Labour Relations Board of Canada* (1991) 82 DLR (4th) 124, a privative intent was inferred by the Court in the absence of any express provision and subjected to the standard test of patent unreasonableness.

[208] *Chevron USA, Inc.* v. *Natural Resources Defence Council* 467 US 837, 842 - 843.

[209] Justice A Scalia "Judicial deference to administrative interpretations of law" (1989) Duke LJ 511.

[210] Above n. 190, 655.

[211] *Marbury* v. *Madison* (1803) 5 U.S. 87, 111 per Marshall CJ "It is, emphatically, the province and duty of the judicial department to say what the law is." Note, however, that

It is true that the standard of rationality has been developed by courts of superior constitutional jurisdiction, and as such may reflect the greater confidence arising from the ability of these courts to prevent unconstitutional actions by direct means. The retention of restrictive interpretation may be seen to provide an alternative means of exercising such control.[213] The need for such a judicial role is a matter of substantial debate,[214] although it would seem that in any event restrictive interpretation is a very limited and obscure means to that end.

It may moreover be suggested that a decision between "rightness" and "reasonableness" is already made by the New Zealand courts in the interpretation of privative provisions,[215] evidenced by the mention of "legitimate room for judgment" in *Bulk Gas Users Group*.[216] Nevertheless, considerable scope for greater transparency and consistency remains, in light of the criticisms of the approach of the Court of Appeal which have been made above.

The benefits of reviewing administrative decisions subject to privative provisions only where wholly unreasonable[217] would appear substantial. The standard allows considerable autonomy and independence for authorities protected by such enactments while allowing review in extreme cases. The small number of areas in which complete preclusion of review would appear warranted would seem likely to be served by the combination of the high threshold of irrationality and the current discretion of the courts.

As has been noted, however, the stringency of a rationality test is not warranted by many current privative enactments. The approach proposed is therefore dependent upon a more moderate approach on the part of the legislature.

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the position has recently been restated in particular regard to privative clauses in the *dissenting* opinion of O'Connor J in *South Carolina* v. *Regan* 465 U.S. 367, 397: "[T]he original jurisdiction of the Supreme Court has long been thought inviolate."

[212] For example, *Block* v. *Community Nutrition Institute* 467 U.S. 340 (1984), in which the Court held that review could be precluded on a broad range of grounds. Note however the very extensive criticism of the deferential approach in K C Davis *Administrative Law of the Eighties* (K C Davis, San Diego, 1989), 480 - 481.

[213] For example, above, n. 187

[214] Above, n. 193.

[215] J A Smillie "The Foundation and Scope of Judicial Review: A comment on *Bulk Gas Users Group* v. *Attorney-General*" (1984) 5 Otago LR 552, 554.

[216] [1983] NZLR 129, 136.

[217] A narrow definition is required: "a decision so outrageous in its defiance of logic or of accepted moral standards that no person who had applied his mind to the question to be decided could have arrived at it." (*Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374, 410).

B LEGISLATIVE COMPROMISE

It is however clear that in many instances judicial respect for parliamentary intent is currently not warranted. Although it is submitted that privative enactments are necessary where legislative intent is so strong as to warrant their use, such intent must be the result of extensive consideration. That consideration has apparently not occurred.

Following repeated criticism of the widespread use of privative provisions,[218] the British Parliament passed the Tribunals and Inquiries Act 1958, which had the effect of repealing all privative enactments other than those specifically retained.[219] At the time of *Anisminic*, the effect of the Act had been to remove all such provisions other than section 4(4) of the Foreign Compensation Act.[220] That status did not, however, give rise to a more favourable interpretation.[221] The Tribunals and Inquiries Act has since been described as legislative acceptance of restrictive interpretation.[222]

In Australia the Administrative Decisions (Judicial Review) Act 1977 confers statutory authority upon the Federal Court to review administrative actions "notwithstanding anything contained in any enactment in force at the Commencement of this Act."[223] The effective repeal of privative enactments under the Act is thus limited to those passed prior to the Commencement and only applies where the action for review is brought under the Act.

There are a number of other limitations in the application of the Act, largely as a result of section 3(1):

> "a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in Schedule 1."

The limits have been extended to some degree by the broad interpretation of the requirements of the terms "decision", "administrative character", and "under an enactment" by the Federal Court.[224] However, further specific limitations may be added to Schedule 1 by amendment, or the Act may be bypassed altogether by regulation.[225] Furthermore, it is to be noted that the

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218 Report of the Committee on Ministers' Powers (Donoughmore Committee) (1932) Cmd 4060, 65, and Report of the Committee on Tribunals and Inquiries (Franks Committee) (1957) Cmnd 218, para. 117.
219 Section 11.
220 *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147, 207.
221 [1969] 2 AC 147, 201 (per Lord Pearce), 207 (per Lord Wilberforce).
222 Above, n. 146.
223 Section 4. The date of commencement was 1 October 1980.
224 Above n. 141, 243 -- 255.
225 Section 19.

legislature has not since the passage of the Administrative Decision (Judicial Review) Act refrained from enacting new privative provisions, which will have effect despite the Act.[226]

The most important function of broad repeal legislation is to give rise to further consideration of privative provisions. In the courts such consideration must attach to the fact that the legislature has recognised the forceful nature of privative enactments and chosen to repeal all but certain specified provisions. Whilst the reaction of the English courts to such legislation was understandable in the context of their past approach to privative provisions, it would seem that if repeal is intended as a means of reform it must be recognised as such.

Legislative consideration occurs both at the time of repeal, in deciding which provisions should be retained, and afterwards, in the decision to enact privative clauses despite the presence of the Act. Such consideration would seem likely to ease concerns over too liberal use of privative provisions, either where statutory restriction of review is unnecessary or where the degree of restriction intended warrants only a more a more moderate provision. It is of course possible that no extant provision may be considered so necessary. It is clear, however, that should the legislature perceive such a need it must be capable of implementing that perception.

Such a result would appear ill-served by legislation which is easily ignored or avoided. It is submitted that whilst legislative recognition of the process of compromise might ideally have such an effect, a requirement requiring notice in Parliament at the passage of any provision akin to section 7 of the New Zealand Bill of Rights Act 1990 may have greater practical effect.[227]

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226 G D S Taylor "The Limits of Judicial Review" (1986) 12 NZULR 178, 191 notes the enactment of three new privative provisions between the date of assent to the Act and its coming into force. The long delay before the Act came into force must however be borne in mind.

227 "Where any Bill is introduced into the House of Representatives, the Attorney-General shall - (a) In the case of a Government Bill, on the introduction of that Bill; or (b) In any other case, as soon as practicable after the introduction of the Bill, - bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedom contained in this Bill of Rights."

V CONCLUSION

The right to apply for judicial review is a central element of constitutional law. Whilst it is used only in a small proportion of disputes, review remains available as an authoritative, independent and public means of ensuring the legality of the administration of government. Whilst it must not be permitted to frustrate the will of the legislature, it is a right which should not be removed without good reason. The fact that good reasons exist - that review is inappropriate in some areas - has been recognised by the courts in their decisions not to review.

The continued passage of privative provisions would, however, indicate a legislative lack of faith in the consistency of judicial discretion. It would, given the instances in which review has been granted despite the presence of a privative clause, appear that the distrust is justified. For practical as well as constitutional reasons, disagreement over the availability of review would seem best resolved in favour of the legislature.

However, many of the clauses currently in force do not appear to justify the forceful terms in which they are expressed. Whilst express privative provisions may be warranted as an expression of particularly strong legislative intent, it would seem clear that other statutory devices may be used where that intent is more moderate. Where that intent no longer exists, as appears likely in the case of many older provisions, broad repeal is both straightforward and necessary.

It would furthermore seem clear that even where justified, most privative provisions are phrased in such strong terms that their literal application is almost certainly contrary to the intention of Parliament.

There remains, therefore, a significant role for the courts even in the presence of a privative clause. The current judicial approach to such provisions seems unlikely to accord such clauses any real effect. An approach based upon a broad rationality test would appear likely to do so while restricting abuse. The constitutional background against which such tests have been developed in other jurisdictions would not appear to detract from their merits.

Many eminent members of the legal profession and of the judiciary have called for greater method and simplicity in administrative law. The obscurity and confusion of the law relating to privative clauses is evident. It is a credit neither to the wisdom of Parliament nor to the sense of the courts. It is the responsibility of both institutions to reach a more appropriate and more open compromise.

APPENDIX I: Privative clauses identified using STATUS Search

Name and date of Act	Section	Subject-matter	Decision-maker	"Lack of jurisdiction"	Appeal provision	Reference
Judicature 1908	s. 56N	General	Australian Courts	No.	No.	n. 77
Pawnbrokers 1908	s. 41	Summary judgment	Justice of the Peace	No.	No.	n. 76
River Boards 1908	s. 41	Removal from office	District Court	No.	No.	
Bylaws 1910	s. 9.	Confirmation of bylaws	Minister	No.	No.	
Electric Power Boards 1925	s. 25	Removal from office	District Court	No.	No.	
Auckland Transport Board 1925	s. 14.	Removal from office	District Court	No.	No.	
Companies (Bondholders Incorporation) 1934-35	s. 29	Bondholders incorporation	Commission	Yes.	High Court.	
Mortgagors and Lessees Rehabilitation 1936	s. 22	Review of leases	High Court	No.	No.	
Marketing 1936	s. 23	Price fixing	Order in Council	No.	No.	n. 30, 124
International Air Services Licensing 1947	s. 19	Airline licenses	Minister	Yes.	No.	
Land 1948	s. 173	Various	Various	No.	No.	
Cooperative Dairy Companies 1949	s. 19	Various	Tribunal	Yes.	High	
Boilers, Lifts and Cranes 1950	s. 57	Summary judgment	District Court	No.	No.	
Harbours 1950	s. 34	Ouster of office	District Court	No.	No.	

Machinery 1950	s. 35	Summary judgment	District Court	No.	No.	n. 83
Penal Institutions 1954	s. 41B	Damages claims	District Court	Yes.	High Court.	
Maori Reserved Land 1955	s. 74	Land valuation	Appeal body	Yes.	No.	
Electoral 1956	s. 168	Electoral	High Court	No.	No.	n. 75
Police 1958	s. 62	Minor offences	District Court	Yes.	No.	
Copyright 1962	s. 48	Copyright	Tribunal	Yes.	No.	
Niue 1966.	s. 67	Land	Land Court / Land Appellate Court	No.	No.[1]	
	s. 125	General	Niuean Courts	No.	No.[2]	n. 77
Diplomatic Privileges and Immunities 1968	s. 20	Diplomatic immunity	Minister	No.	No.	n. 102
New Zealand Security Intelligence Service 1969	s. 4A[3]	Interception warrant	Minister	No.	No.	n. 31, 109, 114
	s. 20	Security complaints	Commissioner	Yes.	No.	n. 109
Public Bodies Leases 1969	s. 3	Status of public body	Minister	No.[4]	No.	n. 123
Armed Forces Discipline 1971	s. 143	General	Court-martial	No.	Yes.[5]	

[1] Appeal to Land Appellate Court from Land Court.
[2] Appeal rights as provided within Niuean Court system.
[3] Note also s. 4A(9) : "This section shall have effect notwithstanding anything to the contrary in any other Act."
[4] The section applies to all notices "by the Minister purporting to have been issued under this Act", and review for want of jurisdiction is expressly excluded.
[5] See Court Martials Appeals Act 1953.

Race Relations 1971	s. 19.	Race relations	Conciliator	Yes.	No.	n. 122
Ombudsman 1975	s. 25	General	Ombudsman	Yes.	No.	n. 87, 101
Local Elections and Polls 1976	s. 108.	Disputed elections	District Court	No.	Yes.*	n. 82
Territorial Sea and Exclusive Economic Zone 1977	s. 21	Fishing licenses	Minister	No.	No.	n. 102
Fisheries 1983[6]	s. 28ZGA	Fishing quota allocation. (transitional)	Director-General / Quota Appeal Authority	No.	No.	n. 127
Immigration 1987	s. 10	Visas	Minister / visa officer	No.	No.	n. 107
Sale of Liquor 1989	s. 203	Removal from office	District Court	No.	No.	
Serious Fraud Office 1990	s. 20	Investigations	Director of Office	No.	No.	n. 117
Employment Contracts 1991	s. 104	Labour relations	Employment Court	Yes.[7]	Yes.[8]	n. 86
Resource Management 1991	s. 391	Relevant statute (transitional)	Licensing / consent authority	No.	No.	n. 127
	s. 422	Relevant statute (transitional)	Territorial authority	No.	No.	n. 127
	s. 423	Relevant statute (transitional)	Minister	No.	No.	n. 125
Treaty of Waitangi (Fisheries Claims)	s. 9	Fishing rights	N / A	N / A	No.	

[6] Section inserted by the Finance Act (No. 6) 1992.
[7] Note, however, the definition of "jurisdiction" given in s. 104(6).
[8] Extensive appeal rights provided in ss. 132 - 135 of the Act.

Settlement 1992						
Maori Land Act Te Ture Whenua Maori 1993	s. 348	Land (transitional)	Maori Land Court and its predecessors	No.	No.	n. 126

APPENDIX II: Table of other legislation considered

Name and date of Act	Section	Comment (where applicable)	Reference
Arbitration Act 1901 (NSW)	s. 32		n. 32
District Courts 1947	s. 64	No review for want of form.	n. 120
Foreign Compensation Act 1950 (UK)			n. 156
Summary Proceedings 1957	s. 204	No review for want of form except in case of miscarriage of justice.	n. 120
Tribunals and Inquiries Act 1958			n. 219
Antarctica 1960	s. 6	Certificate of Minister as to immunity to be conclusive evidence.	n. 113
Indecent Publications 1963	s. 12	Tribunal has exclusive jurisdiction to determine indecency.	n. 95
Consular Privileges and Immunities 1971	s. 9	Certificate of Minister as to immunity to be conclusive evidence.	n. 113
Judicature Amendment 1972	s. 5	Discretion not to review for want of form	n. 119
Marine Pollution 1974	s. 67	Certificate of Minister as to parties to international agreements conclusive evidence.	
Administrative Decisions (Judicial Review) Act 1977 (Australia)			n. 223 - 255
Wild Animal Control Act 1977	s. 25(4)	Finality provision	n. 17
Video Recordings 1987	s. 20(1)	Decision of the Authority or of the Board of Review conclusive evidence.	n. 26, 95
Children, Young Persons and their Families 1989, s. 440.	s. 440	No review for want of form except in case of miscarriage of justice.	n. 120

Sale of Liquor 1989	s. 148	Exhaustion requirement	n. 94
Casino Control Authority 1990	s. 98	Exhaustion requirement	n. 29, 94
New Zealand Bill of Rights Act 1990	ss. 2, 4, 5, 6, 7, 27 (1)		n. 157 - 166, 227

APPENDIX III: Sections 8 and 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

9. EFFECT OF SETTLEMENT ON COMMERCIAL MAORI FISHING RIGHTS AND INTERESTS-- It is hereby declared that--

(a) All claims (current and future) by Maori in respect of commercial fishing--

(i) Whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and

(ii) Whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and

(iii) Whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal,--

having been acknowledged, and having been satisfied by the benefits provided to Maori by the Crown under the Maori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble to this Act, are hereby finally settled; and accordingly

(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 and 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

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

10. EFFECT OF SETTLEMENT ON NON-COMMERCIAL MAORI FISHING RIGHTS AND INTERESTS-- It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic or seaweed that are subject to the Fisheries Act 1983--

(a) Shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto

(b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall--

(i) Consult with tangata whenua about; and

(ii) Develop policies to help recognise--

use and management practices of Maori in the exercise of non-commercial fishing rights; and

(c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but

(d) The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, *shall henceforth have no legal effect*, and accordingly--

(i) Are not enforceable in civil proceedings; and

(ii) Shall not provide a defence to any criminal, regulatory, or other proceeding,

-- except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

(Emphasis added)

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