

MARY T SCHOLTENS

JUDICIAL REVIEW OF CENTRAL GOVERNMENT
IN THE 1990s -

IS IT PROMOTING GOOD ADMINISTRATION?

LLM RESEARCH PAPER
ADMINISTRATIVE LAW (LAWS 519)

FACULTY OF LAW
VICTORIA UNIVERSITY OF WELLINGTON

1 October 1998

S368 SCHOLTENS, M.T. Judicial review of central government.

VICTORIA
UNIVERSITY OF
WELLINGTON

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



LIBRARY

I INTRODUCTION

In his separate judgment in *Waitakere City Council v. Lovelock*¹ Thomas J sets out five factors generally promoted as favouring judicial restraint when considering the reasonableness of a decision of a public authority. In summary these are:

- (1) Responsibility for the decision has been vested in the authority by Parliament, for reasons including its status, experience, knowledge and/or expertise.
- (2) The decision-maker (in that case a local authority) may be (or be directly accountable to) a democratically elected person or body.
- (3) The extent of other forms of administrative control such as the Audit Office, Ombudsman and Official Information Act, the impact of the consultation obligation; statutory appeals, powers of inspection by monitoring bodies and the like.
- (4) The fact that there is genuine scope for differing views on most policy issues:²

The issues are often complex and difficult. The means of obtaining economic efficiency, the achievement of policy or strategic goals in the most cost-effective way, provides but one example of an area where the Courts must be hesitant in assuming, much less asserting, authority to judge."

- (5) Thomas J's fifth factor is "... the possibility that overly indulgent judicial intervention will inhibit administrators' efficiency in the performance of their statutory responsibilities."

Thomas J refers to this fifth factor as "possibly more figmentary". "Figment", according to the *Concise Oxford* (9th ed), is a thing invented or existing only in the imagination. His Honour was sceptical:

Administrators will constantly be looking over their shoulders apprehensive at the prospect of judicial review. The constant threat of such proceedings will make them over-cautious or lethargic. Justice O'Connor of the United States Supreme Court has made this point with a short

¹ [1997] 2 NZLR 385, 413-4 [*Waitakere City Council*]

² Above n1, 414

and entertaining fable in "Reflections on Preclusion of Judicial Review in England and the United States" (1986) 27 Wm & Mary L Rev 643 at p.655:

"The centipede was happy, quite,
until a toad in fun
Said, 'Pray which leg goes after which?'
This worked his mind to such a pitch,
He lay distracted in a ditch,
Considering how to run."

One would not willingly wish this fate upon administrators, but there is in fact little or no empirical evidence that judicial review has the effect of inhibiting administrative action.

His Honour may be right. A survey of those current Cabinet Ministers with (just short of) five to eleven years' Ministerial experience were asked whether they perceived that it did. On a scale of 1 (being not at all) to 5 (definitely), four gave a score of 1, two of 2 and one of 4.³

The same Ministers were asked whether they perceived their effectiveness to be enhanced by the requirements of administrative law to act "reasonably, fairly and in accordance with the law". Two answered "definitely" (5), four rated their answer a 2 on the same scale and one said "not at all".⁴ Whether judicial review by the High Court was influential on their decision-making processes (1 being little influence and 5 being significant influence) was controversial. Two gave a score of 5, one of 4, two of 3, one of 2 and one of 1.⁵

This paper considers the nature of that influence on decision-making in today's central government context. Do the requirements of administrative law to act "fairly, reasonably and in accordance with the law", and the supervisory role of the Court in ensuring the requirements are met, promote or inhibit good decision-making? One expects administrative law values to reflect and reinforce principles of good government. These might include informed decision-making, public participation, openness, acknowledgement/consideration of the rights and interests of individuals and groups, fairness and mutual trust between government and governed. Particular cases involve determining the boundaries of the particular power. The Court's approach to that task, and to the task of determining fair process, can be as value-laden as an assessment of the

³ Responses to Questionnaire – Appendix A [Appendix A] Question 9.

⁴ Appendix A, Question 10

⁵ Appendix A, Question 12(a)

“reasonableness” of a decision. In many cases, the distinction cannot properly be made, as a decision outside the four corners of the statutory power is, in classic *Wednesbury* terms, unreasonable.⁶

This paper first identifies the broad aims and objectives of administrative law and considers the political nature of the judicial role. It then considers how administrative law has responded to the challenges in the New Zealand context. A sketch of today’s governmental environment is attempted and it ends by asking whether administrative law is contributing to good government in an effective way.

II BROAD AIMS AND OBJECTIVES OF ADMINISTRATIVE LAW AND THE ROLE OF THE JUDGE

First principles first. The rule of law is the cornerstone of both individual freedom and democracy.⁷ It is the means by which the rights of individuals are protected from the exercise of governmental power. Where the source of law is a democratically elected legislature, it must be a requirement of democracy that the executive observe it. The exercise of the supervisory jurisdiction by an independent judiciary is at the heart of ensuring those who exercise public powers do so not only lawfully, but also reasonably and in accordance with fair procedures.⁸

The concepts of reasonableness and fairness are laden with value judgements. The task of interpreting the statute can also permit or require an assessment of matters of policy, for which there can be several different approaches and outcomes. How does an independent judiciary approach its jurisdiction? One school of thought maintains that it is a fiction that the law is apolitical,⁹ that the role of the Court can be seen as a response to the social

⁶ See the classic statement of Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223, 228-230.

⁷ For a clear and authoritative exposition on the basic concepts and principles of democracy, see David Beetham & Kevin Boyle *Introducing Democracy* (Polity Press/UNESCO, Cambridge, 1995).

⁸ A paraphrase of the general grounds for review formulated by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (HL) 410-411 and the (then) Rt Hon Sir Robin Cooke in “The Struggle for Simplicity in Administrative Law” in Michael Taggart (ed) *Judicial Review in the 1980s: Problems and Prospects* (Auckland, 1986) 1, 17.

⁹ See Carol Harlow “Back to Basics: Reinventing Administrative Law” (1997) PL 245, 247.

and political context of the time¹⁰. There is ample extra and intra-judicial acknowledgement that administrative law, in particular, develops and changes according to current perceptions of what is required of the Courts.¹¹ Judges will apply administrative law principles to the changing needs, perceptions and expectations of the community. They will do what they consider to be right according to their views of constitutional propriety. There is inevitably a degree of judicial subjectivity and different Courts will take a different view of their role. What was described by the (then) Rt Hon Sir Robin Cooke as a “profound difference in approach to decisions of Ministers” between English and New Zealand Courts in cases such as *Rowling v. Takaro Properties Ltd*¹² and *Petrocorp Exploration Ltd v. Minister of Energy*¹³ was explained in 1992 as a consequence of “... the spirit or the light in which the Judge sees his administrative law responsibility”.¹⁴

There are several different descriptions of the nature of this judicial discretion which focus on the political nature of the judicial role. One approach is the “red light” and “green light” theories of judicial intervention¹⁵. Very broadly, red light theories are those which favour the traditional view that the rights of the individual are among the highest goods known to the politico-legal system and state power in its many manifestations is basically an intrusion upon those rights. It follows that in many cases the law should be interpreted in favour of the individual, with an essential function of the Courts being to restrict encroachments on private rights by being ever ready to show a red light to public decision-makers.

In contrast, green light theories embody the proposition that the contra distinction between “individual rights” and “state power” is a false one, and that the concept of “state power” can be redefined as “the public interest”. It follows from this that the conflict is redefined as a confrontation between narrow, sectional or individual interests on the one hand, and the public interest on the other.

¹⁰ See JAG Griffiths *Judicial Politics Since 1920* (1993) for a very readable excursion through recent UK judicial political history.

¹¹ See, for example, *Thames Valley Electric Power Board v. NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641, 653 per Cooke P; and below n14

¹² [1989] AC 473 (PC); [1988] 1 NZLR 22 (CA)

¹³ [1991] 1 NZLR 641 (PC); [1991] 1 NZLR 1 (HC, CA)

¹⁴ Rt Hon Sir Robin Cooke “Empowerment and accountability: the quest for administrative justice” Judicial Colloquium, Balliol College, Oxford, September 1992, 14

¹⁵ See generally Harlow and Rawlings *Law and Administration* (1984).

Historically, adherents of the green light perspective were more likely to acknowledge the integrity and legitimacy of the political process as an instrument of social regulation. However, as the focus of the political process turns to the enhancement of private rights by regulatory restraint and the freer functioning of the market, the same green light perspective may become more cautionary, seeking ways to intervene to promote and preserve what are seen as broadly fundamental rights and interests.

In his June 1984 paper "The Rise and Ruse of Administrative Law and Scholarship"¹⁶, AC Hutchinson described the different approaches of the "conceptualists" as against the "ideologists". Conceptualists are described as those who see administrative law as a "corpus of doctrinal principles, which coalesce to form an effective, fair and objective restraint on State action".¹⁷ At one end of the "conceptualist" range is the "classical" group headed, Hutchinson opines, by H W R Wade and J F Garner, who fit judicial review into a very simple constitutional design. Parliament delegates power to administrative bodies. Those bodies are accountable through the political process for the substance and merits of their decisions and to the Courts against the misuse or abuse of that delegated power. Underpinning this, however, is the fundamental constitutional responsibility of the Courts to safeguard the reasonable interests of the individual.¹⁸

At the other, "more enlightened" end of conceptualist scholarship, Hutchinson places de Smith who, he observes, concedes that judicial review is "inevitably sporadic and peripheral".¹⁹ Hutchinson observes also what he describes as an emerging "neo-classical" approach. This utilises the concept of rational decision-making to construct more substantive intervention but without the Courts entering the policy-making "maelstrom".²⁰ On one view, New Zealand administrative law can be seen as falling within this neo-classical conceptualist camp for the past 10 years, with the debate over the search for a principled approach to review for unreasonableness continuing.²¹

The alternative approach to defining administrative law is, says Hutchinson, that of the "ideologists", who insist that administrative law is in a state of conceptual disarray. But

¹⁶ AC Hutchinson "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 MLR 293, 318-322

¹⁷ Above n16, 318

¹⁸ Above n16, 319, referring to J F Garner *Administrative Law* (5th ed 1979) 20.

¹⁹ Above n16, 319, referring to de Smith *Judicial Review of Administrative Action* (4th ed 1980) 1.

²⁰ Above n16, 321.

²¹ For example *Waitakere* above n1, per Thomas J

beneath this “conceptual chaos” is a “disturbing ideological coherence” – judges are concerned to protect and preserve the status quo. Hutchinson cites by way of example Professor J A G Griffiths²². Hutchinson himself appears to agree:

The law is like a dog on a long leash. ... [I]t has considerable range of movement. It can wander from the chosen path and cause considerable damage and frustration.”

But, says Hutchinson, “... it will ultimately follow the lead of its political master”.²³

Finally, one should refer to the debate between, roughly speaking, the two “poles on a continuum”.²⁴ These are the democratic positivists (Parliament is sole source of law deriving its legitimacy from the will of the people) and the liberal anti-positivists (judges enforce common law values which give effect to the will of the people – common law values are identified with the rights and liberties of the individual). Somewhere along the continuum the judiciary must supervise the exercise of public powers in the public interest by those elected representatives of the people.

III THE NEW ZEALAND CONTEXT : THE COURT RESPONDS

A The development of the duty to explain decisions

The last 30 years have seen massive change in the process of government and the nature of the exercise of public power in New Zealand.

The 1960s were marked by substantial investment in infrastructure by the Holyoake government, particularly dams, roads, schools and hospitals. The Vietnam war dominated the headlines and election campaigns were stormy. Television was a new and increasingly powerful medium. The level of information received by the electorate increased.

²² Above n16, 321

²³ Above n16, 297.

²⁴ David Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 279-80

The electoral choices in 1972 and 1975 were unequivocal. First, a landslide to Labour and then to National provided a sense of effective electoral accountability and consequently a clear mandate to the elected government to carry out their policies. These were the subject of quite explicit pre-election manifestos. There was no real question of new governments acting against manifesto commitments.

Deference to Ministerial decision-making by the Courts in this context can be noted in cases such as *Shand v. Minister of Railways*²⁵. In general terms, the Courts gave broad effect to privative clauses, permitting a reasonable range of errors within jurisdiction.²⁶

However, the policies of the 1970s, and in particular those under the government of Sir Robert Muldoon, amounted in essence to highly interventionist, autocratic executive rule. This possibly created an element of disquiet about the effectiveness of the orthodox accountabilities of government to the people. We can observe the pendulum swinging in the mid 1970s to a closer look at the content of Ministerial decisions.²⁷ In *Fiordland Venison Ltd v. Minister of Agriculture and Fisheries*²⁸ a bench of three (all later to become consecutive Presidents of the Court) overturned the decision of the High Court deferring to the Minister on the matter of whether an issue of the licence to a game packing house would have a "significant detrimental effect on the economic operation of any game establishment or the stability of the game industry as a whole"²⁹. The Court of Appeal emphasised the need for the Court to be fully informed as to the facts and issues as they presented themselves at the time to the decision-maker. The "uninformative and brief" affidavit from the Director of the Meat Division did not provide the reasons for the decision. The Minister's reasons were the subject of inference by the Court, which then applied a finding of irrelevancy to them, resulting in invalidity.

²⁵ [1970] NZLR 615 (CA)

²⁶ *Attorney-General v. Car Haulways (NZ) Ltd* [1974] 2 NZLR 331 (CA), overturning the judgment of Cooke J who quashed the decision of the Transport Licensing Appeal Authority for error on the face of the record.

²⁷ See, for example, *Van Gorkom v. Attorney-General* [1978] 2 NZLR 387 (CA), this time upholding the judgment of Cooke J declaring general conditions relating to removal expenses of married women teachers to be invalid.

²⁸ [1978] 2 NZLR 341 (CA)

²⁹ Above n28, 353 per Richardson J

This call for transparency and openness with the Court was a continuing theme throughout the next decade. In *CREEDNZ v. Governor-General*³⁰ the Court of Appeal was prepared to draw inferences favourable to the Crown from press clippings and the like. This was in the context of the significant policy decision to fast track the Aramoana aluminium smelter. However the Court, in particular Richardson J, was very critical of the lack of openness on the Crown's part. The message was sharper still seven years later in *New Zealand Fishing Industry Association v. Minister of Agriculture and Fisheries*³¹. In that case, decided in the climate of massive social change and dislocation, a Court of five noted the risk that adverse inferences might be drawn in the absence of an explanatory affidavit from the Minister. Without actually reversing the evidential onus, the possibility of an interventionist change to the rules was raised and the risks to the executive made plain. The Court emphasised that, while it was not for the courts to trespass into the "legitimate policy sphere of Ministers, the constitutional corollary should be Ministerial candour with the Courts about their policy"³². Thus, in a style typical of the Court of Appeal under the presidency of Sir Robin Cooke, the executive was "encouraged" to provide a more open and reasoned response to challenges to its decisions.

B Social dislocation – judicial interventions

Over the period between *CREEDNZ* and *NZFIA*, New Zealand moved from the highly regulated, interventionist style of executive autocracy epitomised by the Muldoon era, to the rapid downsizing of government and a market-regulated economy prevalent since the mid 1980s under the Labour Lange government.

In a fascinating essay, particularly in light of recent political developments under the new MMP electoral system, Richard Mulgan opines that New Zealanders in 1993 faced a "crisis of democratic legitimacy"³³. Successive governments, though granted extensive

³⁰ [1981] 1 NZLR 172 (CA) [*CREEDNZ*].

³¹ [1988] 1 NZLR 544 (CA) [*NZFIA*].

³² Above n31.

³³ Richard Mulgan "The Westminster System and the Erosion of Democratic Legitimacy" in B D Gray & R B McClintock (eds) *Courts and Policy, Checking the Balance* (Brookers Ltd, Wellington, 1995) 265.

powers under New Zealand's extreme version of the Westminster system (unicameral, non-federal system of parliamentary government, first-past-the-post electoral system, single party government), could be made democratically accountable by well-established values and conventions which directed the use of executive power towards purposes set by the voting public. He observes that, since the defeat of the Muldoon government in 1984, these values and conventions have been severely shaken.³⁴

The process of economic and state sector restructuring involved a wholesale attack on the ideology of democratic populism and pragmatism and on the conventions of party accountability which had been sustained by this ideology.

Most of the restructuring carried out by successive governments was not part of either party's policy and did not have the consent of the voter. In Labour's case, Mulgan observes:³⁵

... the general programme of financial deregulation was unexpected and took party supporters and voters by surprise. For instance, the floating of the New Zealand dollar, the opening up of banking and financial markets, the ending of farm subsidies, the introduction of goods and services tax – none of these had been mentioned before the election.

The same period witnessed the divisions of the 1981 Springbok rugby tour to New Zealand, and the quite remarkable (for the time) intervention of the Court to effectively stop the 1985 tour.³⁶ This in circumstances where Parliament had earlier passed a resolution strongly urging that the invitation be rejected in the public interest, but conceding that the decision was a private one for the Union alone. In extending to the Union the degree of care imposed by the Courts on public bodies exercising public powers, Casey J was mindful of Cooke J's earlier warning in *Stininato v. Auckland Boxing Association Inc*³⁷:

... concern for the development of administrative law as an effective and realistic branch of justice must imply that the discretionary remedies should not be granted lightly. After all, progress is not synonymous with giving judgment for plaintiffs.

It was certainly a case for its time. The apartheid policies have gone, Nelson Mandela is President of South Africa, the Springboks hold the rugby world cup, and counsel for Mr

³⁴ Above n33, 272

³⁵ Above n33, 274

³⁶ *Finnegan v. New Zealand Rugby Football Union Inc* [1985] 2 NZLR 139 (HC, CA), and (No.2) 181 (HC) [*Finnegan*]

³⁷ [1978] 1 NZLR 29, referred to by Casey J in *Finnegan* above n36, 186

Finnegan now exert their influence from the benches of the High Court and Court of Appeal. The lines between public and private power, however, remain purposefully blurred. In today's environment, Rule 626(1)(d) of the High Court Rules would assist Mr Finnegan with jurisdiction, while section 18 of the New Zealand Bill of Rights Act 1990 (protecting the right to freedom of movement) could present a problem.

The request for candour ("or else") by the Court of Appeal in *NZFIA*³⁸ was accepted by the executive and set the scene for the broad evidential approach that is now adopted; the provision of reasonably full and frank affidavits on behalf of decision-makers explaining the relevant aspects of the decisions in issue, and an immunity from cross-examination on those affidavits except in exceptional circumstances, where it could be said to be necessary in the interests of a just determination of the issues³⁹.

I suggest that this move towards a procedural duty to explain can be seen as the result of concern by the Courts that the supervisory jurisdiction be exercised in an informed manner. The Courts hesitated to defer to a decision-maker, even in matters involving "policy" without the comfort of persuasion that the "policy" was sound. Perhaps this was a response to the less-consensual nature of government. Perhaps too the courts were mindful of the reality that their decisions on review afford legitimacy to the decisions of government; that to a significant extent they do protect and preserve the status quo. Trite to say that the rule of law enables, rather than inhibits, lawful government. The Court must exercise its jurisdiction in the context of increasingly complex decisions, some far-reaching and difficult to reverse (such as the corporatising and privatising of previously public assets), some creating significant dislocation (for example, changes to fishing quota, market rents for state houses and the tendering of services previously carried out by one group).

The Court's response ensured decisions were clearly explained. It also provided the Court with an ability to exercise more influence. It was the provision of a clear exposition of the Minister's approach in *Petrocorp Exploration Ltd v. Minister of Energy*⁴⁰ that enabled

³⁸ Above n.31

³⁹ This development can be traced through the decisions of the Court of Appeal in *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA), *Attorney-General v Air New Zealand* 4 PRNZ 1 (relating to former Ministers) and *Roussel Uclaf Australia Pty Ltd v Pharmacia* [1997] 1 NZLR 650 (CA).

⁴⁰ [1991] 1 NZLR 1 (CA)

the majority in the Court of Appeal to observe that the Minister's expressed national interest motivation for granting a petroleum mining licence over part of the Waihapa discovery to the Crown, was not for "legitimate" matters such as retaining governmental control of a valuable oil resources in the face of a potential oil crisis, but for "essentially pecuniary" reasons (obtaining value for an unlicensed Crown-owned resource). On the other hand, the minority judge, Richardson J, accepted that the identification and determination of the national interest was for the Minister. He expressly acknowledged the limits to the democratic acceptability of judicial review, reflecting concerns about the constitutional and democratic implications of judicial involvement in wide issues of public policy and public interest⁴¹. This deference to Ministerial policy was a theme of the Courts' decisions a decade earlier in *CREEDNZ*⁴² and *Ashby v. Minister of Immigration*⁴³. The point was bluntly rammed home by the Privy Council, overturning the Court of Appeal in *Petrocorp*⁴⁴:

Judicial review is a great weapon in the hands of the judges – but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power. This is just as true in New Zealand as it is in the United Kingdom.

C Judicial review and the position of Maori under the Treaty

Over the period from the early fisheries challenges in 1986⁴⁵ to, perhaps, the highpoint in the judgment relating to the permitting of whale watching in Kaikoura in 1995⁴⁶ the Court of Appeal under the presidency of Sir Robin Cooke engaged in a delicate "balance of power" dance with the executive.⁴⁷

A new government, litigation wary, did not seek to test the Court of Appeal on the relevance of the recommendations of the Waitangi Tribunal on Te Reo Maori in its 1986 report to the tendering of radio frequencies under the Radio Communications Act 1989 in

⁴¹ Above n40, 46

⁴² *CREEDNZ* above n30

⁴³ [1981] 1 NZLR 222 (CA)

⁴⁴ [1991] 1 NZLR 641 (PC), 656

⁴⁵ The history of the litigation is set out in *Te Runanga O Muriwhenua Inc v. Attorney-General* [1990] 2 NZLR 641

⁴⁶ *Nga Tahu Maori Trust Board v. Director-General of Conservation* [1995] 3 NZLR 553 (CA)

⁴⁷ For an interesting discussion on the rise of judicial activism and return to orthodoxy, see Jane Kelsey *Rolling Back the State* (Bridget Williams Books Ltd, Wellington, 1993) 191-219

Attorney-General v. New Zealand Maori Council ("Radio Spectrum No. 1")⁴⁸. The Crown conceded that the Minister would be obliged to take those matters into account, and did, in fact, do so⁴⁹. In receipt of that concession, the majority (Cooke P, Casey and Bisson JJ) went on to find that, because the Minister had not also considered the "imminent" recommendations of the Waitangi Tribunal on Maori Broadcasting, compliance had not occurred. Interim relief was continued⁵⁰. The issue came back before the Court two months later.⁵¹ The relevant report had been released and considered by the Minister. The government determined to proceed with the tender process. The Court of three unanimously declined to further extend interim relief. This time the majority (Casey and Hardie Boys JJ) expressed reservations about whether the principles of the Treaty were necessarily relevant in areas of decision-making where there is no statutory provision requiring them to be taken into account. The pendulum seemed to be swinging – at least for one member of the Court.

As Cooke P observed in the Fisheries Claim settlement case (*Te Runanga O Wharekauri Rekohu Inc v. Attorney-General*)⁵²:

The New Zealand judgments are part of a widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.

If one considers the aims and objectives of administrative law to be to prevent abuse of power and promote good decision-making, it is perhaps surprising that the vehicle of judicial review has been used to achieve this entitlement.

Yet it is difficult to argue with the evidence of the impact of the process of judicial review on government decisions in circumstances where the assessment of the national interest by the executive was not on all fours with the Courts' assessment of the relative consideration to be afforded Maori interests in particular.

Whether the result contributed to "good government" depends on your viewpoint. Many would say the Courts assisted the executive in finding a politically possible way to give

⁴⁸ [1991] 2 NZLR 129 (CA) [*Radio Spectrum No. 1*]

⁴⁹ Above n48, 144

⁵⁰ Above n48, 139

⁵¹ *Attorney-General v. New Zealand Maori Council (No. 2)* [1991] 2 NZLR 147 (CA) [*Radio Spectrum No. 2*]

⁵² [1993] 2 NZLR 301, 306 (CA)

necessary, and overdue, progress to Maori aspirations. Others see the Court as improperly engaging in social engineering. The "return to orthodoxy" could be seen as a retreat by the Court in the face of rising public disaffection, or alternatively, simply the achievement of the objective, for the moment.

D Promoting fundamental human rights norms through judicial review

Another clear example of the Cooke court "encouraging" good decision-making can be seen from the interim judgment in *Tavita v. Minister of Immigration*⁵³. The judgment is well known⁵⁴.

The Minister's decision declining to cancel a removal warrant against Mr Tavita was made in April 1991, shortly before Mr Tavita's marriage and the birth of his daughter. The Minister's affidavit was sworn in October 1993 and indicated that, even if the fact of Mr Tavita's domestic circumstances had been before him, his decision was not likely to have been any different because he would not have seen those circumstances as "exceptional" circumstances of a humanitarian nature. No mention was made of the International Covenant on Civil and Political Rights 1966 or the Convention on the Rights of the Child 1989.

The submission of counsel for the Minister to the effect that the Minister was not obliged to take international instruments into account, was based on the wholly orthodox position that, in the absence of implementing legislation, treaties do not impose duties or confer rights.⁵⁵ He might equally have argued that the Minister's views on "exceptional" circumstances were not inconsistent with the international commitments of the government, and the Minister's views could be seen as taking into account, for example, the impact of the decision on the child.

⁵³ [1994] 2 NZLR 257 [*Tavita*] (CA)

⁵⁴ For a discussion of *Tavita* and its influence see Melissa Poole "The Use and Abuse of International Instruments" in *Public Law Update on Administrative Law and Judicial Review* (NZLS Intensive, September 1998)

⁵⁵ See, for example, *New Zealand Air Line Pilots' Association Inc v. Attorney-General* 3 NZLR 269 (CA)

The Court reported the "burden of the argument" as being that the Minister was "entitled to ignore the international instruments", and described it as "unattractive". It acknowledged that it was "neither necessary nor desirable" to decide whether the law should be developed, but spelt out the potential risks of forcing the Court to determine whether the executive are "free to ignore" international human rights norms or obligations.⁵⁶

The Minister was given the opportunity of reconsideration, and the appeal was adjourned sine die. As a consequence, the Immigration Service amended its guidelines to direct officers dealing with removal orders to take the relevant international instruments into account, and balance the competing considerations which arise in the particular case. Particular examples are given.⁵⁷

This constructive response by government has meant the Court has not been called upon to decide the issue (as formulated by the Court) of whether the executive is free to ignore international human rights norms or obligations. One might expect that an argument is unlikely to be presented by the Crown in those terms. Subsequent cases such as *Lawson v. Housing New Zealand*⁵⁸, *Puli'uvea v. Removal Review Authority*⁵⁹ and *Rajan v. Minister of Immigration*⁶⁰ proceeded on the basis that, whatever the legal position, the Ministers or relevant decision-makers had in fact taken into account the purport of relevant international obligations.

IV REFORMED GOVERNMENT: THE ENVIRONMENT IN THE 1990s

E Ensuring openness : Public Interest Immunity constrained

A The new public management

As mentioned above, the duty to explain facilitates a closer scrutiny of the quality of decisions. The courts have also ensured that Ministers are not able to hide their true motives and processes behind the shelter of public interest immunity, were they so

⁵⁶ *Tavita*, above n53, 266

⁵⁷ The policy guidelines are reproduced in part in *Elika v. Minister of Immigration* [1996] 1 NZLR 741, 746-7 (HC)

⁵⁸ [1997] 2 NZLR 474 (HC)

⁵⁹ (1995-96) 14 FRNZ 322 (CA)

⁶⁰ [1996] 3 NZLR 543 (CA)

minded. It is, of course, wrong to speak of public interest immunity as if it were a "privilege" of the Crown. An objection to production on the basis of the public interest is the discharge of a duty which arises whether or not a document assists or damages the Crown's case.⁶¹

A certificate of the Minister claiming public interest immunity will be given due respect by the Courts, but they will be prepared to order production for the purposes of inspection to determine whether the claim is properly made. Cooke J observed in *Brightwell v. ACC*⁶²; that "... a Ministerial objection is never to be set aside lightly". However, the move towards more open government is persuasive in the trend towards greater disclosure⁶³.

In any event, the Court is likely to confirm for itself the validity of the claim. A recent judgment⁶⁴ concerned a ministerial certificate signed by the Prime Minister objecting to production of some 70 documents held by the New Zealand Security Intelligence Service. She certified that production would be likely to prejudice New Zealand's defence and security. The objections included those documents of greatest relevance to the proceeding, which related to the interpretation of an interception warrant issued by the SIS. The Court found it had difficulty placing the Prime Minister's assessment in a meaningful context, and proposed to inspect the documents itself before finally ruling on the immunity claim. So again, the theme is close scrutiny and effective checking.

IV REFORMED GOVERNMENT : THE ENVIRONMENT IN THE 1990s

A The new public management

A key reform to influence government decision-making processes in the early 1980s was the move to more open government effected by the Official Information Act 1982. The

⁶¹ See *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394, 446 per Lord Scarman (HL) [1985] 1 NZLR 132, 139 (CA)

⁶² See, for example, *Fletcher Timber Ltd v. Attorney-General* [1984] 1 NZLR 290 (CA) discussing the impact of the Official Information Act 1982

⁶³ *Choudry v. Attorney-General* (19 August 1998) unreported, High Court, Christchurch Registry, CP15/98 (subject to appeal)

core principle of the Act is that official information is to be made available unless it falls within a legislated exception, or the public interest in availability is outweighed by some particular "good reason for withholding" information as provided in the Act.⁶⁵ An enhanced ability to access personal information was provided,⁶⁶ as was a right to a review by the Ombudsman of decisions to withhold information⁶⁷. A duty on decision-makers to give reasons for decisions upon request was provided by section 23. A duty to comply within particular timeframes was introduced by amendment in 1989.

The State Sector restructuring of the mid 1980s included the enactment of the State-Owned Enterprises Act 1986 which exposed former Government trading departments to a more commercial style of operation under the Companies Act regime, responsible to a Board of Directors. Clear lines of reporting and accountability were established, including annual reporting by shareholding Ministers to Parliament, subjection to audit by the Auditor General and select committee scrutiny.

In the core public sector, the State Sector Act 1988 and Public Finance Act 1989 were the cornerstones of the new relationships between Ministers and their advisers and agencies.

Important, too, was the Reserve Bank of New Zealand Act 1989. According to the long title, it aimed:

.... to provide, while continuing to recognise the Crown's right to determine economic policy, for the Reserve Bank of New Zealand, as the central bank, to be responsible for formulating and implementing monetary policy designed to promote stability of the general level of prices.

Thus in the space of five short years, New Zealand moved from the piecemeal hyper-interventions of the executive by way of regulated wages and price freezes,⁶⁸ to delegated independent management by a central bank pursuant to clear and published policies. The cumulative impact of these reforms, cemented further by the Fiscal Responsibility Act 1994, was to increase significantly the fiscal accountabilities of Government while creating a high level of transparency.

⁶⁵ Official Information Act 1982, Part I

⁶⁶ Official Information Act 1982, Part IV

⁶⁷ Official Information Act 1982, Part V

⁶⁸ Wage Freeze Regulations 1982 SR141; Price Freeze Regulations 1982 SR142

There is an increasing emphasis on the "efficient and effective achievement of outputs" by Government entities. Outputs are specified in the purchase agreement negotiated between the Minister and the Department. Since the 1993/94 year purchase agreements have been incorporated into the performance agreements of all CEOs. These principles are currently being extended to underlying Departmental purchase agreements with Crown entities and other third parties from which Government is purchasing "outputs". Purchase agreements emphasise results, leaving the body responsible for finding the most efficient means of achieving them. Limited resources and the consequent need to set priorities is the driver behind these measures.

Outputs are the "basic building block of Government decision-making and accountability mechanisms".⁶⁹ Purchase agreements defining the outputs assist Ministers in more effective government in a number of ways. They provide more clarity of choice between options which best conform to government strategy and represent (in the Minister's opinion) best value for money. They allow Ministers to agree to appropriate cost, quantity and quality measures and standards for desired outputs. Ministers can determine the preferred supplier where there are alternative suppliers, assess the risks and obligations associated with delivery, record and change decisions, and verify output delivery, and hold the supplier accountable for delivery of the specified output.

The public has access to the purchase agreements or statements of intent of all Crown-owned entities and core government agencies. They can see what services are to be provided by these agencies, how much it is expected those services will cost, and how the agency's performance in delivering those services will be assessed. The performance of the agencies against those objectives can be, and is, monitored via the Public Finance Act process. The objectives themselves can be challenged. Thus we live in an age where information about government processes has never been more available to those energetic enough to trawl their way through it.

Social and environmental reforms have also been dramatic. The powers of the Waitangi Tribunal, established by the Labour Government in 1975 to inquire into grievances of Maori, were increased in 1985 to include investigation of grievances back to the signing of the Treaty in 1840. This Parliamentary recognition that the Executive would receive

⁶⁹ That statement and the information which follows is taken from the *Purchase Agreement Guidelines*, New Zealand Treasury, Wellington, 1995.

the results of these inquiries and consider recommendations made by the Tribunal aimed at settling long-standing grievances, set the scene for the dramatic impact of the decisions of the Court of Appeal on subsequent restructuring of state owned assets.⁷⁰

The New Zealand Bill of Rights Act 1990 affirmed New Zealand's commitment to the International Covenant on Civil and Political rights and expressed the objective of promoting human rights and fundamental freedoms in New Zealand.⁷¹ This was another skeleton framework erected by Parliament and brought to life, as such rights legislation inevitably must be, by the Courts.

The Human Rights Act 1993 consolidated various rights legislation and gave promise to the future aspirations of a right based society. In the environmental area the Resource Management Act 1990 reconstructed planning law in New Zealand. A comprehensive and world-leading fisheries management regime was enacted in 1986⁷². Other significant legislative measures designed to protect the environment include the Forests Amendment Act 1993 and the Hazardous Substance and Noxious Organisms Act 1996.

Electoral reform has also been significant. The introduction of a mixed-member form of proportional representation in 1996 has imposed a more formal constitutional requirement on governments to negotiate policies across party lines, rather than primarily within caucus. This is likely to result in more politically popular, and therefore electorally acceptable, policies than might otherwise have been the case under the former system of more centralised executive power.

One can readily see that there are significant operational requirements, checks and balances on today's Public Service. Apart from the legislative framework, there are the general principles in the Public Service Code of Conduct,⁷³ the requirements of the Cabinet Office Manual and various published guidelines on public service ethics. Department performance is subject to Audit Office and select committee scrutiny. The

⁷⁰ Discussed subsequently in this paper

⁷¹ Long title

⁷² Fisheries Amendment Act 1986

⁷³ State Services Commission, 1990

demonstrable public interest in neutrality, professionalism and accountability is at the forefront of recruitment and training in the Public Service.⁷⁴

As one very experienced former Chief Executive has said of government in the 1970s⁷⁵:

Decisions, including those which influenced people's careers, were often made in secret. While judicial review was available in concept, it was rarely availed of in practice. I was once, as Director of Prices and Stabilisation, responsible for that draconian regulatory tool, the Economic Stabilisation Act, under which governments without parliamentary scrutiny, could bring down regulations which controlled major drivers of the economy, eg the wages and prices freeze of the Muldoon era. Fortunately that statute has now been abolished. In its place we have the Reserve Bank Act and the Fiscal Responsibility Act which, in addition to their substantive provisions are renowned for their transparency. Indeed transparency, at least in the core state sector is now part of our environment. It is part of the democratic process and certainly is an integral part of our accountability ... I believe firmly that the state sector reforms have given much stronger incentives for focused performance, for measurement of efficiencies, and for comparative judgments about the way in which departments contribute to a government's strategies.

Today's social and economic environment means that Government places considerable emphasis on the need to do more, better, in the context of tight constraints on public spending.

So on the one hand, we have a significant emphasis on setting priorities and achieving results within limited budgets. The focus in this regard is firmly on results. When the government shifted from budgeting for inputs to budgeting for outputs, it ostensibly freed price from cost, so that the amount it pays no longer explicitly covers the cost of the inputs (for example legal advice, consultation processes) needed to produce the outputs.⁷⁶

At the same time, society less directly but as emphatically also seeks the maximum value for the taxpayer dollar. Business and wider economic imperatives are calling for closer attention to the compliance costs of legislative and policy measures and a closer examination of the appropriateness and costs of government interventions before their implementation.

⁷⁴ See, for example, "Strategic Human Resource Capability Issues in the Public Service" report of State Services Commission, 1997

⁷⁵ John Belgrave "Viewpoint: The State Sector: Where is it Heading?" Public Sector, Volume 20, Number 3, 25

⁷⁶ Professor Allen Schick *The Spirit of Reform* independent report commissioned by the State Services Commission and the Treasury, 1995.

The incentives within government to intervene and regulate is the subject of current debate and review. See, for example, Cabinet agreement in December last year to a regulatory "six pack" of measures. In summary, measures included:

- (1) A Code of Good Regulatory Practice based on principles of effectiveness, efficiency, equity, transparency and clarity.
- (2) A generic policy development process to achieve the goals of the Good Regulatory Practice Code.
- (3) A requirement for Regulatory Impact Statements in all papers to Cabinet, to provide information on the total regulatory impact of the proposed measure including a statement of the net benefit of the proposal, which itself is to include the total regulatory costs (administrative, compliance and economic costs) and benefits (including non-quantifiable benefits) of the proposal, "and other possible options".
- (4) Agreement in principle to a Regulatory Responsibility Act, analogous to the Fiscal Responsibility Act, to enhance the disciplines supporting quality regulatory management. An "Experts Group" has been established to consider this concept.
- (5) Reviews of selected legislation which business considers has significant cost impacts, to ensure that costs imposed by the legislation are minimised. Legislation selected for review includes:

- Building Act 1991
- Health and Safety in Employment Act 1992
- Privacy Act 1993
- Human Rights Act 1993; and
- Meat Act 1981, Dairy Industry Act 1952 and related legislation governing food safety.

It was noted that the Resource Management Act 1990, Employment Contracts Act 1992, Holidays Act 1981 and Accident Rehabilitation and Compensation

Insurance Act 1992 were being considered by the Ministries responsible. Some of these reviews have made some progress.

- (6) A proposal to establish an independent Regulatory Task Force to look at existing regulation and ways of improving it.⁷⁷

Although much of this is aimed at excessive or inefficient regulating, the cost of intervention necessarily includes the cost of the process of intervening - which will almost inevitably include some "big ticket" items such as consultation.

B Consultation in the 1990s

Consultation is central to almost all Government processes. This has been partly the result of a changing society which demands more involvement in decision-making for the decisions of Government to find acceptance with the community, the effectiveness of consultation as a way of best ensuring that decision-making processes are fair, lawful and reasonable, and the acknowledged need by Government to make informed decisions both as to the facts and consequences of particular course of action, and as to their acceptability to various sections of the community.

Consultation operates on several levels. I use the term very broadly, to include that aspect of the duty to act fairly which requires decision-makers to have regard to the interests of individuals directly or particularly affected by a decision, and which will usually include giving them an adequate opportunity to answer any adverse material, or to state their views.⁷⁸

⁷⁷ Media Release, Minister of Commerce, 15 December 1997. See also "Reversing regulatory creep", Janet Shirtcliffe and Conor English, Office of the Minister of Commerce, 10 February 1998; and *Regulation. It is all about incentives* - Speech by Minister of Commerce and Industry at Chen & Palmer, 17 March 1998

⁷⁸ See generally *Fowler & Roderique v. Attorney-General* [1987] 2 NZLR 56 (CA) and contained in *NZFIA* above n31

Consequently, consultation requirements are imposed by a significant number of statutes and regulations, and effectively by the Courts whenever a person or entity's rights, interests and/or legitimate expectations are affected by a decision or action.⁷⁹

Much has been said about the legal requirements of consultation, the elements of which are summarised on the basis of the judgment of the Court of Appeal in *Wellington International Airport v. Air New Zealand*⁸⁰ as follows:

- (1) The consultor must provide the consulted with reasonable information.
- (2) The consultor must give the consulted a reasonable opportunity to state their views.
- (3) The consultor must consider the consulted's views with an open mind before making his/her decision.
- (4) The consultor may act if the consulted do not fully avail themselves of the opportunity for consultation.

The role of consultation in efficient and effective fisheries management

The regulation of fishing in the interests of sustainable management of the resource is one key area where Government significantly interferes with commercial, recreational environmental and Maori interests. Consultation on decisions affecting these interests is a hallmark of the 1983 and 1996 legislations and this is plainly appropriate given the significant impact of policy decisions, such as the level of catch for various species and areas, on those affected.

At the same time, a cost recovery regime was introduced in 1994 whereby a share of the costs incurred by Government in managing the commercial fisheries (including the costs of consulting with the industry in the delivery of policy advice) is recovered from the

⁷⁹ See also the right to natural justice enshrined in s.27(1) of the New Zealand Bill of Rights Act 1990.

⁸⁰ [1993] 1 NZLR 671. For a discussion of the four elements, see *Administrative Law in a Deregulated Economy* NZLS Seminar, November 1993 (Fardell & Scholtens) pp.14-20

industry⁸¹. The intention is that the costs incurred as a result of the existence of the commercial industry (that is, "avoidable costs") shall be recovered from the commercial sector.

Following the setting of levies, the New Zealand Fishing Industry Association filed proceedings seeking judicial review of the regime and a large number of fishers refused to pay their 1996/97 levy. Consequently, in March 1997 the Primary Production Select Committee announced an inquiry into the Government's cost recovery regime and the proceedings were withdrawn.

The 1997/98 contribution by the industry towards the cost of providing fisheries management and research services was \$37 million. The draft budgets made available for the 1998/99 financial year in March of this year (upon which consultation proceeded) would represent an increase to industry levies of \$11 million, or 33 per cent⁸². A significant part of that projected cost was said to be the implementation of the 1996 Fisheries Act, a staged process over four to five years. Each part of the Act is intended to come into effect by way of Order in Council. Regulations are also intended to be phased in. The Ministry advised that "consultation with those likely to be affected ... will be a key part of the development process."⁸³ The one-off costs of implementation are estimated at about \$32 million, with increased ongoing Ministry expenses over the next 4 or 5 years of \$4 million annually.⁸⁴ This is of total industry export receipts for 1997 of around \$1.2 billion.

Following the completion of the consultation process, the Minister recently announced the 1998/99 levies as \$32.4 million, "excluding transaction charges of approximately \$2 million"⁸⁵. He noted the comparative cost to the taxpayer of \$20.2 million, bringing the total cost of fisheries management and related conservation services to \$54.6 million. The reduction from the March draft budget appears from the press release to be partly as a result of a decision by the Minister not to include "under and over recoveries" from previous years, particularly given their impact on small fishers. We see then a clear example of the beneficial results of consultation for the industry. This is consistent with

⁸¹ This information is taken from the Ministry of Fisheries Annual Report 1996/97.

⁸² As reported in *The Dominion* Wednesday 11 March 1998.

⁸³ A summary of the Fisheries Act 1996: Publication by the Ministry of Fisheries.

⁸⁴ Above n83

⁸⁵ Media release, Minister of Fisheries, 23 September 1998

the generally quite positive responses to questions relating to the effectiveness of consultation in the survey of Ministers and Chief Executives.⁸⁶

Interesting also is the Minister's expressed disappointment that he could not lawfully implement a change to the hourly charging regime for a range of marine farming and aquaculture-related transactions "due to the wording in the Fisheries Act 1996". This highlights a well-understood problem with highly prescriptive legislation. It is perhaps surprising that, in an environment where amending legislation has become a very difficult process (due to pressure on sitting hours and the need to secure agreement across party lines in circumstances where consensus does not generally attract media attention or distinguish a party to the electorate), Parliament continues to carefully proscribe its delegated powers.⁸⁷ It is encouraging to note, however, that the Minister was both mindful and respectful of the limits of his powers. The responses to questions 3 and 4 of the survey are apposite.⁸⁸

As a result of concerns about the impact of costs on the viability of the industry, the Minister in March announced he was undertaking an independent review of the policy settings in the 1996 Act, "focusing on simplifying its operation, efficient resource use and if possible reducing compliance costs on stakeholders". The review, "Fishing for the Future" has just been released.⁸⁹ It notes that the current basis for allocating costs between the government (taxpayer) and industry differed markedly in fishing from that of other primary production sectors. It recommended amending the 1996 Act to provide a simpler, less costly regime, and cost recovery based on efficiency, where those groups that benefit from using the fisheries pay for the supporting services, rather than the present "avoidable cost" principle.

The operation of the cost recovery regime under the Fisheries legislation is the best example I have seen of an analysis that comes close to weighing of the costs and benefits of consultation as a precursor to government intervention. The commercial fishing

⁸⁶ Appendix A, questions 6, 7 and 8

⁸⁷ See, for example, the extensive legal constraints upon the decision-making process of the Environmental Risk Management Agency under the Hazardous Substances and Noxious Organisms Act 1996

⁸⁸ Appendix A, questions 3 and 4

⁸⁹ Media release, Minister of Fisheries, 30 September 1998

industry is one group which, because it pays for a share of the costs of the process, has a significant incentive to ensure the process is as efficient as possible. However, it does not control the process, and other interest groups (such as recreational fishers and environmental interests) do not suffer the same incentives. The review's suggestions may rectify that imbalance.

V **IS JUDICIAL REVIEW IN THE 1990s PROMOTING GOOD ADMINISTRATION?**

We have seen how successive governments have responded to the "encouragement" of the Courts. Quality decision-making is a goal of central government and there are now very structured institutions within central government to ensure that this is achieved.

At the same time, the demands for efficient and retrained government spending puts pressure on the system to ensure a balance is achieved. Perhaps the nature of decision-making and an assessment of the influence of the Court in promoting good administration can be considered by reference to the duty to give reasons under the Official Information Act and two recent cases; *Lawson v. Housing New Zealand*⁹⁰ and the review of Pharmac's Rulide decision⁹¹.

A **Official Information Act duty to explain**

Has the Courts' demand for reasoned explanations had a salutary effect on Ministerial decision makers, knowing they might subsequently be required to explain their position to a Judge? One might debate that. Ministers depend on the public understanding and accepting their decisions if they are to retain their influence. Note too that decision-makers have been under a statutory obligation to give reasons for most of their decisions to persons who are directly affected by them, on request, since the inception of the Official Information Act in 1982.⁹²

⁹⁰ [1997] 2 NZLR 474 (HC)

⁹¹ Above n.....

⁹² Section 23 (1)

The written statement required by section 23(1) must include the findings on material issues of fact, a reference to the information on which the findings are based, and the reasons for the particular decision or recommendation. The Minister's recommendation in the *NZFIA* case related to the varying of resource rentals paid by commercial fishermen⁹³. It would have qualified for a statement of reasons under the s.23 duty had an affected member of the industry requested one. That statement would have either explicitly answered the question exercising the Court, that is, did the Minister give separate consideration to actual net returns to commercial fishermen? The lack of any mention of the matter in the statement of reasons, I suggest, would have raised a clear inference that the Minister had not turned his mind to the point.

It must be accepted that a requirement to give reasons for a decision will encourage considered decision making and discourage arbitrary or unprincipled decisions. Thus the process provides an effective safeguard to the exercise of power in an arbitrary or irrational fashion. In this sense, however, the Courts are effectively duplicating an incentive acknowledged and affirmed by Parliament in 1982.

B *Lawson v. Housing New Zealand*

The challenge by Mrs Lawson to the increase in her rent by her landlord, Housing New Zealand, and the policy directions to Housing New Zealand by its shareholding Ministers, necessarily lead the Court into an area of "high policy"⁹⁴. At the heart of the issues were the decisions in the 1991 "Mother of all budgets" to better target housing assistance by adjusting the existing regime of inequitable direct provision of low cost housing to a few, and spread housing assistance more fairly across the public and private rental and mortgage sector for those on low incomes.⁹⁵

The complex nature of the policy development and change process over a 5 year period meant it was only possible to give the Court a summary of that process, albeit that "summary" involved the provision of several eastlight folders of cabinet papers and

⁹³ *NZFIA* above n31

⁹⁴ *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC). The reported decision omits the lengthy discussion of the policy and factual background. See further the unreported judgment; (29 October 1996) High Court, Auckland Registry, M538/94

⁹⁵ The budget decisions are quoted and discussed in the unreported judgment, above n94, 12-17

affidavits from consecutive Ministers. Was that necessary? The shareholding Ministers faced allegations which included failure to have regard to relevant international obligations relating to housing and shelter when setting the Crown's social objectives for Housing New Zealand; unreasonableness; breach of the right to life under s.8 of the New Zealand Bill of Rights Act 1990, and breach of Mrs Lawson's legitimate expectations. Candour as to the policy required a fully reasoned explanation. This was provided. It may have had the effect of persuading the Court that the decisions and actions of the shareholding Ministers were of a kind that involved matters of policy which the Court was not well placed to evaluate. It also may have provided a level of comfort about the process and "quality" of decisions which can carry a public perception of inherent unfairness. In any event, the Court found the matters were not in the circumstances susceptible to judicial review.

This view was arrived at only after a careful consideration by the Court of the surrounding circumstances, including the policy development process, and without concern to the fast fading (now invisible) distinctions between review of statutory and non-statutory powers. In any event, in case it was wrong about justiciability, the Court went on to consider the merits of the claims against both Housing New Zealand and the shareholding Ministers.

Without deciding whether or not the Ministers were legally obliged to have regard to the relevant international instruments, Williams J found that the aims of those instruments were comparable with the principles which had underpinned the housing reforms. Thus the Ministers did properly inform their decision making process and make proper efforts to balance the various competing factors. Again, bearing in mind the dicta of Cooke P in *Tavita v. Minister of Immigration*⁹⁶, query whether the Court would have been prepared to infer this in the absence of full disclosure by the Ministers.

Lawson demonstrated that good decision-making processes were in place. Cabinet received significant quantitative and qualitative material, including policy advice from private and public sector sources. There was a high level of consultation, adequate monitoring and consequent adjustment of policies over time and, indeed, evidence of a degree of political compromise.

⁹⁶

Tavita, above n53, 266

C Judicial review and efficient decision-making: the Rulide case

The decisions of the Court of Appeal and Privy Council in the review of Pharmac's Rulide decision (in *Pharmaceutical Management Agency Limited v. Rousell Uclaf Australia Pty Ltd* and *Rousell Uclaf Australia Pty Ltd & Rousell NZ Ltd v. Pharmaceutical Management Ltd*⁹⁷ make an interesting study of the balancing of administrative law requirements and the need for efficient decision-making. The proceedings related to the decision of the pharmaceutical purchasing agency (Pharmac) to reduce the subsidy payment made by Regional Health Authorities for tablets, an antibiotic produced by Rousell. The proceedings do not relate to Ministerial decisions. However, they concern very significant decisions made in the public interest which, prior to the health reforms of 1993, were made by the Minister.⁹⁸

Under Pharmac's published Operating Policies and Procedures (OPPs), which had been the subject of substantial consultation with the pharmaceutical industry, Pharmac applies a methodology known as reference pricing whereby pharmaceuticals are classified into different therapeutic groups and sub-groups. All pharmaceuticals in a given sub-group are subsidised at the level of the lowest priced pharmaceutical in that sub-group. A sub-group is defined as a set of pharmaceuticals which produce the same or similar therapeutic effect in treating the same or similar conditions.

Until December 1995 there had been different levels of subsidy for a group of pharmaceuticals known as erythromycins on the one hand and for another pharmaceutical Klacid on the other. In December 1995, after an extensive review over a period of about two years, involving consultation with Rousell on five or six occasions, Pharmac decided to create a new sub-group consisting of the erythromycins and . The result was that the level of subsidy for was to be fixed at the (lower) subsidy level for the cheapest of the erythromycins. The subsidy for was accordingly halved. In announcing its decision, Pharmac indicated that consideration of Klacid's place in the therapeutic

⁹⁷ *Pharmaceutical Management Agency Limited v. Rousell Uclaf Australia Pty Ltd* [1998] NZAR 55 (CA); *Rousell Uclaf Australia Pty Ltd & Rousell NZ Ltd v. Pharmaceutical Management Ltd* Privy Council Appeal No 34 of 1998, reasons for report delivered by Lord Lloyd of Berwick, 30 July 1998 (PC)

⁹⁸ See, for example, *Smith Kline Beecham v. Minister of Health* [1992] NZAR 357

group was ongoing and would be "reported on in the near future". The higher subsidy level remained for Klacid.

The legislative context was obviously critical. The Health and Disability Services Act 1993 was recognised as emphasising obtaining maximum value for money in the delivery of health services of an appropriate standard. The purpose of the Act, as stated in s.4, is to reform the public funding and provision of health services and disability services in order to secure for the people of New Zealand:

- (ii) the best health; and
- (iii) the best care or support for those in need of those services ... that is reasonably achievable within the amount of funding provided.

The Court of Appeal split 4-1 in favour of Pharmac.⁹⁹ In his dissenting judgment, Thomas J formulated the essential issue as¹⁰⁰:

... whether ... Pharmac is obliged to act evenhandedly as between companies manufacturing and selling pharmaceutical products in the same therapeutic sub-group, and consistently with its Operating Policies and Procedures, when reclassifying one or more product in that sub-group.

The majority judgment of Richardson P, Henry, Blanchard and Tipping JJ, delivered by Blanchard J, found that, contrary to the decision in the High Court, there was adequate justification for Pharmac's decision to treat differently from Klacid. Reasons included the findings of fact that Klacid held a very small market share (1% compared with 's 65%) and its manufacturer had never been prepared to supply the medicine at the subsidised rate. This meant that any change in the subsidy level by Pharmac would simply increase the part-charge to the purchaser. Thus the market impact on Rousell was perceived as likely to be slight. The greater risk was that other types of antibiotics might be favoured. In fact the Court also recognised that Pharmac's objective was to save money. That is their primary function and is consistent with the Act. The information they had was that substantial savings would follow their decision.

⁹⁹

Above n97 (CA)

¹⁰⁰

Above n97 (CA) per Thomas J (dissenting)

Thomas J, on the other hand, focused on what he referred to as "the fundamental administrative law value" of equal treatment to persons or entities in the same situation. Here, Pharmac was interfering in the operation of the market. He was able to draw upon the clear undertaking by Pharmac to afford "equality of treatment" on the level of subsidy for pharmaceuticals used to treat the same or similar conditions and which produced the same or similar effects. He saw Pharmac as wanting to step outside its extensive published procedures, arrived at after extensive consultation, and act contrary to the way the particular pharmaceuticals had historically been treated. He indicated that Pharmac had not "reserved for itself the power to act arbitrarily as between suppliers, even though it might be able to claim that any such action would best suit the health needs of the population"¹⁰¹. He agreed with the High Court decision that limited time, resources and significant savings would not justify unevenhanded treatment in the circumstances.

The majority's focus was more pragmatic.¹⁰²

Pharmac is a relatively small organisation. Its funding is limited. So is the pool of expertise within this country. An evaluation of candidates for a possible sub-group is also not done as an isolated exercise. There are numerous available drugs in multiple groups or sub-groups. The same problem for need for evaluation or re-evaluation will doubtless be encountered simultaneously in several areas of Pharmac's oversight. It cannot realistically be expected to attend to everything at once. Therefore, it has to prioritise both as between categories of drugs and within those categories. It is also not entirely without significance that a substantial amount of Pharmac's money and of the time of Pharmac staff is being taken up in the conduct of complex litigation brought against it by drug companies. That must reduce its capacity to conduct reviews of pharmaceuticals. For these reasons it cannot be said to be improper for Pharmac, in appropriate circumstances, to undertake a classification or reclassification exercise progressively ... If they did, a decision might be delayed perhaps for several years and Pharmac's function under the Act would be frustrated in the meantime.

The Privy Council upheld the majority view.¹⁰³ After discussing the findings of the High Court and minority appellate Judge that the "lack of evenhandedness and consistency on Pharmac's part ... not dissimilar in kind to the grounds which have led the Courts to intervene elsewhere in the interests of securing procedural fairness" and the evidence on the point, their Lordships concluded that Pharmac had reasonably formed the view that the therapeutic effect of Rulide was "the same as or similar to the therapeutic effect of the erythromycins". Therefore, the only issue could be one of timing¹⁰⁴:

¹⁰¹ Above n97 (CA) 85, per Thomas J (dissenting)

¹⁰² Above n97 (CA) 66

¹⁰³ Above n97 (PC)

¹⁰⁴ Above n97 (PC)

Their Lordships accept that if Rousell could show that Pharmac were obliged under their OPP to review Rulide and Klacid together, or if the failure to do so was contrary to some overriding principle of fairness, requiring equals to be treated equally, then there might be grounds for attacking Pharmac's decision to review one before the other. Can any such case be made out?

On the first point, the Law Lords found nothing in the OPP to indicate or require that reference pricing could only take effect after the review of all the various medicines in the group or sub-group had taken place, separately or together. On the second, the Law Lords did not appear to see the "unfairness" argument as a justiciable process ground.¹⁰⁵

Their Lordships would give the same answer to the wider argument that it was "unfair" to reduce the subsidy on Rulide without also reducing the subsidy on Klacid ... Their Lordships are by no means persuaded that the unfairness of which Rousell now complains is a procedural unfairness of the kind which justifies the Court's intervention by way of judicial review. What is attacked is the decision to review the macrolides one by one, not the way of arriving at that decision. But putting that on one side, fairness does not require all potential candidates for a sub-group to be reviewed at the same time. New candidates might be introduced in the course of a review, with the result that Pharmac's task might never be done ... There were sound economic reasons for pressing on with the review of Rulide, and for implementing the decision as soon as it was made ... The cost of subsidising Rulide represented a very large part of the total cost of subsidising the macrolides. In comparison the cost of subsidising Klacid was tiny. Fairness to Rousell had to be judged at the time the decision was made, and balanced against the public interest in reducing expenditure on pharmaceuticals.

So in the end we see that the Law Lords examined the substantive fairness of the decision to treat Rulide separately from Klacid. The balancing of interests was not judged to favour Rousell.

The minority judgment in the Court of Appeal focused on the equivalent position of Rulide and Klacid in the same therapeutic sub-group, receiving the same subsidy. Thomas J was not persuaded by the difference in market share or the different marketing strategy which was at the heart of Pharmac's decision. Subsequent to Pharmac's decision, Klacid reduced its price significantly. Accordingly, the review of its position was afforded greater urgency by Pharmac. Thomas J wryly observed that the "consequences of acting inconsistently are now more apparent"¹⁰⁶.

We know from the judgments that there was extensive consultation between Pharmac and Rousell over the two year period that Rulide was under review. We do not know whether the risk of different marketplace behaviour on the part of the manufacturers of Klacid

¹⁰⁵

Above n97 (PC)

¹⁰⁶

Above n97 (CA), 91 per Thomas J (dissenting)

were arguments made by Rousell and put to Pharmac or, if they were, what Pharmac made of them.

I wonder about the cost-effectiveness of the process preferred by Thomas J. Would it unnecessarily or unacceptably slow down decision-making so that the public could not take the benefit of progressive decisions, as found by the majority, or would it protect Rulide's positions in service of a greater public interest, and prevent unnecessary market distortions and hurried remedial activity, as suggested by Thomas J?

To speak of a duty of equal treatment to persons in like situations as a "fundamental administrative law value" might seem uncontentious. However such concepts, divorced from some express acceptance on the part of the decision-maker, seem somewhat illusory.

Thomas J's analysis of Pharmac's obligations was primarily based on his view of Pharmac's expressed policies. Should administrative law values go so far, for example, as to find the fisheries cost recovery regime to be unlawful (assuming for a moment it is not the subject of legislative implementation) because other primary production sectors are not subject to a similar regime? I suggest that today's governmental processes, which have lead the Minister to the point where he considers that inconsistent treatment to be unfair and will promote policies to address the issues,¹⁰⁷ provide a more democratically acceptable path to the same end point.

D Survey of Ministers/Chief Executives

Appendix A contains the responses to a questionnaire to Ministers and Chief Executives. The questionnaire itself is Appendix B.

While the survey group (Appendix C) is necessarily a very small one and one cannot draw too many conclusions from it, it does raise some interesting points. There is a broad difference in perception of what proportion of decisions made are capable of judicial review (question 1). For Ministers, at least, the actual threat of judicial review generally has no influence on the decision-making process. As one Minister indicated, decision-makers will be trying to make reasonable decisions notwithstanding judicial oversight. Chief Executives, however, who will generally carry the burden of ensuring the Minister

¹⁰⁷

Media release, Minister of Fisheries, 30 September 1998

is properly advised, responded more positively to the influence of the threat of review to the process (question 2).

Advice on the legal parameters of decision-making powers appeared to be received pretty much as a matter of course (interestingly Chief Executives saw themselves giving more advice than the Ministers saw themselves receiving!) (question 3). The question specifically referred to the relevance of international conventions and the principles of the Treaty of Waitangi. The relevance of these matters are, of course, now built into the decision-making process through the procedures set out in the Cabinet Office Manual. The advice received was universally seen as generally enhancing the decision-making process, although, as one Minister observed, "it also limits options". The recent announcement of the Minister of Fisheries in relation to costs recovery is an example of this¹⁰⁸ (question 4).

Question 5 indicated a difference in perceptions between Ministers and Chief Executives as to the frequency of advice received on proper procedures to be followed in decision-making. One Minister observed that "in some areas consultation has gone mad!", while one Chief Executive observed that "proper procedures ... seldom if ever require consultation (when exercising a statutory power)". One presumes that this respondent is fairly drawing a distinction between consultation and the procedural requirements of the duty to act fairly when exercising a statutory power. Consultation is seen as influential in the decision-making process (question 6). Views varied, but generally Ministers perceived consultation to be an effective use of government resources whereas Chief Executives tended to be less enthusiastic. Ministers noted that it provided an "added cost and further hurdle" limiting policy change. Another noted the weakness of receiving a "vested interest" response rather than general public interest. (question 7)

Question 8 saw the costs of participation by interested persons and groups in the decision-making process as generally an effective use of their resources. One comment acknowledged the educative effect of the process. Another referred to inappropriately high expectations. Generally, the effectiveness of Ministerial decision-making was not seen to be inhibited by the requirements of administrative law (question 9). Neither was

¹⁰⁸

Above n 85

there unanimous enthusiasm for the proposition that the effectiveness was enhanced by the same requirements (question 10).

The views of Ministers was spread across the spectrum in answer to whether they considered the overall cost to society of complying with the requirements of administrative law to be a reasonable charge in promoting good public administration (question 11). The comments of Ministers indicated significant reservations.

Interestingly, when asked to compare the relative influences of checks on Ministerial powers by judicial review, complaint to the Ombudsman, investigation by a Select Committee, opposition question in the House and an item on the "Holmes" show, judicial review seemed to attract a relatively high level of influence. However, as one Minister observed "the fact that a Minister is publicly accountable is an important discipline by whatever means".

VI CONCLUSION

Is judicial review promoting good administration?

On the date this paper is due for submission it is expected that the Governor-General will sign into law the Ngai Tahu Treaty of Waitangi Claims Settlement Act 1998, the third of the significant Treaty Claims Settlements.

Included in that settlement is land which was "memorialised" as a result of the 1987 SOE Lands case.¹⁰⁹ It is not difficult to argue that judicial review has had an impact on the substance of government decision making and policy. As the Minister in Charge of Treaty of Waitangi Negotiations has observed¹¹⁰:

¹⁰⁹ *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA).

¹¹⁰ Address by (then) Hon Douglas Graham "The Joint Impact in New Zealand of Rights Legislation and Treaty Negotiations under the Treaty of Waitangi" Melbourne, 16 September 1997

We have an unwritten and evolving constitution. This, combined with the evolving nature of the Treaty relationship itself, leaves us with some flexibility to respond to the constitutional position of Maori. Gradually, and in fragments, steps of constitutional significance have been taken – the Waitangi Tribunal's jurisdiction has been extended, obligations to consult have developed in various policy areas, and ... Treaty principles have been expressed and incorporated into legislation. In these senses, the Treaty – or at least some intangible notion of its spirit - has at some undefined point become part of our evolving constitution.

Perhaps one can see in his words the concept of a different partnership – one between the Courts and government. Respectful of and responsive to reach others position and role, much can and has been achieved.



APPENDICES

Appendix A

Appendix A summarises the results of questionnaires sent to the 11 current Cabinet ministers who have (almost) five or more years Cabinet experience, and to 14 chief executives of core government departments. Recipients were advised in a covering letter that:

The objective is simply to obtain a range of subjective responses from those most significantly affected by judicial review.

Responses were received from seven of the 11 ministers, and from six of the 14 chief executives.

The ministers who responded have a total of 59 years Cabinet experience between them.

Appendix B

A copy of the questionnaire sent to Ministers is Appendix B. A similar questionnaire was sent to chief executives, but with questions altered to ensure the focus was on advice to ministers and ministerial (as opposed to departmental) decision-making.

Appendix C

A list of recipients is Appendix C.

APPENDIX A

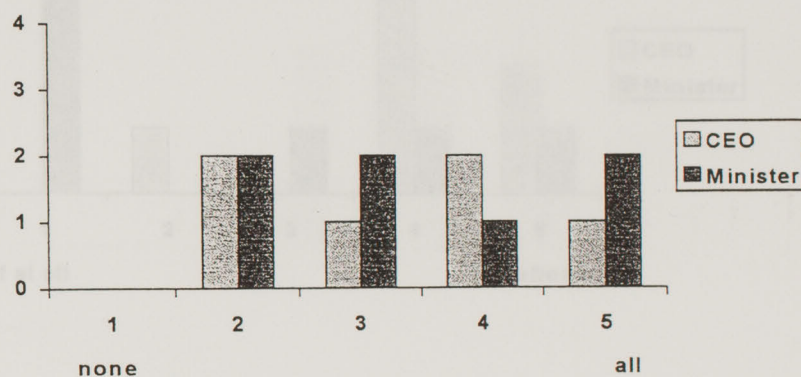
Question 2:

Does the actual threat of review influence your decision-making process?

Question 1:

Of the decisions you make as Minister, about what proportion do you perceive to be capable of judicial review by the Courts? [Please disregard the actual likelihood of review.]

Question one



Comments:

Ministers

Comments:

Ministers

- 1 Economic and fiscal decisions generally out of reach of the Court. Ownership and Treaty decisions capable of review.
- 2 Most health decisions are delegated to HFA, HHS where all are subject to judicial review.

CEOs

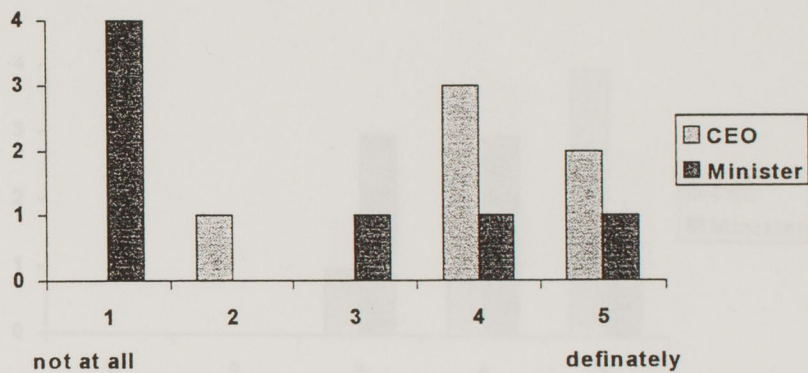
- 1 Answer relates to decisions when a statutory power is exercised – very limited in numbers and scope.

Question 2:

Does the actual threat of review influence your decision-making process?

(Include such matters as whether you are required, for example, to take into account matters such as certain international conventions and Treaty of Waitangi principles.)

Question two



Comments:

Ministers

1 I try to meet tests of reasonableness in decisions in any event.

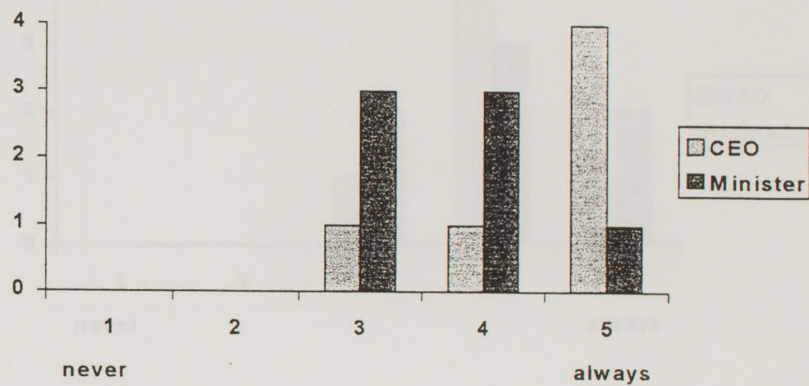
CEOs

1 Care is taken to ensure that the record shows the Minister considers each matter on its merits and has all the necessary information before him.

Question 3:

Do you receive advice on the legal parameters of your powers? [This will include such matters as whether you are required, for example, to take into account matters such as certain international conventions and Treaty of Waitangi principles.]

Question three



Comments:

Ministers

- 1 In areas likely to be reviewed such as fisheries very full legal parameters are supplied.
- 2 Where they may be reviewable.
- 3 Where appropriate, yes.

CEOs

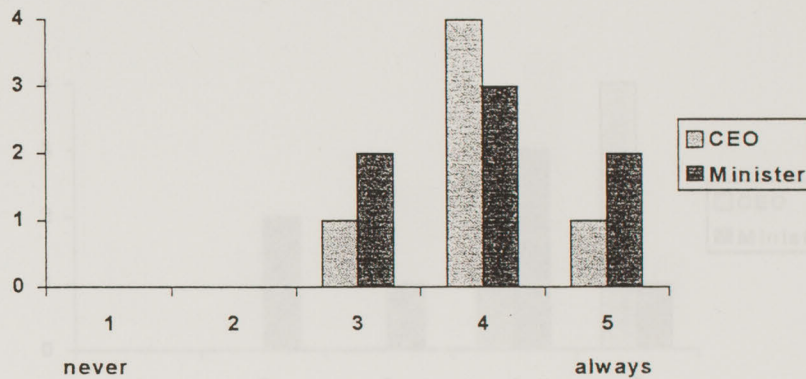
- 1 Applies to the very limited circumstances in which the Minister holds the statutory authority.

Question 4:

Do you consider that advice to enhance your decision-making?

(including the need for and requirements of consultation?)

Question four



Comments:

Ministers

- 1 It probably does, it also limits options.
- 2 Where appropriate, always.
- 3 This is generally delegated – HPA, HHS always get advice on this, especially HPA.

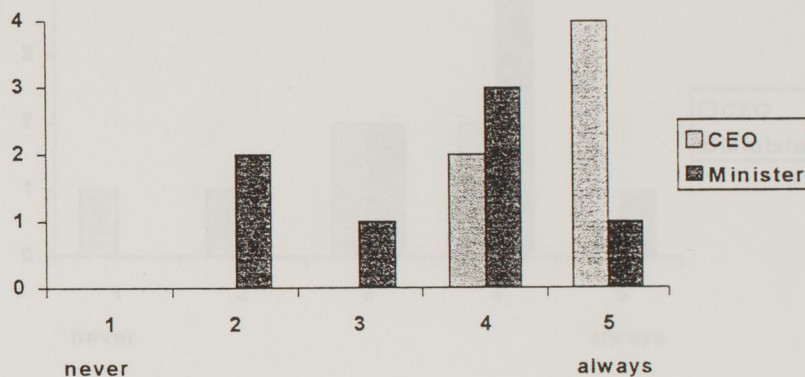
CEOs:

- 1 Advice on proper procedures – yes, but this seldom if ever requires consultation (when exercising a statutory power).

Question 5:

Do you receive advice on the proper procedures to be followed, including the need for and requirements of consultation?

Question five



Comments:

Ministers

- 1 Generally yes. In some areas consultation has gone mad!
- 2 Where appropriate, always.
- 3 This is generally delegated – HFA, HHS always get advice on this, especially HFA.

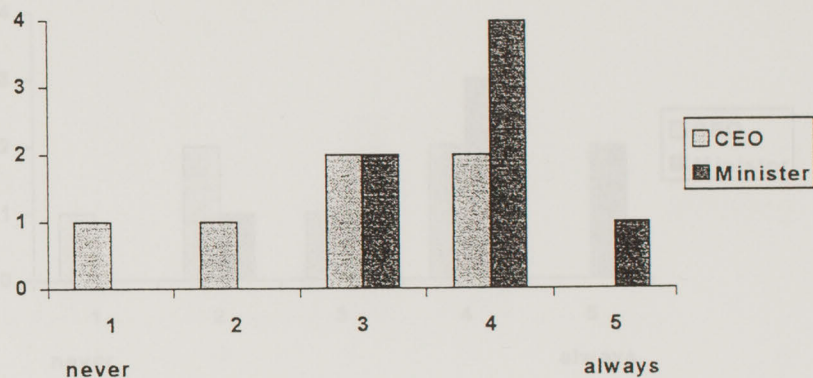
CEOs

- 1 Advice on proper procedures – yes, but this seldom if ever requires consultation (when exercising a statutory power).

Question 6:

Is the consultation carried out by you or on your behalf influential in your decision-making?

Question six



Comments:

Ministers

- 1 Both can have an influence but not always.
- 2 It is, although I do not always follow recommendation from consultations.

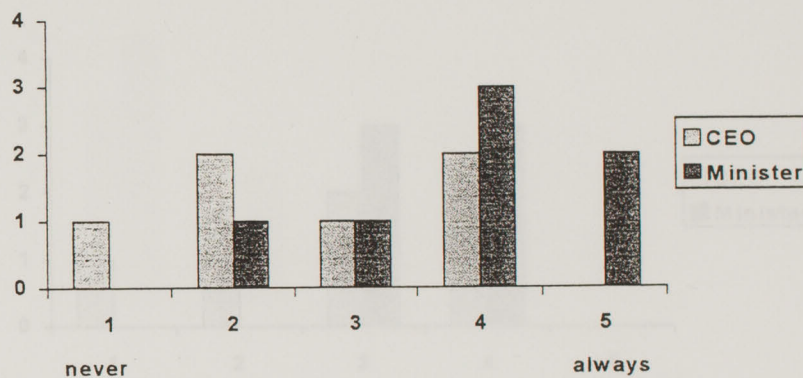
CEOs

- 1 No consultation is normally required.

Question 7:

Do you perceive the consultation carried out by you or on your behalf to be an effective use of government resources?

Question seven



Comments:

Ministers

- 1 Often it is an added cost and further hurdle limiting policy change.
- 2 Generally, yes. The weakness is that one often gets a "vested interest" response rather than general public interest.

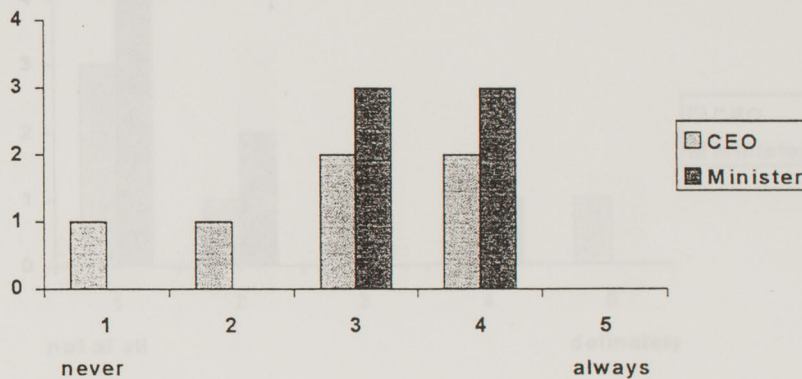
CEOs

- 1 No consultation is normally required.

Question 8:

Do you consider the costs of participation by interested persons and groups in the decision-making process to be an effective use of their resources?

Question eight



Comments:

Ministers

- 1 Sometimes their expectations of consultation are well in excess of the outcome. They generally wish to change policy to protect privilege or rights.
- 2 It can be.
- 3 Often educative for both sides even if decisions go ahead.

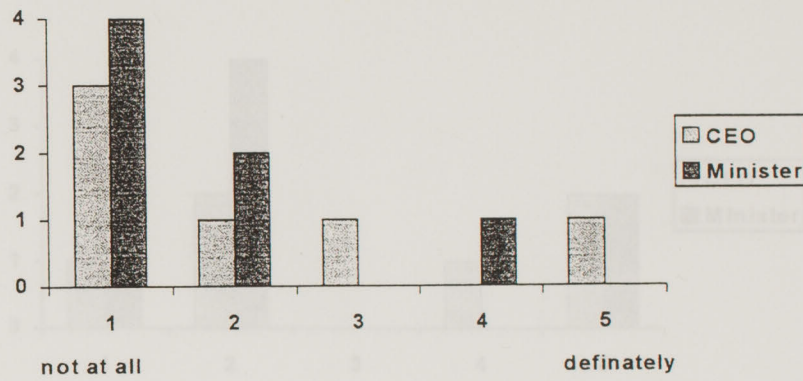
CEOs

- 1 No participation is normally required.

Question 9:

Do you perceive your effectiveness to be inhibited by the requirements of administrative law to act “reasonably, fairly and in accordance with the law”?

Question nine



Comments:

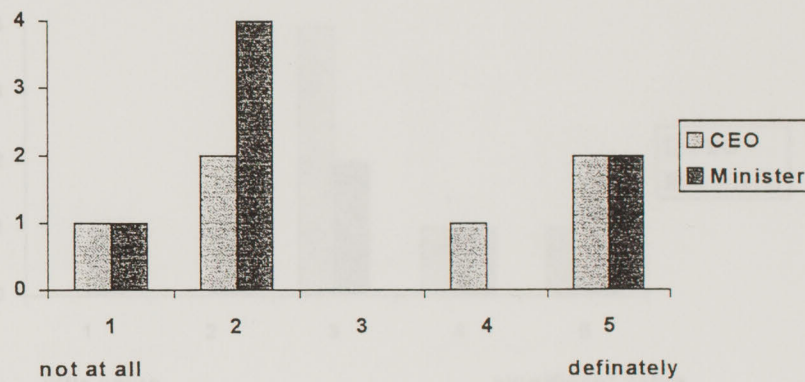
Ministers

1 Not greatly, just slowed down and more expensive.

Question 10:

Do you perceive your effectiveness to be enhanced by the requirements of administrative law to act “reasonably, fairly and in accordance with the law”?

Question ten



Comments:

Ministers

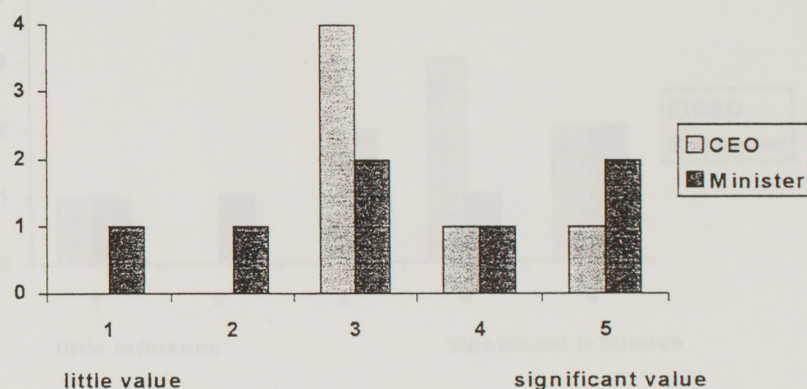
- 1 Generally little change. but probably necessary in moderation.
- 2 I doubt whether the threat of review improves the public policy process much if at all. Any costs involved therefore are of doubtful value.
- 3 Only moderate due to the propensity to attract “vested” interests and activists – the silent majority are not often heard.
- 4 High costs can be incurred totally disproportionate to outcome.

Question 11:

Do you consider the overall costs to society of complying with the requirements of administrative law to be a reasonable charge in promoting good public administration?

(a) Judicial review of the decisions by the High Court.

Question eleven



Comments:

Ministers

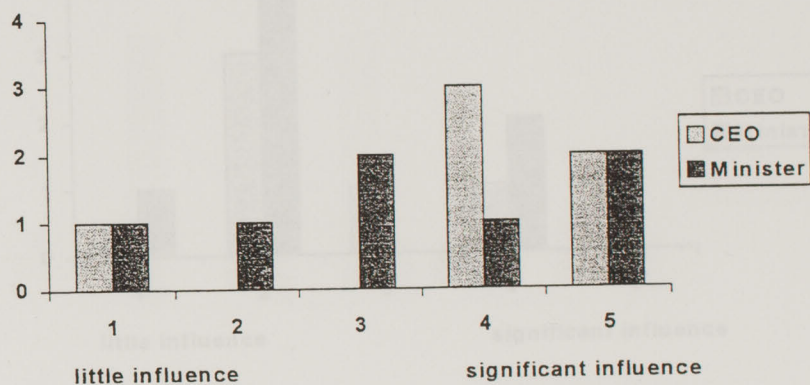
- 1 Generally increases costs but probably necessary in moderation.
- 2 I doubt whether the threat of review improves the public policy process much if at all. Any costs involved therefore are of doubtful value.
- 3 Only moderate due to the propensity to attract "vested" interests and activists – the silent majority are not often heard.
- 4 High costs can be incurred totally disproportionate to outcome.

Question 12: (continued)

(b) How would you describe the relative influence of the following democratic checks and balances on decision-making processes:

(a) Judicial review of the decision by the High Court.

Question twelve (a): *Judicial review*



Comments:

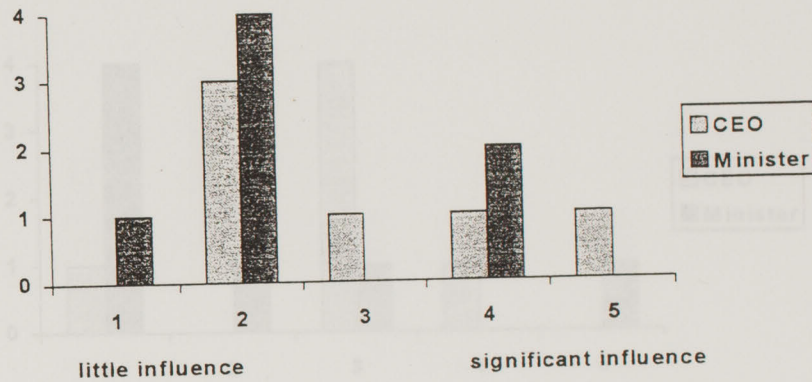
Ministers

- 1 Must follow letter of law even if not the intent. Less ability to exercise judgement.
- 2 It's there but I try to meet the tests anyway.
- 3 Too much influence.

Question 12 (continued)

(b) Complaint to the Ombudsman.

Question twelve (b): ombudsman



Comments:

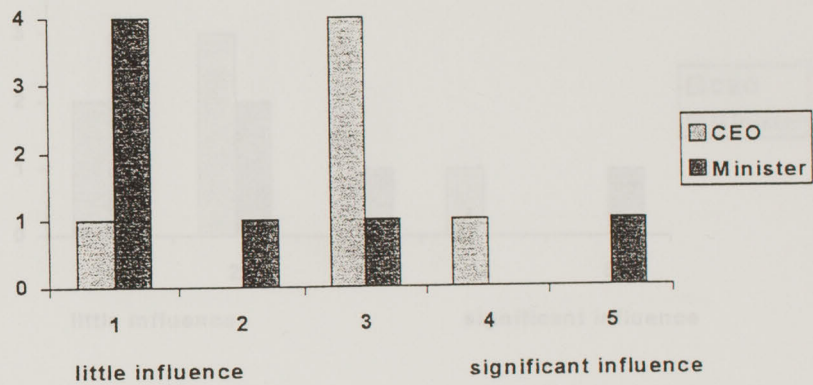
Ministers

- 1 Generally of little relevance as I try to meet requests of public.
- 2 Quality marginal from this source. Rather strictly "bureaucratic" type decisions. Not very helpful.

Question 12 (continued)

(c) Investigation by Select Committee.

Question twelve (c): *Select Committee*



Comments:

Comments:

Ministers

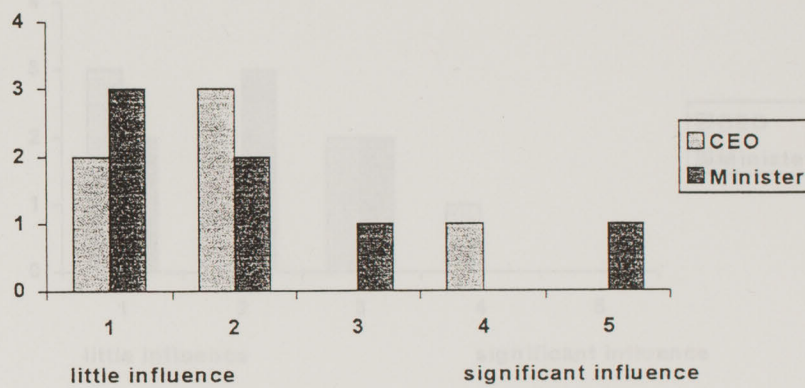
Ministers

- 1 I enjoy questions on any area of responsibility.
- 1 Generally controlled by Government but may change in future.
- 2 Usually low grade political point scoring.
- 2 [Scored 3] Owing to their relative incompetence.
- 3 Near irrelevant.

Question 12 (continued)

(d) Opposition question in the House.

Question twelve (d): PQ



Comments:

Ministers

1 I enjoy questions on any area of responsibility.

2 Usually low grade political point scoring.

Question 12 (continued)

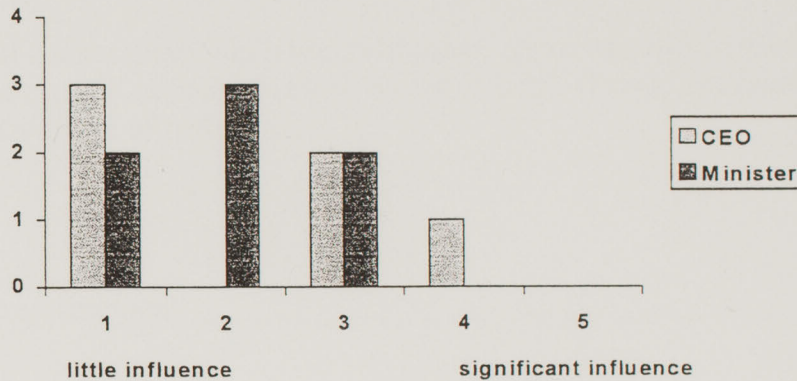
(e) "Holmes" Show item.

Comments:

Ministers

- 1 An occasional journalist can probe an issue.
- 2 The fact that a Minister is publicly accountable is an important discipline by whatever means. All the above processes are a part of the public accountability.

3 The **Question twelve (e): Holmes show**



Comments:

Ministers

- 1 Only interested in conflict or to embarrass Ministers or Government.
- 2 Does not change the decision – makes it necessary to find very simplistic explanations.

APPENDIX B

LAWS 519 : QUESTIONNAIRE TO MINISTERS

Definition:

Judicial review is the process of review by the High Court, on the application of an affected person or body, of the lawfulness, fairness and/or reasonableness of decisions made in the public sphere and which adversely affect the interests of individuals. Judicial review is perceived as a constitutional safeguard whereby the Courts exercise a supervisory jurisdiction to protect the citizen against the abuse of public power.

Please circle your answers on the scale of 1-5

1. Of the decisions you make as Minister, about what proportion do you perceive to be capable of judicial review by the Courts? [Please disregard the actual likelihood of review.]

1 2 3 4 5
None All

Any comment: _____

2. Does the actual threat of review influence your decision-making process?

1 2 3 4 5
Not at all Definitely

Any comment: _____

3. Do you receive advice on the legal parameters of your powers? [This will include such matters as whether you are required, for example, to take into account matters such as certain international conventions and Treaty of Waitangi principles.]

1 2 3 4 5
Never Always

Any comment: _____

4. Do you consider that advice to enhance your decision-making?

1 2 3 4 5
Never Always

Any comment: _____

5. Do you receive advice on the proper procedures to be followed, including the need for and requirements of consultation?

1 2 3 4 5
Never Always

Any comment: _____

6. Is the consultation carried out by you or on your behalf influential in your decision-making?

1 2 3 4 5
Never Always

Any comment: _____

7. Do you consider the consultation carried out by you or on your behalf to be an effective use of government resources?

1 2 3 4 5
Never Always

Any comment: _____

8. Do you consider the costs of participation by interested persons and groups in the decision-making process to be an effective use of their resources?

1 2 3 4 5
Never Always

Any comment: _____

(b) Complaint to the Ombudsman.

1 2 3 4 5
Little Significant
influence influence

Any comment: _____

(c) Investigation by Select Committee.

1 2 3 4 5
Little Significant
influence influence

Any comment: _____

(d) Opposition question in the House.

1 2 3 4 5
Little Significant
influence influence

Any comment: _____

(e) "Holmes" Show item.

1 2 3 4 5
Little Significant
influence influence

Any comment: _____

(f) Other? _____

Any further
Comment: _____

Thank you for your assistance

APPENDIX C

Ministers:

Rt Hon Jenny Shipley
Hon Wyatt Creech
Rt Hon Bill Birch
Hon John Luxton
Hon Bill English
Rt Hon Doug Graham
Hon Murray McCully
Hon Maurice Williamson
Rt Hon Don McKinnon
Dr Hon Lockwood Smith
Hon Simon Upton

Chief Executive Officers:

Secretary to the Treasury
Secretary, Ministry of Education
Secretary, Ministry of Agriculture
Secretary, Ministry of Fisheries
Comptroller of Customs
Secretary for Labour
Secretary, Ministry of Health
Secretary, Ministry of Commerce
Commissioner of Inland Revenue
Secretary for Justice
Director-General of Conservation
Secretary, Ministry for the Environment
Secretary for Transport
Secretary, Department of Internal Affairs

	<p>A Fine According to Library Regulations is charged on Overdue Books.</p>	<p>VICTORIA UNIVERSITY OF WELLINGTON LIBRARY</p>
<p>LAW LIBRARY</p>		

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY

 3 7212 00556889 2



