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JUDICIAL REVIEW OF LOCAL GOVERNMENT DECISION-MAKING UNDER THE LOCAL GOVERNMENT ACT 2002 – A TIME FOR DEFERENCE?

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ABSTRACT

Local government is becoming increasingly important in New Zealand's constitutional arrangements. Through the Local Government Act 2002 central government has ensured that local government has wider powers and discretions to develop the policy most appropriate to the community they represent.

As the importance of local government increases the supervisory role of the courts is also likely to be called upon. The courts will be asked to ensure that local government does not abuse the power and discretions with which they have been entrusted.

In this paper I examine various approaches that the courts could take to the review of local authority decision-making and conclude, that based on the provisions of the Local Government Act 2002, the best approach the courts could take would be a deferential approach. A deferential approach would give local authorities the latitude to engage in policy making and avoid them having to take a legalistic approach to decision-making. The courts should defer to local authority decisions except where they decide that the nature of the decision, or the procedure that had been adopted in making the decision, means that it is imperative that they intervene.

I analyse the traditional administrative review "chapter headings" of illegality, irrationality and procedural impropriety and note that these will continue to be of some relevance to this type of review. Although, a broad assessment of; the facts, the power that is being used, the way the decision was made and the decision itself will also be important in determining whether a decision is to be reviewed.

I also note that in the case of *Wellington City Council v Woolworths (NZ) Ltd (No.2) and ors* [1996] 2 NZLR 537 (CA) the courts indicated that they were willing to adopt a deferential type approach to local authority decision-making where this is appropriate. I suggest that this is the type of approach which should be used when reviewing decisions made under the Local Government Act 2002.

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I INTRODUCTION

The Local Government Act 2002 vastly increased the discretionary power of local authorities. In particular the power of general competence changed the way local authorities are empowered to perform their general operational functions.[1] To temper these broad powers, Part 6 of the Local Government Act 2002 specifies the way decisions are to be made and the type of consultation that is necessary when a decision is made.[2] In this paper I will assess whether it is appropriate for the courts to supervise local authority decision-making. Judicial review has traditionally been used by the courts as a means of ensuring that local authorities utilise their powers correctly and in particular that they do not act in a manner which has not authorised by central government.[3]

I will argue that the courts should be taking a more deferential approach to local authority decisions made under the Local Government Act 2002.[4] My argument will be based on the approach taken by the Court of Appeal in *Wellington City Council v Woolworths New Zealand Limited (No2)* and the broader policy objectives underlying the Local Government Act 2002.[5] In discussion of my argument I will examine past court decisions, judicial commentary and look at the provisions of the Local Government Act 2002.

My paper will be divided into six parts. After my introduction I will outline the role of local government in New Zealand and discuss the Local Government Acts of 1974 and 2002. In the next section of my paper I will discus administrative law review of

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[1] Local Government Act 2002, s 12 (2) and Local Government Act 2002, Part 6.
[2] Local Government Act 2002, s 75, 76, 77, 78, 79, 80, 81 and 82.
[3] See generally Geoffrey Palmer and Matthew Palmer *Bridled Power New Zealand's Constitution and Government* (4ed, Oxford University Press, Melbourne, 2004) 255 where they set out: The doctrine of *ultra vires* historically has been the most potent check against the making of decisions… that are too wide. Local authorities are limited to the powers Local authorities are limited to the powers given them by Parliament. But… Parliament in 2002 gave powers of the nature of general competence to local authorities. This means the doctrine of *ultra vires* will be much less of a brake on the activities of local authorities than it has been. But there will still be some occasions upon which it will be relevant.
[4] But see generally Grant Hewison "A power of general competence – should it be granted to local government in New Zealand" (2001) 9 Auck U LR 49 who sets out an argument that "the grant of a power of general competence will increase the role of the judiciary in determining the boundaries of that power" See also the reasoning of Cooke P in *Bulk Gas Users Group Limited v A.G* [1983] NZLR 129.
[5] *Wellington City Council v Woolworths (NZ) Ltd (No.2) and ors* [1996] 2 NZLR 537 (CA) ["Woolworths"].

local authority decisions prior to the Local Government Act 2002. The fourth part of my paper will take a broad at what a deferential approach to local authority decision-making would entail. The fifth part of my paper examines the application of a deferential approach to the Local Government Act 2002 and the final part of my paper will set out my conclusions.

II LOCAL GOVERNMENT IN NEW ZEALAND

A Constitutional Role

In New Zealand's centralised, unitary system of government the powers of local government depend on the will of Parliament as expressed, from time to time, in legislation.[6] As set out by one author:[7]

> ...local authorities are created by statute and have no independent status or inherent right to continued existence. The theory and place of local government in the political system does not derive from any formal constitutional entitlement...The history of local government depends primarily on the policies and expectations of central government, and the practical advantages in conferring local powers to provide and regulate functions and services.

The role of local authorities in New Zealand's constitution was described by Richardson J in *Mackenzie District Council v Electricity Corporation of New Zealand*:[8]

> A local authority such as Mackenzie has only a subordinate role in our system of government. It is a statutory creation exercising the local and special purpose functions reposed in territorial authorities by Parliament. It is not to be viewed in high policy terms as the alter ego of central Government.

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[6] Palmer and Palmer, above n 3, 248.

[7] Kenneth A Palmer *Local Government Law in New Zealand* (2ed, The Law Book Company Limited, Sydney, 1993) 23.

[8] See Generally *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 [*Mackenzie*], where Richardson J concurred with the House of Lords statement in *Hazell v Hammersmith and Fulham London Borough Council* [1991] 1 All ER 545, 548 that "A local authority, although democratically elected and representative of the area, is not a sovereign body and can only do such things as are expressly or impliedly authorised by Parliament."

Although the conception of a local authority set out in *Mackenzie* is still ostensibly accurate, in the contemporary constitutional environment local authorities have developed a certain level of autonomy. In particular, under the Local Government Act 2002 central government has given local authorities wide discretionary powers.[9] Local authorities are also given powers under numerous other statutes including; The Local Government (Rating) Act 2002, the Local Electoral Act 2001, the Resource Management Act 1991, the Building Act 1991, the Dog Control Act 1996, the Fencing and Swimming Pools Act 1987 and the Reserves Act 1977 to name a few.[10][11] This paper focuses on the powers given to local authorities under the Local Government Act 2002, although some of the observations I will make are also likely to be relevant to other pieces of legislation.

B Supervision of Local Authorities by the Courts

Through judicial review the courts have carved out the constitutional function of ensuring local authorities and other administrative agencies do not misconstrue their statutory power and that they apply the correct process and procedure to their decision-making.[12] However, in line with the greater level of autonomy given to local authorities the courts have also noted that local authorities are empowered to make policy decisions and that there are circumstances where courts should defer to these decisions. In *Woolworths* when discussing a decision made by a local authority under rating legislation Richardson P noted:[13]

> ...there are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the courts are to reweigh considerations involved and the less inclined they must be to intervene.

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[9] See generally Local Government Act 2002 section 12 (2) and Part 6 of the Local Government Act 2002.
[10] Peter Mitchell and Jonathan Salter "A Guide to the Local Government Act 2002" (Paper presented at the New Zealand Law Society Seminar Series, Wellington, March 2003) 1
[11] Palmer and Palmer, above n 3, 248.
[12] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001), 727.
[13] *Woolworths*, above n 5, 546

I will examine the extent to which the broad discretions granted by central government will affect the need for judicial supervision.

C The Local Government Act 1974

Prior to the Local Government Act 2002 local authorities were empowered by the Local Government Act 1974. Under the Local Government Act 1974 Act a local authority's corporate powers were set out as follows:[14]

> 37 L (4) Every regional council and every territorial authority shall be a body corporate with perpetual succession and a common seal, and, *subject to this and any other Act*, shall be capable of acquiring, holding, and disposing of real and personal property, of entering into contracts, of suing and being sued, and of doing and suffering all such other acts and things as bodies corporate may do and suffer.

While this section seems to give broad powers, these powers were limited by the phrase "subject to this and any other Act." Accordingly, this section was enabling only and the substantive powers authorising a local authority to act were required to be found elsewhere in the Local Government Act 1974 or in any other statute that gave a local authority power to act.[15]

Some of the sections under the Local Government Act 1974 were quite general, for example, section 225 gave local authorities the power to acquire property for the performance of their functions. By contrast others were very specific, for example section 659 of the Local Government Act 1974 empowered local authorities to sell firewood.[16] The lawfulness of local authority actions was critical to the way local authorities operated. As one author set out, under the 1974 Act: [17]

> Fundamental to the administration of a local authority is the question whether the activity or decision is lawful. If the activity or decision is not lawful, members of the authority may risk

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[14] Local Government Act 1974, s 37 L (4) *(emphasis added)* see also ss 247B and 247C.
[15] Hewison, above n 4, 503.
[16] Palmer and Palmer, above n 3, 250.
[17] Kenneth Palmer, above n 7, 45.

> personal liability by way of surcharge for unauthorised expenditure, and any contractual obligation may be prima facie unenforceable.

The risks associated with entering into an activity or transaction which was not lawful, or ultra vires, meant that local authorities were careful to check whether they were empowered to carry out an activity. This checking made decision-making time consuming and costly.

D The Local Government Act 2002

The Local Government Act 2002 replaced the Local Government Act 1974 and brought about a change in the way local authorities were empowered to act and make decisions.

1 The purpose of Local Government and the purpose of the Local Government Act 2002

The purpose of the Local Government Act 2002 was to improve the way local government operated in New Zealand's constitutional environment. In the Minister for Local Government's speech at the second reading of the Local Government Bill 2001, he stated:[18]

> At the heart of this new Bill is the concept of local government as grassroots democracy. We believe locally elected people should be able to make and implement decisions that directly affect their community. They are better placed than anyone else to do so. … For this reason, the Bill proposes general powers for city, district and regional councils… it will bestow on communities the flexibility to act for themselves.

These goals are reflected in section 10 of the Local Government Act 2002 which states the purpose of local government is:[19]

> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and

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[18] Hon Chris Carter (17 December 2002) 605 NZPD 2804.
[19] Local Government Act 2002, s 10.

(b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

The purpose of the Local Government Act 2002 is stated as being to provide for democratic and effective local government that recognises the diversity of New Zealand communities. To achieve these aims, in addition to setting out the purpose of local government, the Local Government Act 2002:[20]

(a) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
(b) promotes the accountability of local authorities to their communities; and
(c) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.

It is clear that under the Local Government Act 2002 the relationship between central and local government will not be the same as that which existed under the Local Government Act 1974. The Local Government Act 2002 is empowering local authorities to make decisions affecting their communities through the discretionary powers that have been provided. It has been noted the purposes are much more ambitious than merely attending to drains, roads and rubbish. The purpose provisions are all about values and outcomes.[21] When deciding whether to review a local authority decision it will be important that the courts take into account these purposes as an expression of the will of Parliament.

2 Power of general competence

In the Minister for Local Government's speech at the second reading of the Local Government Bill 2001, he said:[22]

> The Government's intention is to shift the focus from whether a council "can" resolve an issue to whether it "should" resolve an issue. Expressing the empowerment of councils in a general way clarifies many of the powers that are already embedded among the prescriptions of the current Act *(the Local Government Act 1974)*.

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[20] Local Government Act 2002, s 3.
[21] Palmer and Palmer, above n 3, 249.
[22] Hon Chris Carter, above n 18, 2804 *(emphasis added)*.

Section 12 (2) of the Local Government Act 2002 is the provision which brings about this shift in focus. This section changed the method by which local authorities are empowered to carry out most operational functions.[23] This section of the Local Government Act 2002 has been referred to as a "power of general competence."[24] This power of general competence is one of the provisions of the Local Government Act 2002 which is likely to affect when it will be appropriate for the courts to interfere with decisions made by local authorities.

3 Decision-making by local authorities under Part 6 of the Local Government Act 2002

The decision-making and consultation procedures that are to be followed by local authorities are set out in Part 6 of the Local Government Act 2002. Parts of the decision-making procedure are also applicable to other pieces of legislation that empower local authorities. However, as I have previously set out in this paper I am focusing on the relevant provisions of the Local Government Act 2002.[25] This decision-making and consultation framework is designed to temper the power of general competence. The framework sets out the processes that are required to be followed and the type of matters that are to taken into account when local authorities make decisions. Every local authority is required to ensure its processes promote compliance with the applicable provisions of part 6 of the Local Government Act 2002. Part 6 of the Local Government Act 2002 sets out, among other things, the:[26]

- obligations in relation to decision-making;
- obligations in relation to the involvement of Maori in decision-making processes;
- obligations in relation to consultation with interested and affected persons;

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[23] Mitchell and Salter, above n 10, 1, as noted above, operational functions are distinct from mandatory and regulatory responsibilities of local government which continue be dealt with by The Resource Management Act 1991, the Building Act 1991, the Dog Control Act 1996, the Fencing and Swimming Pools Act 1987, the Reserves Act 1977 among others.

[24] Dr Andrew Butler, Dean Knight and Geoff McLay "Liability of Local Authorities" (Paper presented at the New Zealand Law Society Seminar Series, Wellington, June 2005) pg 6.

[25] See generally Local Government Act 2002, s 76 (5) which sets out: "where a local authority is authorised or required to make a decision in the exercise of any power, authority, or jurisdiction given to it by this Act or any other enactment or by any bylaws, the provisions of subsections (1) to (4) and the provisions applied by those subsections, unless inconsistent with specific requirements of the Act, enactment, or bylaws under which the decision is to be made, apply in relation to the making of the decision".

[26] Vivienne Wilson and Jonathan Salter, *The Local Government Act 2002* (Brookers, Wellington, 2003) 31 & 32.

- nature and use of the special consultative procedure;
- process for identifying and reporting on community outcomes;
- processes and general content for the long-term council community plan, the annual plan, and the annual report;
- obligations in relation to financial management; and
- borrowing provisions.

The decision-making procedure is in general discretionary. The exceptions to this rule include financial management decisions and what are described as "significant decisions."[27] The consultation procedure is also mostly discretionary. However, again there is an exception to the general rule for a small number of matters for which government has required a special consultative procedure which is mandatory and prescriptive.[28] The fact that the final decision on how to comply with these decision-making and consultation procedures is generally left to the judgment of the local authority is consistent with the purpose of the Local Government Act 2002. That is, it allows democratic local decision-making and action by, and on behalf of, communities and allows local government to promote the social, economic, environmental and cultural well-being of their communities, taking a sustainable development approach.[29] I will now analyse the relevant sections of part 6 of the Local Government Act 2002 in more detail.

Section 76 (1) of the Local Government Act 2002 sets out that every decision made by a local authority must be made in accordance with the provisions of sections 77 and 78 which set out the decision-making procedure, section 80 which relates to decisions which are significantly inconsistent with an adopted policy and sections 81 and 82 which relate to consultation.[30] As I have said, how a local authority complies with these provisions is generally left to each local authority's own discretion.[31]

Section 77 of the Local Government Act 2002 outlines the matters that a local authority must take into account when it makes a decision. It aims to ensure all options are identified and to ensure there is a thorough assessment of those options.

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[27] Local Government Act 2002, ss 76 (2) and 79 set out the discretions available under the Act.
[28] Local Government Act 1974, s 83.
[29] Local Government Act 2002, s 3.
[30] Local Government Act 2002, section 76.
[31] Local Government Act 2002, section 76 (2).

Section 78 of the Local Government Act 2002 requires a local authority to take into account community views when making a decision. In particular it requires a local authority to take into account the views of those persons likely to be affected by a decision.[32]

Both sections 77 and 78 are subject to the discretions set out in section 79. Section 79 (1) sets out that:[33]

> (1) It is the responsibility of a local authority to make, *in its discretion, judgments-*
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> (a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision; and
>
> (b) about, in particular, -
>
> (i) the extent to which different options are to be identified and assessed; and
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> (ii) the degree to which benefits and costs are to be quantified; and
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> (iii) the extent and detail of the information to be considered; and
>
> (i) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.

Section 79 (2) sets out:

> (2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to-
>
> (a) the principles set out in section 14; and
>
> (b) the extent of the local authority's resources; and
>
> (c) the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons.

Section 79 (2) (a) of the Local Government Act 2002 refers to section 14 of the Local Government Act 2002. Section 14 sets out some broad principles which are expressed as "shoulds". The section sets out a local authority should bear the following in mind when performing its role:

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[32] Local Government Act 2002, section 78 (1).
[33] Local Government Act 2002, section 79 *(emphasis added).*

- that it should conduct its business in an open, transparent, and democratically accountable manner;[34]
- that it should give effect to its identified priorities and desired outcomes in an efficient and effective manner;[35]
- it should make itself aware of, and have regard to the views of all of its communities;[36]
- when making a decision, it should take account of the diversity of the community, and the community's interests and the interests of the future as well as current communities and the likely impact of any decision on each aspect of purpose of local government set out in section 10 of the Local Government Act 2002;[37]
- that it should provide opportunities for Maori to contribute to its decision-making processes;[38]
- a local authority should collaborate and co-operate with other local authorities and bodies as it considers appropriate to promote or achieve its priorities and desired outcomes, and make efficient use of resources;[39]
- a local authority should undertake any commercial transactions in accordance with sound business practices;[40]
- a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region;[41]
- in taking a sustainable development approach, a local authority should take into account—

- the social, economic, and cultural well-being of people and communities;
- the need to maintain and enhance the quality of the environment; and
- the reasonably foreseeable needs of future generations.[42]

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[34] Local Government Act 2002, section 14 (1) (a) (i).
[35] Local Government Act 2002, section 14 (1) (a) (ii).
[36] Local Government Act 2002, section 14 (1) (b).
[37] Local Government Act 2002, section 14 (1) (c) (i), (ii) and (iii).
[38] Local Government Act 2002, section 14 (1) (d).
[39] Local Government Act 2002, section 14 (1) (e).
[40] Local Government Act 2002, section 14 (1) (f).
[41] Local Government Act 2002, section 14 (1) (g).
[42] Local Government Act 2002, section 14 (h), (i), (ii) and (iii).

These broad principles are intended to provide prompts as to the type of matters local government should be taking into account when it makes its decisions. However, ultimately the discretion lies with the local authority.

Section 80 of the Local Government Act 2002 outlines that if a local authority decision is significantly inconsistent with any of its plans or policies that have been adopted in line with the Local Government Act 2002, it must clearly identify that inconsistency and the reasons for it.[43]

Section 81 of the Local Government Act 2002 sets out that every local authority must establish and maintain processes to provide opportunities for Maori to contribute to its decision-making processes, as well as consider ways in which it may foster the development of Maori capacity to contribute to its decision-making processes. The local authority must also provide relevant information to Maori for these purposes.[44]

Section 82 of the Local Government Act 2002 states the principles of consultation that a local authority must comply with. The six principles are set out in section 82 (1) are:[45]

1. that persons who will or may be affected by, or have an interest in, a decision or matter should be provided with reasonable access to relevant information in a manner and format appropriate to their preferences and needs;
2. that persons who will or may be affected by, or have an interest in, a decision or matter should be encouraged to present their views;
3. that persons who are invited or encouraged to present their views should be given clear information about the purpose of the consultation and the scope of the decisions to be taken;
4. that persons who wish to have their views considered are given a reasonable opportunity to present their views in a manner and format appropriate to their preferences and needs;
5. that local authorities receive views with an open mind and give them due consideration in making a decision; and
6. that persons who present their views are given information on the decision made and the reason for it.

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[43] Mitchell and Salter, above n 10, 11.
[44] Mitchell and Salter, above n 10, 11.
[45] Mitchell and Salter, above n 10, 11 citing the Local Government Act 2002, section 82.

Section 82 (2) of the Local Government Act 2002 states that a local authority must ensure it has in place processes for consulting with Maori in accordance with the principles in section 82 (1) of the Local Government Act 2002.

Section 82 (3) of the Local Government Act 2002 inserts the discretion in the section, it states that local authorities may exercise a discretion as to the way the six consultation principles set out in section 82 (1) are observed.

Section 82 (4) of the Local Government Act 2002 specifies that in using its discretion a local authority must have regard to:

- the community views set out in s 78 of the Local Government Act 2002, although section 78 (3) specifies:
  "a local authority is not required by this section alone to undertake any consultation process or procedure";
- the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and
- the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and
- the provisions of Part I of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is a good reason for withholding local authority information); and
- the costs and benefits of any consultation process or procedure.

Section 82 (5) of the Local Government Act 2002 makes it clear that the principles in the section do not override any specific consultation requirements set out in the Local Government Act 2002 or in other legislation.[46]

Section 83 of the Local Government Act 2002 outlines the special consultative procedure. The special consultative procedure is required to be followed in certain circumstances specified under the Local Government Act 2002.

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[46] Mitchell and Salter, above n 10, 12.

The broad discretions in the decision-making and consultation procedure sections of the Local Government Act 2002 will have an impact on whether it is appropriate for courts to review local authority decision-making. In the next part of my paper I will examine the way the courts have historically been involved in reviewing local authority decision-making.

III JUDICIAL REVIEW OF LOCAL AUTHORITY DECISIONS

A Ultra Vires

The concept of ultra vires was developed by the courts when they decided that Parliament did not intend subordinate bodies or authorities to possess plenary powers or unlimited discretions as to activities, where affecting the rights of other persons or property.[47] The common law took the view that the powers of statutory corporations are limited to those conferred on them by statute. Any local authority action which is not expressly or impliedly authorised by statute is unlawful or ultra vires.

This rule was applied in New Zealand in *Takapuna City v Auckland Regional Authority*. The court decided that the legislature did not intend the Auckland Regional Authority to have the direct or incidental power to purchase shares in a private bus company.[48] Because the courts deemed the purchase to have been ultra vires, central government was required to pass special legislation to authorise the transaction. The power of general competence in the Local Government Act 2002 was enacted to minimise the occasions in which a local authority found itself unable to act for want of substantive power.[49]

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[47] Palmer, above n 7, 46 where he cited the House of Lords case *Attorney-General v Great Eastern Railway Co (1880) 5 App Cas 473, 481 HL(E)* and noted where Lord Blackburn set out "Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for a particular purpose, what it does not expressly or impliedly authorise is to be taken as prohibited."

[48] *Takapuna City and Waitemata County v Auckland Regional Authority* [1972] NZLR 705, 711 (SC) McMullin J. In his judgment McMullin J cited Halsbury's Laws of England (3rd ed, Butterworths, London, 9, 62 Para 129) which set out "The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited".

[49] Butler, Knight and McLay, above n 24, 7.

B Administrative Review - The Evolving Role of the Courts in Judicial Review

The ultra vires doctrine also evolved to take into account matters beyond whether a public corporation had the substantive power to enter into a transaction. It moved into the realm of whether the power given in the legislation had been utilised correctly. Courts began to question whether the legislation which enabled administrative bodies to interfere with private rights was explicit.[50] However, the role of the courts has stopped short of allowing an administrator to review a local authority's substantive decisions.[51] This should continue to be the case while the sovereignty of Parliament is the keystone of New Zealand's constitution.[52] As the review of administrative power has developed, the doctrine of "ultra vires" has ceased to be as important as it once was.[53] The present situation is that various principles have been established by common law which, if not observed, could lead a court to declare the decision or action to be invalid or beyond the procedural powers of a local authority.[54]

When the courts were called upon to determine whether a decision was invalid or beyond a local authority's procedural powers, it has often been the case that their analysis focused on the applicability of three distinct "chapter headings" of judicial review.[55] In *Council of Civil Service Unions v Minister for the Civil Service*, Lord Diplock identified these "chapter headings" as; illegality, irrationality and procedural impropriety.[56] Having identified these chapter headings their Lordships pointed out that they were not exhaustive nor were they mutually exclusive.[57] The reason they are not mutually exclusive is that each chapter heading is ultimately looking to act as a check on the inappropriate use of power by administrative authorities. Because each

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[50] A.V Dicey *The Law of The Constitution* (10ed, MacMillan & Co Ltd, London, 1959) *Introduction* cxxi. Where it is set out that where discretionary power is given to a public body, it is assumed that there is no intention to interfere with private rights unless the power is expressed in such a way as to make interference inevitable.

[51] A.V Dicey, above n 50, *Introduction* cxxiv where the Editor to the 10th edition set out "...the validity of an Act of Parliament cannot be challenged on the grounds that it is *ultra vires*.".

[52] A.V Dicey, above n 50, 39 where he set out "The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions".

[53] See generally, Joseph, above n 12, 761 where he notes that "Ultra vires has ceased to be the organising principle of judicial review".

[54] Palmer, Kenneth, above n 7, 57.

[55] See generally, Joseph, above n 12, 786 where he refers to Lord Donaldson MR's description in *R v Secretary of State for the Home Dept; Ex p Brind* [1990] 1 All ER 469 at 480 (CA).

[56] See generally *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 per Lord Diplock (HL) ["CCSU"] and see also Joseph, above n 12, 776.

[57] Joseph, above n 12, 776.

chapter heading has the same goal, it is inevitable that at times they will overlap. In some cases it might be difficult for the courts to determine which form the review should take. Of the three chapter headings illegality and irrationality tend to overlap the most. Despite the fact that procedural impropriety is ultimately looking to achieve the same ends as illegality and irrationality, I would suggest it can be dealt with discretely. I will illustrate why I think this is the case below.

1 Illegality and irrationality

Illegality requires administrative decision-makers to act within the parameters of their empowering statute. An administrative decision-maker is required to understand correctly the law that regulates its decision-making power to give effect to it.[58] Whether a decision-maker has acted illegally comes down to a matter of statutory interpretation. Parliamentary intent or legislative purpose is not always obvious and where the statutory language is ambiguous the courts can take the opportunity to 'fill in the gaps' in the statutory framework.[59] The courts will be required to assess when this "filling in of the gaps" is appropriate. Central government may have left gaps in its instructions or given broad discretions on purpose.

A matter could be deemed to be irrational where the decision of a local authority is outrageous, perverse or where an official has "taken leave of his senses." These situations have been loosely described as being irrational or *Wednesbury* unreasonable.[60] The fact that there can be more than one "reasonable" result can sometimes mean it is difficult for the courts to decide when an unreasonable result has occurred.[61] It is important for the courts to demonstrate that they are not making a subjective assessment of their own. If the courts did enter their own subjective assessment they would be interfering with the discretion granted by Parliament and would be moving into controversial constitutional territory.

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[58] Joseph, above n 12, 788 citing *CCSU*, above n 55, 410 per Lord Diplock (HL).
[59] Joseph, above n 12, 788.
[60] Joseph, above n 12, 830.
[61] See generally *Progressive Enterprises Limited and ors v North Shore City Council and ors* (15 June 2005) HC A CIV-2004-404-7139 where Baragwanath J set out: "As the House of Lords showed in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 there may be quite contrary decisions, each reasonable, either of which is open in law to the decision-maker".

The reason illegality and irrationality are so closely linked is that they are relying on the same justification for review. They are both relying on the statute to decide whether an administrator has acted appropriately. As noted in *Woolworths*:[62]

> In summary, judicial review of the exercise of local authority power, in essence, is a question of statutory interpretation. The local authority must act within the powers conferred on it by Parliament and its rate fixing decisions are amenable to review on the familiar *Wednesbury* grounds. Rating authorities must observe the purposes and criteria specified in the legislation. So they must call their attention to matters they are bound by statute to consider and they must exclude considerations which on the same test are extraneous. They act outside the scope of the power if their decision is made for a purpose not contemplated by the legislation. And discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute. Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.

The difference between illegality and irrationality is in the perspective from which they approach their analysis of the local authority decision. In an illegality type review, it is more likely that the courts will be able to identify what could be described as a reviewable error of law. In a review based on irrationality, the courts will first focus on what they think is an irrational or unjustifiable result and their analysis will then move to the decision-making process. In an irrationality type review the courts analysis of the decision-making process will be based on the assumption that the decision-maker has gone beyond what Parliament intended.

To illustrate the different perspectives, I describe two hypothetical examples:

(1) If a statute sets out that a local authority is entitled to take into account "x" and "y" in making their decision, the courts could review the local authority's decision-making process to ensure they had taken into account "x" and "y" or to ensure they had not taken into account "v" and "s" or committed another reviewable error of law. This type of review would be characteristic of an

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[62] See generally *Woolworths*, above n 5, 545.

illegality type review. A review of this type is relatively easy to justify and clearly does not interfere with the will of Parliament.

(2) If a statute sets out that a local authority is to take into account "x" and "y". If the decision-maker does this, and provided the decision-maker has not taken into account an irrelevant consideration or committed another reviewable error of law, the courts should be precluded from conducting an illegality type review. In this set of circumstances if the result is "t", and if the courts thought this result could not be justified on a reasonable assessment of the powers of the authority, they would think that it is implicit from this result that something has gone wrong in the decision-making process and that the local authority has not acted in accordance with the will of Parliament. This is typical of an irrationality type review. A review of this type relies on a broader assessment of matters by the courts and is potentially harder for the courts to justify. It also has a greater potential to result in interference with the will of Parliament. A decision-maker could argue that Parliament required it to take into account "x" and "y" to reach a result and that as it had done this the courts should not interfere with their result. On the other hand, the courts justification would be that the erroneous decision must have meant that the decision-maker had abused Parliament's discretion.

These examples illustrate that both illegality and irrationality rely on a review of the statutory discretion granted by Parliament. For this reason when courts are reviewing a decision, depending on the nature of the facts, it can sometimes sound like both illegality and irrationality type issues might be at play. It may be just a matter of the court deciding which perspective for analysis is more appropriate. An irrationality type review is more often applied where the impugned decision is pre-eminently about policy or involves political or subjective evaluation. Irrationality principles are more likely to be used to review the decision of government ministers, elected councils, or commercial organisations.[63] This is because where subjective evaluation is involved it is likely that it will be more difficult to identify the type of reviewable error of law that might be associated with an illegality type review. Conversely it

[63] Joseph, above n 12, 832.

would seem an illegality type review is more likely to occur where there is a definite or ascertainable test set out in a statute.

2 *Procedural impropriety*

Procedural impropriety on the other hand relies on a different type of analysis to that which takes place for irrationality or illegality type reviews. The starting point for analysis of this nature is that administrative authorities are bound by procedural requirements, which come about through the rules of natural justice. It is noted:[64]

> Where an empowering statute omits positive words imposing the duty, the "justice of the common law will supply the omission of the legislature". The rules of natural justice promote decisions that are informed and accurate and which instil a sense of fairness.

The New Zealand Bill of Rights Act 1990 affirms New Zealand's commitment to natural justice. Section 27 (1) enacts that:[6566]

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Because challenges based on procedural impropriety are reliant on natural justice and not statutory interpretation, except to the extent that a matter has not been dealt with by a statute, reviews of this nature should be justified differently to most reviews based on illegality or irrationality. A review based on procedural impropriety will be based on the idea that natural justice requires a matter to be taken into account or a certain procedure to be followed even though it has not been specifically required by the legislation.

It is acknowledged that some legislation provides procedural requirements. But failure to comply with these should result in the courts conducting an irrationality or

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[64] Joseph, above n 12, 847 where he cites *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 194 per Byles J and *John Rees* [1970] Ch 345 at 401 per Megarry J.
[65] Section 27 (1) of The New Zealand Bill of Rights Act 1990.
[66] See generally Joseph, above n 12, 847 where he notes that the New Zealand Bill of Rights Act 1990 is not a form of higher law and cannot found constitutional challenges to legislation.

illegality type review. A review based on procedural impropriety should only be necessary where the statute is silent as to a matter which the courts thought was relevant to ensuring justice was done. In this type of situation the courts can import criteria from outside of the positive law and rely on natural justice type criteria. These rights come from what has been described as "the wellspring of the common law" and not statute.[67] Procedural impropriety can be used as a residual challenge where the procedure followed has not ensured justice.

The justice of the decision will require analysis of the nature of the decision making body and the facts of the case. As one author notes:[68]

> The content of the rules and the standards of fairness are flexible. Wheras rigorous standards of procedural fairness may be expected of courts, only a rudimentary standard may be expected of employers, trade unions or political parties. Some situations may call for a full impartial hearing with legal representation and cross-examination, other situations may warrant a simple notice in the local newspaper advising of an application and inviting comment on submissions.

In spite of the different nature of the three traditional chapter headings there are likely to be occasions when the factual situation means that there seems to be an overlap between all three of the concepts. Some decisions will be so bad that they will offend all sensibilities.

C Review of Decisions Made by Administrative Authorities in New Zealand

There is a line of administrative law cases that I think is applicable to the way the Local Government Act 2002 should be interpreted. Initially the courts were concerned with the ability of the legislature to give decision-making bodies wide discretion. However, more recently these concerns have, to a certain extent, dissipated. The courts have become more accepting of these types of discretions when they are granted. In the later cases I will examine how they have moved their analysis to

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[67] See generally Joseph, above n 12, 848 where he set out "Nevertheless, one judge has questioned whether a sovereign Parliament may validly and constitutionally dispense with the right to natural justice. Cooke J identified this right as "fundamental", rising from the wellspring of the common law, and speculated whether it may constrain even sovereign powers of legislation."

[68] Joseph, above n 12, 848.

whether the decision is irrational in nature and the manner in which the decision was made.

1 Bulk Gas Users Group Ltd v Attorney General onwards

In *Bulk Gas* Cooke J, who was a foremost proponent of the interpretive function of the courts, thought that the courts "in fulfilment of their constitutional role as interpreters of written law" have the functioning of interpreting Acts of Parliament and the duty to correct any errors of law made.[69] However, this duty to "correct" administrative interpretations of law did not extend to all questions of law. Justice Cooke thought that this constitutional duty to correct erroneous interpretations of statutes by an administrative body is limited to situations where the statutory language poses a "definite" or "ascertainable" test or where a so-called "pure question of statutory interpretation" is involved.[70] Although Cooke J thought that "while Parliament may empower an administrative decision-maker to have the final word on a question of statutory interpretation, the courts will "be slow" to conclude that this was Parliament's intention."[71] On this point one author has noted:[72]

> ...where the statutory provision presents a "definite" or "ascertainable" test then it is ultimately for the Court to say what the provision means, but, having done that, application of that correct test to the facts lies with the administrator and will only be corrected on the grounds of mistake of fact or *Wednesbury* unreasonableness. Inferentially... it seems where the statute does not present a definite or ascertainable test or involve a pure question of interpretation, the "correctness" test appears to be replaced by the less intrusive *Wednesbury* unreasonableness standard.

It would seem that where a statute gives the courts an ascertainable test to apply they should look to use an illegality type review. Where the statute does not present an ascertainable type test, it would seem that either an irrationality or procedural impropriety type review might be appropriate depending on the nature of the case.

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[69] *Bulk Gas Users Group Ltd v A-G* [1983] NZLR 129, 136 Cooke J cited in Michael B Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Law perspective" in Michael Taggart *Judicial Review of Administrative Action in the 1980's Prospects and Problems* (ed) (Oxford University Press, Auckland, 1986) 195.
[70] *Bulk Gas Users Group Ltd v A-G* cited in Taggart, above n 69, 196.
[71] Taggart, above n 69, 195.
[72] Taggart, above n 69, 196.

However Justice Cooke's judgment in the *Bulk Gas* indicated that he thought that the courts would be slow to give up their ability to conduct an illegality type review.

The next case which dealt with matters of this nature was *Hawkins*.[73] In *Hawkins* the Court of Appeal judges showed subtle differences in their approach to the statutory interpretation required for an administrative law review.[74] In interpreting the statute in question, Cooke P "did not view the statute as conferring power on the decision-makers to determine conclusively the true interpretation of the criteria".[75] Although he acknowledged that "there would appear to be an issue whether the criteria posed any ascertainable test or presented any pure question of law, as *Bulk Gas* seemed to require". But he did not see the fuzziness of the statute as rebutting the presumption that the courts' were responsible for authoritative interpretation.[76] However, based on his review of the decision he saw no misinterpretation of the Act in question.[77]

When Richardson J came to interpret the statute he outlined that in some cases "the statutory analysis will lead to the conclusion that the identification and weighing of relevant policies and considerations is for the decision-maker alone, and in that sense it is not justiciable at all." He also noted "in the end it is a question of statutory interpretation whether, and if so on what principled basis, judicial review of the exercise of the particular statutory power is available."[78] Ultimately he felt that deciding whether to review a decision required "an assessment of the nature and subject-matter of the decision under challenge set in its broad legislative context which necessarily involves consideration of the object of the statutory grant of decision-making power, and the role under our system of government of the body entrusted with the exercise of that power."[79] Richardson J's approach to interpretation appeared to be less inclined toward a presumption in favour of a judicial monopoly

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[73] *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA).
[74] *Hawkins v Minister of Justice*, above n 73.
[75] Taggart, above n 69, 200.
[76] Taggart, above n 69, 200.
[77] Taggart, above n 69, 200.
[78] *Hawkins v Minister of Justice,* above n 73, 536.
[79] *Hawkins v Minister of Justice,* above n 73, 536 see also where he noted this was all familiar legal territory and referred to *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 and to *Bulk Gas Users Group v Attorney General* [1983] NZLR 129.

over statutory interpretation.[80] While Cooke P was concerned about the legislature's ability to give decision-makers wide discretions, Richardson J appeared more comfortable with the granting of discretions of this nature. It has been noted that Cooke's suspicion of unfettered parliamentary discretion may have been because of a series of events between 1975 and 1984. These events contributed to a view in some quarters that the government of the day led by the then Prime Minister, the Right Honourable Robert Muldoon, was prepared to act, and did act in a manner which was unconstitutional.[81]

In *Woolworths,* which is the most recent case I will examine, Richardson P took a similar view to the one he had taken in *Hawkins.* He thought judicial review of the exercise of local authority power was in essence a question of statutory interpretation. He thought that whether Parliament had entrusted the decision-maker with jurisdiction to determine the statutory criteria required a broad assessment "taking into account the policy content, the nature and subject-matter of the decision, and the role performed by the decision-maker in our system of government".[82] In interpreting the rating legislation in question the court decided that wider substantive judgments are to be made by the popularly elected representatives exercising a broad political assessment. Richardson P noted that under the legislation a territorial authority had wide rating powers and that:[83]

> Rating requires exercise of political judgment by the elected representatives of the community. The economic, social, and political assessments involved are complex. The legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives.

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[80] Taggart, above n 69, 201, noted, "there is no mention by Richardson J of Cooke's presumption against the administrative body being the final decision-makers on questions of law" and "that the overall impression given by the judgment is that where Parliament has entrusted the issue to the decision-makers, the order was not reviewable absent manifest unreasonableness".

[81] See generally Justice E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millenium" (2000) 31 VUWLR 5, 17 and see also Karen Grau "Parliamentary Sovereignty: New Zealand – New Millenium" (2002) 33 VUWLR 351, 369 where she notes "Coke CJ's and Cooke J's utterances are products of their times; the reigns of both King James and Prime Minister Robert Muldoon; when the balance between the power of the Legislature, the Executive and the Courts was threatened".

[82] Taggart, above n 69, 201.

[83] *Woolworths*, above n 69, page 553.

There is no mention of a rebuttable presumption against a decision-maker being entitled to conclusively interpret legislation. In *Woolworths,* the court clearly acknowledged that the legislature had given the decision-maker a broad discretion. Because of this, the Court of Appeal questioned the extent to which courts should be reviewing a decision made using this type of discretion. The language used by Richardson P suggests that where a broad discretion has been granted, the courts are willing to take a more deferential approach.

A deferential approach has been adopted in Canada.[84] I am not going to analyse the deferential approach other than to note it takes the opposite view to the rebuttable presumption suggested by Cooke in *Bulk Gas.* Rather than there being a presumption against administrative decision-makers having the final word on a question of statutory interpretation, the doctrine of deference accepts that the specialist agency has "primary statutory responsibility for implementing and elaborating the legislative mandate within [its] area of regulation".[85][86]

By adopting a deferential approach the courts would not be giving an administrative authority an unfettered discretion. Richardson P stated in *Woolworths*:[87]

> Rating authorities must observe the purposes and criteria specified in the legislation. So they must call their attention to matters they are bound to by the statute to consider and they must exclude considerations which on the same test are extraneous. They act outside the scope of their power if their decision is made for a purpose not contemplated by the legislation. And discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute.

The courts will still look to review an administrative authority's decision where after a broad assessment of the use of discretion the court feels the decision-maker has gone beyond the scope of the power granted by the legislature, or has not adopted an appropriate decision-making procedure.

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[84] See generally, Taggart, above n 69, 204 - 212 and his discussion of Canada.
[85] See generally, Taggart, above n 69, 195.
[86] *National Corn Growers Assn v Canada (import Tribunal)* [1990] 2 SCR 1324 at 1337 per Wilson J (SCC), (quoting J M Evans "Developments in administrative law: The 1984-85 term" (1986) 8 Sup Ct L Rev 1 at 27-28).
[87] *Woolworths,* above n 5, 545.

Another aspect of the *Woolworths* that suggests a move toward a more deferential approach is Richardson's statement that:[88]

> There are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the courts are to reweigh considerations involved and the less inclined they must be to intervene.

Richardson P then moved onto look at the review of the decision made by the local authority. In reviewing a decision, he felt that to the extent that a definite or ascertainable test could be found, if the use of that power did not comply with the statute the decision would be flawed and therefore reviewable. This is in line with the traditional illegality type review. When analysing the council's actions in the *Woolworths* case Richardson P thought that there was no challenge to the adequacy of the consultative process set out in the legislation.[89] It was accepted that the Council had met all the procedural requirements under the legislation and as such, the courts thought the local authority had correctly interpreted the legislation.[90]

Richardson P went on to note that a decision could also be reviewable if the decision is irrational in the sense that this also indicates that the use of the power was flawed.[91] This type of analysis is more likely to take place where a clear error of law cannot be easily identified. In *Woolworths* the courts assessed whether the decision was

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[88] *Woolworths*, above n 5, 545.
[89] *Woolworths,* above n 5, 552.
[90] *Woolworths*, above n 5, 552.
[91] *Woolworths*, above n 5, 552 sets out that: The legal principles are well settled and were discussed in *Mackenzie,* above n 8, 43-44 and 47. In summary, judicial review of the exercise of local authority power, in essence, is a question of statutory interpretation. The local authority must act within the powers conferred on it by Parliament and its rate fixing decisions are amenable to review on the familiar *Wednesbury* grounds… So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous. They act outside the scope of the power if their decision is made for a purpose not contemplated by the legislation… Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.

"fundamentally flawed" so as to warrant a review and decided it was not.[92] If the Court of Appeal had decided that the decision was fundamentally flawed the local authority's decision-making process would have come under closer analysis. When deciding whether the decision made by the local authority in *Woolworths* was fundamentally flawed, Richardson P analysed the Court of Appeal decision in *Mackenzie*.[93] *Mackenzie* was a similar case to *Woolworths* in that it was a challenge to the validity of a rating decision made by a local authority. However, in *Mackenzie* the court reached a different conclusion and ultimately decided that the rating decision made by the Mackenzie District Council was fundamentally flawed.[94] In *Mackenzie* the court noted:[95]

> It seems Mackenzie was mesmerised by the income it believed it could properly derive from Electricorp and by the mind set that Electricorp was like any other ratepayer even though its situation was obviously unique...It may have been the preoccupation with that goal which led Mackenzie to misconstrue its statutory powers, to its non-compliance with the sequence of steps contemplated by the legislation, and to rating decisions that were fundamentally flawed for two reasons: first in giving rise to a huge unallocated surplus and the perceived need for supplementary estimates, neither of which was allowed for by the governing legislation; and second in ignoring Mackenzie's fiduciary duty to Electricorp to consider its special interests as a ratepayer.

In discussing *Mackenzie,* Richardson P noted "it was that extraordinary combination of circumstances which made *Mackenzie* an exceptional case".[96] He differentiated the facts from those the court was faced with in *Woolworths*. He noted:[97]

> *Mackenzie* was a clear and extreme case. The council there misconstrued its statutory powers and failed to follow the statutory process. The process adopted led it to approve a budget providing for an unallocated surplus of $1.9m, contrary to the then s 121 which did not contemplate the possibility of such a surplus. The council had not, it seems, considered the possibility of differential rating or of changing to a land value or annual value system to recognise the dramatic impact on the district and Electricorp on the introduction of Electricorp as a new ratepayer.

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[92] *Woolworths,* above n 5, 552.
[93] *Mackenzie District Council v Electricorp*, above n 8.
[94] *Mackenzie District Council v Electricorp*, above n 8, 53.
[95] *Mackenzie District Council v Electricorp*, above n 8, 53.
[96] *Woolworths*, above n 5, 546 and 547.
[97] *Woolworths*, above n 5, 546.

The Court of Appeal differentiated *Mackenzie* and noted that in *Woolworths* the:[98]

> "statement relating to rating objectives, rating principles and other information relevant to the differential and rating determinations speak for themselves and that they reflected an appropriate approach by the Council to the exercise of legal responsibility."

The Court of Appeal thought that, unlike *Mackenzie, Woolworths* was not one of those extreme cases meeting the stringent test for impugning the rating determinations".[99] It was the exceptional nature of the decision in *Mackenzie* as well as the way the local authority interpreted the statute that meant that the decision making process in that case was flawed. *Mackenzie* illustrates the way the irrationality and illegality type factors mix together when the courts are reaching their decision.

Richardson P did not expressly analyse whether procedural impropriety type grounds were applicable in *Woolworths*. It is not clear whether procedural impropriety type arguments were raised at the hearing. Procedural impropriety principles could have been applied, but the court may have felt it was more appropriate to use the procedures set out in the relevant legislation. The court may have decided it was not necessary to augment the procedural requirements which were referred to in its judgment on the ground of natural justice or the justice of the case.

IV A DEFERENTIAL APPRAOACH TO JUDICIAL REVIEW OF THE LOCAL GOVERNMENT ACT 2002 AND JUDICIAL SUPERVISION WHERE A DFERENTIAL APPROACH IS ADOPTED

Woolworths indicates that Lord Cooke of Thorndon's presumption against administrative decision-makers having the final word on questions of statutory interpretation may no longer be the starting point for the Court of Appeal's analysis of the review of local authority decisions.[100] In other areas of administrative review

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[98] *Woolworths*, above n 5, 552.
[99] *Woolworths*, above n 5, 552.
[100] See generally, Taggart, above n 69, 195.

the courts have become accustomed to taking a more deferential approach.[101] I suggest that it might also be appropriate for them to take a more deferential approach in relation to the Local Government Act 2002. My analysis in this part of my paper is divided into two parts. Firstly I will examine whether Parliament has given local government the final power of interpretation. Secondly I will examine the way the courts might assess; whether a decision is reasonable and whether an appropriate decision-making process has been used.

A Has Parliament Given Local Government the Final Power of Interpretation?

The Local Government Act 2002, like the rating legislation discussed in *Woolworths*, is based on the premise that the wider substantive judgments are to be made by popularly elected representatives exercising broad economic, social and political assessments.[102] The expressed purpose of the legislation is that it is to provide for "democratic and effective local government". The Local Government Act 2002 provides "a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them" and "provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities..."[103]

The Local Government Act 2002 does not appear to provide a "definite" or ascertainable test. The legislature, generally, has not specified mandatory substantive criteria but has left the overall judgment to the elected representatives. Because of this approach it is questionable to what extent it is the constitutional duty of the courts to act as final interpreter of the Local Government Act 2002. The decisions made under the Local Government Act 2002 will often be in relation to broader policy issues. If the courts do not adopt a deferential approach, they might paralyse local authority

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[101] Joseph, above n 12, 747 where he notes "sometimes the specialist agency's policy function may call for a rational basis/deference approach. The courts, for example, have readily deferred to New Zealand labour law institutions and the specialist court's rulings on the industrial statute. They have declared for themselves a 'reserve or supportive role in that special statutory field'" *NZ Labourers' Union v Fletcher Challenge Ltd* [1988] 1 NZLR 520 at 523 per Cooke P for the court (CA)

[102] *Woolworths,* above n 5, 553, Richardson P assessed that the rating legislation required: "exercise of political judgment by the elected representatives of the community. The economic, social, and political assessments involved are complex. The legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives."

[103] Local Government Act 2002, s 3 and s 10.

decision-makers by forcing them to take a legalistic approach to decision-making. A legalistic approach would arise if local authority decision-makers became preoccupied with the likelihood of judicial review. This type of approach would hinder local government's ability to focus on broader policy objectives and limit the extent to which local authority decision-makers could achieve the purposes set out in the Local Government Act 2002. In most cases it would be difficult to see how local authority decision-makers, or the courts for that matter, could divine an ascertainable test from the broad discretions they have been given. It appears that central government has given local authorities broad discretions under the Local Government Act 2002 to avoid a legalistic approach to decision-making.

I agree with Richardson's reasoning in *Hawkins* and then *Woolworths* that it is not the courts' role to second guess policy decisions where this job has been entrusted to a specialist body. I suggest the elected representatives of the community are the people best placed to make the type of decisions that are required to be made under the Local Government Act 2002. A deferential type approach is also consistent with that taken by the Court of Appeal in *CREEDNZ Inc v Governor-General.* This case set out "the greater the need to exercise judgment and discretion, the greater the latitude the courts will allow.[104] In *Woolworths* the broad nature of the rating legislation meant that there was little room for a presumption in favour of the courts retaining the ultimate role of interpreting statute. It would seem that the Local Government Act 2002 is another piece of legislation which is framed in this way.

When the Court of Appeal looked at the way the local authority had used its discretion under the rating legislation in *Woolworths*, they set out:[105]

> The legislation contains no express criteria or purpose statement applicable in this case for making the various choices... it imposes significant process obligations providing for public participation, openness and accountability in the decision making. But the substantive decisions are not expressly circumscribed. The legislation proceeds on the premise that the wider

[104] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 197-198 (CA); *NZI Financial Corp Ltd v NZ Kiwifruit Authority* [1986] 1 NZLR 159 at 173-175; *Lion Corp v Commerce Commission* [1987] 2 NZLR 682 cited in Joseph, above n 12, 833.

[105] *Woolworths,* above n 5, 545 "That decision-making is the prerogative of the local authority subject to the statutory limitations and process constraints already referred to – and to amenability of judicial review".

> substantive judgments are made by popularly elected representatives exercising a broad political assessment....

The Local Government Act 2002 also imposes significant process obligations providing for public participation, openness and accountability in decision making without circumscribing how to make substantive decisions. In addition to this the purpose of the Local Government Act 2002 indicates that it proceeds on the premise that the wider substantive judgments are to be made by popularly elected representatives exercising a broad political assessment.

The Local Government Act 2002, through the legislative purpose and its broad powers and discretions, indicates that Parliament intended the local authority to have the final say on interpreting the law. It would seem that if you apply Richardson P's reasoning from *Woolworths* to the Local Government Act 2002, the broad nature of the power of general competence and the discretionary nature of part 6 of the Local Government Act 2002 should mean the courts defer to local authority decision-making.

B The Decision-Making Process and the Decision

If the courts are to take a deferential approach to decisions made under the Local Government Act 2002 they would still have a residual role. They might still be required to intervene in two situations;

(i) where the decision-making process was flawed on the grounds set out under the traditional chapter heading "procedural impropriety"; and
(ii) in the case of an extreme or unreasonable decision.

1 A flawed decision-making process - procedural impropriety

Procedural impropriety review will be based on the fact that a necessary procedural requirement is not included in the statute and has not been otherwise adopted by the decision-maker. A review based on procedural impropriety will require a broad assessment of the total circumstances applying to the individual case. This will

determine whether justice requires that the courts intervene on the grounds of procedural impropriety. As noted by one author:[106]

> The requirements of natural justice must depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

As I have already discussed, the procedural requirements set out in the Local Government Act 2002 mean that there could be seen to be an overlap between illegality, irrationality and procedural impropriety. Where the procedures available under the Local Government Act 2002 are applicable it would seem appropriate to use those, rather than importing natural justice grounds. Procedural impropriety should only be used where it is necessary to augment the procedural requirements set out in the legislation to ensure justice prevails.

2 An extreme or unreasonable decision? Irrationality

The assessment conducted by the court in *Woolworths* is representative of the way the courts should review whether an extreme or unreasonable decision has been made. The courts will, where necessary, ensure that the assessments required by the Local Government Act 2002 have been made in an appropriate manner. As set out in *Woolworths* a local authority would "act outside the scope of the power if their decision is made for a purpose not contemplated by the legislation".

Traditional illegality revolves around the misinterpretation of the statute used by the decision-maker. However, there are very few limits on the discretion of a local authority under the Local Government Act 2002. An error of law was traditionally said to have occurred if when judged against the statute an administrative authority: (a) acts in bad faith; (b) makes a decision which it has no power to make; (c) breaches the rules of natural justice; (d) misconstrues its statute and "asks the wrong questions"; (e) relies upon irrelevant considerations; or (f) disregards mandatory

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[106] Joseph, above n 12, 848 citing *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 per Tucker LJ (CA).

relevant considerations.[107] Given the wide discretions available to local authorities in the Local Government Act 2002 it would generally be difficult to argue a local authority had committed an error of law based purely on (b), (d), (e) and (f). In relation to (a), an act which is carried out in bad faith could potentially be reviewed under any of the traditional "subject headings." In relation to (c), a breach of the rules of natural justice should be looked at using a traditional procedural impropriety type analysis. It would seem best to use irrationality type considerations when reviewing decision made under the Local Government Act 2002. However, given the traditional difficulty the courts have faced when attempting to outline a rule or standard for irrationality or *Wednesbury* unreasonableness it is probably most useful to look at the circumstances which have lead to previous decisions. Statements like "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" viewed in isolation can only provide limited guidance.[108] An understanding of the circumstances that lead the courts to make a decision is the best way of understanding the courts rationale. Because of the differing standards that are likely to be applied in each case it will ultimately be best for the courts to move beyond the traditional "chapter headings." An assessment based on the totality of the circumstances would seem best. This would include a review of the decision and a detailed assessment of the decision-making process. However, the traditional categorisations will continue to provide useful signposts when an administrative review is being conducted.

V APPLICATION OF A DEFERENTIAL APPROACH

In the previous section I provided some general analysis of why the courts should be taking a deferential approach to the review of local government decisions and the type of review that they should conduct once a deferential approach has been adopted. I will now outline further support for my thesis by examining the effect an approach of this nature would have on the review of decisions made under the specific powers and procedures set out in the Local Government Act 2002.

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[107] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 per Lord Reid (HL).
[108] *Woolworths*, above n 5, 545 quoting Lord Diplock in *CCSU*, above n 56.

A The Power of General Competence and Traditional Ultra Vires

Section 12 of the Local Government Act 2002 gives local authorities a power of general competence. Judicial challenge is unlikely to come on the basis that a local authority has not been given the power by central government to carry out a task. For that reason traditional ultra vires analysis is likely to have limited application to the Local Government Act 2002. A challenge is more likely to be on the basis that an irrational type decision means that a local authority has erred in its decision-making process or that a local authority has not adopted the correct procedure. A challenge of this nature is likely to call into question a local authority's use of the part 6 decision-making and consultation procedure.

B Part 6 of the Local Government Act 2002

Part 6 is hugely important to local authority decision-making. As one author noted, recognising when consultation is required, and when to exercise the discretions given to local authorities under subsections 79 and 82 of the Local Government Act 2002, are the keys to local authorities moving ahead with confidence.[109]

Given the wide nature of the discretion set out in section 79, it would seem that if we apply the principles from *Woolworths* the courts should be reticent to interfere with a local authority's decision, apart from where it is an extreme or irrational decision or natural justice requires intervention. It is not the role of the courts to second guess the way a local authority uses its discretion. If courts began to interfere in these areas, as well as potentially being unconstitutional, it might stifle the operation of local government. In deciding whether to review a local authority's decision, the courts would be required to take into account the purpose of the legislation and this clearly sets out that it is to enable the democratically elected councils to make decisions of this nature.

There might be the possibility to review a local authority decision if a local authority had not had regard to the matters they are required to assess under section 79 (2) of

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[109] Padraig McNamara "Local Government's requirements to consult" (2004) NZLJ 361, 368.

the Local Government Act 2002. However, it is hoped that a local authority would not completely ignore its obligations under this section. If a local authority does not completely ignore its obligations it would seem difficult for the courts to interfere with the way a local authority has chosen to exercise its discretion unless the decision is thought to be irrational.

Sections 80 and 81 do not leave the local authority with the type of discretion that is available under section 79. If a local authority did not comply with either section 80 or 81, it could be open to review as the statutory language ensures these are mandatory requirements. However, the requirements set out under section 80 and 81 although mandatory are not particularly onerous. Section 80 requires the identification of any inconsistency and section 81 is aimed at ensuring processes are in place for consulting with Maori. If a local authority had not completely ignored or forgotten its obligations under these sections it would seem that a review based on either of these two sections would be unlikely. If a local authority had ignored its obligations the courts could well be compelled to ensure compliance with the requirements set out in these sections. However, it must also be remembered that forcing compliance with these requirements alone may not change the decision that has been made.

Again, section 82 of the Local Government Act 2002 gives local authorities a wide discretion when considering whether and how to consult. Provided a local authority had complied with its obligation to at least turn its mind to the matters raised in section 82 it seems that it would be difficult for the courts to conduct an administrative law review, except where the decision was considered to be of an extreme or irrational nature or natural justice required intervention.

A local authority could also leave itself open to review if it did not comply with the special consultative procedure outlined in section 83 of the Local Government Act 2002 when required to do so. For this reason it is extremely important for local authorities to identify where this type of consultation is required. Failure to conduct this type of consultation where necessary would likely mean that the courts could be compelled to order a local authority to comply with the procedure.

C The consultation policy of the Wellington City Council and the consultation policy of the Auckland City Council

The consultation policies of the Wellington City Council and the Auckland City Council are examples of the way local authorities have addressed their consultation obligations. Not only do they ensure compliance with section 40(1)(h) of the Local Government Act 2002, which requires local authorities to make publicly available their consultation policies, it also helps address the consultation issues set out in section 82 of the Local Government Act 2002.

The Auckland City Council's consultation policy sets out:[110]

> The purpose of this policy is to ensure a consistent approach to consultation across Auckland City Council and compliance with the consultation requirements of the Local Government Act 2002.

Both these consultation policies outline the way the respective local authorities will use the consultation discretion that is available under the Local Government Act 2002. If the Auckland and Wellington City Council comply with their respective consultation policies it seems that they should eliminate the threat of judicial review based on lack of consultation in most cases, except where a decision is viewed as irrational or extreme, or where natural justice required adherence to procedures beyond those set out in the legislation. The consultation policies set out the nature of the consultation process that each local authority will follow and in particular each specifies the type of consultation they will be utilising. The Auckland City Council outlines "collaboration, participation, involvement and reaction" as the types of consultation that they will be utilising. The Wellington City Council in a similar vane sets out that they will be utilising what they describe as "partnering, participatory, interactive and reactive consultation".[111]

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[110] Auckland City Council <www.aucklandcity.govt.nz> (last accessed 26 October 2005).

[111] Auckland City Council <www.aucklandcity.govt.nz> (last accessed 26 October 2005) outlines collaboration, participation, involvement and reaction as their types of consultation. The Wellington City Council <www.wellington.govt.nz> (last accessed 26 October 2005) outlines Partnering, Participatory, Interactive and Reactive as their types of consultation.

Both consultation policies also acknowledge their commitment to consultation with Maori and as such should ensure compliance with section 81 of the Local Government Act 2002.[112]

The Auckland City Council's consultation procedure also identifies the special consultative procedure. It notes that the special consultative procedure will be used for:[113]

- Long-term council community plan (s84 Local Government Act 2002)
- Annual plan (s85 Local Government Act 2002)
- Adoption, amendment or review of by-laws (s86 Local Government Act 2002)
- Change to a significant activity (s88 Local Government Act 2002).

It also notes that there are other occasions when the procedure must be used which can be found in the Local Government Act 2002.

As discussed, ensuring that a local authority has complied with section 83 of the Local Government Act 2002 is imperative for decisions that require the special consultative procedure.

V CONCLUSION

The importance of Local Government in New Zealand's constitutional arrangements will continue to increase. Central government has acknowledged that "local authorities have grown up" and that they "are more professional than ever."[114] In the Local Government Act 2002 central government has ensured that local government has wider powers and discretions to develop the policy most appropriate to the community they represent.

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[112] Auckland City Council <www.aucklandcity.govt.nz> (last accessed 26 October 2005) states "The council will maintain processes that provide opportunities for Maori to contribute to decisions". The Wellington City Council <www.wellington.govt.nz> (last accessed 26 October 2005) states "The Council is committed to acknowledging the unique perspectives of Maori as Mana Whenua and Taura Here in its consultation".

[113] Auckland City Council <www.aucklandcity.govt.nz> (last accessed 26 October 2005).

[114] Hon Chris Carter , above n 18, 2804.

As the importance of local government increases, the supervisory role of the courts is also likely to be called upon. The courts will be asked to ensure that local government does not abuse the power and discretions with which they have been entrusted.

I have examined various approaches that the courts could take to the review of local authority decision-making and have concluded, that based on the provisions of the Local Government Act 2002, the best approach the courts could take would be a deferential approach. A deferential approach would give local authorities the latitude to engage in policy making and avoid them having to take a legalistic approach to decision-making. The courts would defer to local authority decisions, except where they considered the nature of the decision or the procedure that had been adopted in making the decision meant it was imperative that they intervene.

I have analysed the traditional approaches the courts have taken to the review of local authority decision-making. Judicial analysis based on the traditional "chapter headings" of illegality, irrationality and procedural impropriety will continue to be of relevance. Although, as often is the case with reviews of this nature a broad assessment of the facts, the power that is being utilised, the way the decision was made and the decision itself are likely to be very important.

Finally I noted that in *Woolworths* the courts indicated that they are willing to adopt a deferential type approach where this is appropriate. It will be interesting to see if the courts continue with this type of approach when reviewing decisions made under the Local Government Act 2002.

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