Gail Jansen

MINISTERIAL POWERS UNDER THE INDUSTRIAL RELATIONS ACT 1973

Research paper for Administrative Law
LL.M. (LAWS 501)

Law Faculty
Victoria University of Wellington
Wellington 1982

Gail Jansen

MINISTERIAL POWERS UNDER THE INDUSTRIAL RELATIONS ACT 1973

Research paper for Administrative Law
LL.M. (LAWS 501)

Law Faculty
Victoria University of Wellington

Wellington 1982

CONTENTS

I	INTRODUCTION	1.
II	STATUTORY POWERS	10.
	A. Ministerial powers of appointment	10.
	B. Powers to Intervene in Disputes	14.
	C. Ministerial Ballots	32.
III	WORDS CONFERRING POWERS	35.
Iv	AVENUES OF CHALLENGE	47.
	A. Appeal	47.
	B. Review	60.
	(a) Improper Delegation	67.
	(b) Breach of Natural Justice	71.
	(c) Abuse of Discretion	84.
	(d) Bad Faith	94.
	C. Declaratory Judgments Act 1908	99.
	D. Ombudsmen Act 1975	101.
V	CONCLUSION	103.
	APPENDIX ONE	105.

I INTRODUCTION

It is intended in this paper to consider the array of ministerial powers conferred by the Industrial Relations Act 1973. We will begin by noting the scope of these powers and the statutory language in which they are expressed. Following this analysis consideration will be given to some of the possible procedures and grounds available to challenge the exercise of these ministerial powers, including an indication of the potential attitude of the courts to such actions.

Our initial starting point should however be to consider some of the wider policy issues which may be taken into account by the courts[1] in addition to the actual statutory language which confers the power. When undertaking an inquiry into the exercise of a ministerial power in the industrial relations sphere the courts would have a wide range of responses available to them. There is no clear cut or immediately apparent answer as to the exact approach which the courts would take as the exercise of a ministerial power pursuant to the Industrial Relations Act 1973 or its predecessors has never been challenged in the courts. Whether there are causes of action into which such a challenge could be fitted is the issue it is hoped to canvass in Part IV of this paper. The courts' response to these avenues of challenge will be determined by the statutory language and relevant policy considerations.

---

1. Excluding the Arbitration Court

It must be asked whether the courts would or should take the same approach to a ministerial decision concerning an industrial relations matter as it would to a decision concerning national security. The latter area is one in which the courts have traditionally declined to review a decision by a Minister.[2] Another area in which the courts have been slow to intervene is in the field of immigration. However a successful review action was taken against the Minister in Daganayasi v. Minister of Immigration[3] to which we will return. The New Zealand Court of Appeal adopted a more passive approach though in the case of Ashby v. Minister of Immigration.[4] That case concerned the Minister's exercise of his discretionary power pursuant to section 14 of the Immigration Act 1964 in granting temporary entry permits to the Springboks. Richardson J. considered this to be a non-justiciable issue emphasising that "immigration policy is a sensitive and often controversial political issue"[5] which involved the conduct of foreign relations and the national interest. Cooke J. was not prepared however to hold that the Minister's exercise of his discretion under section 14 could never be reviewed by the courts.

---

2. For example Regina v. Secretary of State For Home Affairs, Ex parte Hosenball [1977] 1 WLR 766 where the English Court of Appeal held that where national security was involved the ordinary principles of natural justice were modified for the protection of the realm.
3. [1980] 2 NZLR 130
4. [1981] 1 NZLR 222
5. Ibid p231

Thus we see the courts reluctant to intervene in issues that they perceive to be the proper and sole domain of the Government of the day. The question is whether a decision taken by the Minister under the Industrial Relations Act 1973 would be viewed as coming within this category. As mentioned above, there is some indication in Ashby v. Minister of Immigration[6] that the Court of Appeal would treat each case on its merits rather than adopting a blanket approach of refusing to ever review a particular discretion. As in the Ashby[7] case the court will no doubt consider the role of Government policy in the decision taken and consequently the role adopted by the Government in the industrial relations system.

It is submitted however that there is no "consistent agreement regarding the role which the State has to play in industrial relations."[8] It has been suggested that the Government's role stems from its responsibility to protect the public interest.[9] Such an argument would appear to be very similar to those made in Hosenball's [10] case concerning national security. However the Government's role has also been framed in terms of providing

---

6. Supra n.4

7. Idem

8. R.S. Rudman Government Intervention In Industrial Relations: A New Zealand Perspective (Victoria University of Wellington, Industrial Relations Centre, 1977) p2

9. Idem

10. Supra n.2

> "...adequate machinery for the peaceful settlement of Industrial disputes and that the machinery is up-to-date and flexible enough to cope with problems raised by the changing needs of our industrial structure.
>
> (Secondly).. to provide guidelines for the safety, health and welfare of persons in employment in the form of minimum standards.
>
> (Thirdly).. to promote and encourage good relationships between employers and unions at all levels; including their organisation into effective bargaining units." [11]

The argument concerning the role of the Government is further confused by the fact that "intervention in New Zealand has largely resulted from pragmatic or expedient responses to particular situations." [12] The role adopted by the Government has not therefore been constant over time. This means that the court may be faced with widely divergent arguments in any one case as to the level of policy input in a ministerial decision taken pursuant to a power conferred by the Industrial Relations Act 1973.

---

11. Supra n.7

12. Supra n.7 p5

Such divergence may in itself be sufficient to indicate to the court that the area of industrial relations should not be treated in the same way as for example national security. The fact that it is not unanimously percieved to be an area for the sole determination of the Government of the day may be sufficient, at the very least, for the court to consider each case on its merits.

These arguments must also be viewed in light of the language used in the particular statutory provision being considered. The wording may be sufficiently wide for the decision to be a highly political one which should properly be sanctioned by Parliament and the electorate and not by the courts. Conversely the Minister's decision may be required by the statute to be based on facts which are easily determined by the courts.

The wide range of statutory language used to confer powers on the Minister and the possible implications of each will be discussed in Parts lll and lV of the paper but for the present purposes the differing scope for the input of Government policy can be seen from the following two examples. Section 134(1) provides for the Minister to give notice in the Gazette of the registration of a new union if he is "satisfied that a new union of employers, or, as the case may require, of workers, representing the employers or the workers who were represented by the deregistered union has been registered under this Act." It is contended that there

is little scope for the input of Government policy into the decision of the Minister in this case as whether a new union has been registered will be a matter of fact easily discovered by the court through the Registrar of Industrial Unions. Whether the new union represents those covered by the deregistered union may be determined by an examination of the description of the industry to be covered by each union. These are matters which evidence before the court could firmly establish. As a contrast to this is the provision in section 130(1) which gives the Minister power to deregister a union if he is "satisfied" that "in respect of any discontinuance of employment it has caused or is likely to cause serious loss or inconvenience and that it has been brought about wholly or partly by any union of employers or of workers or by any member or members thereof...". In this instance the power of the Minister is also based on a satisfaction that certain circumstances exist. They are however much more vague than those in section 134(1). For example Government policy may determine the exact level at which serious loss or inconvenience is caused. A court may be reluctant to replace the Minister's determination of a serious loss or inconvenience with its own and probably more reluctant to impose its judgment of future events, as to whether serious loss or inconvenience is likely, on the Minister. The courts may be more willing to leave these rather more vague matters to be decided by the Minister according to Government policy than it would the circumstances in section 134(1) which do not involve the subjective judgments required by section 130(1).

The court may look further than the words of the specific provision of the statute that is in question to the overall scheme of the Act. The fact that the Industrial Relations Act 1973 establishes a specialist court in the Arbitration Court may indicate that the Legislature intended all industrial matters to be dealt with by that court. A limited right of appeal is given by section 62A to the Court of Appeal and the ability to seek review is limited by the privative clause in section 48(7). These limitations are also an indication of a statutory attempt to keep industrial matters within the specialist court and many of the procedures in the Act are designed to settle disputes without reference to any court. For example the section 117 personal grievance procedure. Another section which may be interpreted as illustrating that the Act is designed to operate outside the normal court system is section 54(4) whereby barristers and solicitors may not appear before the Arbitration Court in arbitration proceedings except with the consent of all parties. Arguments may therefore be made, based on the Industrial Relations Act 1973 as a whole, that the courts should be slow to intervene in an area which by statute they are given only a limited role. This would have to be weighed against such considerations as the seriousness of the interests involved and whether there are any alternative safeguards provided by the legislation.

The courts may be influenced in favour of exercising some form of control over the powers conferred by the Industrial Relations Act 1973 due to the number of international conventions which are applicable to this area. In Ashby v. Minister of Immigration[13] Richardson J. acknowledged New Zealand's responsibilities under such treaties although he stopped short of requiring the Minister to separately identify and consider the Racial Discrimination Convention. In the industrial relations sphere there are for example many International Labour Organisation Conventions, some of which bind New Zealand as they have been ratified by this country, whilst others simply indicate the appropriate standards, duties and obligations of the parties involved. These international conventions could provide the basis for an argument that the decision is in fact not open to political whim alone but must be made in accordance with established international legal standards.

It is submitted that, even though a decision taken by a Minister pursuant to powers conferred by the Industrial Relations Act 1973 may be based to some extent on government policy that alone would not be sufficient reason for a court to decline to consider the decision. Neither, it is contended, would a court refuse to consider such a decision merely because it concerned industrial relations.

---

13. Supra n. 4 p231

There is no history of the courts adopting this approach compared for example to the area of national security and the exact role of the Government is unclear. Thus we are left with the probable result of the Court looking at each individual case on its merits. From the Court of Appeal's attitude to appeals from and review of Arbitration Court decisions there is an indication that the court would adopt a passive approach deferring to a more specialist decision-maker in the field of industrial relations. This issue will be more fully discussed in Part lV of this paper. It is however the statutory language of the provision in question that will initially determine, the grounds on which the ministrial actions are able to be challenged, and the approach adopted by the courts. It is to an analysis of those statutory provisions that we now turn.

II STATUTORY POWERS

Since the passing of the Industrial Conciliation and Arbitration Act 1894 the government has become an integral part of the New Zealand industrial relations system. The current role of the Minister of Labour in the industrial relations sphere is largely determined by the 1894 Act's successor, the Industrial Relations Act 1973. Before turning to a consideration of judicial control of these powers it is necessary to outline the specific provisions in the Industrial Relations Act 1973 which confer on the Minister of Labour, hereinafter referred to as the Minister, some form of decision-making power.

A. Ministerial powers of appointment

In relation to the Industrial Conciliation Service and the Industrial Mediation Service pursuant to sections 63(2) and 64(2) respectively the Minister is given the power of recommending to the Governor-General the persons to be appointed to these services. This power is however wider in one context than the other, section 63(2) reads:

> " The service shall consist of conciliators who shall be appointed by the Governor-General <u>on the recommendation of the Minister</u> to exercise the powers and jurisdiction conferred on them by this Act."

By comparison section 64(2) imposes a duty of consultation on the Minister, it reads:

> " The service shall consist of mediators, who shall be appointed by the Governor-General on the recommendation of the Minister after consultation with the central organisations."

The Central organisations referred to are defined in section 2 to be the central organisation of employers and the central organisation of workers. Currently these bodies would be the Employers' Federation and the Federation of Labour. Mediators and conciliators so appointed hold office for three years and are eligible for reappointment from time to time. In both services those appointed may at any time be removed from office by the Governor-General pursuant to sections 68(6) and 64 (8) respectively.

The functions and powers of a conciliator as given by subsections (3) and (4) of section 63 are primarily concerned with the administration of conciliation council for the hearing of disputes of interest. By comparison the functions of a mediator as established by section 64(3) and 64(4) are to assist employers, unions and workers to carry out their responsibilities to establish and maintain harmonious industrial relations. The role of the

mediator is to work closely with both the employers and workers to endeavour to prevent industrial disputes. It is suggested that the extra requirement in section 64(2) that the Minister consult with the central organisations before making his recommendation to the Governor-General is appropriate due to the close rapport with these organisations that a mediator is required to establish. A conciliator does not have the same statutory function of maintaining a close and continuous liaison with the parties in industry and this may explain the omission in section 63(2) of a requirement on the Minister to consult with the central organisations.

In respect of both services temporary appointments may be made but the discretion to create these positions rests with different persons. The section 63(7) power to appoint a temporary conciliator for a period less than three years is exercisable by the Governor-General. The section 64(9) discretionary power to appoint a temporary mediator is, in contrast, conferred on the Minister and appointments are restricted to a specified period not exceeeding twelve months or, to be in connection with any dispute that has arisen. The potential tenure of office for a ministerial appointed mediator is therefore shorter than that of a temporary conciliator appointed by the Governor-General.

The terms in which these two discretions are conferred by the statute also differ. Section 63(7) simply states that the "Governor-General may from time to time appoint a conciliator in a temporary capacity." Section 64(9) by contrast is in the terms that "the Minister may, when he considers it desirable, appoint a person to be a mediator to act in a temporary capacity." Whether these extra words have any effect on the ability of the courts to review a decision of the Minister in contrast to the Governor-General will be discussed at a later stage of this paper.

The Minister also has the responsibility of appointing three persons to the Conscientous Objection Committee which is established by section 108. The appointment of the Chairman, Deputy Chairman and deputy members is also performed by the Minister. The Chairman, being one of the three committee members may, pursuant to section 110, be removed from office by the Minister for disability, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Minister. The Deputy Chairman and deputy members however hold office during the Minister's pleasure, affording little security of tenure. The Minister is given, by these sections total control of the appointment of members of the Conscientious Objection Committee.

B. Powers to Intervene in Disputes

The further power of appointment exercised by the Minister is of a different nature as it is not connected to any of the permanent bodies established by the statute. It is the power to appoint a committee of inquiry conferred on the Minister by section 121 in the circumstances prescribed by section 120.

> 120. Power of Minister to call compulsory conference in case of strike or lockout -
> (1) Where the Minister has reasonable grounds for believing that a strike or lockout exists or is threatened, he may, if he thinks fit, call a compulsory conference of the parties to the dispute or their representatives in an endeavour to secure a settlement of the dispute, and appoint any person to be chairman of the conference with power, if the Minister thinks fit, to make a decision settling the dispute.
>
> (3) In addition to the parties or representatives of the parties to the dispute, the Minister may also require the attendance at the conference of any person whose attendance would in the opinion of the Minister be likely to assist in securing a settlement of the dispute.
>
> (4) Where the Minister has conferred on the chairman of the conference the power to make a decision settling the dispute and -
> (a) The parties, or their representatives, who attend the conference are unable to agree on a settlement; or

(b) The parties fail to attend or to be represented at the conference -

the chairman may make a decision settling the dispute; and the chairman's decision shall be final and binding on the parties.

The Minister is under an initial obligation to have "reasonable grounds for believing" that a strike or lockout exists. It is probable that "may" when followed by "if he thinks fit" will confer on the Minister a discretion to call a compulsory conference and appoint a chairman. The same wording can be interpreted as giving the Minister a further discretion as to the powers of the chairman.

The composition of the conference is not limited to the parties involved in the dispute but may be augmented by the Minister if the persons would in his opinion be likely to assist in securing a settlement of the dispute. It is contended that the subjective wording of subsection (3), "in the opinion of" coupled with "may" confers on the Minister a discretion as to the composition of the compulsory conference.

The Minister's use of the section 120 power in the last three years has been [14].

Year ended 31 March 1979	15
Year ended 31 March 1980	12
Year ended 31 March 1981	6

---

14. Report of Department of Labour for year ended 31 March 1980 p25
Report of Department of Labour for year ended 31 March 1981 p28

Instead of or in addition to a section 120 compulsory conference the Minister is given the power to appoint a committee of inquiry pursuant to section 121,

121 Power of Minister to appoint committee of inquiry-

In any case to which section 120 of this Act applies, the Minister may if he thinks fit, instead of or in addition to calling a compulsory conference under that section, appoint a committee of inquiry with the power to inquire into the matter of the dispute generally or into such aspects of it as the Minister specifies.

(2) The committee shall consist of an equal number of persons to represent respectively the employers and the workers concerned in the dispute, together with a chairman; but if the Minister thinks fit the committee may consist of one person.

(3) The committee shall be deemed to be a Commission under the Commissions of Inquiry Act 1908, and the provisions of that Act, except sections 2, 4A and 10 to 12, shall apply accordingly.

(4) The committee shall report the results of its inquiry and its findings to the Minister. A copy of the report shall be made available by the Minister to each of the parties concerned in the dispute.

(5) The minister may publish the report of the committee or a summary of the report.

It should be noted that before the Minister can appoint a committee of inquiry he must first have "reasonable grounds for believing" that a certain set of circumstances exists or is threatened. The Minister then has a discretion as to whether he appoints a committee of inquiry, expressed by the statute in terms of "may if he thinks fit." The Minister may decide if he "thinks fit" to appoint a one-man Commission but if he chooses not to do so subsection (2) imposes the condition of equal representation of workers and employers. The scope of the inquiry to be undertaken by the committee is specified by the Minister. The use of "shall" in subsection (4) is to be contrasted with the use of "may" in subsection (5). It is submitted that subsection (4) would be interpreted as to require the Minister to make the report available to the parties but that in subsection (5) "may" confers on the Minister a discretion as to whether the report or a summary of it is published.

The number of times that the Minister has used his section 121 powers over the last three years is as follows: [15]

Year ended 31 March 1979	6
Year ended 31 March 1980	2
Year ended 31 March 1981	2

---

15. Idem

Sections 120 and 121 conferred on the Minister the powers to endeavour to settle a dispute by calling a compulsory conference and/or appointing a committee of inquiry. Sections 125B and 125C as inserted by section 9 of the Industrial Relations Amendment Act 1981 provide further powers for the settlement of disputes in essential industry or export slaughter-houses.

125B
Power of Minister to refer to conciliator mediator, or other person existing or threatened strike or lockout affecting essential industry or export slaughter-house -

(1) Where the Minister is of the opinion,-

(a) That a strike or lockout exists or is threatened in an essential industry or an export slaughterhouse; and

(b) That the strike or lockout substantially affects or will substantially affect the public interest,-

he may request a conciliator or mediator or some other person appointed by the Minister to inquire into the matter of the dispute.

(2) The conciliator, mediator, or other person to whom the matter of a dispute is referred under subsection (1) of this section shall be requested-

(a) To -

(i) Inquire into the facts of the dispute; or

(ii) Both inquire into the facts of the dispute and endeavour to secure a settlement of the dispute; and

(b) To report to the Minister

The powers conferred by section 125B are similar to those contained in section 121 . Section 121 allows for a one man committee of inquiry to be appointed by the Minister and the same effect is achieved pursuant to section 125B. The Minister is able to appoint a mediator or conciliator or some other person under both section 121 and 125B. In contrast to section 121, section 125B contains an explicit description of the scope of the inquiry whereas under section 121 the scope of the inquiry is specified by the Minister.

In order for the Minister to implement section 125B he must be of the opinion that the specified circumstances do exist. It is contended that the "may" in subsection (1) means that the Minister has a discretion as to whether he initiates an inquiry pursuant to this section but, that being of the opinion required he is not bound to take any action under section 125B.

Once the Minister has obtained a report and the dispute is still unsettled the options open to him are either to do nothing or to refer the matter to the Arbitration Court under section 125C.

125C Power of Minister to refer to Court existing or threatened strike or lockout affecting essential industry or export slaughterhouse-

(1) Where the Minister receives a report under section 125B (2) (b) of this Act, he may, if the dispute has not been settled or if a strike or lockout exists in respect of that dispute, refer the matter of the dispute to the Court for settlement.

(2) Where the matter of a dispute is referred to the Court under subsection (1) of this section, the Court shall set a date for the hearing of the dispute as a matter of urgency.

(3) The hearing shall be dealt with in accordance with the practice of the Court and in accordance with any rules or regulations governing the procedure of the Court.

(4) If, after inquiring into the dispute, the Court is satisfied that the strike or lockout or the threatened strike or lockout substantially affects or will substantially affect the public interest, the Court shall make a determination -

(a) Settling the dispute; or

(b) Prescribing the procedure to be followed in settling the dispute.

(5) The determination of the Court shall be final and binding on the parties.

(6) If, notwithstanding a determination under subsection (4) of this

> section, full work or the operation of any undertaking is not resumed, the Court shall, on the application of any of the parties or the Minister order a resumption of full work or, as the case may require, of the operation of that undertaking, unless the Court determines that there is good reason not to make an order under this subsection.

The teeth to enforce these procedures are contained in the penalty provisions of section 125D.

It should be noted that pursuant to section 125C(6) if the Minister makes an application to the Arbitration Court for an order for the resumption of full work the final decision as to the making of such an order rests with the court.[16]

Remaining in the area of provisions designed to achieve the settlement of a dispute and a return to work the Minister by sections 126 and 127 is given the power to call for a ballot on the issue of a return to work.

---

16. Section 125B was used twice in 1982, one case proceeded to the Arbitration Court pursuant to section 125C. From discussions with staff members of the Department of Labour.

126 Secret ballot on the issue of a return to work - At any time during the continuance of a strike in respect of a dispute of interest -

(a) The Court in its discretion; or

(b) The Registrar of Industrial Unions in his discretion; or

(c) The Minister, the Court, or the Registrar, on the request in writing of not less than 5 percent of those workers who are directly concerned in the strike -

may conduct or cause to be conducted, in the prescribed manner, a a secret ballot of all workers directly concerned in the strike on the issue of a return to work.

127 Secret ballot on the issue of a resumption of operation of undertakings - At any time during the continuance of a lockout in respect of a dispute of interest -

(a) The Court in its discretion; or

(b) The Registrar of Industrial Unions in his discretion; or

(c) The Minister, the Court, or the Registrar, on request in writing of one or more employers who are directly concerned in the lockout -

may conduct or cause to be conducted, in the prescribed manner, a secret ballot of all employers directly concerned in the lockout on the issue of a resumption of the operation of the undertakings concerned.

It is to be noted that under both section 126 and section 127 the Minister is only able to act to require a ballot after he has been requested to do so by the prescribed number of workers or employers respectively. This is to be contrasted with the discretions conferred on the Court and the Registrar of Industrial along with the power, as possessed by the Minister, to conduct a ballot upon request. It is arguable that in these sections "may" is only to be read as conferring a discretion when read with paragraphs (a) and (b). But that when paragraph (c) is being considered "may" is to be read as "shall" as (c) unlike (a) and (b) does not use the language of a"discretion". It is contended that if a discretion was intended to be given in the case of a request then the same formula of "in its discretion" would have been used throughout the section. The contrary argument is that all words are to be given their ordinary meaning, therefore "may" confers a discretion when read in conjunction with any of the three paragraphs. This would mean that the Minister could never be bound under section 126 or section 127 to conduct or cause a secret ballot to be conducted but, he is powerless to exercise his discretion to do so without first obtaining the necessary written requests.

Currently it is doubtful that the scope of the Minister's discretions under either of these sections will be interpreted by the courts as they have never been used.[17]

The power to deregister a union in the event of a "discontinuence of employment" is also conferred on the Minister. The industrial conciliation and arbitration system established in 1894 and continued by the Industrial Relations Act 1973 is based upon unions of employers and workers being registered pursuant to the statute law. Only an association so registered can enjoy the benefits conferred by the legislation. For example, only a registered union of workers can negotiate for the inclusion of an unqualified preference clause in their Award.[18] The deregistration of a union means that it no longer has to abide by the requirements of the Act but also that it can no longer claim monopoly coverage of the workers or employers in that industry. Thus a new union may be registered effectively destroying the old one.

The Minister has the exclusive power to deregister a union pursuant to section 130 of the Industrial Relations Act 1973.

---

17. From discussions with staff members of the Department of Labour
18. Section 98A Industrial Relations Act 1973

130 Minister may cancel registration of union, or cancel award or agreement -

(1) If in respect of any discontinuance of employment the Minister is satisfied that it has caused or is likely to cause serious loss or inconvenience and that it has been brought about wholly or partly by any union of employers or of workers or by any member or members thereof, the Minister may, by notice in the Gazette, cancel the registration of the union, or cancel any award or collective agreement so far as it relates to the union, or cancel the membership of any specified class of members of the union.

(2) Any notice under this section may be general or may be limited to any specified locality

(3) Every notice under this section shall have effect according to its tenor, and shall take effect on the date of its publication in the Gazette, or on such later date as may be specified in that behalf in the notice.

(4) On the cancellation under this section of the registration in respect of any locality of any union registered in respect of any industry (whether that locality is the whole or part of the area in respect of which the union is registered), all awards and collective agreements shall be deemed to be cancelled so far as they relate to that union and to that locality or any part thereof;

and thereafter, until the Minister consents thereto, no other union of employers or workers, as the case may be, shall be registered in respect of that industry and in respect of that locality or any part thereof and the scope of any other union of employers or workers, as the case may be, that is registered in respect of that industry shall not be extended to that locality or to any part thereof.

(5) On the cancellation under this section of the membership of any specified class of members of any union, the following provisions shall apply:

(a) The membership rule of the union shall be deemed to be amended so as to exclude members of that class from membership of the union or, where the notice is limited to a specified locality, to exclude them from membership in respect of that locality; and members of that class shall thereupon cease to be members accordingly; and

(b) No award or collective agreement, so far as it relates to that union, shall apply to members of that class, or, where the notice is limited to a specified locality, to members of that class in respect of that locality or any part thereof; and

(c) Until the Minister consents thereto, members of that class shall not be eligible to belong to any union registered in respect of the industry or, where the notice is limited to a specified locality, to any such union in respect of that locality.

> (6) For the purposes of this section, the expression "discontinuance of employment" includes the refusal by any employer to engage workers for any work for which he usually employs workers, the refusal of any workers to accept engagement for any work in which they are usually employed, and any method, act or omission in the course of employment that has or is likely to have the effect of interrupting or impeding the work in any industry.

Section 130 (1) requires that before the Minister makes any decision concerning the deregistration of a union he must first be "satisfied" that the specified circumstances exist. Once he is satisfied of this, it is contended that, the words "the Minister may" confer a discretion on the Minister as to whether or not a union is to be deregistered. It is submitted that the Minister once satisfied, was not intended by Parliament to be bound to deregister a union as the Act contains several alternative courses of action that the Minister may take where a discontinuance of employment exists. For example sections 120 and 121, as discussed above, could be applied because the section 123 definition of a"strike" includes a discontinuance of employment. To read "may" as "shall" in this section would be to improperly limit the scheme of the Act.

The Minister's power is not confined to the deregistration of a union but extends to the possibility of an association or its members being able to re-register as an industrial union pursuant to the Industrial Relations Act 1973.

Upon deregistration the union's assets become subject to sections 131 to 134 whereby they are to be managed by the Public Trustee until a new union is registered in place of the old union. If no new union is registered then, pursuant to section 131(1) (b), within 6 months or within such further time as the Minister before the expiry of the said period of 6 months, may direct, the assets are to be distributed amongst the members of the deregistered union. The vesting of the assets in a new union is dependent upon the Minister exercising his power under section 134 whereby if

> "the Minister is satisfied that a new union of employer, or, as the case may require, of workers, representing the employers or the workers who were represented by the deregistered union has been registered under this Act, he shall, by notice in the Gazette, declare that -
> (a) The new union has been so registered under the name specified in the notice; and
> (b) On the date specified in the notice (being the date of the notice or any later date), the assets of the deregistered union then vested in the Public Trustee shall vest in the new union..."

Under section 134 there is again a requirement that the Minister be "satisfied" of the existence of certain specified circumstances. However in contrast to the use of "may" in section 130, the word "shall" is used in relation to notice being given in the Gazette. The different wording used in these sections could indicate that whilst a discretion was intended to be conferred in section 130 the notice requirements in section 134(1) are mandatory and must be fulfilled by the Minister once he is satisfied that a new union fulfilling the section 134(1) requirements has been registered. One of the reasons for this difference possibly being that, the Minister has a number of options as to the action he may take in the event of an industrial dispute but that the registration of a new union to replace a deregistered one is a matter of public importance which should be publicly announced and so no option is given to the Minister.

Even if no new union is registered the Minister pursuant to section 134(6) has the power to distribute the assets of the deregistered union. If the Minister "is satisfied" within six months or the period he has directed that a majority of the members of the deregistered union have become or desire to become, members of another union which they may lawfully join the Minister "may" , by notice in the Gazette, declare that the assets of the deregistered union then vested in the Public Trustee shall vest in that other union.

A further result of deregistration is provided by section 142(2) which states that if a dispute relates to work formerly within the scope of a union that has been deregistered a conciliator "may" take action to recommend a conference in respect of that dispute only with the consent of the Minister.

It can be argued that if the Minister is satisfied of the specified circumstances in section 134(6) that he should be bound to vest the assets in the new union. However the use of the word "may" prima facie confers a discretion on the Minister and such a discretion would be consistent with the wide powers concerning deregistration and the distribution of assets given to the Minister under sections 129 to 136.

Section 142 cannot be interpreted in exactly the same manner as section 134(6) as consent of the Minister is a prerequisite to the exercise of any discretion which might be conferred by the use of "may", by the conciliator. It is probable that a discretion is intended to be given to the conciliator because the recommendation of a conference is only one possible method of resolving a dispute. This exercise of discretion is not based on a subjective judgement by the conciliator but upon the consent of the Minister. No grounds are defined by the statute on which the Minister is to decide whether or not to give his consent. This power again highlights the dominant role of the Minister in relation to deregistration of industrial unions.

The ministerial power to deregister a union has been used seventeen times since 1939 when it was first introduced into the legislation. A list of these instances is contained in appendix 1. The threat of deregistration is often used as a weapon to threaten both public and private sector unions which may be contemplating some form of industrial action. [19]

---

19. For example, headline in Evening Post Monday 29th March 1982 "PM threatens PSA with deregistration" To deregister the PSA special legislation would be required, as section 130 only applies to private sector industrial unions.

C. Ministerial Ballots

The Minister, pursuant to section 101A as inserted by the section 16 of the Industrial Relations Amendment Act (No.2) 1976,

> "may from time to time, by notice to the registrar, require a ballot to be conducted of all adult workers who will, if an ... unqualified preference provision is inserted or continues to be inserted in any award or collective agreement (including an award or collective agreement to be made in substitution for any existing award or collective agreement), be bound to become or remain members of a union of workers bound by the award or collective agreement."

The Minister is required by subsection(2) to:

(a) Inform the organisation known as the New Zealand Federation of Labour of his proposal to issue the notice and of his reasons for that proposal; and

(b) Give the Federation a reasonable opportunity of consulting with him with regard to the issue of the notice.

Pursuant to subsection (4) a ballot shall not be conducted if, during the preceeeding three years a ballot has been conducted in accordance with this section. The actual procedure to be followed and the effect of the ballot are laid down in sections 101B to 101E. The initial power of decision is in terms of the Minister "may" which in this context is contended to confer a discretion on the Minister as to whether or not a ballot is to be required.

Following the insertion of the provision for a Ministerial ballot there have been seven ballots[20]

---

20. section 101A ballots

Golden Bay Cement Works Employees
Canterbury Rubber Workers
North Island (except Hawkes Bay and Wairarapa) Chemical Fertilizer Workers
Wellington District Rubber Workers
Dunlop N.Z. Ltd Upper Hutt Rubber Workers
Nelson Timber Workers
N.Z. Freezing Workers Clerical

source: Report of Department of Labour for year ended 31 March 1979

conducted pursuant to these sections. This section has not been used since 1979 following the insertion of section 175A by section 9 of the Industrial Relations Amendment Act 1978 which required every union wishing to insert an unqualified preference clause in an award or collective agreement to ballot its members on this issue every three years. These ballots are conducted by the Department of Labour.[21]

---

21. It is probable that section 175A will be repealed during the 1982 Parliamentary session by the provisions of the Industrial Law Reform Bill 1982 which was introduced into the house on 15 September 1982. If passed this Bill will replace section 175A with a procedure whereby 50 union members or 10% of the financial membership, whichever is the lesser, may apply to the Registrar of Industrial Unions for a ballot to be held on the issue of the inclusion of an unqualified preference clause in an award or collective agreement.

III WORDS CONFERRING POWERS

The powers conferred on the Minister under the Industrial Relations Act 1973, as outlined in Part II of this paper, result from several different formulations of statutory language. The important position of the Minister in the industrial relations field as evidenced by his many and varied functions under the Industrial Relations Act 1973 is one factor which the court may take into account when considering a challenge to a Ministerial decision purportedly made in accordance with these provisions. The scope of the Minister's powers in each instance is however initially to be determined by an examination of the exact wording of the section in question. In the following analysis we will group together sections containing similar wording but the individual words must also be read keeping in mind the wider context of the section in which they appear.

Pursuant to section 63(2) the Governor-General is to appoint conciliators on the recommendation of the Minister and by section 64(2) to appoint mediators on the recommendation of the Minister after consultation with the central organisations. The extra requirement on the Minister in section 64(2) was noted in Part II of this paper. In each instance all the Minister has the power to do, according to the words of the statute, is to recommend the people to be appointed to the services. In reality this power may be seen as analagous

to a power of appointment as the Governor-General invariably appoints to the Mediation Service and Conciliation Service the people recommended by the Minister.

The power to recommend is not a power of final decision-making and therefore may be likened to the Minister's powers to refer a matter to the Arbitration Court or to initiate a procedure such as a compulsory conference. In the majority of these provisions the Minister by the use of the word "may" in the statute is prima facie given a discretion as to whether or not he takes any action pursuant to that section. However, the preconditions such as the state of the Minister's knowledge before he is able to exercise his discretion are expressed in several different terms.

Section 64 (9) gives the Minister power to appoint a temporary mediator in the following words; "the Minister may when he considers it desireable."

The Minister's power to appoint a Deputy Chairman and deputy members of the Conscientous Objection Committee is conferred in the terms that the Minister "may" appoint such members "as he thinks fit"

In both of the above sections the use of the term may can be interpreted as being intended to confer a discretion

as these are instances of temporary or additional appointments which will only be required to be made if the circumstances demand. These discretionary powers are exerciseable by the Minister following a judgment on the part of the Minister. That judgment is expressed by the statute in subjective terms in both cases although different language is used. It is contended that in effect the terms when he considers it desirable and as he thinks fit are equivalent in the standard they impose on the Minister as these terms are synonymous in ordinary usage and no special meaning is given to them by the Act. Both terms are highly subjective and if any difference in interpretation was intended by the use of these different phrases it is not immediately apparent. In both sections a use of the power by the Minister may prima facie be difficult to challenge due to the problem of obtaining evidence to prove that the Minister did not in fact consider it desirable or think it fit.

Sections 125B(1) uses the phrase "where the Minister is of the opinion (a) That a strike or lockout exists or is threatened in an essential industry or an export slaughterhouse; and (b) That the strike or lockout substantially affects or will substantially affect the public interest - he may request a conciliator or mediator or some other person appointed by the Minister to inquire into the matter of the dispute." This section, as was discussed in Part II above, would be

interpreted as conferring a discretion on the Minister as, to take action pursuant to this section is only one of the options open to him, in the event of a dispute, under the Industrial Relations Act 1973. But before the Minister can exercise that discretion he must be of the opinion that the specific circumstances described in paragraphs (a) and (b) exist. Whilst the requirement that the Minister be of the opinion is subjective the situations outlined in (a) and (b) introduce some objectivity. It may be possible to obtain evidence as to whether a strike or lockout existed or was threatened however whether that strike or lockout substantially affected or would have affected the public interest is an issue more likely to be influenced by government policy and harder to prove before a court. The subjective wording of opinion coupled with the criteria of substantial affect to the public interest means that the courts would probably be reluctant to intervene unless for example there was strong evidence to prove that no strike existed or was threatened and so there was no evidence on which the Minister could have formed his opinion. As both the circumstances in paragraphs (a) and (b) must exist in the opinion of the Minister, it would only be necessary to successfully challenge one of them.

The possible avenues of challenging a decision of the Minister purportedly made pursuant to sections such as this will be considered in Part IV of this paper. However, it should be noted that the inclusion of a subjective standard such as "in the opinion of" will not in itself prevent the courts from inquiring into the exercise of that power.[22]

Section 130(1) provides for the deregisration of an industrial union by the Minister. The power is in the terms that "if in respect of any discontinuance of employment the Minister is satisfied that it has caused or is likely to cause serious loss or inconvenience and that it has been brought about wholly or partly by any union of employers or of workers or by any member or members thereof, the Minister may...." As has been discussed above, it is contended that in this section may is used to confer a discretion on the Minister. Before that discretion can be exercised he must though be satisfied that the specified circumstances do exist. Once again a subjective term has been used, which may be compared with the use of opinion in section 125B(1). The term satisfied can be argued to require the Minister to have a stronger basis for his decision than if he is simply to form an opinion. However the matters about which he is

---

22. Reade v. Smith [1959] NZLR 996

to be satisfied involve subjective judgment on the part of the Minister. For example it could be exceedingly difficult to prove that the discontinuance of employment was not likely to cause serious loss or inconvenience when the terms serious and loss or inconvenience are not defined in the Act and therefore under the section are open to interpretation by the Minister. The court would however be more likely to intervene if it was proven that there was no discontinuance of employment and therefore no evidence from which the Minister could have been satisfied.

The same standard that the Minister be satisfied is also required by section 134(1). Pursuant to this section the Minister shall give notice in the Gazette declaring certain information when he is "satisfied that a new union of employees, or, as the case may require, of workers, representing the employers or the workers who were represented by the registered union has been registered under" the Industrial Relations Act 1973. The effect of the notice in the Gazette is to vest the assets of the deregistered union in the new union. Whilst initially the Minister is to be satisfied as in section 130(1) the use in section 134(1) of shall contrasts to the use of may in section 130(1). This can be seen as a deliberate change by the Legislature and that the meaning attached to such a change is that

a discretion is conferred by section 130(1) but that once the Minister is satisfied as required by section 134(1) he is bound to issue the notice in the Gazette. Thus even if it could be proven that the Minister should have been satisfied under section 130(1) or should have been of the opinion in section 125B(1) he could not be compelled to act under those sections as he still has a residual discretion. By comparison if under section 134(1) it can be proven that the Minister should have been satisfied then he is bound to act and may be directed to do so by the Court.

Another different standard is imposed on the Minister by section 120(1) which also applies to section 121(1). A discretion, as contended in Part II above, is conferred by the use of may in both sections 120 and 121. The Minister can only act in accordance with this discretion if he "has reasonable grounds for believing that a strike or lockout exists or is threatened". This phrase is actually stated only in section 120 but is imputed into section 121 by the words in subsection (1) that "In any case to which section 120 of this Act applies the Minister may...". The term reasonable grounds is an easier standard for the Court to judge than whether the Minister is of the opinion or is satisfied. The Court may therefore be more ready to intervene on the grounds that the Minister did not have reasonable grounds than it would be where it must hold that the Minister was not of that opinion or could not have been satisfied.

In the instances of sections 120 and 121 the court would be able to hold that the Minister had improperly exercised his discretion if he did not have reasonable grounds for believing that a strike or lockout existed or was threatened. The court could not however force the Minister to exercise his discretion to call a compulsory conference pursuant to section 120 or to appoint a committee of inquiry under section 121. In both of these sections the discretion implied by the use of may is reinforced as section 120(1) reads "he may if he thinks fit, call a compulsory conference" and section 121(1) "the Minister may, if he thinks fit, instead of or in addition to calling a compulsory conference, appoint a committee of inquiry...." This subjective formula of "if the Minister thinks fit" is repeated in section 120(1) in relation to the conference of the power to make a decision settling the dispute on the chairman, and in section 121(2) with regard to a committee of inquiry consisting of one person. It emphasises the discretionary nature of the powers conferred by sections 120 and 121 despite the stricter formula of the Minister having reasonable grounds for believing...."

Sections 101A(1) and 125C(1), it is contended, also confer a discretion on the Minister as to whether he takes any action pursuant to them however, his discretion in these sections rests upon the occurrance of specific events. The imposition of objective conditions is in contrast to the subjective ones discussed above and the difficulty of obtaining evidence to prove or disprove

them would be lessened. It is submitted that the court would also be more willing to intervene where it could decide, whether the power had been properly exercised, on a question of fact.

Section 101A(1) provides that the Minister may from time to time require a ballot to be conducted of the workers who will, if an unqualified preference provision is inserted or continues to be inserted in any award or collective agreement be bound to become or remain members of a union of workers bound by the award or collective agreement. The objective condition is therefore whether or not an unqualified preference clause is inserted in an award or collective agreement, which is a factual question that the courts would feel competent to deal with.

Section 125C(1) is concerned with the power of the Minister to refer to the Arbitration Court an existing or threatened strike or lockout affecting an essential industry or an export slaughterhoue. The prerequisite conditions laid down by subsection (1) before the Minister can exercise his discretion to refer the matter to the Arbitration Court are that the Minister "receives a report under section 125B(2)(b)" of the Act and if the dispute has not been settled or if a strike or lockout exists in respect of that dispute." Here again the courts would be dealing with a question of

fact as to whether a report had been received and then whether a strike existed. The latter issue in this case is not open to arguments concerning threatened disputes or possible losses but with more easily proven facts. The courts may therefore be better able to gather evidence and be more willing to intervene than where questions of specialist judgment and Government policy may be involved. It must be noted once again though that if may is taken to confer a discretion on the Minister the court would be unable to force him to act even if the conditions in section 125C(1) had been met.

It has been argued in Part II above that may in some provisions could be interpreted to mean shall. The provisions in which this is most likely to occur are sections 126 and 127. Pursuant to these provisions the Minister on the request of not less than 5 percent of the workers or employers directly concerned in the strike may conduct a secret ballot of all the workers or employers concerned in the strike on the issue of a return to work. Regardless of the interpretation given to may the requirement that a request from 5 percent of the workers or employes be made before the Minister can act is a question of fact which the court would be competent to adjudicate on. A condition such as this may be contrasted with for example, the section 125B(1) condition that the Minister is of the opinion that the certain specified circumstances exist.

If sections 126 and 127 are interpreted as imposing a requirement on the Minister to always conduct a ballot once the required request has been made then the courts would be able to order that the Minister is to conduct the ballot.

The Act does in some sections use the term shall as for example in section 134(1) discussed above. In that section its use was coupled with the subjective condition of when the Minister is satisfied. In section 101A the requirement on the Minister is phrased in a different way. Subsection (1) provides that where there is an unqualified preference provision in an award or collective agreement the Minister may require a ballot and issue a notice accordingly. However pursuant to subsection (2) before such a notice is issued the Minister shall (a) inform the Federation of Labour of his proposal to issue the notice and (b) give the Federation a reasonable apportunity of consulting with him in regard to the issue of the notice. In contrast to the use of may in subsection (1) the use of shall in subsection (2) can be seen as a deliberate difference which means that whilst the Minister has a discretion as to the decision whether or not to require a ballot once he has made that decision he is bound to act in accordance with subsection (2). If the Minister had issued a notice pursuant to subsection (1) without fulfilling the conditions in subsection (2) the court

may be persuaded that the Minister had improperly exercised his discretion. This type of argument may be made in the course of a challenge on the grounds of an abuse of ministerial discretion. This will be considered further in Part IV of the paper.

The many and varied forms of language used in the Industrial Relations Act 1973 to confer powers on the Minister highlight the importance of focusing on the exact words used in each case. The possible grounds for challenging a ministerial decision and the potential remedies available will depend on whether or not the statute confers a discretion, whether there are any prerequisite conditions that must be fulfilled before the Minister can exercise that discretion and whether the conditions are in subjective or objective language.

IV AVENUES OF CHALLENGE

In this part of the paper we shall be concerned with the possibility of appealing against and seeking review of a ministerial decision purportedly taken pursuant to the powers conferred by the Industrial Relations Act 1973. The result of any litigation in this area would depend on which particular power was being challenged, the statutory language in which that power was conferred and, of course, the material facts of the case. Thus the following analysis is not intended to answer the facts of any one case but to illustrate, firstly that there are potential grounds on which these ministerial decisions may be challenged, and secondly the possible attitudes of the courts to such a challenge.

A. Appeal

There is no direct right of appeal from a decision taken by the Minister pursuant to the provisions of the Industrial Relations Act 1973 conferred by the Act. An appeal could not be brought therefore which is solely concerned with the exercise of a power by the Minister under this Act.

The issue of the validity of a ministerial decision taken pursuant to the Industrial Relations Act 1973 could come before the Arbitration Court as a preliminary

or subsidiary issue to a case which it is considering under its jurisdiction in section 48. For example a ballot ordered by the Minister pursuant to section 101A may be called into question in a case concerning the rights of the parties under any award or collective agreement where the inclusion of an unqualified preference provision is at issue.

Section 125C provides an avenue for challenging the Minister's decisions taken both under that section and section 125B. If the Minister does refer a dispute to the Arbitration Court pursuant to section 125C it would be open for the parties to argue that the Court had no jurisdiction as the Minister had improperly exercised his discretion pursuant to section 125C(1) to refer the matter to the Arbitration Court. Alternatively it might be possible for the parties to argue that the report received by the Minister was not made pursuant to section 125B as the Minister had invalidly exercised his discretion in making a referral to a conciliator, mediator, or other person pursuant to section 125B, in the circumstances of that particular case.

Once the issue of the validity of a decision of the Minister purportedly made pursuant to a provision in the Industrial Relations Act 1973 is before the Arbitration Court the possibility of an appeal to

the Court of Appeal arises. The Arbitration Court's judgment concerning the validity of the Minister's actions could be appealed against to the Court of Appeal under section 62A. It is however, a limited right of appeal.

> Section 62A(1) Where any party to any proceedings under this Act is dissatified with any decision of the Court(other than a decision or the construction of any collective agreement) as being erroneous in point of law he may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law only.
>
> (4) In determining any appeal under this section, the Court of Appeal shall have regard to the special jurisdiction and powers of the Arbitration Court and, in particular, to the provisions of sections 48(4), 57(1), 226 and 229 of this Act.
>
> (5) In its determination of the appeal, the Court of Appeal may confirm, modify, or reverse the decision appealed against or any part of that decision.
>
> (7) The determination of the Court of Appeal on any appeal under this section shall be final and conclusive.

Despite the wide powers given to the Court of Appeal to determine a case the power to refer appeals back for reconsideration by the Arbitration Court is given by section 62B. Subsection (1) states that the Court of Appeal may direct the Arbitration Court to reconsider

either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates. Subsection (2) provides for the Court of Appeal to give reasons for its referral of the case back to the Arbitration Court and to give to that Court such directions as it thinks just as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that has been referred back for reconsideration.

Another avenue by which an exercise of ministerial power may be questioned by the Court of Appeal is through section 51 of the Industrial Relations Act 1973. Pursuant to that section the Judge of the Arbitration Court may of his own motion, or on the application of any party, state a case for the Court of Appeal. The case stated is limited though to a question of law excluding any question as to the construction of any award or collective agreement. Section 51 was amended to read as outlined above by the Industrial Relations Amendment Act 1977. Prior to 1977 the power to state a case had been in the form "the Judge may on his own motion, and shall on the application of any party...". It is contended that the deliberate change in the language of section 51, which accompanied the insertion of the section 62A appeal rights, makes the section 51 power completely at the discretion of the Arbitration Court Judge.

Whilst section 51 does allow for a possible challenge to an Arbitration Court ruling the statement of a case under this provision is very different to the right of appeal by way of case stated conferred by section 62A. The section 51 procedure can only be invoked by the Arbitration Court and must be exercised before the Court has reached a decision on the matter before it. The Court of Appeal has no power to decide the case and can make no order modifying the Arbitration Court's decision as that decision will not have been delivered at the time that the Court of Appeal's opinion is sought.

The Court of Appeal has adopted a similar approach to appeals by way of case stated on questions of law, pursuant to section 62A as it had previously taken in respect of section 51 and its equivalent in earlier Industrial Conciliation and Arbitration Acts. In International Paints of New Zealand Ltd v. Hopper[23] the Court of Appeal clearly expressed the manner in which the questions for the opinion of the Court were to be framed. In International Paints [24] the Court concluded that the questions were too general

---

23. [1948] NZLR 240

24. Idem

and declined to answer them. The Court of Appeal held that a case stated by the Arbitration Court should contain findings of all the relevant facts and should ask the particular questions of law which arise upon these particular facts. The Court emphasised that its role was to answer questions of law in order to advise the Arbitration Court on how to decide the issue before it, and not to make findings of fact, or to give a treatise or exposition on various controversial matters.[25]

In an appeal pursuant to section 62A in the case of the New Zealand Forest Products Ltd v. The Northern (Except Kawerau and Caxton Paper Mills Ltd) Wellington and Otago and Southland Industrial District Woodpulp Paper and Related Products Industrial Union of Workers[26] the Court of Appeal was concerned with the interpretation of

---

25. Cornish J. did however at length discuss the issues of the doctrine of substantiality compared with the doctrine of individisibility in effect giving such a treatise whilst not being prepared to answer the questions put.

26. Unreported Cooke J. 4 May 1981 C.A. 181/80

section 128(1) of the Industrial Relations Act 1973 which allows for the suspension of non-striking workers. When answering the questions put to it the Court of Appeal illustrated a reluctance to consider questions of fact in any form. In relation to the second question, "whether the worker's suspension on the 18th February 1980 was justified at the time of such suspension?" the Court held that this was partly a question of fact, and that if the Arbitration Court had applied the wrong test the Court would have referred the case back to that Court. In answer to question one the Court of Appeal had already held that the Arbitration Court had applied the correct test. The Court of Appeal thus indicated that it would not have declined to answer the question or decided the issue itself but would have used the section 62B power to refer the case back to the Arbitration Court.

The Court of Appeal was prepared though to answer questions three and four which it was admitted did not arise if the Arbitration Court's decision stood but Cooke J. considered that it was "better not to leave doubt in this sphere, we think we ought to answer them."[27] This contrasts with the decision in International Paints[28]

---

27. Ibid p12

28. Supra n.24

that the Court will not answer general questions, as the Court in this instance simply gave an interpretation of the phrase in section 128 "until the strike is ended."

The Court of Appeal had initially noted its duty to consider the special jurisdiction and powers of the Arbitration Court. In respect of whether the onus of proof had been discharged in this case the Court of Appeal held that this was essentially a question of fact and that the Arbitration Court was entitled to reach the conclusion which it did on the evidence. The Court of Appeal was clearly leaving all findings of fact to be made by the Arbitration Court however, Cooke J. did make several comments which highlight some of the difficulties of this type of appeal.[29]

> Some difficulty has arisen in dealing with the case because of some lack of clarity in the findings of fact and in the indication in the decision of the Court's approach. Perhaps this partly accounts for the present appeal. We recognise, however, that the Arbitration Court's jurisdiction is one with special problems and accordingly make these observations in no critical sense.

---

29. Supra n.27 pp8-9

A deference to the Arbitration Court is also evidenced by the decision in Cornhill Insurance Co. Ltd v. New Zealand Workers Industrial Union of Workers.[30] The Court of Appeal whilst concluding that the Arbitration Court had interpreted section 150(2) incorrectly was not prepared to determine the appeal under section 62A and remitted it to the Arbitration Court, with directions as to how to decide the issue, under section 62B.

The Court of Appeal again showed a reluctance to state broad principles in Auckland City v. Hennessey[31] stating that questions must be framed in a fact specific manner and declined to give answers to questions (b) and (c) which it saw as being "framed in absolute terms which neither require nor should be given answers that could be mistakenly applied to cases of very different facts."[32]

The Court of Appeal's preference for remitting cases back to the Arbitration Court was clearly expressed in the Wellington Road Transport Union of Workers v. Fletcher Construction Company Limited[33] case.

---

30. [1980] 1 NZLR

31. Unreported Somers J. 29 March 1982 C.A. 178/81

32. Ibid p10

33. Unreported Woodhouse P. McMullin J. Holland J. 29, April 1982 C.A. 70/81

Counsel in this case were agreed that the Court of Appeal should determine the case but the majority of Woodhouse P. and McMullin J. were "unable to reach a conclusion as to what decision the Court would have reached on a proper application of the onus of proof".[34] All three judges in the Court of Appeal took account of the specialist nature of the Arbitration Court and stated that "within reasonable limits it ought to be left ... to develop its own methods and processess in order to find the just and fair solutions intended by the Act."[35]

The Court of Appeal's approach to the section 62A appeal rights can be seen from the above judgments as being cautious not to take over the jurisdiction of the Arbitration Court. The most graphic illustration of this is the Court of Appeal's insistence on remitting cases back under section 62B rather than to determine the case itself under section 62A. The reluctance of the Court of Appeal to become finders of fact under section 62A may be important in respect of a challenge to the validity of a ministerial decision. For example if a decision by the Minister to refer a matter to the Court pursuant to section 125C was being questioned facts such as whether or not the dispute had been settled

---

34. Ibid McMullin J. p5

35. Supra n. 34 Woodhouse P. p7

or if a strike or lockout existed in respect of that dispute would remain for the Arbitration Court to determine. It is apparent also that even if the Arbitration Court has misconstrued the law the Court of Appeal will correctly state the law but then remit the case back to the Arbitration Court for it to apply the law to the facts of the particular case. Thus if an issue arose pursuant to sections 126 and 127 the Court of Appeal would answer a question as to whether or not the Minister has a discretion but leave to the Arbitration Court to determine as a finding of fact whether five percent of workers or employees had requested that a ballot be held.

Section 51 is unlikely to provide any wider avenue for challenging a ministerial decision than section 62A . The type of case which is most frequently referred to the Court of Appeal is that of statutory interpretation.[36]

---

36. For example in Inspector of Awards v. Malcolm Furlong Ltd. 1977 1 NZLR 36 the effect of the Industrial Relations Act 1973 on section 211 of the Industrial Conciliation and Arbitration Act 1954 was considered. In Auckland Freezing Works and Abattoir Employees IUW v. Te Kuiti Borough 1977 1 NZLR 211 section 117 (4) was interpreted. In AHI N.Z. Glass Manufacturing Ltd v. North Island Electrical Related IUW 1977 Arb Ct 243 the Court of Appeal laid down a test to distinguish between a dispute of interest and a dispute of right.

This section could be used by the Arbitration Court to define the width of the Minister's powers as conferred by statute. For example , whether the Minister had a discretion and if so what matters should he take into account. The question of whether the Minister did actually take account of these matters would doubtless be a matter of fact for the Arbitration Court and not the Court of Appeal.

Thus an industrial union of workers deregistered by the Minister pursuant to section 130 could bring an action in the Arbitration Court to enforce an unqualified preference provision in their collective agreement. The Arbitration Court would be bound by section 98A to hold that as the union was not registered its collective agreement could not contain an unqualified preference provision and therefore the action must fail. Before the Arbitration Court had given a final decision in this case the opinion of the Court of Appeal could have been sought pursuant to section 51. This could only be on questions of law such as the interpretation of the section and the final decision would remain with the Arbitration Court. Once the Arbitration Court had delivered its judgment the union could then appeal on a point of law pursuant to section 62A. The union could approach such an appeal on the basis that the Arbitration Court was wrong in law in holding that they could not enforce an unqualified preference clause as the union was in fact still registered

because the Minister's deregistration of the union was invalid. Questions of law could be argued concerning the interpretation of section 130 for example, the meaning of the phrase "discontinuance of employment." A question of law could also be framed to consider the level of proof required to show that the Minister was satisfied of the conditions specified in section 130. It is contended that if the Court of Appeal adopts the approach evidenced above in previous appeals under section 62A, it will take a narrow view of its jurisdiction and remit the case back to the Arbitration Court to apply the law as stated by the Court of Appeal to the facts as found by the Arbitration Court.

The ability to appeal against a decision taken by the Minister pursuant to a section in the Industrial Relations Act 1973 is not totally removed by the fact that there is no statutory right of appeal. The issue may be brought before the Arbitration Court and therefore challenged in that forum. An appeal right pursuant to section 62A is then available. This is however a limited right of appeal which has been kept strictly within its statutory limits by the Court of Appeal.

B Review

Judicial review of a ministerial decision purportedly made in exercise of a power conferred by the Industrial Relations Act 1973 could be sought in the High Court under the provisions of the Judicature Amendment Act 1972. It is intended in our discussion of review as a possible avenue of challenging a ministerial decision to, firstly consider whether or not the Judicature Amendment Act 1972 is applicable and secondly to outline some of the possible grounds on which judical review could be sought. Having established the scope of judicial review under the Judicature Amendment Act 1972 the availability and scope of review of a decision of the Arbitration Court will be determined.

Provided that the decision being complained of falls within the ambit of the Judicature Amendment Act 1972 judicial review may be sought pursuant to that Act without the need to specify the relief applied for in terms of a writ or order of mandamus, prohibition, certiorari or for a declaration or injunction. Section 4(1) provides for an application for review in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power. The High Court pursuant to section 4(2) may declare that a decision made in the exercise of a statutory power of decision was unauthorised or otherwise invalid

or the Court may set aside the decision. Subsection (5) allows the Court to direct any person whose act or omission was the subject-matter of the application to reconsider and determine either generally or in respect of any specified matters, the whole or any part of any matter to which the application related.

Jurisdiction to decide applications for review pursuant to the Judicature Amendment Act 1972 is given to the High Court. This decision is then subject to appeal in the Court of Appeal. It is contended that even though an application for review concerns an industrial matter it will never be within the jurisdiction of the Arbitration Court. This is because of section 48(4) which states that "In all matters before it the Court shall have full and exclusive jurisdiction to determine them in such manner and to make such decisions, orders, or awards <u>not consistent with</u> this or <u>any other Act</u>, as in equity and good conscience it thinks fit." Thus whilst the deregistration of a union by the Minister pursuant to section 130 may fall within section 48(2) (h) which gives the Arbitration Court jurisdiction to hear and determine questions relating to the registration of unions it would be inconsistent with the Judicature Amendment Act 1972 if the Arbitration Court heard an application for review made pursuant to that Act. Section 48(4) therefore has the effect of removing any possibility of

review under the Judicature Amendment Act 1972 being sought in the Arbitration Court instead of the High Court.

In an action seeking review the applicant must satisfy the Court that review of a statutory power of decision is being sought, before the merits of the case may be assessed. By section 3 of the Judicature Amendment Act 1972 a "statutory power" is defined to mean

> " a power or right conferred by or under any Act...
> (a) To make any regulation, rule, by law, or order, or to give any notice a direction having force as subordinate legislation; or
> (b) To exercise a statutory power of decision; or
> (c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or
> (d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person:
> (e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person."

A "statutory power of decision" referred to in paragraph (b) above is defined as

(a) The rights, powers, privileges, imminities, duties, or liabilities of any person; or
(b) The eligibility of any person to receive, a benefit or licence, whether he is legally entitled to it or not."

If there has been no exercise of a statutory power the complainant may still have a cause of action under the prerogative writs rather than the application for review.

It is submitted that all of the powers conferred upon the Minister by the Industrial Relations Act 1973 fall within the definition of a "statutory power" defined in the Judicature Amendment Act 1972. This can be seen when the empowering provisions are examined.

Sections 63(2) and 64(2) confer on the Minister a power to recommend to the Governor-General those to be appointed to the Conciliation and Mediation services. In these instances the Minister's decision as to the content of the recommendation he makes to the Governor-General affects the, powers and duties of the potential appointees. These powers therefore fall within "a statutory power of decision" as defined by section 3 of the Judicature Amendment Act 1972.

The Court of Appeal in Slipper Island Resort v. Minister of Works [37] acknowledged that where a Minister's power to recommend is specially mentioned in a statute then that power may be subject to review.

The appointment of a mediator under section 64(a) is a decision by the Minister which affects the powers and duties of a person and is therefore a statutory power of decision. The same analysis is also appropriate for the section 111(1) power of appointment to the Conscientious Objection Committee.

Section 108(2) confers on the Minister power to appoint three persons to the Conscientious Objection Committee. A failure to make those appointments on the part of the Minister would not allow, those who wished to, to object to becoming union members. The Ministers decision therefore affects the rights of potential objectors and is reviewable under the Judicature Amendment Act 1972.

Sections 120(1) and 121(1) allow the Minister to call a compulsory conference or appoint a committee of inquiry respectively. The calling of a compulsory conference means that the parties to the dispute are required by law to attend. Such a requirement is however only imposed following a decision of the Minister pursuant to section 120(1). Thus the Minister is exercising a statutory power within the Judicature Amendment Act 1972 definition.

---

37 [1981] 1 NZLR 136, 139

Section 121(1) is also a statutory power, as an inquiry into the matter of a dispute would inevitably be an inquiry into the rights, powers, privileges, immunities, duties or liabilities of those involved.

The decision to deregister a union pursuant to section 130(1) falls within the Judicature Amendment Act 1972 definition of a"statutory power of decision" as it is a decision which affects the rights, powers, privileges, immunities, duties, or liabilities of the individual union members and the union as a whole.

The Minister by section 134(1) is given a discretion concerning the disposal of assets of a deregistered union, when exercising this discretion he is making a decision which affects the rights and liabilities of the members of the deregistered union and the new union. Accordingly the Minister's actions fall within the scope of the Judicature Amendment Act 1972 as being a statutory power of decision.

Sections 126 and 127 provide for a secret ballot to be conducted following a request to the Minister by five percent of those involved in a dispute. If the Minister has a discretion under these sections then they can be seen as falling within the definition of a statutory power as the secret ballot is called for by the Minister.

The workers are being required to do an act which, but for the Minister's decision, they would not be required by law to do. Alternatively if sections 126 and 127 impose a duty on the Minister to conduct a ballot following a request by five percent of those involved in a dispute, if the Minister fails to conduct a ballot his actions will be affecting the rights of those workers and therefore be a statutory power of decision open to review under the Judicature Amendment Act 1972.

Section 101A(1) confers on the Minister the power to require a ballot of the members of a union on the issue of the inclusion of an unqualified preference provision in an award or collective agreement. Such a power can be seen to fall within the definition of a "statutory power" in the Judicature Amendment Act 1972. It requires the members of the union concerned to vote in a ballot which, had it not been for the Minister's exercise of his powers under section 101A, they would not have had to participate in.

Once it has been established that an exercise by the Minister of a power conferred by the Industrial Relations Act 1973 falls within the scope of the Judicature Amendment Act 1972, judicial review pursuant to the Judicature Amendment Act 1972 provides a procedure by which the Minister's decision may be challenged. Some of the possible grounds available for such a review action will now be considered.

(a) Improper Delegation

An appropriate starting point when determining whether or not a decision purportedly made pursuant to the ministerial powers in the Industrial Relations Act 1973 is reviewable is to consider the issue of who actually exercised the power in question.

There may well be an evidentary difficulty of proving that a decision was not made by the Minister in person. This raises issues concerning the scope and availability of discovery and whether the doctrine of public interest immunity would prevent the relevant documents being obtained. It is not however the purpose of this paper to pursue these issues but simply to indicate their relevance in this context. If there is evidence available to indicate that the Minister in fact did not exercise the power conferred on him by statute but that the matter had been dealt with by a departmental officer the issue arises whether or not the Minister is able to delegate his powers. The answer may depend on the exact circumstances, that is, whether the Minister formally delegated his powers or whether his department exercised the power simply in the normal course of fulfilling its functions.

The ability of the Minister of Labour to delegate powers conferred on him by Statute, including those under the Industrial Relations Act 1973 is governed by the Labour Department Act 1954. Section 7 states that:

(1) The Minister may from time to time, by writing under his hand, delegate to the Secretary all or any of the powers exercisablly by him under this Act or under any other Act.

(2) Every delegation under this section shall be revocable at will, and no such delegation shall prevent the exercise of any power by the Minister.

(5) The fact that the Secretary or any person acting for the Secretary exercises any power of the Minister shall, in the absence of proof to the contrary, be sufficient evidence that he has been authorised to do so by a delegation under this section.

Section 7 must be read subject to section 7A

(2) ... the Secretary shall not delegate any powers delegated to him by the Minister without the written consent of the Minister...

When the Minister's power to delegate is expressly stated by statute it is contended that all delegation must be in accordance with that statute. The statutory provision must be read as replacing the constitutional convention stated in In re Golden Chemical Products Ltd[38] that the Minister was not obliged to exercise his powers personally even when those powers involved a serious invasion of the

---

38. [1976] 1 Ch 300

freedom or property rights of the subject. It could be argued though that section 7 of the Labour Department Act 1954 should not be interpreted as widely as the constitutional convention. The basis for such an argument being that Parliament could not have intended the Minister to be able to delegate the more important powers conferred by any Act. For example, that because the power of the Minister to deregister a union pursuant to section 130 of the Industrial Relations Act 1973 has very wide consequences and may be seen as the most serious penalty under the Act that that decision should only be able to be made by the Minister, who is directly accountable to Parliament, and not a member of his Department. The section 130 power may be contrasted with the power to recommend to the Governor-General those to be appointed to the Conciliation and Mediator Services under sections 63 and 64. In these sections the Minister does not have the power to make a final decision and it may be seen as rather more of an "administrative" task than the deregistration of a union.

It is submitted however that if Parliament had intended such a limit to be placed on the Minister's power to delegate it would have been specifically included in the statute as it is in the Immigration Act 1964 at section 39

> (1) The Minister may from time to time, by writing under his hand, delegate to any Immigration Officer all or any of the powers (except this present power of delegation and any powers conferred on the Minister by section 19, section 22 or section 32 of this Act) exercisable by the Minister under this Act.

The exceptions include the important areas of granting exemptions from the requirements of the Act and determining the grounds for deportation. The fact that no exceptions are stated in section 7 of the Labour Department Act 1954 would indicate that all the Minister's powers conferred by the Industrial Relations Act 1973 are able to be delegated.

The restriction placed on the delegation of the Minister's powers by the Secretary to other members of the Department imposed by section 7A(2) of the Labour Department Act 1954 could provide grounds for review. The evidence required would be that the Secretary had delegated powers delegated to him by the Minister without the necessary written consent. Apart from this exception section 7(5) of the Labour Department Act 1954 imposes a rebuttable presumption that all exercises of the Minister's powers are authorised. Whether or not it could be rebutted and provide grounds for review would depend on the evidence available in each case.

(b) Breach of Natural Justice

Circumstances may arise where a decision made or action taken by the Minister pursuant to any one of his powers conferred by the Industrial Relations Act 1973 is open to challenge on the basis that there has been a breach of natural justice. The audi alteram partem rule which imposes the requirement that the parties be given adequate notice and opportunity to be heard[39] has been restated in terms of a duty to act fairly in the recent New Zealand Court of Appeal decision of Daganayasi v. Minister of Immigration.[40] The court in that case clearly stated that whilst the requirements of natural justice vary with the power which is exercised and the circumstances it is not confined to those situations which may be labelled judicial.[41] This decision is in line with the Privy Council's approach in Furnell v. Whangarei High School Board[42] that natural justice is but fairness writ large and juridically. The test espoused in Daganayasi [43] constitutes a pragmatic approach, being expressed simply as "what fairness required in the present case."[44]

---

39. de Smith Judicial Review of Administrative Action 4th edition J.M. Evans ed. (Stevens & Sons, London, 1980) p.156

40. [1980] 2 NZLR 130

41. Ibid p141

42. [1973] 2 NZLR 705, 718

43. Supra n.40

44. Supra n.40 p25

When deciding what fairness requires in each case the court is in effect considering whether or not an extra requirement should be added to the words of the statute and if so what form it should take. For example as in Daganayasi, that the party affected by the decision should have a fair opportunity of correcting or contradicting any relevant statement prejudicial to his or her view.[45]

The New Zealand Court of Appeal considered the question of whether the principles of natural justice should be added in CREEDNZ Inc v. Governor-General[46]. This case concerned the exercise of the Governor-General's power pursuant to section 3 (1) of the National Development Act 1979 to apply the procedures under that Act to an aluminium smelter and associated works proposed to be carried out by South Pacific Aluminium and the Otago Harbour Board at Aramoana. The case gives some indications as to the matters which the court will take into account when considering the applicability of the principles of natural justice.

---

45. Supra n.40 p29

46. [1981] 1 NZLR 172

The starting point for the Court of Appeal was to consider the wording of the specific provision and the broad purpose of the Act concerned. Cooke J.[47] in reaching his decision that no extra requirements were necessary placed emphasis on several specific points. The judge discussed the importance of the status of the person specified by the statute to make the decision in question. The imposition of consultation procedures in other sections of the Act and the finality of the decision when seen in the light of the overall scheme of the Act, were also considered. The type of issues involved, in the CREEDNZ Inc[48] case were matters of national importance to New Zealand, were also taken into account.

There is some overlap in the matters taken into account by the court in deciding the issue of whether the principles of natural justice require an additional element and the issue of exactly what form this extra requirement should take. It was the latter issue which was decided by the Court in Daganayasi [49] which, unlike CREEDNZ[50] considered a decision regarding the personal circumstances of one individual. The decision in question made by the Minister of Immigration pursuant to section 20A of the Immigration Act 1964 was to decline to order that Mrs Daganayasi not

---

47. Ibid pp 177-178 Cooke J.

48. Supra n.46

49. Supra n.40

50. Supra n.46

be deported from New Zealand. Cooke J. gave consideration to the wording of the specific provision and the scheme of the Act as a whole. The scope of the particular matters that the Minister was to have regard to were seen as important in the light of Lord Reid's comments in Ridge v. Baldwin.[51] The section 20A power concerning the treatment of an individual was contended to be easier for the courts to control than a large scale power.

A further indication of the issues to be considered by the court is found in Cook J's reference to the Privy Council decision in Durayappah v. Fernando.[52] In this case three matters, apart from the statutory language, were contemplated. These three factors were; firstly the nature of the property, the office held, status enjoyed or services to be performed by the complainant of the injustice; secondly, the circumstances or occasions in which the person claiming to be entitled to exercise the measure of control is entitled to intervene, and thirdly the sanctions that he is entitled to impose.

It is submitted by the writer that a strong argument is able to be made for the imposition of an added requirement based on the principles of natural justice to

---

51. [1964] A C 40, 71-76

52. [1967] A C 337

section 130 of the Industrial Relations Act 1973 and that the requirements to be added should be in the form of a duty on the Minister to consult with the parties involved before a final decision is reached.

The section 130 power of deregistration is able to provide an example of how the right to seek review pursuant to the Judicature Amendment Act 1972 may be used to challenge the exercise of a ministerial discretion. This section may be considered by taking the same line of approach as theCourt of Appeal has espoused in CREEDNZ Inc[53] and in Daganayasi.[54] Here we are concerned with a power which contains no procedural code or indication of the procedure it is contemplated that the Minister will use. In contrast to section 3(1) of the National Development Act 1972 this power has been conferred upon the Minister rather than the Executive Council. The courts, it would appear from Daganayasi ,[55] are more willing to intervene in a decision taken by a Minister than the Executive Council. It was recognised by Cook J. in CREEDNZ[56] that the courts are very slow to impose a duty to follow a procedure at all analogous to judicial procedure upon the Executive Council. The safeguard in that case being seen in the strict criteria laid down by statute upon which the Governor-General in Council was to make his decision. In comparison section 130 does not contain the

---

53. Supra n46

54. Supra n.40

55. Idem

56. Supra n.46 p178

strong wording such as "is essential" of the National Development Act 1979 but rather only requiring satisfaction of the fact that it "is likely to cause serious loss or inconvenience...".

The fact that the Minister's decision to deregister a union pursuant to section 130 is a final decision and not simply a decision to set an inquiry in progress or to start a statutory procedure in action is also a factor which may influence the court to impose some form of natural justice requirement. This is of course part of the argument concerning the overall scheme of the Act and whether it indicates that a court imposed procedure is necessary. The purpose contained in the title of the Industrial Relations Act 1973 "to make provision for improving industrial relations" could be argued to illustrate that the intention of Parliament was that the Minister exercise his powers in the fairest way possible, to ensure that all parties received a fair hearing in order to attain and maintain harmonious industrial relations.

The matters to be considered in the context of section 130 can however be seen to have wider implications than the personal circumstances of the individual. Certainly it is the circumstances of each individual union member which are at issue but also at issue is the state of the industrial relations system in New Zealand. The weight given to this last issue by the court could depend on the circumstances of the particular case and the scale of the loss or inconvenience being considered.

Assuming that a court was willing to impose a duty of fairness upon the Minister in the exercise of his power pursuant to section 130 the next step in the analysis is to decide what the duty to act fairly requires in this case. The same consideration as mentioned above that this may well be a case with wider implications than to a single individual would have to be weighed against the factors such as the nature of the interest involved. The power to deregister a union has been described as "the ultimate penalty" which "puts the union in the same precarious situation as an unregistered society, requiring total solidarity for survival...".[57] It is submitted that a union has a legitimate expectation that the weapon of deregistration will only be used after a serious industrial dispute has occured and that it will be exercised in a fair manner. The complainant, in this case a registered union, has a status that is of considerable value to it and in the majority of instances a union will be unable to survive once it has been deregistered. Thus the sanction which the Minister can impose, that is deregistration, is seen in terms of being the most severe penalty under the Industrial Relations Act 1973. Its consequences are increased by the fact that the deregistered union may only be re-registered with the Minister's consent

---

57. Geare New Zealand Industrial Relations: Legislation and Practice (Campbell & James, Dunedin, 1979) p123

and so the possible long term effects are that another union will gain registration in place of the deregistered union and receive all the assets of the deregistered union under section 131.

The minister is constrained to some extent by the circumstances in which he may exercise this power, which are defined in section 130(1). This can be seen to indicate Parliament's intention that the Minister is not to be totally free to exercise this power with no regard to procedural fairness.

It is possible to argue that due to the extreme nature of this sanction that a duty of fairness imposes on the Minister a requirement to consult with the parties concerned. Such consultation would give the union involved an opportunity to place its perception of the facts before the Minister and to rebut any inaccurate information which may have influenced the Minister in reaching his decision. A requirement to consult with the parties involved before a final decision is made would not be opposed to the scheme of the Industrial Relations Act 1973 as it is imposed in section 64(2) before the Minister recommends those to be appointed to the mediation service and in section 101A (2) before the Minister issues a notice requiring a ballot. The inclusion of the procedure of consultation in other sections of the Act may be interpreted as indicating a deliberate omission by Parliament

in regard to section 130. The Court of Appeal in Daganayasi [58] was however prepared to impose a procedure on a section in the Immigration Act 1964 when other sections of the Act specifically provided for such a procedure.

An alternative requirement which the rules of natural justice may be used to impose has been suggested to be that "the Minister must give the union an opportunity to be heard (on the factual question whether the necessary circumstances exist) before making the decision to deregister."[59] Termed in this manner there would be no duty imposed on the Minister to actively seek out the parties involved to determine if they have any representations to him but rather that the Minister must, if approached, be prepared to listen to any submissions made to him with an open mind.

It is submitted that it is fair, taking into account the seriousness of deregistration, that those who will be affected by the decision should have an opportunity to place evidence before the decision-maker. It is further submitted that the parties involved should be afforded this right to make representations even where deregistration has been threatened by the Minister. It may be argued that where a threat of deregistration has been made following exchanges between the union and the Minister

---

58. Supra n.40

59. Mazengarb Industrial Relations and Industrial Law 4th edition A.Szakats ed. (Butterworths, Wellington. 1982) p151

that all parties are well aware of the situation and the union knew that deregistration would follow if they took certain action. The recent Queen's Bench decision in Regina v. Secretary of State For the Environment, Ex parte Brent London Borough Council and Others[60] would indicate however that the Minister should always be ready to listen to any new representations. Brent L.B.C.[61] concerned the adjustment and removal of a rate support to local authorities. Prior to the Act conferring the powers to alter the grants receiving the Royal Assent the Secretary of State had heard representations by local authorities potentially affected by the discretionary powers to be conferred on him. However, after the Act became law the Secretary of State had fettered his discretion and had not acted fairly by refusing to entertain a delegation of representatives of affected authorities without ascertaining whether they had any new representations to make.

The court in Brent L.B.C [62] accepted that the Secretary of State was entitled to have well in his mind his policy and that keeping an open mind does not mean an empty mind but that his "mind must be kept ajar." This part of the natural justice argument is founded upon the maximum "nemo judex in causa sua" which stands for the principle that the decider or decision maker should be

---

60. [1982] 2 WLR 693

61. Idem

62. Supra n.60 p732

disinterested and impartial.[63] The court in CREEDNZ[64] whilst recognising the role of party politics in national development decisions was still prepared to question whether the Ministers had genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria was satisfied.

Again taking section 130 as an example, it is possible to see how the above test may provide a grounds for review in the appropriate circumstances. The Government in the field of industrial relations will usually have some form of policy in much the same way as it does on issues of national development. The court would then, following the CREEDNZ[65] approach, consider whether the Minister had an open mind when he made his decision to deregister a union under section 130. For example whether or not he looked further than Government policy to deregister militant unions and replace them with unions sympathetic to the Government. This raises the second part of the question asked by the Court of Appeal, which in the circumstances of a section 130 is, whether the Minister had turned his mind to and been satisfied that in respect of a discontinuance of employment that it had caused or was likely to cause serious loss or inconvenience and that it had been brought about wholly or partly by any union or union members. Thus the

---

63. Supra n.39

64. Supra n.46 p194

65. Supra n.46

evidence available to the compainants would have to illustrate that the Minister had totally disregarded the factors that section 130(1) directed him to take into account. This again raises the issue of the importance of obtaining an order for discovery and the corresponding issue of public interest immunity.

It has been contended that the Minister's decision to deregister a union is "unreviewable" [66] by the High Court. It is respectfully submitted by the writer that in view of the recent New Zealand and United Kingdom decisions and the arguments outlined above that the courts would be prepared to review the Minister's exercise of power pursuant to section 130 on the grounds of natural justice and to impose a duty to act fairly on the Minister. A likely form for the duty to take would be to impose the condition that the Minister be prepared to hear new representations with an open mind at all times before he makes his final decision. It must be noted however that the appropriate action to be fair in each case may vary with the circumstances but that if natural justice is required, the need for urgency was held in Durayappah[67] to be no justification for refusing it.

---

66. Mathieson Industrial Law in New Zealand (Sweet & Maxwell, Wellington,1970) p121

67. Supra n.52

That there has been a breach of natural justice could provide grounds for seeking review in relation to other decisions taken by the Minister under the Industrial Relations Act 1973 and not just section 130. For example, whether the Minister entered the consultation required under section 101A(2) with his mind "ajar",which raises the issue of the role of party policy. Taking into account the highly political nature of ballots on the insertion of unqualified preference clauses the occurrence of the consultation and the fact that the Minster had submissions from the Federation of Labour before him may be held to be sufficient.

The power to deregister a union can also be compared with the section 121 power of the Minister to appoint a committee of inquiry. In the section 121 case the Minister is not making a final decision but is initiating an inquiry into the matter of the dispute. It can be argued that the requirement for a fair hearing is fulfilled by the committee of inquiry and therefore a duty to hear representations before the committee is appointed should not be imposed on the Minister. The preliminary nature of the decision was one of the arguments accepted by the Court of Appeal in CREEDNZ[68] for holding that there had been no breach of natural justice. Thus the exact nature of the power is an important factor in determining whether judicial review can be sought on the grounds of a breach of natural justice.

---

68. Supra n.46

(c) Abuse of Discretion

Not only may the Minister be required to keep an open mind on the matter in question but the courts have also been prepared to insist that the Minister must exercise his power only for the relevant purposes under the Act, taking into consideration only those factors which are relevant and disregarding all irrelevant factors. When considering an argument based on an abuse of a ministerial discretion the exact wording of the statute is of crucial importance. It is in this context that it becomes necessary to decide whether the Minister is bound to take the action laid down by the statute or whether he has a discretion. If the Minister is bound for example, in sections 126 and 127 to conduct a ballot on the issue of a return to work if requested to do so by five percent of those involved, once that request is proven the Minister is acting ultra vires his power as long as he fails to conduct a ballot. However if the Minister has a discretion as to whether he conducts a ballot the evidence must go further than to prove that the request was received and that the Minister failed to conduct a ballot. There must be in addition evidence of an improper use of the discretion. The manner in which a Minister is to exercise his discretion was stated by Lord Reid in Padfield v. Minister of Agriculture, Fisheries and Food[69] in the following terms

---

69. [1968] A C 997, 1030

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be construed by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

Regardless of subjective wording in a ministerial discretion the courts are prepared to consider whether or not the Minister has correctly interpreted his powers, that is whether or not he has made an error of law. In Padfield[70] that error was in relation to the purposes for which the power was exercised. In Fiordland Venison Ltd v. Minister of Agriculture and Fisheries[71] the issue was whether the Minister only took into account relevant matters and disregarded irrelevant matters. The Minister in Fiordland Venison [72] was under a duty to grant a game-packing-house licence once he was satisfied of the five

---

70. Idem

71. [1978] 2 NZLR 341

72. Idem

specific criteria listed. That subjective requirement did not prevent review and neither did the fact that the Minister had given no reasons for his decision. The court was willing to draw inferences as to the Minister's reasons from the evidence presented to it, but as in Rowling v. Takaro Properties[73] was not prepared to accept that the Minister's decision might have been based on relevant considerations. In these cases there was a willingness to examine other evidence in order to determine the Minister's reasons, which had not been present in the earlier case of Martin v. Attorney-General.[74] The latter case illustrates the importance of the exact wording of the statute as the court was able to hold that the purpose of closing the oyster season was simply to close the season and that was a relevant purpose under the Fisheries Act 1908. This made irrelevant any discussion of the policy reasons behind the closure of the season.

In the area of natural justice the issue of a fair hearing being given to ensure that the decision-maker decided on the basis of correct information was considered. In the context of abuse of discretion it is also important that the Minister is deciding the matter on the correct facts. Education Secretary v. Tameside[75] was a case in

---

73. [1975] 2 NZLR 62

74. [1970] NZLR 158

75. [1977] AC 1014

which by statute the Secretary of State for Education was given the power to act if he was satisfied of certain specified circumstances. Despite the subjective wording the House of Lords was prepared to consider whether or not those facts did exist. Lord Wilberforce stated:[76]

> If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment however bona fide it may be, becomes capable of challenge.

Adopting this approach the courts are clearly prepared to review a Minister's actions regardless of the basis for his decision being termed in a subjective manner. A judicial attitude of this nature is directly contrary to the view expressed by Mathieson[77], in support of his contention that the Minister's power to deregister a union is unreviewable, "the formula" is satisfied" "involves a subjective rather than an objective inquiry, and the ... court would accordingly refuse to review the Minister's action."

---

76. Ibid p1047

77. Supra n.66 pp120 - 121

Whilst recent cases indicate a willingness on the part of the courts to grant review even where there is subjective language, that language may still determine the remedy granted. Where the staute is in the terms that the Minister may if he is satisfied that certain facts exist, if the Minister has taken incorrect considerations into account the court will, as in Padfield[78] and Takaro[79], direct the Minister to reconsider his decision in light of the law as stated by that court. The court will not impose its discretion and decide whether or not the Minister would have acted if he had made his decision on a correct legal basis. This approach is to be contrasted with the remedy given in Fiordland Venison[80] which was a declaration that the applicant was entitled to have the licence issued. The regulations in Fiordland Venison[81] directed that the Minister shall issue a licence once satisfied of the five specific criteria. The court came to the conclusion on the evidence before it that the applicant had satisfied the relevant criteria. Having

---

78. Supra n.69

79. Supra n.73

80. Supra n.71

81. Idem

interpreted shall to mean that the Minister was bound to issue a licence once those criteria were met there was no discretion for the Minister to exercise once the court had decided the criteria were met and therefore no reason to send it back for the Minister to decide.

The Industrial Relations Act 1973 contains a wide variety of statutory powers conferred on the Minister in just as wide a variety of statutory language. It is contended that the courts would consider each case on its merits and not refuse an application for review merely on the grounds of the subjective wording used. For example, considering the Minister's power to deregister a union. The Minister's decision pursuant to section 130 could be challenged on the grounds that there had been an abuse of discretion. The circumstances of each case would be of overriding factor but the wording of the section indcates some of the potential issues. It may be argued that there was in fact no discontinuance of employment although the wide definition of this term in section 130(6) which includes where there is likely to be an interruption of work could make proving this to the court difficult. The Minister's decision that he was satisfied that the discontinuance of employment had caused or was likely to cause serious loss or inconvenience and that it had been brought about wholly or partly by any union of employers or of workers or by any member or members thereof could be challenged on several grounds. It may be contended

that the facts did not exist on which the Minister could base his decision, however the vague terms of serious loss or inconvenience would not be easily quantified. Alternatively it could be argued that the Minister had not exercised his power in accordance with the purposes of the Act, although the court would then be faced with the deciding whether or not deregistration of the particular union was likely to improve the conduct of industrial relations which raises the issue of the place of government policy in the Minister's decision. If it could be proven to the court that the Minister was simply following Government policy and had not turned his mind to the criteria laid down in section 130 that would be seen by the court as an undue fettering of the Minister's discretion to the point where the Minister had in fact not exercised his discretion at all. For example, an election promise to deregister all purportedly "militant" unions which was then followed without regard to the specific conditions required by the statute would be viewed with disdain by the courts.[82]

---

82. See for example: Asher v. Secretary of State for Environment [1974] 1Ch. 208
Bromley London Borough Council v. Greater London Council [1982] 2 WLR 62

Thus, there are instances in which the exercise of the Minister's powers under section 130 could be challenged in the courts. The success of that challenge would depend however on the strength of the evidence available to the court. A lack of such evidence would probably mean that the court would be slow to intervene and more ready to give full effect to the wide language of the section, and to the fact that it is the Minister who is accountable to Parliament who is exercising this power. But even if the court could be convinced that there had been an abuse of discretion the courts would not make the decision whether or not to deregister a union as they could not determine what the Minister's decision would have been had he considered the matter according to law.

The courts may find it easier to intervene in a challenge to the exercise of the power to call a compulsory conference in the case of a strike or lockout pursuant to section 120. The Minister under this section is to have reasonable grounds for believing that a strike or lockout exists or is threatened before he may exercise his discretion if thinks fit to call a compulsory conference. In Tameside [83] the House of Lords was prepared to consider whether the Secretary of State could have been satisfied that a local education authority had

---

83. Supra n.75

acted unreasonably . The court determined this question after considering the facts in depth. It is contended that the inclusion of reasonable in section 120 would provide the court with the basis for considering the weight of all the evidence available to decide whether there were reasonable grounds for the Minister's belief. It can be seen in terms of a question of fact as to the evidence before the Minister rather than a policy decision. The only discretion in the section is conferred by the fact that the Minister may if he thinks call a compulsory conference. Thus even if it could be proven that the Minister did have reasonable grounds he could not be compelled to call a compulsory conference.

The requirement that the Minister have reasonable grounds in section 120 can be contrasted with the rather more indefinable conditions in section 125B. In particular the Minister is to be of the opinion that the strike or lockout substantially affects or will substantially affect the public interest. The court is less likely to intervene in the section 125B instance where Government policy would play a far larger role.

It has been contended that " in relation to section 130 "the use of formula " if the Minister is satisfied" means that his decision will be final and unreviewable, provided it is made on relevant evidence, for the purposes, and it is not so unreasonable as to be in law no decision."[84]

---

84. Supra n.59

It is submitted by the writer that these exceptions to the Minister's decision being final and unreviewable are all substantial grounds within the ambit of a challenge on the basis of an abuse of discretion that are applicable to every discretion conferred on the Minister under the Industrial Relations Act 1973. It is suggested that regardless of the subjectivity of the provision the courts will be prepared to review an exercise of ministerial discretion to ensure that the Minister has exercised his power for the proper purposes under the Act, that he has taken into account all relevant considerations, that he has not taken into account irrelevant considerations and that he has in fact addressed his mind to the matters at issue and therefore truly exercised his discretion. Whilst the scope of the courts inquiry will depend on the particular section being considered and the evidence in the case, it is submitted that the issue of an abuse of discretion presents significant grounds on which to seek to review a ministerial decision made under the Industrial Relations Act 1973.

(d) Bad Faith

The extreme position which takes the argument of pre-determination and bias one step further is to argue that the Minister exercised his power in bad faith. The Minister who simply follows in good faith Government policy according to what he sees as a mandate from the electorate cannot be challenged on the grounds of having acted in bad faith. By comparison a Minister is acting in bad faith if he has acted in a fraudulent or malicious manner. For example he may have exercised his power for a purpose for which he knows it was not conferred. An example of a malicious exercise of power is found in Roncarelli v. Duplessis[85] where the Minister was motivated to use his power out of personal animosity towards those affected.

When the power conferred by section 130 is considered the evidentary difficulty of proving bad faith on the part of the Minister is enhanced by the subjective wording of is satisfied. The actual motive behind a decision by the Minister will generally be very difficult to prove except in a blatant case such as Roncarelli.[86]

---

85. [1959] SCR 121, 141

86. Idem.

We have been considering in the foregoing analysis the possible grounds for review where it is sought in the High Court pursuant to the Judicature Amendment Act 1972. It is possible however that the issue of the exercise of a ministerial power could be argued before the Arbitration Court. The Arbitration Court would not have jurisdiction to consider an action seeking review under the Judicature Amendment Act but the decision of the Arbitration Court could itself be subject to review.

Review of Arbitration Court decisions is limited by the privative clause contained in section 48(6) of the Industrial Relations Act 1973.

> (6) Except on the grounds of lack of jurisdiction or as provided in section 62A of this Act, no decision, order, award, or proceeding of the court shall be removed to any court by certiorari or otherwise or be liable to be challenged, appealed against, reviewed, quashed or called in question in any court.

The Arbitration Court by subsection 7 is defined to suffer from a lack of jurisdiction only where -

> (a) In the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
> (b) The decision, order, or award is outside the classes of decisions, orders, or awards which the court is authorised to make; or
> (c) The court acts in bad faith.

The definition of lack of jurisdiction as found in subsection 7 was inserted by section 3 of the Industrial Relations Act 1977. There has been no clear definition by the courts as to the width of this ground for review either before or after the 1977 amendment.[87] The closest consideration of the phrase was in the Court of Appeal in New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related IUW v. Court of Arbitration and Others.[88] The submissions in this case were however dismissed on substantive grounds without the Court of Appeal deciding whether jurisdictional errors had been pleaded. The reason for this was given by Richmond J.[89]

> ... it is often difficult to draw a clear line between jurisdictional errors and errors within jurisdiction. I think it preferable in the present case to deal directly with the relevance of the matters referred to by counsel for the Union.

Cooke J. does give some indication as to the scope of a review court[90]

---

87. See New Zealand Textile and Garment Manufacturers Industrial Union of Employers v. Industrial Commission [1976] 1 NZLR 241
Northern Totalisator and Allied Employees Assn(Inc) v. Industrial Unions Registrar and Others [1976] 2 NZLR 22

88. [1976] 2 NZLR 283

89. Ibid p 295

90. Supra n. 88 p301

> courts of general jurisdiction should be slow to hold that when establishing a court or tribunal of limited jurisdiction Parliament meant it to have authority to determine conclusively for the purposes of any given case the meaning of provisions in the Act by which it is constituted and under which it operates.

This suggests that matters of interpretation should be reviewable by the courts but the extent of such review is unclear. Cooke J.'s comment must be read in the light of his statement above the passage quoted that, in this case it was unnecessary to discuss the various meanings in which the term "jurisdiction" is used, or error on the face of the record or privative clauses.

The ambit of the power to review Arbitration Court decisions is, due to the section 48 privative clause, a lot narrower than the scope of review sought under the Judicature Amendment Act 1972. The ability to seek review of a decision of the Arbitration Court has been virtually replaced by the section 62A right of appeal on a point of law. The reluctance of the Court of Appeal to become finders of fact under section 62A leaves the possibility of a case seeking review on the grounds of a factual error which affects jurisdiction. This would be outside the right of appeal on an error of law compared with an error of law going to jurisdiction which would fall within section 62A.

The fact that there have been no cases seeking review since the introduction of the right of appeal would indicate that the right of appeal has largely replaced the areas covered by the limited ability to seek review. The right of appeal also provides the opportunity for the case to be decided by the Court of Appeal or remitted back rather than the single remedy of quashing the order or award available upon review.

If a decision by the Minister, purportedly made pursuant to a power conferred on him by the Industrial Act 1973, has been subject to a decision in the Arbitration Court it is contended that the right of appeal given by section 62A provides a wider avenue of challenge than the right to seek review. The scope of the appeal right was discussed at the beginning of Part IV of the paper. There is however the possibility of seeking review on the grounds of a factual error which goes to jurisdiction. For example, if the Minister refers a dispute to the Arbitration Court pursuant to section 125C it may be argued on review that the Minister had never in fact received a report under section 125B(2)(b) therefore the Minister had no power to refer the matter to the Arbitration Court and that court therefore had no jurisdiction to consider the dispute. It is the factual question of whether or not the report actually existed which would be at issue. The necessity for the factual error to affect the jurisdiction of the Arbitration Court decreases the impact of this avenue of challenging a ministerial decision.

C. Declaratory Judgments Act 1908

It would be possible in regard to any of the powers conferred on the Minister by the Industrial Relations Act 1973 to seek a declaratory judgment pursuant to the Declaratory Judgment Act 1908. Section 3 of the Declaratory Judgments Act 1908 provides that "where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute" that person may apply to the High Court for a declaratory order determining any question as to the construction or validity of the statute.

The effect of a declaratory judgment, pursuant to section 4 of the Act, is potentially very wide. An order is to be binding on the applicant, all persons on whom the summons had been served and on all persons who would have been bound by the declaration if the proceedings had been an action.

Section 9 provides for a declaratory judgment or order to be made in anticipation of any event to have binding effect in respect of that future event. Section 11 increases the availability of declaratory judgments to instances where the High Court has no power to give relief in the matter to which the judgment or order relates, or where such matter would be within the exclusive jurisdiction of any other court. This provision could be used to avoid the privative clause in section 48 of the Industrial Relations Act 1973.

The High Court by section 10 is given a complete discretion whether to make or give a declaratory judgment or order, and the High Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

The High Court pursuant to the Declaratory Judgments Act 1908 could not be asked to determine the facts of a particular case but must be presented with an agreed set of facts. The Declaratory Judgments Act 1908 could provide an avenue by which the Minister's interpretation of his powers under the Industrial Relations Act 1973 could be challenged.

D. Ombudsmen Act 1975

The Ombudsmen Act 1975 does not provide the basis for a direct challenge to the Minister but an indirect challenge through the Department of Labour. This limitation is found in section 13 of the Ombudsmen Act 1975. Subsection (1) provides that the function of the Ombudsmen is to investigate any decision or recommendation made, or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity. The power to investigate a recommendation made to a Minister is specifically conferred by section 13 (2).

One advantage of an investigation by an Ombudsman is that pursuant to section 22 he may make a report containing recommendations to the Department in far wider circumstances than that the decision was contary to law. The other grounds listed in section 22 (1) are:

> (b) Was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
> (c) Was based wholly or partly on a mistake of law or fact; or
> (d) Was wrong.

The Ombudsman's report is however his only means of attempting to enforce his recommendations. There is no legal duty on the recipients of an Ombudsman's report to comply with it.

In order to challenge a ministerial decision through a complaint to the Ombudsmen it would be necessary that officers of the Department of Labour had made some form of recommendations to the Minister. The final effect may be to in fact challenge the Minister's decision but even if the Ombudsman upholds the complaint his decision cannot be enforced against the Minister.

The Ombudsman Act 1975 section 7 clearly indicates that a complaint to the Ombudsman is not to be regarded as an alternative to taking an action in the courts. Section 7 (a) states that the Act shall not authorise the Ombudsman to investigate any decision in respect of which there is a right of appeal or a right to apply for review except if by reason of special circumstances it would be unreasonable to expect the complainant to resort or have resorted to it. It is submitted that the Ombudsman would be slow to invoke the proviso where a decision of the Minister under the Industrial Relations Act 1973 was in reality the decision being challenged.

V CONCLUSION

The dominant position of the Minister under the Industrial Relations Act 1973 is a reflection of the interventionist role of the New Zealand Government in the industrial relations system. This inevitably leads to Government policy being seen as having a place in the determination of decisions by the Minister of Labour under the Industrial Relations Act 1973. The mere fact that Government policy does have a place in the decision-making process should not of itself prevent the courts from considering in each individual case whether or not the Minister has acted according to law. It is not contended that the courts should replace the Minister's judgment with their own but that there is a legitimate place for the courts in ensuring that the Minister has acted within the confines of the power conferred on him by Parliament.

It is the exact words of the statute which confer the power on the Minister which are of crucial importance. In relation to the possible avenues and grounds for challenging the Minister's decision considered it must be emphasised that the depth of the inquiry entered into by the courts will be largely delineated by the words used in the statute. Subjective wording alone will not prevent the court considering the basis on which the decision was made. The courts job is much easier

however if the Minister's decision is required to be made on a factual basis the existence of which the court is able to adduce from evidence placed before it. For example whether five percent of the union did send a request to the Minister.

There are many different avenues by which the decision of a Minister under the Industrial Relations Act 1973 may be brought before the courts. It is the circumstances of the particular case which must determine which avenue is chosen and upon what grounds the decision is challenged.

The courts in the past have not been called upon to consider the legality of ministerial decisions taken pursuant to powers conferred by the Industrial Relations Act 1973. This cannot be taken to indicate however, that the courts could not or would not consider such a case, if it arose, on its merits. It is contended that there is no power conferred on the Minister by the Industrial Relations Act 1973 that is unreviewable and the legality of which cannot be challenged in the courts.

Appendix One

INDUSTRIAL UNIONS DEREGISTERED IN NEW ZEALAND

July	1939	Otahuhu Chemical Manure Workers
November	1940	Wellington Tobacco Factory Employees (partial cancellation).
January	1942	Auckland Abattoir Assistants and United Freezing Works Employees (two partial cancellations).
March	1949	New Zealand (except Otago and Southland) Carpenters and Joiners and Joiners" Machinists (partial cancellation).
February	1951	New Zealand Waterside Workers.
March		Wellington, Nelson, Marlborough and Taranaki Freezing Works, Abattoir and Related Trades Employees.
April		Golden Bay Cement Company's Employees.
April		Portland Cement Workers.
March		Wellington Raod Transport and Motor and Horse Drivers and their Assistants.
May		Ohura District Coalminers.
May	1962	Northern Industrial District Chemical Fertiliser Workers.
		Hawkes Bay Chemical Manure and Acid Workers.
		Wanganui Chemical and Acid Workers.
		New Plymouth Chemical Fertiliser Workers.
November	1971	New Zealand Seamen.
July	1975	Auckland District Boilermakers, Structural Metal Fabricators & Assemblers, Metal Ship & Bridge Builders(partial cancellation)
September	1976	Wellington District Boilermakers Metal Worker Assistants Iron and Steel Ship and Bridge Builder and Structural Steel Workers.

Source: Registrar of Industrial Unions, Department of Labour.