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The
JUDGE
OVER YOUR
SHOULDER

A GUIDE to
JUDICIAL REVIEW
of ADMINISTRATIVE
DECISIONS

This paper has been prepared as general advice
for CLIENT DEPARTMENTS and AGENCIES by
CROWN COUNSEL in the CROWN LAW OFFICE.

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FOREWORD

The first edition of “The Judge Over Your Shoulder” appeared in 1988/89. Since that time the scope and volume of administrative law and judicial review have continued to develop at an increasing pace. Among the significant legislative reforms since that time are the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 (and subsequent Amendment Act 2001), the Privacy Act 1993, the Electoral Act 1993 (which provided for MMP), Te Ture Whenua Māori Act 1993, the Income Tax Acts of 1994 and 2004 and the Tax Administration Act 1994, and the Supreme Court Act 2003.

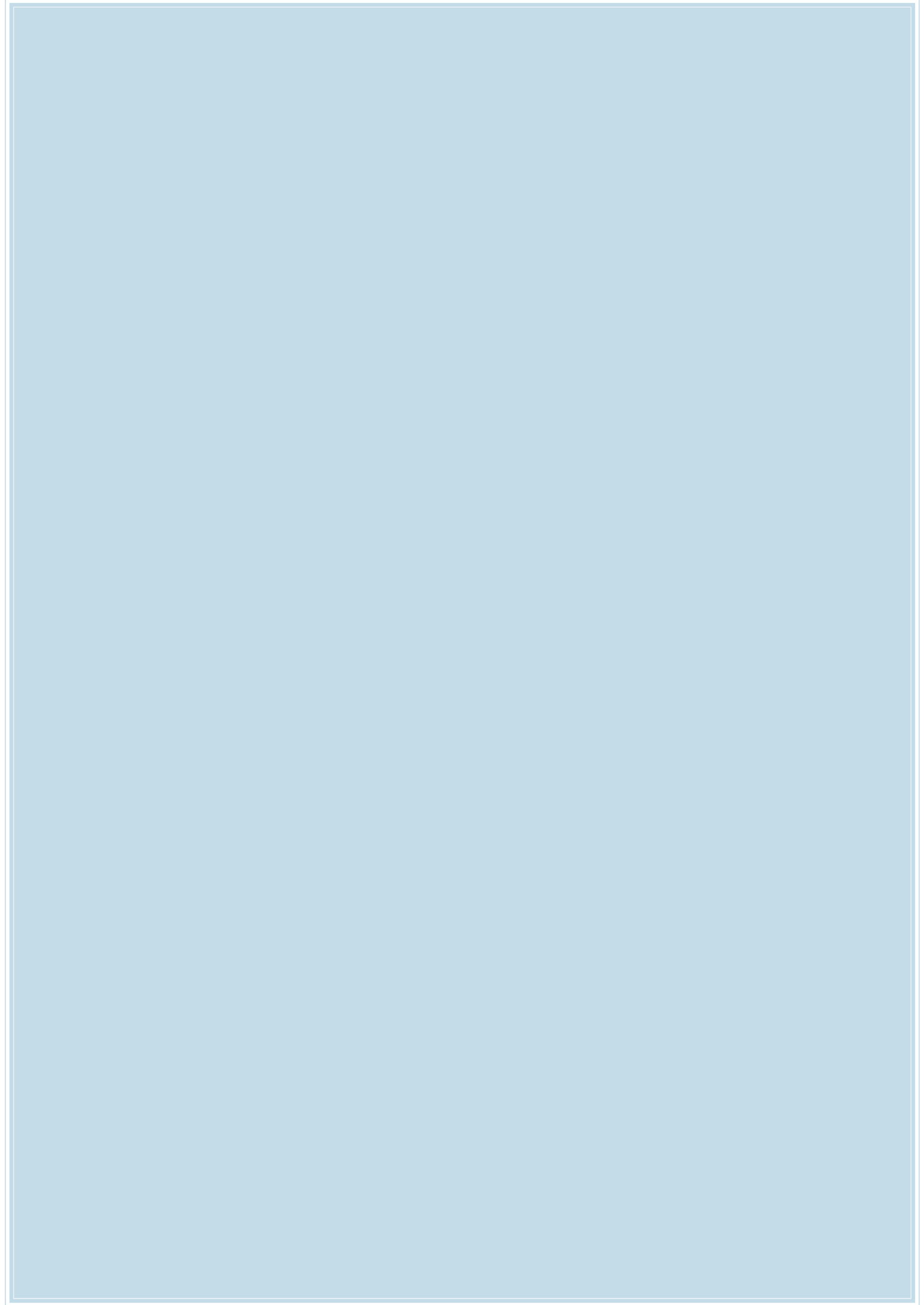
For decision-makers within Government, particular reforms which have, or may in the future, provide fertile ground for judicial review applications include the Education Act 1989, the Resource Management Act 1991, the Building Act 1991, the Employment Contracts Act 1991 (followed by the Employment Relations Act 2000), the Health and Safety in Employment Act 1992, the Holidays Act 2003, the Defamation Act 1992, the Land Transport Act 1993, the Fisheries Act 1996, and the

Foreshore and Seabed Act 2004. In the criminal law area the Bail Act 2000, the Parole Act 2002 and the Sentencing Act 2002 have been passed.

All of these changes make a new edition of “The Judge Over Your Shoulder” timely indeed. Its purpose is to give decision-makers (and those who advise them) at all levels an introduction to the present state of the law and to highlight the principles of good administration which the courts expect us to apply. I am sure that this edition will prove as useful and popular as the first edition of “The Judge Over Your Shoulder”.



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1 March 2005



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INTRODUCTION

1. The Judge Over Your Shoulder is directed to Government officials responsible for making decisions affecting public rights or those who prepare reports and recommendations for others (including Ministers and Chief Executives) to decide. The purpose of this publication is twofold: first, to give guidance as to the principles involved in review of decision-making; and, second, to highlight the danger areas where Government decision-makers may be particularly open to challenge in the courts. It also offers general advice on the format of recommendations and the process to follow.

2. The Judge Over Your Shoulder is not, and cannot be, a substitute for seeking specific legal advice. Nor is it a comprehensive guide to administrative law. What it aims to do is alert public decision-makers to the potential challenges their decisions may face so that they can take legal advice at the right time, and to provide a general framework for the decision-making process. Although The Judge Over Your Shoulder will be available to the public, it is not intended to be a public guide to official decision-making or legal advice. Care also needs to be taken to ensure that the law has not changed since the date of publication. Specific queries should be addressed to departmental legal advisors in the first instance, or to the Crown Law Office.

THE NATURE OF JUDICIAL REVIEW

3. Judicial review is the review by a judge of the High Court of any exercise (or any refusal to exercise) of public decision-making powers, in order to determine whether that decision or action is unauthorised or invalid. Although most such powers derive from statute, judicial review may also extend to public powers that do not have a statutory basis, including decisions under the Crown prerogative.

4. Although this guide will concentrate on decisions made by Crown officials pursuant to statute, it is important to realise that it is not just the core public sector which can be subject to judicial review. Many organisations carry out functions formerly performed by the public sector but do so on a commercial basis. Although this does not necessarily protect such bodies from review, the courts will generally be reluctant to review commercial decisions of public organisations.

See *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, where the Privy Council found that the Electricity Corporation, as a state-owned enterprise, may be liable in contract, but would generally only be judicially reviewable in respect of its commercial dealings on the grounds of unreasonableness, bad faith and improper or ulterior motives.

5. The courts also distinguish between public and private decisions made by non-Government organisations and may intervene if such bodies are exercising a public power. It is the public nature of the power being exercised, not the classification of a decision-maker as part of the Crown, or as a statutory body, which will determine whether a body is reviewable.

See *White v New Zealand Stock Exchange (No 2)* [2002] NZAR 342, *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513, *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621, and *Electoral Commission v Cameron* [1997] 2 NZLR 421, where respectively the Stock Exchange, Royal College of Surgeons, Sky Casino and Advertising Standards Complaints Board, all private organisations, were reviewable in relation to decisions they had made affecting their members or the public.

6. Judicial review, as one aspect of **administrative law**, is however only one way in which a decision by officials can be challenged. Other possible avenues of challenge may include statutory appeals, administrative rehearings, investigations by the Ombudsmen's Office, the Official Information Act and use of Parliamentary questions or select committees such as the Regulations Review Committee. There are also various forms of inquiry, including a commission of inquiry. Those challenging government decisions will often use these avenues instead of or as well as judicial review.

7. Judicial review is however a flexible and potent way in which the courts can control the activities of the executive and safeguard the rights of citizens. Judicial review ensures that public authorities act within the law by defining the principles of law that govern administration, and by safeguarding individual interests against illegal or unreasonable administrative action, or administrative action taken without following proper procedures.

8. The courts cannot however overrule the statute under which a decision is properly made as, in New Zealand, Parliament is the supreme law-making body. Instead, the courts in judicial review concentrate on the actions of the executive. The role of the executive (which includes both the Ministers of the Government and public servants) is both to propose legislation for enactment by Parliament and to implement the laws made by Parliament. The judiciary's role in judicial review is to interpret legislation and ensure it is correctly applied by the executive. Although the New Zealand courts do not have the power to strike down Acts of Parliament, they can declare regulations and other "subsidiary legislation" to be invalid if such rules are not authorised by an Act of Parliament.

Examples where the Courts would not interfere with Parliamentary processes include *Te Runanga o Wharekauri v Attorney General* [1993] 2 NZLR 301 (CA), where the Court could not prevent the Government from introducing the "Sealords" deal in the form of the Treaty of Waitangi (Fisheries Claims) Settlement Bill to Parliament, and *Westco Lagan v Attorney-General* [2001] 1 NZLR 40, which was an unsuccessful attempt to prevent the introduction of legislation to stop West Coast logging without compensation to sawmillers.

9. The courts are also generally reluctant to intervene in the internal processes of Parliament which fall within the scope of Article 9 of the Bill of Rights Act 1688. See *Huata v Prebble* [2004] 3 NZLR 382 where the majority emphasised the undesirability of the courts passing on the internal proceedings of Parliament. Although the Supreme Court overturned the Court of Appeal's decision, the question of the scope of parliamentary privilege was not argued before the Supreme Court.

10. In general, a court will not get involved in questions of policy, as implementing a particular policy is a matter for the executive, especially where the electorate has voted on specific policies.

Recent examples where the Courts have not intervened in policy matters include:

Lumber Specialties Ltd v Hodgson [2000] 2 NZLR 347. Where the incoming Labour Government exercised its right under the State-Owned Enterprises Act 1986 to issue a directive to Timberlands West Coast Ltd requiring the company to exclude the harvesting of beech from its statement of corporate intent as it had promised to halt beech logging on the West Coast. The Court held that it is not for the courts to prevent the Crown from exercising legitimate power.

In *Curtis v Minister of Defence* [2002] 2 NZLR 744, the Court of Appeal was not prepared to interfere with the decision to disband the Air Combat Squadron of the Royal New Zealand Air Force, regarding it as a political not a legal issue.

In *Attorney-General v Daniels* [2003] 2 NZLR 742, the Court of Appeal overturned a decision of the High Court that the Government's policy for special needs school children was contrary to rights guaranteed to all school age children in the Education Act.

11. Judicial review is not concerned with the merits of a decision, but with the process by which the decision is made. So long as the processes followed are proper, a court will not interfere with the decision, unless it is clearly an unreasonable one.

12. Sometimes, however, it can be difficult to completely sever the decision-making process from the merits of the decision. As a result, the courts can influence the development of policy and its implementation, which are traditionally the province of the executive. Tensions arise particularly when disputes involve important political, Treaty or human rights issues.

An example is *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, where a provision in the State-Owned Enterprises Act 1986 recognising the Treaty of Waitangi allowed the Court of Appeal to prevent the transfer of land from the Crown to state enterprises until a suitable mechanism to protect Treaty claims to those lands had been devised.

THE GROUNDS OF CHALLENGE

13. To establish whether the decision-maker has acted properly and fairly, the courts will look closely at the decision-making process. This overriding concept of fairness to all affected parties is critical. Judicial review is a discretionary remedy and even where the grounds of review are established and a decision is found to be invalid, the remedy given or whether any remedy at all is given may ultimately depend upon the court's view of what is "fair" and "reasonable".

14. The grounds of challenge can be broadly divided into:

- 14.1 illegality (acting outside the scope of the power; getting the law wrong);
- 14.2 unfairness (sometimes referred to as procedural impropriety);
- 14.3 unreasonableness.

These grounds (which contain further subcategories) often overlap and decisions are often challenged on a number of grounds. For example, a decision that is illegal may also be unfair and/or unreasonable. An unreasonable decision is almost always either illegal or unfair.

15. The Judge Over Your Shoulder will also briefly discuss challenges based on breach of the Treaty of Waitangi, international conventions and the New Zealand Bill of Rights Act 1990 (NZBORA). While not grounds for review in their own right, they are often linked with an application for judicial review, and need to be considered by decision-makers.

FIRST GENERAL GROUND OF REVIEW – ILLEGALITY

16. Illegality is another way of saying that the decision-maker got the law wrong. The starting point for this argument is the correct meaning of the words in the legislation and, therefore, the correct scope of the power or discretion they confer. In addition to the specific statute before the court, this will often involve the application of the principles of statutory interpretation, in particular the Interpretation Act 1999.

In *New Zealand Employers Federation Inc v National Union of Public Employers* [2002] 2 NZLR 54, the Court of Appeal held that s 11 of the Interpretation Act, which allows public officials to take certain actions putting infrastructure in place once an Act has been passed but before it comes into force, did not extend to registering unions before the Employment Relations Act 2000 came into operation.

17. There are a number of bases upon which a court might hold that actions or decisions have been made illegally. In summary, a decision-maker acts outside the scope of his or her power if:

- 17.1 the decision is materially influenced by some **legal or factual error**;
- 17.2 the decision is *ultra vires* in that it contravenes an existing Act and the empowering Act does not authorise it, either expressly or by implication;
- 17.3 the decision fails to take into account certain **relevant matters**;
- 17.4 the decision takes into account matters that are **irrelevant** and should not be considered;
- 17.5 the decision-maker rigidly applies a **pre-determined policy** without regard to the particular merits of the case;
- 17.6 the decision-maker acts under **dictation** from someone else;
- 17.7 the decision is motivated by an **improper purpose** (one not contemplated by the legislation or other source of power);
- 17.8 the decision-maker has acted under an **invalid delegation**.

These grounds are discussed individually below.

ERROR OF LAW

18. It is fundamental that, in making decisions, decision-makers must get the law right and must base their findings on sufficient evidence. The error of law must however be relevant to the decision taken, not a minor technical error.

In *Peters v Davison* [1999] 2 NZLR 164 (the “Winebox” case), the Court of Appeal held that Mr Peters could apply for review of a finding of a Royal Commission, even though its recommendations had no direct legal force, where there was an alleged error of law which affected his reputation.

ERROR OF FACT

19. Although, in contrast to an appeal, a court on judicial review is not concerned with the factual merits of a decision, it may intervene if a decision is made on the basis of a serious factual error. A mistake of fact must however be central to the decision and an established, incontrovertible fact, rather than a matter which is disputed or where differing opinions are possible.

In *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 727, the Principal of the school was found to have based the decision to suspend a student on factual errors, including a belief that the student had had cannabis in his possession.

In *Daganayasi v Minister of Immigration* [1980] NZLR 130, the Minister failed to take into account the very special medical needs of a child before deciding not to rescind a deportation decision.

20. Decision-makers should therefore be very careful to get the facts right and ensure that their decision is supported by proper evidence. They are, however, entitled to adopt a point of view on the facts when it is possible to reasonably hold differing points of view.

ULTRA VIRES

21. Decisions must be within the powers of the decision-maker; if not they are described as being *ultra vires*. An area where this problem can arise is where regulations are made which are wider than or outside the scope of the empowering legislation.

In *Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722, regulations which allowed the Chief Executive to allocate catch entitlements for any species, without providing any guidelines, were *ultra vires* because the statute envisaged that the regulations themselves would stipulate how the entitlements would be allocated.

RELEVANT OR IRRELEVANT CONSIDERATIONS

22. A decision-maker must consider all relevant matters and must not take into account any irrelevant matters. Relevant considerations may be categorised as mandatory or permissible.

23. Mandatory considerations will usually be expressly stated in the statute, but some may be necessarily implied because their importance is so obvious. However, as long as each consideration is properly considered, the weight to be given to each will be a matter for the decision-maker. The court will not intervene unless the decision can be categorised as unreasonable (see later discussion).

In *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* [1997] NZAR 316, the Minister of Fisheries had reduced the total allowable commercial catch for snapper. He was statutorily required to consider whether or not it was possible for the Crown to reduce the level of fishing by retaining or obtaining the right to take fish under appropriate quota and not making those rights available for commercial fishing. However, the Minister had been advised that it was not appropriate to compensate fishers and that the Crown should not therefore acquire quota. The Court held that the Minister had as a result failed to take into account one of the statutory provisions.

24. Permissible considerations may also be express, for example where the statute provides a list of factors which the decision-maker may have regard to. They can also be implicit in an Act, in which case the court will look at the overall scheme and purpose of the Act to find out what other matters may be relevant.

In *New Zealand Bus Ltd v Commerce Commission* (2002) 7 NZBLC103, 605, a bus company sought clearance under the Commerce Act 1986 to acquire the Trans Metro bus service. The Commerce Commission declined to consider the application because the joint venture partner was not legally permitted to own passenger transport services. The Court held that the Commission should have taken into account the resolve of the parties to proceed with the acquisition and the willingness of the Government to promote the necessary law change.

25. Relevant considerations may also be expressly set out in the statute, but are often likely to be implied by looking at the scheme (or overall format), long title and purpose of the Act.

26. Increasingly New Zealand's international obligations, the principles of the Treaty of Waitangi and the NZBORA may also be implied as mandatory relevant considerations, even when they are not referred to in the statute. These are discussed separately in later chapters.

RIGID APPLICATION OF A PRE-DETERMINED POLICY

27. A decision-maker is entitled to adopt a general policy as a guide to exercising a discretion, but is not generally permitted to apply that policy so rigidly as to exclude the merits of an individual case. Therefore, although manuals and other departmental guidelines are important in ensuring some consistency of decision making, departmental policies should not fetter any discretion the Act confers.

In *Ankers v Attorney-General* [1995] 2 NZLR 595, Ministerial directions to the Director-General about the payment of special benefits fixed the dollar amounts to be paid by prescribing a formula, with allowable departures in very exceptional circumstances. An application for a special benefit was declined when staff failed to seek evidence of special circumstances. The Court held that the Department had misinterpreted its rules and therefore acted unreasonably, both by seldom considering or requesting details of special circumstances and by having an inadequate reference in its manual to very exceptional circumstances.

See also *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158, where it was held a general policy had failed to take into account individual circumstances; cf *Attorney General v Refugee Council* [2003] 2 NZLR 577 where it was held that whether a general policy was being lawfully applied could be determined only by looking at individual circumstances.

ACTING UNDER DICTATION

28. While decision-makers may consult and receive advice from others, decision-makers must personally take the final decision. They cannot abdicate the responsibility for exercising their powers, unless they have formally and properly delegated that power to another person (see paragraph 30). Acting under dictation can happen if decision-makers purport to make the decision themselves, but allow someone else to have a decisive say in the matter, or follow a direction from someone else on how to make the decision. This ground may also overlap with an allegation that the decision-maker is rigidly following a prescribed policy.

Social Security Commission v Macfarlane [1979] 2 NZLR 34. A statutory requirement that the Commission exercise its powers "under the general direction and control of the Minister" did not allow the Minister to give a specific direction about limits on income and assets when the Commission decided applications for family benefit capitalisation. The Minister could not dictate the basis on which the Commission was to determine applications and thereby override its discretion.

29. Other examples of abdicating responsibility for decisions are where the decision-maker has been briefed on what is happening but does not actually make the decision, or where a decision of another person is simply rubber stamped by the decision-maker.

In *Waikato Regional Council v Attorney-General* [2004] 3 NZLR 1, it was held it was not sufficient for the Director-General to be generally aware of the steps his officials were taking when the statute required him to decide personally. In *CRA3 Industry Association v Minister of Fisheries* [2001] 2 NZLR 345, the Court emphasised that in concurring with a proposed marine reserve, the Minister of Fisheries had to reach an independent decision, not merely rely on the Minister of Conservation's conclusions.

INVALID DELEGATION

30. Similarly, there will be an invalid delegation if the right person does not exercise the power. If a power has been delegated (for instance from a chief executive to a senior official), there must be clear authority to delegate the power, the delegation should be in writing and must clearly follow the terms of the empowering instrument. Often the statute or regulation itself provides for or prohibits delegation. Section 41 of the State Sector Act 1988 also provides a general power of delegation.

In *Webster v Tairaroa* (1987) 7 NZAR 1, the applicant had been prosecuted for taking undersized lobsters under regulations allowing the Minister or Director-General to issue Gazette notices specifying size. The relevant notice purported to be issued by the Director-General but concluded with the name and title of the Assistant Director-General. Although the Director-General had power to delegate his authority to the Assistant Director-General, he had not formally done so. The notice was accordingly held to be invalid.

IMPROPER PURPOSE

31. If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. The cases on improper purpose involve scrutiny of the validity of the objectives that the decision-maker seeks to achieve in exercising the power.

In *Walls v Commissioner of Police* [1998] 1 ERNZ 224. A Police Instructor was initially transferred then suspended pending disciplinary proceedings. The Employment Court agreed with the applicant's claim that the transfer was punitive, and he was reinstated.

In *Green v Housden* [1993] 2 NZLR 273, in the course of litigation, the Inland Revenue Department used a provision in the Inland Revenue Department Act 1974 that required persons to produce documents to the Department. The purpose was to see what the applicant taxpayer's advisors thought about their client's position and the Department's conduct. The Court of Appeal held that would constitute an abuse of the Commissioner's powers.

32. Even where a statute appears to confer the widest possible discretion on a decision-maker, the courts will consider that the discretion has not been properly exercised if the decision is outside the purpose or the spirit of the Act. In deciding what that purpose or spirit is, the courts will look at whether the Act expressly sets out its purposes and objects. If these are not expressly set out, the court will look at the Act as a whole, and sometimes also its history and surrounding legislation.

33. A decision made for a proper purpose is not invalid because it also has an ancillary purpose, provided the additional purpose is within the ambit of the Act.

In *Attorney-General v Ireland* [2002] 2 NZLR 220, the Court of Appeal held that the Department of Conservation could use buildings on a reserve, not just for the purposes of that reserve as provided in the Act, but to administer other reserves as well.

SECOND GENERAL GROUND OF REVIEW – UNFAIRNESS

34. Broadly speaking, this head of challenge covers all questions relating to the manner in which a decision is reached, as opposed to the decision itself. It relates primarily to whether those affected by a decision have been given a fair opportunity to be heard or their views adequately considered. The grounds of review under this general heading, and which are discussed below, include:

- 34.1 breach of natural justice;
- 34.2 bias;
- 34.3 legitimate expectation;
- 34.4 substantive unfairness.

35. Inadequate consultation is also often pleaded as a separate ground for review, and will be considered below, although in reality it usually forms part of other grounds, such as breach of natural justice, or legitimate expectation, or failure to consider relevant considerations.

36. Overall “the duty to act fairly” means decision-makers must give adequate opportunity for representations to be made and considered so that they may be fully aware of all the relevant considerations before making a decision. Those making representations must also have adequate information to know the case they have to answer.

In *Zaoui v Attorney-General* [2004] 2 NZLR 339, the High Court held that a refugee held pending a determination by the Inspector-General of Intelligence that he was a security risk, was entitled to have a summary of reasons for the Security Risk Certificate under which he was held, without breaching classified information. (Other aspects of this judgment are under appeal to the Supreme Court at the time of writing.)

37. What the duty to act fairly amounts to depends upon the facts and circumstances of the case. It relates largely to the nature of the rights affected, and what procedures are necessary to give those affected a proper opportunity to put their case. It may arise as a result of provisions in the statute or because of the nature of the interests involved. It may also arise as a result of an existing practice that the applicant expects will continue, or because of past assurances (which gives rise to a legitimate expectation – discussed at paragraphs 45 to 48).

NATURAL JUSTICE

38. The duty to act fairly includes ensuring that the procedural requirements of **natural justice** are met. Particularly if adverse findings may be made against a person or body, it may be necessary to:

- 38.1 grant an oral hearing;
- 38.2 give prior notice of proposed findings or the risk or likelihood of adverse findings;
- 38.3 give prior notice of allegations that the person or body is to answer;
- 38.4 give the person or body reasonable time to prepare his or her case;
- 38.5 disclose the relevant material relied upon;
- 38.6 depending on the statute and context, give reasons for a decision.

39. Sometimes, particularly with investigations and inquiries, there may be a duty to permit legal representation and cross-examination of witnesses.

40. If identifiable individual interests are affected, the duty to act fairly will almost always require:

- 40.1 giving prior notice of a proposed decision or action to interested persons/bodies who are adversely affected;
- 40.2 disclosing the reasons for the proposal and the material relied upon;
- 40.3 giving adversely affected persons/bodies a fair opportunity to make representations (written or oral);
- 40.4 giving proper consideration to those representations.

Phipps v Royal Australasian College of Surgeons [2000] 2 NZLR 513. An inquiry into a surgeon's treatment of patients made recommendations about supervision of the surgeon's work. The surgeon had not had adequate opportunity to respond to some of the allegations, so the College's report was in part quashed.

In *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641, the Minister was the authority responsible for issuing licences as well as being a party to a joint venture petroleum exploration agreement. Following a significant discovery of crude oil and gas, Petrocorp's application to extend its licence into the new area was declined, the Minister granting himself the licence. The Privy Council held that the Minister was right to take the view that the Crown's contractual obligations under the joint venture operating agreement were of no relevance to the decisions he made. In this case, it was for the Minister alone to identify and determine the national interest, and his decision was not reviewable by the Courts.

In *Coal Producers' Federation of New Zealand Inc v Canterbury Regional Council* [1999] NZRMA 257, the Court quashed a regional council's decision to ban domestic burning of coal in Christchurch city. The council had notified the ban within a week despite knowing that the plaintiff would be disadvantaged by not being heard on the complex scientific issues involved.

BIAS

41. Another form of procedural unfairness is bias or the appearance or suspicion of it. There will be apparent bias if, in all the circumstances of the case, there is a real danger or real possibility of bias. The test has been variously expressed in recent years, but was recently held to be whether the reasonable observer, aware of all the circumstances would think that the impartiality of the decision-maker might be or might have been affected. Examples of apparent bias include potential conflicts of interest arising from financial interests in the subject matter of the decision, being related to the applicant, or having some past connection with an applicant.

42. Apparent bias may be distinguished from actual bias in relation to the subject matter, which may also form the basis of a challenge on other grounds. If, for example, the decision-maker is prejudiced against members of a particular political party, he or she may be led into taking into account an irrelevant consideration. However, depending upon the wording of the enabling legislation, favouring one class of person over another is not necessarily bias, provided that the decision-maker does not have a closed mind to the circumstances of the particular case.

43. Generally, a decision-maker must not have:

- 43.1 a direct financial interest in the outcome of the decision;
- 43.2 some relationship to a party or witness (unless disclosed and agreed to by the parties at the time);
- 43.3 any personal prejudice or attitude towards a party or a party's case;
- 43.4 pre-determined the issue, by making up his or her mind before all the relevant information is available.

44. However, a party may waive its objection to a decision-maker who would otherwise be disqualified on the ground of bias.

In *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, the Casino Control Authority granted a licence to Sky Tower Casino Ltd rather than Auckland Casino Ltd. Auckland Casino claimed presumptive bias, on the grounds that some Authority members had held shares in a company related to Sky Tower Casino Ltd, selling their shares shortly before the hearing concluded. Auckland Casino also claimed apparent bias on the ground that the chairman and deputy chairman were lawyers whose firm acted for the Auckland City Council in dealings with Sky Tower over the proposed casino site, and on other matters. It was also alleged that the chairman had personal connections with Sky Tower. As Auckland Casino had known these facts before the hearing but had not objected, the Court held that it had therefore waived bias, but that in general any direct interest in the subject of an inquiry disqualifies a person from acting as a judge in the matter.

Man O'War Station Ltd v Auckland City Council (No 1) [2002] 3 NZLR 577, in which the Court of Appeal rejected a motion to recall a judgment. The recall was applied for because one of the Court of Appeal Judges knew the principal witness (although there had been no contact since he/she became a judge). The Privy Council held that no fair-minded observer could possibly have doubted the Judge's neutrality and objectivity.

Riverside Casino Ltd v Moxon [2001] 2 NZLR 78, robust questioning by a member of the Casino Control Authority did not constitute bias. Members of specialist tribunals were expected to have expertise and experience in the relevant area.

LEGITIMATE EXPECTATION

45. In certain circumstances, the duty to act fairly will include an obligation to act consistently with some previous representation, or in accordance with how other similar cases have been treated. This applies particularly where a person's "legitimate expectations" may be disappointed. A legitimate expectation is relevant only to the process by which the decision was reached. The outcome will not have a bearing on whether or not a legitimate expectation is reasonably held.

46. A legitimate expectation can arise from:

- 46.1 previously expressed assurances, promises or statements of intent by the decision-maker;
- 46.2 a regular practice that the claimant could reasonably expect to continue;
- 46.3 the wording of the legislation if, for example, that refers to principles of equity.

In *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98, a council regularly consulted with a Māori trust board on environmental issues. The trust board was, however, not told that the council had acquired bypass land which was subject to a Waitangi Tribunal claim until after the purchase. The trust board sought to prevent the transfer of land to the council, arguing that dealings between the council and the trust board gave rise to a legitimate expectation of consultation. The Court held that although the council had endeavoured to involve the trust board in a consultative process, it was for the council to make the decisions. As there was no evidence that the council had committed itself to consult the trust board on a continuing and invariable basis, the trust board had no legitimate expectation to be consulted.

In *Lawson v Housing New Zealand* [1997] 2 NZLR 474, the Minister of Housing's policy of transferring state houses to Housing New Zealand and increasing rents to market rates, was opposed on the basis of a legitimate expectation that tenants would not be forced out of their home if they could not afford market rents. The Court held that although an assurance, regular practice, or machinery for a hearing process could create a legitimate expectation, this could not be invoked to challenge the merits of a decision. A legitimate expectation did not protect a person from an adverse decision, but entitled the person to be heard before the decision was made only if they were likely to be affected very differently from the public generally.

47. There may also be a legitimate expectation that a decision-maker will take account of New Zealand's international obligations and the principles of the Treaty of Waitangi. These are discussed further below.

48. In the United Kingdom, courts have on occasion been prepared to accept claims to a "substantive" legitimate expectation, that is an expectation of a certain outcome, not merely a certain process (for example *R v North and East Devon Health Authority exp Coughlan* [2001] 1 QB 213). To date, New Zealand courts have been reluctant to go down this path (see *Challis v Destination Marlborough Trust Board* [2003] 2 NZLR 107).

LACK OF CONSULTATION

49. As noted, lack of consultation or inadequate consultation is often pleaded as a separate ground for review, although it often merges with allegations of failure to take account of relevant considerations, or breach of legitimate expectation, or the general duty of fairness.

50. Sometimes the statute or regulations will specifically provide for consultation with affected parties before a decision can be taken. In these cases, the statutory requirements must be carefully followed. In other cases, consultation is more an issue of good governance or a protection against overlooking relevant considerations or making material mistakes of fact or law, or breaching a legitimate expectation of consultation before a policy is changed.

51. Consultation is not required in all circumstances. There will be times when the decision-makers are already adequately informed of the relevant views of those affected or where a decision is simply a step in a process and does not of itself affect legal rights.

52. It is also important not to confuse consultation with agreement or negotiation. Although decision-makers must approach consultation honestly and be open to changing their minds, they may have a preferred option as a basis for consultation and must be free to make the eventual decision.

In *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671, the Court of Appeal found consultation required more than mere notification and the decision-maker must approach consultation with an open mind. The Court of Appeal's decision is a useful statement on other requirements of consultation also.

53. There is a strong expectation of consultation with Māori in matters where the principles of the Treaty of Waitangi are involved, but this is not invariable.

In *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682-3, Richardson J held that while an open-ended and formless duty to consult was impractical and not implicit in the Treaty of Waitangi, the Crown was obliged to ensure it was sufficiently informed of the relevant facts to say it had had proper regard to the principles of the Treaty. More recently in *Te Waero v Minister of Conservation*, unreported, M360-SW01, High Court Auckland, 19 February 2002, Harrison J, the plaintiffs representing iwi interests argued that the Minister of Conservation was under a duty to consult with them when making classification decisions about the reserve status of land. The Minister of Conservation argued she was bound to classify the land because it was an existing reserve and the most appropriate classification of the land was as recreation reserve. The High Court held that there were no Treaty of Waitangi principles to which the Minister was bound to give effect when deciding upon the classification of the land. The concept of consultation with iwi is not a separate or discrete Treaty of Waitangi principle.

THIRD GENERAL GROUND OF REVIEW – UNREASONABLENESS

54. In administrative law, a decision-maker must act in a reasonable fashion and the decision must rely on some reasonable basis. To invalidate the ultimate decision as unreasonable, it must be so perverse, absurd or outrageous in its defiance of logic that Parliament could not have contemplated such a decision being made. This principle is often referred to as *Wednesbury* unreasonableness, after the leading case, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. It is also sometimes referred to as “irrationality”.

55. Even though the decision-maker has apparently considered all relevant factors and closed their mind to the irrelevant, if the outcome of the exercise of discretion is irrational or the decision is such that no reasonable body of persons could have arrived at it, the only proper inference is that the power itself has been misused. The classic example cited is the dismissal of a teacher because she had red hair. Unreasonableness can derive from both the process and the outcome of the decision. On a practical level, decision-makers need to look objectively at what has occurred and be satisfied that a fair and reasonable process has resulted in a fair and reasonable outcome.

In *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, the Court of Appeal reiterated the *Wednesbury test* and held that for a court to overturn a rating decision it must be so perverse, absurd or outrageous in defiance of logic that Parliament could not have contemplated such decisions being made by an elected council. Considerable latitude had to be given to such bodies.

However, over time there has been a selective lowering of the threshold for judicial review based on unreasonableness in New Zealand: In *Ports of Auckland Limited v Auckland City Council* [1999] 1 NZLR 601, the Court rejected the respondent’s submission that the proper test for unreasonableness was the “stringent *Wednesbury test*”. In *Pharmac v Roussel* [1998] NZAR 58 (upheld by the Privy Council); [2001] NZAR 476, a case involving a challenge by a pharmaceutical company to Pharmac’s decision to reclassify a particular medicine, the majority observed that, in some cases, such as those involving human rights, a less restricted approach (a “hard look”), may be needed. The existence of a “variable” approach to unreasonableness was also confirmed in *Wolf v Minister of Immigration* [2004] NZAR 414.

The Court of Appeal also has recognised a variable approach to unreasonableness, in *Electoral Commission v Cameron* [1997] 2 NZLR 421.

56. Proving unreasonableness is difficult and, in practice, the courts rarely find on grounds of unreasonableness alone. If they find that the decision made was unreasonable, they will almost always find illegality or some procedural unfairness as well.

SUBSTANTIVE UNFAIRNESS

57. Substantive unfairness has been recognised as a legitimate ground of review (*Thames Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641). This ground tends to merge the procedural focus of “unfairness” and the “merits” approach of unreasonableness. It has been used relatively rarely in recent years largely because it is usually caught by other grounds.

In *Carmichael v Director-General of Social Welfare* [1994] 3 NZLR 477, a retired couple had been wrongly advised by the Department of Social Welfare about the residence requirements for New Zealand superannuation and had altered their position as a result. The Court held they were not therefore liable to repay the superannuation they had wrongly received and that this was a case where unreasonableness and unfairness overlapped.

OTHER IMPACTS ON JUDICIAL REVIEW

58. As well as applying the relevant legislation and general principles of review to the decision-making process, courts are increasingly also considering the application of treaties and human rights legislation to the interpretation of legislation and procedures to be adopted.

59. Treaties include both the Treaty of Waitangi and conventions and other international instruments New Zealand has entered into, but which may not be expressly incorporated into domestic legislation. Decision-makers must therefore bear in mind these provisions as well as the statute under which they are acting. The degree of relevance of these instruments will depend a great deal on the context.

60. The NZBORA has also affected judicial review. The Human Rights Act 1993, as substantially amended in 2001 to bring allegations of discrimination by central government agencies within its scope, is also likely to have a significant impact on public decision-making.

THE TREATY OF WAITANGI

61. The Treaty of Waitangi has traditionally been held to have no independent legal status and cannot be directly applied unless expressly incorporated into statute. An example of incorporation is section 9 of the State-Owned Enterprises Act 1986, which provides that the Crown, acting under that legislation, may not act inconsistently with the principles of the Treaty. Similarly the Conservation Act 1987 requires decision-makers to “give effect to” the principles of the Treaty of Waitangi.

In *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, a Ngai Tahu-owned company had a permit to run a whale-watching business in Kaikoura. The Director-General of Conservation issued a permit for the same purpose to another company. The decision was made under the Marine Mammals Act 1978, which was listed in a schedule to the Conservation Act 1987, which requires all decisions made under that Act, or scheduled Acts, to give effect to the principles of the Treaty of Waitangi. The Court held that because the Treaty imposed a positive duty to act in good faith, fairly, reasonably and honourably, a reasonable Treaty partner would not have considered Ngai Tahu interests as a mere matter of procedure. The statutory incorporation of these Treaty principles into the conservation legislation also entitled Ngai Tahu to a reasonable degree of preference.

62. If a statutory provision expresses the principles of the Treaty of Waitangi as a restraint on the decision-maker’s authority, the decision itself, not just the process, is reviewable. This places the obligation on the decision-makers to ensure they have acted reasonably and in good faith, consulted adequately, and the decision does not diminish the Crown’s obligation to protect Māori interests. (This is often interpreted as not acting to make the prospect of redress of Treaty grievances less likely.)

63. A number of other statutes provide that the decision-maker must “have regard to” or “take into account” Treaty principles, which makes the Treaty a mandatory relevant consideration in decisions taken under that Act. In such cases, although decision-makers must give weight to the principles, they do not have to act consistently with them if other factors predominate.

64. This may require consultation with Māori and/or consideration of the relevant report of the Waitangi Tribunal to ensure that the decision-maker is informed of Māori interests.

In *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129, the Government was required to await the outcome of a Waitangi Tribunal report on radio-frequencies before selling the frequencies, even though there was no legislative requirement to do so, but it did not have to accept the Tribunal’s recommendations.

65. Consultation with relevant iwi or Māori interest groups may be required if there is a legitimate expectation that they be consulted before a change is implemented that affects their interests. This expectation will exist when the decision-maker has indicated that it intends to consult with Māori before it makes decisions affecting their interests.

66. When there is no reference to the principles of the Treaty of Waitangi in the Act, there may be no legal necessity to consider them. The Treaty of Waitangi can be relevant, however, if it establishes one of the previously mentioned grounds of judicial review. This occurs when a legal obligation to consider the Treaty exists because of the context in which the decision is made. The context of a decision is both its factual background and the relevant provisions in other Acts.

Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179, was an appeal from a Family Court decision rather than judicial review, though raising similar issues. The Treaty was held to be relevant to an adoption decision, as although the Adoption Act makes no reference to the Treaty, the familial relations of Māori were a taonga which must be considered. In the end, however, the paramount consideration was the welfare of the child.

67. A decision that is totally inconsistent with the principles of the Treaty of Waitangi may be reviewable on the grounds that no reasonable Minister having regard to the relevant considerations would have reached that decision. The outcome as well as the process can be reviewed. The applicant must first establish the importance of the Treaty to the particular decision.

68. In carrying out its obligations to protect taonga, the Crown does not have to go beyond taking reasonable action in the circumstances. If, however, the court is satisfied that the policy is unreasonable, it can intervene in how the Crown chooses to fulfil its obligations under the Treaty of Waitangi.

In *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, (the Broadcasting Assets case), the Privy Council held that, while the Government was entitled as a matter of policy to transfer its television assets to a state enterprise, a court could examine whether its commitments to Māori (in this case to establish Māori television) were met.

69. The principles of the Treaty of Waitangi have been the subject of considerable discussion, but have been expressed (for example by the Court of Appeal in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641) as encompassing:

- 69.1 the Crown and Māori must act reasonably and in good faith towards each other;
- 69.2 the Crown has a duty to make informed decisions, which may require consultation with Māori. Consultation does not require negotiation, nor is it open-ended. Consultation is required to ensure that the decision made is informed;
- 69.3 the Crown has an obligation to protect Māori interests, which prevents the Crown from acting to unreasonably compromise the resolution of grievances that have arisen under the Treaty;
- 69.4 however, the Crown is sovereign and Parliament has the freedom to make laws for all New Zealanders.

INTERNATIONAL OBLIGATIONS

70. International obligations may be implied as mandatory relevant considerations that the decision-maker should take into account, or give rise to a presumption that, where possible, legislation will be interpreted consistently with relevant international obligations. The two approaches are illustrated below.

Tavita v Minister of Immigration [1994] 2 NZLR 257, where the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child were held to be matters that the Minister of Immigration should take into account in determining the removal order of an overstayer who was the father of a New Zealand citizen.

New Zealand Airline Pilots' Association v Attorney General [1997] 3 NZLR 269, where the Court of Appeal held that although New Zealand was a party to the Chicago Convention on Civil Aviation, the whole of the Convention did not form part of New Zealand law. Although legislation should be read, where possible, as being consistent with New Zealand's international obligations, this presumption will depend on the actual text of the international instrument and the relevant statute.

71. Weight must therefore be given to the international obligations but they are not necessarily the paramount consideration in making the decision, and other domestic considerations may also be taken into account.

For instance, if a person subject to a removal order has dependent children, the interests of the children are a weighty but not decisive factor see *Puli'uwea v Removal Review Authority* (1996) 14 FRNZ 67 and *Qiu v Removal Review Authority* [2002] NZAR 430.

72. Treaties may be incorporated into domestic law to differing degrees, depending on whether they have simply been signed, but not ratified and, if ratified, whether a statute specifically incorporates aspects of the treaty as New Zealand law, or simply requires that decision-makers have regard to the treaty or specific parts of it. The Ministry of Foreign Affairs and Trade holds information by which agencies can identify all treaties that have been incorporated into New Zealand law.

In *Attorney-General v Refugee Council* [2003] 2 NZLR 577, the Court of Appeal considered the status of the Refugee Convention under the Immigration Act 1987. Whereas s 129D required determinations of refugee status to be made "in a manner consistent with New Zealand's obligations under the Refugee Convention", s 129X(2) merely provided that in the exercise of other powers affecting refugee claimants, immigration officers must "have regard to" the Refugee Convention. Only the former provision had the direct force of law, while the latter was a mandatory relevant consideration.

73. The rulings of various international tribunals, such as the United Nations Human Rights Committee, may also be a relevant consideration for New Zealand courts, but are not binding.

In *Wellington District Legal Services Committee v Tangiora* [2000] 1 NZLR 17, a claim was lodged with the United Nations Human Rights Committee claiming that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 violated rights under the International Covenant on Civil and Political Rights. The applicant claimed legal aid under the Legal Services Act 1991. The Privy Council held the Human Rights Committee was not an administrative tribunal or judicial authority for the purposes of the Legal Services Act because it was not part of the law of New Zealand.

NEW ZEALAND BILL OF RIGHTS ACT 1990 (NZBORA)

74. The NZBORA is part of the general law of New Zealand and inconsistency with its provisions may therefore be a ground for judicial review or may found a separate action. Unlike most other grounds of review, review of a decision for breach of NZBORA often requires review of the merits of the decision, not merely of the process undergone to reach that decision. A successful review may also involve an award of compensation.

75. Three requirements must be met before a decision can be held inconsistent with NZBORA:

- 75.1 the decision infringes a right affirmed in NZBORA;
- 75.2 the infringement is not a reasonable or justified limitation upon that right;
- 75.3 the authorising Act does not explicitly or implicitly authorise the infringement.

76. The NZBORA applies to acts done by the legislative, executive, or judicial branches of Government and acts done by any person or body in performing a public function. NZBORA is not entrenched in New Zealand law and ordinary Acts of Parliament can override the rights contained in it (s 4 NZBORA). This means NZBORA cannot invalidate either an Act or the legal exercise of a power conferred under an Act.

In *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9, the Court of Appeal indicated that it has a power to find that an Act of Parliament places an unjustified limit on the rights and freedoms guaranteed by the Bill of Rights. While of no immediate legal effect, the Court held such findings would be of value to Parliament in reviewing the legislation and possibly the United Nations Human Rights Committee if the matter was taken there.

77. The courts may however find that regulations and other subsidiary legislation are *ultra vires* if they are inconsistent with NZBORA, even if the empowering legislation under which they were made is NZBORA consistent.

In *Drew v Attorney-General* [2002] 1 NZLR 58, prison regulations limiting the right to legal representation were found to be *ultra vires* the Penal Institutions Act 1954 as they were contrary to NZBORA, when the empowering section was to be given a meaning consistent with NZBORA. Accordingly, the regulations were not protected by s 4 of NZBORA.

78. Where decision-making under an Act of Parliament involves an exercise of discretion, it must be consistent with the NZBORA unless the Act explicitly or implicitly allows the Bill of Rights to be infringed (s 6). The broader the discretion, the more likely it is that NZBORA principles can have an impact. The NZBORA is therefore less likely to impact on the law in areas that are already governed by a detailed statutory code.

In *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570, the Film and Literature Board of Review classified a video as objectionable because it encouraged discrimination against homosexuals. On appeal, the High Court held that the sexual orientation was included in the matters coming under the jurisdiction of the censoring authorities because it was a ground of discrimination specified in the Human Rights Act 1993 and could therefore be applied relying on the Bill of Rights Act. The Court of Appeal disagreed and said that there is a distinction between censorship legislation and anti-discrimination legislation. Both have their own purpose and subject matter.

79. The rights and freedoms protected are contained in Part II of NZBORA. The courts give these a broad interpretation. The rights that will most frequently be invoked as a ground for review include:

- 79.1 the right not to be deprived of life (s 8);
- 79.2 freedom of thought, conscience and religion (s 13);
- 79.3 freedom of expression (s 14);
- 79.4 manifestation of religion and belief (s 15);
- 79.5 freedom of peaceful assembly (s 16);
- 79.6 freedom of association (s 17);
- 79.7 freedom of movement (s 18);
- 79.8 freedom from discrimination, on the grounds set out in the Human Rights Act 1993 (s 19);
- 79.9 the right for a person belonging to a minority to enjoy the culture, to profess and practice the religion, or to use the language of that minority (s 20);
- 79.10 the right to be secure against unreasonable search and seizure (s 21);
- 79.11 the right not to be arbitrarily arrested or detained (s 22);
- 79.12 the right to the observance of the principles of natural justice by any tribunal or other public authority (s 27).

80. Even if a decision infringes a right or freedom, it will not be inconsistent with NZBORA if it is reasonable in a free and democratic society and prescribed by law (s 5 NZBORA).

81. A decision will be “prescribed by law” if the decision-maker’s power to make decisions is conferred by an Act or the common law. This requirement is easily satisfied in most circumstances; it may also be implied.

82. There are no general rules on what is reasonable or justified. This depends on the circumstances in which the decision is made, including economic, administrative and social implications. But the following factors may be considered in determining whether a decision is reasonable in the circumstances:

- 82.1 the importance of the purpose of the decision;
- 82.2 whether the decision is rationally connected to the purpose;
- 82.3 whether the decision impairs the right affected no more than is necessary to achieve the purpose;
- 82.4 whether the decision has a disproportionately severe effect on the person whose right is infringed.

Decisions were held to have infringed freedoms or rights in the following cases:

Newspapers Publishers Association of New Zealand (Inc) v Family Court [1999] 2 NZLR 344. The parents of a child suffering from cancer hid him so he received alternative rather than hospital treatment. A Family Court order suppressing publication of any information identifying the persons involved, and prohibiting the taking of photographs, videos etc, was found to be inconsistent with freedom of expression. While the welfare of the child is fundamental, the breadth of the order went beyond what the child's welfare required and unreasonably interfered with free expression.

Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218. The RHA restricted the purchase of primary health services to doctors holding New Zealand undergraduate qualifications. As this constituted indirect discrimination it therefore breached s 19 of the Bill of Rights Act and ss 22(1)(a) and (b) of the Human Rights Act.

Wilson v New Zealand Customs Service (1999) 5 HRNZ 134. Customs seized cars imported from Japan that breached the Customs and Excise Act 1996 as a result of wrong valuations. The plaintiff applied to the Minister to waive forfeiture and supplied evidence to show that she was an innocent third party. Customs did not reconsider, regarding her purchase as tainted since she was the daughter of the sole director of the motor company. The Court held that while the initial seizure was not unreasonable, the continued detention was unreasonable under s 21 of the New Zealand Bill of Rights Act. It awarded compensation for the loss of the use of the vehicle from the time when Customs should have reconsidered.

Decisions which did not infringe freedoms or rights include:

Lal v Residence Appeal Authority (1999) 5 HRNZ 11. Trade certificates in tailoring not being available in the applicant's home country, Fiji, the Immigration Service declined to classify the applicant as a tailor. As the requirement for a trade certificate was not directed at Fijians or any other ethnic group, the Court held that there was no discrimination on the grounds of national or social origin under s 19 of the Bill of Rights Act or ss 21(1)(g) and 65 of the Human Rights Act 1993.

In *Mendelssohn v Attorney-General* [1999] 2 NZLR 268. A Centrepoint Community member issued proceedings against the Attorney-General for failure to protect the Centrepoint religion. The Court held that the right to freedom of religion did not impose a positive duty on the State, and the State had only not to interfere unreasonably with individuals' right to religious freedom.

Moonen v Film and Literature Board of Review [2002] 2 NZLR 754. The Board of Review, established under the Films, Videos and Publications Classification Act 1993, classified a book as objectionable on the grounds that it contained photographs that would tend to promote exploitation of children or young persons. Because the Act did not define "children" and "young persons", the appellant alleged that the Board had failed to correctly apply the provisions of the New Zealand Bill of Rights Act relating to freedom of thought, conscience and religion. The Court of Appeal held, however, that the failure of the Act to define "children" and "young persons" was deliberate and did not lead to any incompatibility with Bill of Rights standards. The question was not the precise age of the subjects in the photographs, but what effect the photographs would have on children and young persons and society's attitude to them. The Court held that the Board had properly assessed this question.

Federated Farmers of New Zealand Inc v New Zealand Post Ltd [1992] 3 NZBORR 339. It was noted that while the increase in rural delivery postal charges infringed the right to freedom of expression contained in s 14 of the Bill of Rights, the infringement was a reasonable limitation on the right.

Television NZ Ltd v Attorney-General (17/09/04, CA 169/04). TVNZ requested under the Penal Institutions Regulations 2000 to interview Mr Zaoui, who was detained in prison pending a decision on a security risk certificate. The request was refused on the basis that the interview would undermine the certificate decision-making process. The Court of Appeal held that to be an inadequate basis for limiting Mr Zaoui's right to freedom of expression (s 14 NZBORA). The Court ordered the request be reconsidered in accordance with the judgment.

83. Even if a decision contravenes the NZBORA and it is an unreasonable and unjustified infringement, it is not a breach of NZBORA if an Act authorises it, either expressly or by implication, since s 4 NZBORA then applies.

Quilter v Attorney General [1998] 1 NZLR 523. An applicant sought review of the Births, Deaths and Marriages Registrar's decision to refuse to marry same sex couples, on the grounds that this constituted discrimination and therefore contravened s 19 of the Bill of Rights Act. The Court held that it was not possible to interpret the Marriage Act 1955 to include same sex marriages or that, if this was discrimination, it was expressly sanctioned by the Marriage Act 1955.

REMEDIES

84. A breach of NZBORA rights may result in an award of compensation. This is different from judicial review cases, where generally the decision in question is simply quashed or the matter reheard according to law.

85. The courts have held that the NZBORA implies that effective remedies should be available for its breach. Typically, the courts award damages and assess those by taking into account the circumstances of each case. In some cases, the court may be able to quantify objectively an actual loss. In others, it will assess general damages. It will not necessarily award damages for every breach, particularly if the breach caused no loss or would have made no difference to the outcome.

Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667. The Police received information that a man was selling cannabis but the search warrant was for the wrong house. On entry they were told by the occupant that they had entered the wrong house, but continued to search, finding nothing incriminating. The homeowner issued proceedings, alleging a breach of the NZBORA. The Court held that the Act implied that effective remedies should be available for breaching it and that, in that case, damages were the only appropriate remedy.

86. For this reason, a NZBORA claim is often linked in with a judicial review claim – for instance where a breach of natural justice is alleged, both judicial review and a breach of s 27 NZBORA may be claimed. Whether a breach of s 27 NZBORA allows monetary compensation to be awarded in respect of administrative decisions is still to be decided by the Courts. The Crown’s position is that administrative law remedies are sufficient to compensate for any s 27 NZBORA breach.

Binstead v Northern Region Domestic Violence Approval Panel [2002] NZFLR 832. Mr Binstead’s application for renewal of approval for his stopping domestic violence programme was declined. It was accepted the decision to decline was made in breach of natural justice, in breach of s 27 NZBORA. As a result of the decision Mr Binstead suffered financial loss and he claimed damages for breach of s 22, relying on *Baigent’s case*. The Court held the major vindication of Mr Binstead’s s 27 right was the consent order that a breach had occurred, the interim reinstatement of approval, ability to earn and the reconsideration order. However, the Court also held that some part of the claimed loss of income may be claimable for a brief period.

HUMAN RIGHTS ACT

87. A related avenue for those wishing to challenge the validity of some Government decisions is a claim under the Human Rights Act 1993. Claims are taken to the Human Rights Commission, and if a mediated resolution is not possible then may proceed to the Human Rights Review Tribunal.

88. The Tribunal has a variety of remedies available to it, including a declaration that a breach has been committed, orders restraining further breaches and damages.

89. The Human Rights Act was amended in 2001 to allow members of the public to challenge any Government action, including legislation, on the grounds that it is discriminatory in that it is inconsistent with s 19 NZBORA.

THE PROCESS AND OUTCOME OF JUDICIAL REVIEW

INTERIM ORDERS

90. Applicants for judicial review will often seek interim orders declaring that no action be taken until the review is complete. In extreme circumstances, such orders may be sought *ex parte* (without notice to the defendant), although the court will usually require that the defendant be notified.

91. Interim orders can be a powerful weapon for those who wish to maintain the status quo and can sometimes have significant financial or other consequences. Interim orders will often affect the final outcome, or even make a substantive hearing redundant. Tax assessments, pharmaceuticals, and fisheries management are common areas where delay can create a significant financial advantage to the applicant in review proceedings. Interim orders can also delay the implementation of Government policies for considerable periods.

92. As there is a significantly lower onus of proof on an applicant for interim orders, Government will sometimes undertake not to implement a decision pending an urgent substantive hearing instead of having an interim hearing. Cases that do proceed to an interim hearing will often require considerable preparation to ensure the court is adequately informed before a decision is made.

RELIEF

93. Judicial review is a discretionary remedy, which means that even if a plaintiff establishes that there has been a breach of an administrative law right, the court can decline relief if it decides it is in the overall public interest to do so. This might occur where a plaintiff has unreasonably delayed bringing action; or has acted wrongly, where the right affected is minimal; or where the rights of others will be unduly affected if relief is granted. However, mere administrative inconvenience on the part of the Government will rarely be a reason for declining relief.

In *Turner and Others v Allison and Others* [1971] NZLR 833, relief was refused because of the conduct of the first respondents in remaining inactive for a long period (almost a year).

94. If the court finds there has been a breach of an administrative law duty and exercises its discretion to grant relief, it may:

- 94.1 make declarations about the way a decision was made/action was taken (eg declare that certain things that ought to have been done were not done, or that some matter taken into account by the decision-maker was not relevant);
- 94.2 set aside the decision as unlawful;
- 94.3 direct the person who made the decision or took the action to reconsider the matter, and may give directions on how this should be done;
- 94.4 whether or not relief is granted, it may also make an order for costs in favour of the successful party.

PROCESS

95. The court will find out whether or not the decision has been made lawfully by examining the documents and evidence of relevant decision-makers as well as interpreting the relevant statutes and case law. The first steps in preparing the evidence for a judicial review hearing are usually discovery of documents, followed by an exchange of affidavit evidence by both sides. (Although discovery is not available as of right in judicial review, usually the Crown will agree to it. In many cases, the applicant will in any event have obtained some or all of the relevant documents by way of Official Information Act requests.)

DISCOVERY

96. Discovery involves providing a list of all relevant documents to the other side, the opportunity to inspect those documents, and providing copies of any documents requested. This obligation is in addition to, and separate from, any obligations to disclose that information under the Official Information Act 1982 and often involves slightly different tests for disclosure. It is therefore important not to assume that because something is not available under the Official Information Act, it does not need to be discovered.

97. Everything that is relevant must be made available to the applicant and the court, unless it can be withheld because it is privileged (such as legal opinions and advice obtained once litigation is underway or contemplated). Very rarely a document may also be withheld if it is subject to public interest immunity, usually where it involves very sensitive security material.

98. Officials should therefore work on the assumption that whatever they write may be closely examined by judges and lawyers to see whether the decision was properly made. This may include emails and informal comments on papers, including drafts. It is therefore very important to avoid comments that can be used later and prove embarrassing in court.

99. Discovery will involve the relevant officials providing all potentially relevant documents held in their offices and other departments as well as those of their Ministers, to their lawyers. This may include:

- 99.1 memoranda between officials and ministers or advisers and decision-makers;
- 99.2 Cabinet papers and minutes;
- 99.3 board meeting papers and minutes;
- 99.4 diary notes;
- 99.5 file notes and emails;
- 99.6 correspondence;
- 99.7 any other written evidence.

100. Where there is any doubt as to whether a document is relevant or privileged, it must be fully discussed with the lawyers. The responsible official will then be required to swear an “affidavit of documents” listing the discovered documents (both privileged and not privileged) and stating that all relevant documents have been discovered.

AFFIDAVITS

101. Evidence is generally given by affidavit in judicial review proceedings. Typically, the affidavit(s) for the Crown will outline the steps taken and reasons for a decision and will usually include an affidavit from the actual decision-maker (except in the case of a judicial officer, where the judgment speaks for itself and a judge will not usually give direct evidence).

102. Cross-examination is not permitted as of right in judicial review proceedings. Occasionally the judge may give leave to hear oral evidence where there is a material conflict of evidence and cross-examination is necessary to resolve the issues, but there is a convention that courts will not order Ministers or judicial officers to give evidence arising from their roles as decision-makers.

Goodman Fielder Ltd v Commerce Commission [1987] 2 NZLR 10, *Butcher v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 and *Roussel Uclaf Australia v Pharmac* [1987] 2 NZLR 10, discuss the rule against cross-examination and the role of Ministers and expert tribunals giving evidence.

GETTING THE PROCESS RIGHT

103. The best way to try to prevent judicial review proceedings being brought or being successful is to ensure proper processes are adopted throughout. Where in doubt as to the correct process, it is important to seek legal advice before a decision is made, as this should save a great deal of expense, time and potential embarrassment to the Government in the long run.

CONSULTATION

104. One way to reduce the possibility that a decision will be the subject of a successful judicial review is to consult those who may be affected. As indicated earlier, the appropriateness and extent of consultation will depend on the facts of each case. In general, give early notice of the proposed decision, and provide reasonable information including the reasons, factors to be considered, and the material relied upon. Often consultation occurs before any tentative conclusion is reached, but consultation may also be held on proposed action. Before making a decision, give adversely affected persons a fair opportunity to comment, as well as proper consideration to those representations.

105. If the decision-maker intends taking a different course from one recommended, adversely affected parties may need to be consulted and given another opportunity to comment. The decision-maker may also make a decision for reasons other than those on which the recommendations are based. In that case also, it is prudent to explain the approach to the decision to those affected.

106. The courts do recognise that public consultation can attract submissions from interest groups and that the “silent majority” may not participate, either because of indifference or because of satisfaction with the status quo. The mode and extent of consultation will therefore vary. In some cases, it may be confined to an opportunity to make written submissions; in others, more proactive meetings, advertising and other methods may be necessary. In all cases, the decision-maker is required to keep an open mind but need not yield to the sheer weight of numbers.

PREPARING THE RECOMMENDATIONS

107. Although traditionally there is no general principle of law that reasons should be given for decisions, reasons are increasingly required by statute and the courts have indicated that in some circumstances (eg where an unexplained decision might result in injustice or prejudice to a party), failure to give reasons might be regarded as a breach of the duty to act fairly. Also, courts may be more likely to accept an explanation for a decision that is reflected in contemporaneous reasons than one that appears much later in response to proceedings.

108. The Official Information Act is also relevant, in that s 23 of the Act gives requestors the right to be supplied with a written statement of the reasons for any decision affecting them. It is imperative that a full statement of reasons can be drawn from the papers.

109. In any event, decision-makers or officials preparing recommendations should carefully formulate the reasons for a recommendation or decision because those reasons will usually be critical to the outcome of any judicial review, particularly if the decision-maker makes a decision for reasons different from those initially put forward.

110. In some circumstances, the courts may infer from the absence of reasons that there were no good reasons for a decision. The Court of Appeal has said that if there is no evidence that a relevant matter was taken into account, the court will draw the inference that it was not.

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111. To avoid such inferences or an application for the court to grant leave for cross-examination, it is vital that the papers reflect all the relevant considerations taken into account and the reasons for the decision. They should also show that the appropriate parties were properly consulted and their representations considered. If the ultimate decision-maker does not accept the recommendation in its entirety or the reasons set out, that divergence and the reasons for it should be briefly recorded, either on the recommendation itself or in a letter of advice to the affected party. Care should be taken to ensure that the decision-maker's reasons are proper, and that affected parties are not prejudiced by the divergence without being given the opportunity to comment first.

112. To ensure the duty to act fairly is complied with, take the following steps wherever possible when identified individual interests are adversely affected:

- 112.1 call for views before making any recommendation, depending on the time-frame and the complexity of the issues under consideration;
- 112.2 call for public input where individual interests are adversely affected but the individuals cannot be identified;
- 112.3 forward a draft of the recommendation or report to adversely affected parties, indicating that this is the proposed course of action/recommendation that will be put to the decision-maker, and invite affected parties to make written submissions within a reasonable period;
- 112.4 consider those submissions. If, as a result of those submissions, you amend the advice/recommendation and someone else is now adversely affected, consider whether they have also been given an appropriate opportunity to respond;

112.5 ensure that you properly summarise the affected parties' positions, and, where appropriate, attach their submissions to the recommendation;

112.6 if the ultimate decision-maker proposes a different course of action from the recommendation, ensure that, before this is irrevocably taken, adversely affected parties are consulted and their representations considered;

112.7 if the above procedure does not seem appropriate, ensure that you take legal advice on the appropriateness of the course you are following;

112.8 ensure that the papers show the reasons for the decision and the fact that the submissions of various affected parties were properly considered.

113. The letter advising a person of the outcome of the decision is the document that may result in a visit to the lawyer. A recipient is likely to feel less aggrieved at an adverse decision if it is clear from the letter that his or her arguments were considered, and reasons for the decision are provided. If the matter is subsequently taken to court, the letter from the decision-maker is the best evidence of the reasons in the decision-maker's mind. It becomes particularly important where departmental recommendations are simply noted "Approved" by the decision-maker.

114. If the decision-maker accepts the recommendation in its entirety, the simple approach may be to send a brief letter attaching the recommendation and stating "I decline your application for the reasons set out in the department's recommendation", providing the recipient has access to that paper. This also avoids the risk of omitting something important in an attempt to summarise the position. If the decision-maker's reasons differ in some respects from the recommendation, the letter might attach the recommendation but explain where those differences lie. The letter should also record that the decision-maker has considered the various submissions, and list them.

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115. The courts have identified a number of purposes in giving a statement of reasons:

- 115.1 they impose a discipline on the decision-maker;
- 115.2 they assure those affected that their evidence and arguments have been assessed according to law;
- 115.3 they help the person affected decide whether or not to appeal or otherwise challenge the decision;
- 115.4 they provide assistance to all involved in any appeal or challenge that might be lodged;
- 115.5 they establish a body of precedent and assure the public that processes are legitimate, open and accessible.

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