PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

FIFTEENTH REPORT

PRESENTED TO THE MINISTER OF JUSTICE
IN JULY 1980

WELLINGTON
NEW ZEALAND

FIFTEENTH REPORT OF THE PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

ANALYSIS

INTRODUCTION

1. This report covers the work of the Committee since the Twelfth Report was presented in September 1978. In that time we have completed reports on the Commissions of Inquiry Act 1908 and Damages in Administrative Law. These reports have been submitted to you. We have also examined a number of Bills containing provisions affecting subjects assigned to the Committee.

CONSTITUTION AND MEMBERSHIP

2. The present membership of the Committee is:

Professor J.F. Northey, Dean of the Faculty of Law at Auckland University, Chairman,

Professor K.J. Keith, Victoria University of Wellington,

Professor D.L. Mathieson, Victoria University of Wellington,

Dr R.G. McElroy C.M.G., Barrister, Auckland,

Mr E.A. Missen O.B.E., of Wellington, formerly Secretary for Justice,

Mr R.G. Montagu, Chief Legal Adviser, Department of Justice,

Mr J.B. Robertson, Barrister and Solicitor, Dunedin,

Judge D.F.G. Sheppard, Auckland,

Mr E.W. Thomas, Barrister, Auckland,

Mr D.A.S. Ward C.M.G., Barrister, Wellington,

Mr W. Dewes, Legal Adviser, Department of Justice was the Committee's Secretary during the period covered by this report.

3. Since our last report one of our members, Mr D.F.G. Sheppard, has been appointed a District Court Judge and will sit on the Planning Tribunal. We record our pleasure in his appointment.

Mr Robertson of Dunedin joined us at our May 1980 meeting.

Dr McElroy's term expires at the end of June 1980. Dr McElroy has been a member of the Committee since its creation in 1966. His wide experience, not only in legal practice but also in local body affairs, including a term as Mayor of Auckland, has been of immense assistance to the Committee. It will be difficult to secure a replacement to fill the gap left by his retirement. The Committee acknowledges its indebtedness to Dr McElroy.

The Committee is conscious that it is under strength and that the usefulness of its work depends upon its membership being maintained, qualitatively and numerically.

ACTION TAKEN ON RECOMMENDATIONS

4. Legislation has been enacted giving effect to the recommendations in our Ninth Report concerning the Milk Act 1967 (No. 30) and appeals under the Noxious Weeds Act 1950 (No. 15). The recommendations made in our Twelfth report, paragraphs 79-80 in respect of the Meat Amendment Act 1976 have been incorporated in the Meat Amendment Act 1978 (1978 No. 109).

RECOMMENDATIONS NOT YET ADOPTED

5. Legislation

(a) Discipline in the Legal Profession (10th Report)

We understand that the recommendations made in this report are being considered in the context of the current review of the Law Practitioners Act.

(b) Standing in Administrative Law (11th Report)

We understand that the amendment to the Judicature Act 1908 recommended in this Report is likely to be introduced when the legislative programme allows.

(c) Revised Code of Civil Procedure : Part VI (12th Report)

Our recommendations, which were also submitted to the Rules Committee when that Committee was involved in the revision of the Code of Civil Procedure, are now being considered by the Committee.

(d) Marine Farming : Licences and Leases (9th Report)

Our recommendations were concerned primarily with the adequacy of procedures before decisions are taken in respect of a licence or a lease for a marine farm. We were also concerned about the absence of rights of appeal from those decisions. We understand that the Ministry of Agriculture and Fisheries favours retention of the status quo and is of the view that the Planning Tribunal is not seen as the appropriate leasing or licensing body. In the Ministry's view such an independent authority would be more costly and might also impede or disrupt the Ministry's integrated programme for the overall planned development and conservation of

marine life. The Ministry does, however, agree that the objection procedures are not entirely adequate; we have been advised that approval in principle has been given to the appointment of a committee to conduct hearings and to report to the controlling authority, before the decision is taken. We intend to offer comments on the draft legislation as to objection procedures and the other matters raised in this paragraph when the opportunity arises.

TRIBUNALS

6. (a) Transport, Air Services and Harbour Ferry Service Licensing (1st-12th Reports).

We have made numerous recommendations supporting the transfer of the jurisdiction of the existing appellate tribunals to the Administrative Division of the High Court. We understand that the Minister of Transport believes that a change in the present system is not warranted; we remain convinced that modification is called for. The issues to be resolved are no different from others already within the jurisdiction of the Administrative Division.

(b) Land Settlement Board (3rd Report)

In our Third Report we recommended:

(i) that appeals from decisions of the Board be taken to the Administrative Division of the High Court;

(ii) that the very wide power of delegation conferred on the Board be curtailed; and

(iii) that parties (or their counsel) should be entitled to appear when a case is stated on a question of law in terms of s.19 of the Land Act 1948.

The Department of Lands and Survey later advised us that the Land Act was being reviewed and invited our suggestions. In response to that invitation we have further recommended:

(i) that the privative provision (s.173 of the Land Act 1948) be repealed (See 6th Report, paragraph 39);

(ii) that the Board be required to give reasons for its decisions (See 6th Report, paragraph 36); and

(iii) that the power of the Minister to give directions under s.13(2) of the Act be restricted to broad issues of policy; it is inappropriate for the power to be exercised in relation to an individual case.

We expect that our recommendations will result in amendments being included in the Bill. We shall keep these matters under review.

(c) Motor Spirits Licensing (2nd Report)

In our Second Report we recommended:

(i) that members of the licensing authority be appointed for a fixed minimum term rather than holding office at pleasure;

(ii) that the jurisdiction of the Motor Spirits Licensing Appeal Authority be transferred to the Administrative Division;

(iii) that any further appeal should be restricted to a question of law;

(iv) that the appellate authority should have the power to secure the assistance of counsel if it appears that only one side of the case will be presented;

(v) that the effect of the decision appealed from be suspended until determination of any appeal therefrom; and

(vi) that the appellate authority should be given the power to refer the whole or part of any decision for reconsideration by the licensing authority.

We understand from a letter that the Department of Trade and Industry supports our recommendations; we expect the amending legislation to be introduced as soon as opportunity is presented.

(d) Education Tribunals (7th Report)

We have made further recommendations to the Minister on the Education Amendment No. 2 Bill introduced in late 1979 to give effect in part to the Marshall Report on the registration of teachers. Those recommendations concern the power of the Minister to replace educational authorities and the registration and disciplining of teachers. The recommendations are still under consideration by a Select Committee.

(e) Rating Act 1967 : Rate Postponement (7th Report)

We recommended that there be a right of appeal from the decisions of local authorities in respect of eligibility of properties for postponement of rates. The difficulties which can arise are

illustrated by Johnston and Others v. Manukau City Council [1978] 1 NZLR 68 (C.A.). The Department of Internal Affairs has undertaken to consider our recommendation when amendment of the rates postponement procedures is proposed.

(f) Egg Marketing (Production Entitlement) Regulations (12th Report)

Because of the substantial sums involved and the issues involved being no different from those now within the jurisdiction of the Administrative Division, we have recommended the abolition of the present system of appeals to an "appeal arbitrator", a hybrid type of authority, and that instead appeals be taken to the Administrative Division of the High Court.

We understand, however, that the Ministry of Agriculture endorses the Egg Marketing Authority's belief that the existing provisions and procedures should be maintained on the grounds that:

(i) the appeals mostly involve questions of fact such as personal hardship;

(ii) the relaxed semi-formal atmosphere and inexpensive procedure is preferred to the High Court;

(iii) the present method of disposing of appeals is the most appropriate and best suited for poultry farmers and preferred by the poultry industry.

We are not convinced that those reasons are sufficient to exempt this area from the jurisdiction of the Administrative Division. The general question of the effectiveness of the Division is discussed below.

(g) Town and Country Planning Act 1977 s.166 (12th Report)

The Ministry of Works and Development has undertaken to examine the amendment to s.166 recommended by us when the next review of the provisions of the Act is undertaken. We shall keep this matter under review. We note that the new provision was interpreted by Barker J. in Ireland v. Auckland City Council (judgment, 18 December 1979) where he described s.166 as "an unexpected provision in the present climate of Administrative Law in this country"; see [1980] N.Z. Recent Law 109, 110.

APPLICATIONS FOR REVIEW

7. The following decisions given in relation to applications for review made under the Judicature Amendment Act 1972 have come to our notice since publication of our Twelfth Report. The list is not exhaustive. For convenience the cases are divided into five categories:

(a) Decisions taken by Ministers

(b) Decisions taken by Government Officers

(c) Decisions taken by local authorities

(d) Decisions taken by statutory tribunals

(e) Decisions taken by Courts.

An index to these decisions appears in Appendix I.

(a) Decisions taken by Ministers

8. There have been 9 applications in respect of a decision taken by a Minister.

Akauola, Lilo and Hikila v. Minister of Immigration (Judgment 9 April 1979 A.378/79, A.368/79, A.357/79; Barker J.)

The applicants sought to delay their pending deportation. The Court held on the basis of Movick v. Attorney-General 1978] 2 NZLR 545 that an application by a person with no status to remain in New Zealand for interim relief under s.8 of the Judicature Amendment Act 1972 must be declined. The Court also found no evidence that the Minister's decision not to interfere with the deportation orders was capricious, based on irrelevant grounds or otherwise unlawful.

Chandra v. Attorney-General

[1978] 2 NZLR 559

The applicant, a Fijian citizen who had applied for permanent residence in New Zealand, sought review of the decision of the Minister of Immigration. The proceedings were seen as a test case and for that reason the merits of the application were not examined. After a review of the recent cases on natural justice and fairness, Barker J. held:

(i) that the Minister's power to grant permanent residence was a "statutory power of decision", as defined under the Judicature Amendment Act 1972, s.3;

(ii) that in exercising that power the Minister was under a duty to act fairly, a duty different from a duty to act in accordance with the principles of natural justice.

The three factors identified in Durayappah v. Fernando [1967] 2 AC 337, 339 were considered in deciding the nature of the duty.

In particular, the applicant was seen as having a "legitimate expectation" of remaining in New Zealand until his application for permanent residence was determined. Furthermore, the sanctions following the decision were liability to deportation and separation from his wife.

The application to strike out the motion for review was accordingly dismissed.

Dwen v. Young and Waikato Valley Authority
(Judgment 15 December 1978 A.801/77 Auckland; Barker J.)

The applicant sought to review a decision of the Minister of Works and Development to delete from a schedule of work to be done, the building of a stop bank on the applicant's property. Barker J. held that the function of the Minister did not fall within the definition of "statutory power of decision" contained in s.3 Judicature Amendment Act 1972. The Minister had not exercised a power or right conferred by legislation in making that decision.

Moreover, if the decision did fall within the definition, it was a "policy" decision which was unreviewable by the Courts.

The application to strike out the motion for review succeeded.

Faleafa v. Minister of Immigration
(Judgment 18 September 1979 A.293/79 Auckland; Barker J.)

The Minister refused to consider an application under s.20A Immigration Act 1964 on the ground that it had not arrived within the period allowed in the statute. The application had been received in time at the department's Auckland office. Barker J. held that this was sufficient compliance as the function of receiving applications could be delegated

to administrative officers. To operate otherwise would give those living in Wellington an unfair advantage. The application for review was granted and the Minister was ordered to consider the application.

Fiordland Venison Ltd v. Minister of Agriculture and Fisheries [1978] 2 NZLR 341

The appellants appealed against Davison C.J.'s refusal to review the decision of the Minister of Agriculture and Fisheries not to grant the applicant a game packing house licence.

Regulation 10 of the Game Regulations 1975 (S.R. 1975/174) provides that the Minister "shall grant and issue a licence ... if ... after having regard to the local authority recommendations (if any) and ... after making such enquiries and investigations as he thinks necessary he is satisfied that ... (then follow five requirements)". This provision was seen as excluding any discretion and as placing a duty on the Minister to grant a licence if he was satisfied as those five matters.

Only the fifth matter was in dispute:

> (v) The issue of a licence would not have a significant detrimental effect on the economic operation of any game establishment ... or the stability of the game industry as a whole.

The Minister's decision was attacked on the ground that he took into account irrelevant matters, namely "the economic need and justification for the continuance of Te Anau as a game packing house and the availability of inspection staff"; the he miscounstrued (v); that he did not have any or due regard to (ii); and that overall he approached and dealt with the matter on the basis of reduction and reallocation of existing licences in the industry instead of the requirements for a licence on the particular application (spoken of as "rationalisation"). The Court of Appeal considered that the regulations did not require a "policy" decision by the Minister. His function was seen as analagous to a judicial decision where reasons should be given. The Court was satisfied that the Minister had misdirected himself and was influenced by "rationalisation". The Minister's decision was held to be invalid.

The Court rejected relief by way of mandamus directing consideration according to law because of the three year delay that had occurred and the further delay that might occur. Because there was no evidence on which the Minister could reasonably or properly determine that he was not satisfied as to the matter prescribed in regulation 10 and because as a reasonable Minister applying the right tests he could not have found that he was not satisfied as to head (v), a declaration was made, subject to the upgrading of the Te Anau premises, that the appellant was entitled to a game packing house licence.

Manhaas v. Attorney-General

(Judgment 17 August 1979 A.219/79 Wellington; Jeffries J.)

Jeffries J. following the decision in Movick v. Attorney-General [1978] 2 NZLR 345 dismissed an application to review a decision of the Minister of Immigration because the applicant had not shown that the Minister had failed to observe the principles of natural justice or had acted unfairly. It was not a function of the Court to review the immigration policy administered by the Minister.

Mohammed v. Minister of Immigration
[1979] 2 NZLR 321

The applicant sought discovery against the Crown at a conference held under s.10 of the Judicature Amendment Act 1972 (as amended in 1977). Barker J. ruled that the savings provision in s.14 preserved the earlier position of the Crown of discovery only in "civil proceedings", which does not include proceedings by way of application for review.

The Judge indicated, however, that only if public policy required non-disclosure should the Crown insist on preserving secrecy.

Slipper Island Resort Ltd v. Minister of Works and Thames County Council
(Judgment 31 July 1978 A.178/77 Wellington; Speight J.)

The applicant sought review of the decision of the Minister of Works declining to intervene between the applicant and the second defendant to secure the revocation of a portion of a proclamation taking land.

It was held that first, the power to revoke was vested in the Governor-General not the Minister. Hence, there had been no refusal by the Minister to exercise a statutory power as defined. Secondly, revocation of a proclamation is initiated by the local body, not the Minister; again the Minister had no power which could be reviewed.

Tongia v. Bolger

(Judgment 2 July 1979 A.655/79; Auckland; Barker J.)

The Minister may revoke a deportation order under s.20A of the Immigration Act 1964 if "he is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unduly harsh or unjust to deport the offender from New Zealand".

The applicant sought a review of the Minister's decision not to allow a wife and child of a New Zealand citizen to remain in New Zealand. The Minister's decision had been based on the husband's failure to submit a letter of support within the required time. It was submitted that the Minister's decision was valid.

The Minister was under a duty to act fairly but he did not have to make any inquiry, nor give any reasons for his decisions. The onus was on the applicant to establish circumstances in which a decision not to deport could be made.

In view of the subjective nature of the criteria for the Minister's decision the Court held that it could only interfere if the decision was one that no responsible Minister could take, or if the Minister had not considered relevant circumstances, or if he had considered irrelevant factors. The Court found that none of those grounds for intervention had been established.

In addition the application failed in limine as the request to the Minister to exercise his power of decision was made out of time.

(b) Decisions taken by Government officers

9. There were 5 applications in respect of decisions taken by Government Officers.

Elston v. Social Services Commission (No. 3)
[1979] I NZLR 218

A declaration was sought concerning the legality of the suspension of an electricity worker by a Commissioner for refusing to work with gas. (Though the application was for a declaration, it is being treated as if it were an applicaton for review).

The Court held that the Commission had to act independently of the Minister of State Services in this matter and that there was no legal proof that it had not done so. However it held that the suspension was unlawful because:

(a) this was a major policy decision which the Commission could not delegate to individual Commissioners;

(b) there had not been an actual refusal to carry out full duties, merely a meeting declaring that intention;

(c) the duties refused were not in accordance with the terms and conditions normally applying to the performance of the worker's full duties.

Geothermal Energy New Zealand Ltd v. Commissioner of Inland Revenue

[1979] 2 NZLR 324

This application was concerned with when New Zealanders working overseas are regarded as having their home in New Zealand for income tax purposes. The Commissioner had told the company that he thought its employees overseas were liable to pay income tax.

Beattie J. considered that this was not an exercise of a statutory power because the Commissioner was not making a final decision but rather was giving his interpretation of the law on the facts available at that time. Requiring interim PAYE payments was likewise not an exercise of a statutory power but rather was a request to formally comply with the provisions of the Income Tax Act 1976. Even if it was an exercise of a statutory power the Judge considered that the scheme of the Income Tax Act 1976 providing for objections and appeals excluded judicial review. Thus the application was dismissed.

National Union of Railwaymen of New Zealand, Industrial Union of Workers v. Hayward and Attorney-General

(Judgment 2 August 1979 A.279/79 Wellington; Davison C.J.)

Review of a decision of the General Manager of Railways suspending railwaymen from their normal duties was sought. The power of suspension can be exercised if the Minister (or his delegate) is of the opinion that there is "insufficient work". Davison C.J. found that it had not been established that the Minister, or his delegate, had acted without evidence or unreasonably and the application was dismissed.

O'Brien v. Stitfall and O'Flynn

(Judgment 6 November 1978 A.520/78 Wellington; Quilliam J.)

A review of the Island Bay Returning Officer's decision on how the applicant's party designation was to be expressed on the ballot papers was sought.

Quilliam J. dismissed the application stating that a Returning Officer has a discretion allowing him to resolve any potential confusion about party designations on ballot papers. The particular designation the applicant advocated was capable of causing confusion. There was no evidence to suggest that the Returning Officer had exercised his discretion on incorrect principles.

Van Loghem v. Auckland Collector of Customs

Judgment 2 August 1979 A.1134/78 Auckland; Speight J.)

Review of a decision by the Collector of Customs imposing duty and sales tax on a car imported by the applicant was sought. Because the applicant failed by 4 days to show use of the car for at least one year prior to shipment, the application was dismissed.

(c) Decisions taken by local authorities

10. There were 7 applications in respect of decisions taken by local authorities.

Anderton and Others v. Auckland City Council and James Wallace Pty Ltd
[1978] I NZLR 657

The applicants sought review of a decision of the Auckland City Council giving the second respondent planning permission to construct a shopping mall. The principal ground advanced by the applicants related to bias or predetermination on the part of the Council. Mahon J. held that the Council had predetermined the question as they had "... convened this hearing with a closed mind, impervious to whatever evidence the objectors might submit ..." The decision was set aside pursuant to the Judicature Amendment Act 1972, s.4.

Duigan v. Thames Coromandel Distict Council
(Judgment 13 March 1979 H.201/77 Hamilton; Mahon J.)

In 1973 the applicants were assured by the Council that by reason of the bulk and allocation requirements, any building across the road would not obstruct the view from the home they intended to build. In May 1977 construction of a new house began across the road which would obstruct the view.

The Council's action in issuing a permit was held invalid due to its failure to grant a dispensation from its town planning requirements.

It also breached the building law restriction.

Mahon J. revoked the building permit as having been unlawfully issued. The owners were required to apply for a dispensation from the bulk and location requirements.

T. Flexman Ltd v. Franklin County Council and Another
(Judgment 13 February 1979 A.1578/76 Auckland; Barker J.)

The plaintiff sought review of a decision made by the Franklin County Council imposing a levy on the plaintiff and others under the Forest and Rural Fires Act 1955, s.39, after a fire which had spread to their respective properties. The main issue was whether the principles of natural justice or the doctrine of fairness applied and whether they required a hearing and that reasons for an award be given.

Having considered the legislation governing the allocation of financial responsibility for fire fighting in the light of the three factors identified in Durayappah v. Fernando [1967] 2 A.C. 337, 339, Barker J. concluded that the legislature did not intend the fire authority to act judicially; nonetheless, it was under a duty to act fairly. The failure to give a hearing was held not to breach the requirements of fairness. But the failure to give reasons, in the circumstances of this case, amounted to unfairness and the award was quashed.

Lion Breweries v. Mt Roskill Borough Council

(Judgment 18 May 1979 A.1114/78 Auckland; Speight J.)

The applicants sought review of the Council's decision refusing to grant a building permit until a liquor licence was obtained. Under the Sale of Liquor Act 1962 a liquor licence would only be issued when the building was erected. Speight J. decided that the Council could not refuse the permit where the building was authorised by the district scheme, bylaws had been complied with, and there was an intent to obtain a licence in due course.

The application for review was granted and the decision to refuse a permit was quashed.

N.B. Before the Judicature Amendment Act 1972 as amended by s.4(2A) in 1977 it would have been necessary to prove that the function of issuing permits needed to be exercised judicially, an unlikely conclusion.

McKee v. Hawkes Bay Hospital Board

(Judgment 1 December 1978 A.75/78 Napier; Davison C.J.)

The application concerned the power of the Hawkes Bay Hospital Board to transfer a patient from one hospital to another, against the patient's wishes. The applicant sought an order preventing the transfer and compelling the Board to observe its duty under the Hospitals Act 1957 s.4(1)(d). That provides that a Board must accept patients if it has adequate accommodation and the patient is of the class for whom the institution was established.

Davison C.J. upheld the Board's authority to transfer patients so long as it has adequate accommodation and the patient is within the class named in s.4(1)(d).

Meadowvale Stud Farm Ltd v. Stratford County Council

[1979] I NZLR 342

The applicant sought review of a decision of the Council attaching conditions to an offensive trades licence; one of the conditions effectively rendered the licence useless. Five of the Councillors who took part in the decision to impose the condition were shareholders in the dairy company which had opposed the application for a licence.

It was held that the Council was not obliged to act judicially and comply with natural justice, but the Council's obligation to be fair had been breached. The decision was set aside and the matter referred for reconsideration under s.4(5) of the

Judicature Amendment Act 1972 by a meeting of a Council from which all shareholders in the dairy company were to be excluded (except where a quorum was otherwise unattainable).

Rotorua District Council v. Bay of Plenty Catchment Commission and National Water and Soil Conservation Authority
[1979] 2 NZLR 97

This application was removed into the Court of Appeal by consent. The question for determination was whether an administrative rate under the Soil Conservation and Rivers Control Act 1941 should be met from local rates or by central Government.

In the Court's unanimous opinion the rate should be met out of local rates on the principle that local participation carries with it a responsibility for local funding.

(d) Decisions taken by statutory tribunals

11. There were 13 applications in respect of decisions taken by statutory tribunals.

Bevan Smith Ltd and Others v. Boots the Chemists (NZ) Ltd and Another
(Judgment 15 February 1979 A.177/78 Wellington; Beattie J.)

The applicant sought review of a decision of the Pharmacy Authority that it has no jurisdiction to approve the enlarging of the trading area of a pharmacy owned and operated by the first defendant.

The Court ruled that the provisions of the Pharmacy Amendment Act 1954 dealing with the consent of the Pharmacy Authority had no application to the expansion proposed by Boots. Any change could be made by the defendant to its premises provided the business remains a pharmacy at the address already approved. The application was dismissed.

Dunedin City Council v. New Zealand Historic Places Trust
(Judgment 14 May 1979 A.70/78 Dunedin; Somers J.)

This case concerned the validity of a covenant entered into by the New Zealand Historic Places Trust and a decision made by it under the covenant. The incidental question arose of whether the decision of the Trust fell within the definition of "statutory power of decision" contained in s.3 Judicature Amendment Act 1972.

Somers J. held that the Trust's decision did not fall within the definition as the power or obligation arose under contract and not by statute.

Eastern (Auckland) Rugby Football Club (Inc.) and Others v. Licensing Control Commission
[1979] I NZLR 367

The applicants sought review of a decision of the Licensing Control Commission. They also sought a determination ;under s.10(j) of the Judicature Amendment Act 1972 (substituted by s.14 of the Judicature Amendment Act 1977):

> "In the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court, and give such directions as he thinks fit as to its filing".

The Court declined to order that a transcript of the evidence received by the Commission be filed. The principal concern was that if a full transcript became part of the record the proceedings might be converted from a review in the nature of certiorari into an appeal. [Speight J. also considered that the broad interpretations given to jurisdictional error since Anisminic [1969] 2 A.C. 147, particularly by Denning M.R., e.g. in Pearlman v. The Keepers and Governors of Harrow School [1979] 1 All E.R. 365, rendered provisions for appeals by way of case stated otiose].

Gazley v. Wellington District Law Society
(Judgment 16 June 1978 A.48/79 Wellington; Davison C.J.)

The applicant sought review of "a decision" made by the District Law Society interpreting the Domestic Proceedings Act 1968, s.13. The Society had issued a circular dealing with the responsibilities of legal practitioners under s.13.

The Society's contention that it had not exercised a "statutory power of decision" as defined in the Judicature Amendment Act 1972, s.3 (as amended by the Judicature

Amendment Act 1977, s.10) was upheld. The applicant's statement of claim was struck out and the application for review was stayed.

James Aviation Ltd v. Air Services Licensing Appeal Authority [1979] I NZLR 481

The applicants sought review of a decision of the Air Servicew Licensing Appeal Authority. They questioned the jurisdiction of the Appeal Authority to order the Licensing Authority to entertain an application from a trustee for a company to be formed. The Court upheld this argument, and as it was jurisdictional error it was not protected by the privative provision contained in the Air Services Licensing Act 1951, s.38.

Among the other grounds advanced was the breach of natural justice on the part of the Appeal Authority which had not disclosed to the parties a report made by the Ministry of Transport. Vautier J. relied on Denton v. Auckland City Council [1969] NZLR 256 and concluded that the report should be disclosed.

The decision of the Appeal Authority was quashed and a direction made in terms of s.4(5) Judicature Amendment Act 1972 to the present Air Services Licensing Appeal Authorityu that he in turn direct the Licensing Authority to reconsider the application in the light of the judgment of the High Court.

John Bull and Co. (Brooklyn) Ltd. v. Licensing Control Commission and Others

(Judgment 27 February 1979 A.50/79 Wellington; Beattie J.)

The applicant sought an interim injunction prohibiting the second respondent from opening a bottle store pursuant to an approval given by the Licensing Control Commission. Under the Judicature Amendment Act 1972, s.8 (as substituted by the Judicature Amendment Act 1977, s.12) an interim order may be made for any of the enumerated purposes by the Court if it is "necessary" to do so to preserve the position of the applicant.

Beattie J. applied the tests laid down in Laytons Wines Ltd v. Wellington South Licensing Trust [1976] 2 NZLR 760 and Smith and Others v. Inner London Authority [1978] 1 All E.R. 411, 419 and concluded that the damage alleged as likely to be caused to the applicant by the business being commenced pending the hearing of the application for review (for which hearing Beattie J. ordered urgency) did not make it necessary that an interim order be made. It was therefore refused.

Philips and Pike Ltd v. The Commerce Commission and Others
(Judgment 14 December 1979 A.444/79 Wellington; Davison C.J.)

The applicant sought a review of a decision of the Commerce Commission refusing to decline its jurisdiction to hear argument about a trade practice alleged to be contrary to the public interest. The applicant had tried to persuade the Commission to decline jurisdiction on the ground that the action complained of was not affected by the sections of the Commerce Act under which the action was brought.

Davison C.J. was of the opinion that in effect the Commission was being asked to decide on legal matters before holding the formal enquiry. This, he felt, was a procedural matter and the Commission was empowered to determine its own procedure as it saw fit. Such a procedural decision was held to fall outside the definition of a statutory power of decision in the Judicature Amendment Act 1972. Applications for review are only available in regard to the exercise of failure to exercise a statutory power. The application was dismissed.

Re an Application by Simonsen
(1979) 2 NZAR 56

The applicant sought review of a decision of the Social Security Appeal Authority on the basis that the requirement of the Social Security Act 1964, s.12P, that the appellant be sent a memorandum of the decision and the reasons therefor had not been discharged.

Although the decision and the reasons were somewhat cryptic, the deficiency was not sufficient to upset the decision; the application was dismissed.

Simpson and Others v. Meat Industry Authority
(Judgment 25 May 1979 A.181/79 Wellington; Davison C.J.)

The application was for a review of the Meat Industry Authority's decision to approve ancillary undertakings along with the Auckland City Council's municipal abbatoir. The Court held that the Board had no authority to make such a decision.

South Canterbury Road Services Ltd v. Education Board of the District of Canterbury
(Judgment 22 February 1977 M.432/78 and A.8/79 Christchurch; Somers J.)

These proceedings demonstrated the expansion of administrative law into an unexpected area - the law of contract. The applicant sought review of a decision of the Board (a decision falling within the definition in the Judicature Amendment Act 1972, s.3) cancelling contracts for the carriage of school children. The essential question was whether the notice of termination of contract satisfied the contractual requiements. It was held that it did and so the application for review was dismissed.

Wilson v. Hughes and the New Zealand Racing Conference
(Judgment 25 July 1978 A.809/77 Auckland; Speight J.)

The application concerned the powers of the Executive Committee of the New Zealand Racing Conference to conduct an inquiry into allegations that the applicant had committed a "corrupt practice" as defined in Rule 328.

The argument that the Executive Committee had no jurisdiction was rejected.

The applicant also argued that the Executive Committee was disqualified by bias. Speight J. distinguished Reid v. Rowley [1977] 2 NZLR 472 on the facts and held that on an application of the "modern test" of "reasonable suspicion" the applicant's case fell short of raising that suspicion.

Wilson v. Hughes and the New Zealand Racing Conference
(Judgment 15 September 1978 A.809/77 Auckland; Casey J.)

The applicant sought an order prohibiting the New Zealand Racing Conference from hearing charges against him until his appeal against the decision of Speight J. (in respect of the powers of the Conference to conduct an inquiry into allegations against the applicant) had been determined.

The Court, having considered the comments of the Court of Appeal in Philip Morris (N.Z.) Ltd v. Ligett and Myers Tobacco Co. (N.Z.) Ltd [1977] 2 NZLR 35, the House of Lords in American Cyanamid Co. v. Ethicon Ltd [1975] A.C. 396 (balance of convenience test) and earlier authorities, decided that it was not a proper case to grant an injunction.

Woods v. Cinematograph Films Licensing Authority and Another [1978] 1 NZLR 851

The applicant sought review under s.4 Judicature Amendment Act 1972 of a decision of the Cinematograph Films Licensing Authority in respect of an exhibitor's licence.

The applicant claimed that when considering "other considerations, ... relevant affecting the public interest" under s.40 Cinematograph Films Act 1961, the authority had taken into account irrelevant matters and failed to take into account relevant matters. The Court accepted that a specialist tribunal is not immune from review for taking account of irrelevant matters, but held that in this case no irrelevant matters had been taken into account. Furthermore, the authority had not failed to take account of relevant matters. The application was dismissed.

(e) Decisions taken by Courts

12. There were 3 applications in respect of decisions taken by a Court.

B. v. R. and M.

(Judgment 6 November 1978 A.915/78 Auckland; Mahon J.)

The applicant sought review of a Magistrate's order made under the Guardianship Act 1968, s.13. He argued unsuccessfully that the decision was a nullity due to a breach of natural justice as the Magistrate failed to give reasons for his decision. It was held that there is no statutory obligation requiring a Magistrate to give reasons for orders made under the Guardianship Act 1968, s.13, nor does the common law require reasons.

Another submission that the refusal of the Magistrate to hear relevant legal argument constituted a breach of natural justice was successful. Natural justice requires that every litigant be entitled to have his case fully presented.

The order of the Magistrate was set aside.

Thompson v. Attorney-General and Bradford

(Judgement 20 June 1979 M.148/79 Christchurch; Somers J.)

This application to review the decision of a Magistrate as a visiting justice was dismissed because of unwarranted delay (22 months) by the applicant in bring proceedings. It was alleged that the Magistrate refused to allow a prison inmate to call evidence of witnesses. Furthermore the Court noted that as the visiting justice had accepted the prisoner's evidence resulting in a lighter penalty the evidence of the additional witnesses whom the prisoner had wished to call would not have been of any benefit to the applicant's case.

Woods v. Attorney-General

(Judgment 23 June 1978 M.168/77 Auckland; Perry J.)

The applicant sought review of a Magistrate's decision not to issue a summons. The applicant had filed an information under the Guardianship Act 1968, s.20, alleging a breach of the Act.

Perry J. adopted the interpretation given to the Summary Proceedings Act 1957, s.19, by McMullin J. in Daemar v. Soper (unreported 1977). He held that there was no basis for interfering with the discretion exercised by the Magistrate and refused the application.

13. Of the 37 cases discussed above 12 were successful and 19 were dismissed. Two cases concerned procedural matters. Four other cases were dismissed because they did not fall within the Judicature Amendment Act 1972 because they did not involve a "statutory power of decision".

THE ADMINISTRATIVE DIVISION OF THE HIGH COURT

14. It is now more than ten years since the Administrative Division was created. Its jurisdiction has been extended from time to time and some 46 statutes (listed in appendix II) provide for appeals to be taken to the Division. In a few cases, as discussed above, our recommendations that the Administrative Division should replace the existing ad hoc appellate authorities have been resisted by the Ministry or Department responsible for the administration of the relevant legislation.

15. As is also indicated in this as in earlier reports, we continue to examine existing and proposed legislation to determine whether, in our view, the Administrative Division should be given appellate jurisdiction in the area of administration concerned.

16. The effect of the Practice Note reported in [1975] 2 NZLR 345 was to have all applications for review under Part I of the Judicature Act 1972 in relation to decisions of tribunals from which there is a right of appeal to the Administrative Division referred to the Division. Henceforth the Division will not only hear any appeals under the 46 statutes mentioned in the appendix, but also applications for review of the decisions of such tribunals.

17. It may be appropriate for us, in the light of this experience, to make some comments about the effectiveness of the Division.

In our first report in which we recommended the setting up of the Division we anticipated the following advantages and features:

(1) A simple and more rational system would replace the "bewildering variety (or lack of them), of types of appellate bodies, of constitutions, procedure and jurisdiction" (para 32 (i)).

(2) In particular the status of the existing appellate authorities was not readily understood; whatever the quality of the decisions, some of those involved thought they had received less than justice (para 32 (ii)). Arrangements for appointments and tenure were not always satisfactory and there were resulting problems of recruitment (para. 32 (iii)). Again those problems would disappear as the Division acquired the relevant jurisdiction.

(3) The judges in the Division would have the status and qualities of judges of the Supreme Court (para. 35). One consequence would be that its decisions on questions of law would be more acceptable than those taken by ad hoc administrative appeal authorities.

(4) The competence of the Division on the questions of fact and merits would be no less than that of the authorities which had been abolished. This expertise would result from the limited number of judges in the Division (para. 33 and 35), from "a degree of specialisation among the judges" (which would also produce consistency of decisions) (para. 36 (vi)), and from the qualifications of those appointed to the Division:

"Persons appointed to the Administrative Division should have a full appreciation of the need to give effect to the economic and social policies the legislation was designed to implement. It is perhaps hardly necessary to add, but to avoid any possible misunderstanding we do so, that they should also possess the other qualities appropriate to Supreme Court judges" (paragraph 36(ii)). Lay members or assessors should also be appointed when desirable (para. 36 (iii)).

(5) The combination of the limited number of judges and of specialisation in hearing administrative appeals would have also the more general advantages of consistency of judicial policy and approach and for the ready acquisition of skill and experience in dealing with the problems of administrative law. It would also make for economy of effort" (para. 33).

(6) "The proceedings should not be more expensive than proceedings before the present administrative tribunals" (para. 36 (iv))." The atmosphere should not be more formal ..." (para. 36 (v)). The Rules governing the Division expressed these objectives in Rule 4: "Construction of Rules - these rules shall be so construed as to secure the just, speedy and inexpensive determination of any proceeding".

> In sum, the overall objectives were to retain the advantages, in terms of expertise, specialisation, informality, cost and expenditure, of the administrative appeal system and to add the advantages which we deemed crucial, namely, "the greater consistency, coherence and authority the Administrative Division would bring" (para. 37). Justiciable issues would be returned to the High Court and that conferral of jurisdiction would inspire greater public confidence, by reason of the higher status of the appellate body (para. 35).

18. We are aware that in recent times there have been criticisms of the Administrative Division. We are concerned whether the purposes for which the Administrative Division was created are being achieved or not. We have begun to gather some information relating to the number and types of case proceeding to the Division, the manner of their disposal, and the time taken to dispose of those cases. Since the Division was created in 1968, it has disposed of some 250 appeals or about 20 each year. About 80% of those appeals have been heard by members of the Division and the remainder by Judges to whom the appeal was assigned by the Chief Justice in terms of the Judicative Act 1908, s.26(3). The small number of appeals handled by each Judge makes it more difficult to secure the advantages already discussed.

DRAFT LEGISLATION

19. Our 12th Report noted that one of our functions is to advise the Minister of Justice on the terms of draft legislation concerning administrative tribunals, their procedures and the rights of appeal and review in respect of their decisions. We carry out that examination by reference to the principles stated in earlier reports (especially the Sixth). We are of course sensitive to the fact that the needs of particular tribunals vary. The same rules cannot apply to all. We have experienced difficulties in discharging our advisory duties because of the relatively short period available for us to make comments on Bills. We have recently arranged to receive copies of the draft legislation as soon as possible after introduction of the Bill. We have frequently found it necessary to prepare our comments for consideration by the Minister in a shorter time than normally elapses between meetings of the Committee. This reduces our effectiveness as a Ministerial adviser. For that and other reasons we welcome the opportunity, such as that provided by the Department of Lands and Survey (paragraph 6(b) above), to comment on legislative options while the legislation is still being drafted. It would also be helpful if we were informed when our recommendations have not been adopted.

Bills considered in the period covered by this report were:

(a) Those portions of the Dietitians Amendment Bill and Electrical Registration Bill affecting the procedures and powers relating to registration and discipline within those occupations;

(b) Those parts of the Pesticides Bill and Toxic Substances Bill conferring wide powers of delegation on the statutory authorities established therein and establishing licensing procedures;

(c) That part of the Reserves Amendment Bill dealing with the procedure by which a change of purpose of a local purpose reserve may be effected by a territorial authority and the need for a hearing and right of appeal in that process;

(d) The provisions of the Maori Affairs Bill relating to the licensing of interpreters.

(e) The provisions of the Education Amendment (No. 2) Bill 1979; see paragraph 6(d) above.

20. Some amendments were made to the Dietitians Amendment and the Reserves Amendment and the Toxic Substances Bill following our recommendations; in the remainder, our recommendations were not adopted. Part of the explanation may lie in the relatively short period available to the Committee for the submission of comments on draft legislation and to those responsible for the legislation to consider the comments.

Dietitians Amendment Bill and Electrical Registration Bill

21. In considering these Bills and in particular the procedures and powers relating to registration and discipline, we were guided by the principles included in our Ninth Report (paragraphs 28-30). The simultaneous introduction of two Bills concerned with similar issues gave us an opportunity to identify and comment on the different provisions in the two Bills. The Dietitians Amendment Bill made adequate provision for lay participation; the Board includes members who are not dietitians. The Electrical Registration Bill made no provision for lay members.

22. We believe that legislation conferring disciplinary powers should separate the functions of investigation and adjudication. If the same individuals are involved both in deciding whether a disciplinary charge should be laid and later in deciding whether it has been established and what, if any, penalty should be imposed, the procedure may be unfair and may be seen to be unfair. There may be a real danger of

prejudgment. Those affected could well see such a danger. Neither Bill provided for the body making the initial decision to investigate and prosecute being separate from the adjudicating body.

23. The procedure leading up to adjudication must be fair. Both the Bills provided that the Boards should act in accordance with "the rules of natural justice". We recommended that the legislation be more specific and suggested that detailed procedural provisions would give better guidance to the Board made up of lay members, who are not lawyers. Moreover, if this is done, the procedure can be adapted to the needs of the particular case.

24. We also recommended that provision be made for a legal assessor to assist the Board, that there be clarification of the requirements as to notice, that the Board be given the power to summon witnesses and to put them on oath, and that it be obliged to give reasons for its decisions. Finally, in respect of appeals, we recommended that there be a single right of appeal from the Board to a Judge of the Administrative Division sitting with assessors.

25. Though the Dietitians Amendment Act 1979 incorporates provisions based on our recommendations, the Electrical Registration Bill was not modified in the respects recommended.

Pesticides Bill and Toxic Substances Bill

26. Again the similarity in subject matter and manner of treatment makes it convenient to consider these Bills together.

The registration Boards set up under each Bill were given a very wide power to delegate, to committees in the case of the Toxic Substances Board, and to "any person" in that of the Pesticides Board, "any of its functions powers and duties". There are no conditions circumscribing the extent to which the powers may be delegated or the use to which they may be put. We recommended that the power to delegate be limited to those functions, powers and duties properly assigned to the advisory committees.

Both of the Bills dealt with the regulation of the distribution, packaging and application of toxic substances. A system of registration and licensing was established.

27. We were concerned that the Board or one of its delegates had been empowered in most cases to refuse to grant or revoke registration without first hearing the applicant. Unlike the Toxic Substances Bill, the Pesticides Bill did provide, where a person was suspended before cancellation, that the licensee be given a hearing after suspension.

28. Though there were some clauses in the Pesticides Bill requiring that reasons for decision be given in most cases this was not required. Unless reasons are given an applicant will face difficulties in establishing grounds for appeal. How can he for instance, establish that a requirement of the Act or regulations has not been complied with or that the Board acted unreasonably in reaching its decision when reasons are not provided? We recommended that reasons be given for all decisions when a right of appeal was provided.

29. None of our recommendations were included in the Pesticides Act. The Toxic Substances Act does now provide for an oral hearing of an application for a licence and provides for a hearing in relation to suspension or cancellation of a licence.

Reserves Amendment Bill

30. We were concerned by those provisions of the Bill under which the purpose of a local purpose reserve could be altered by a territorial authority. The procedure under the principal Act required the decision to be made by the Minister after public notification of the proposed change and hearing, by the territorial authority involved, of the objections of every person claiming to be affected. Thus the initiating local authority was not the final arbiter on objections received and the objections were submitted to and evaluated by the Minister.

31. The Bill conferred on a territorial authority, in whom a local purpose reserve had been vested, the power to change by Gazette notice the purpose for which a local purpose reserve is classified. Public notification was required and objections must be considered; but if the authority rejects them, its decision would be final. In our view a change to the purpose of a reserve is broadly similar in effect to a change in a District Scheme. Furthermore, the purposes for which a local purpose reserve may be classified vary in nature quite significantly and a change of purpose will often have drastic effects on individuals or groups within the local community.

32. We therefore recommended that there should be an express obligation on the territorial authority to grant a hearing and some right in the nature of an appeal against the disallowance of objections. No change was made to the Bill.

APPEALS BY WAY OF CASE STATED

33. The present procedure, when used by administrative tribunals to state a case on a question of law, has been criticised by members of the legal profession. We prepared a short working paper which was circulated to the Judges, including those who are members of the Administrative Division, the New Zealand Law Society and its District Societies, statutory tribunals, and the Municipal and Counties Associations.

34. The working paper included criticisms of the existing procedure and proposed an alternative procedure for determining questions of law. We thank those who commented on the working paper. We expect our report to be issued shortly.

HIGH COURT (ADMINISTRATIVE DIVISION) RULES

35. Our attention was directed to the right of appeal to the Administrative Division conferred by the provisions of the Customs Acts Amendment Act (No. 2) 1976. Under that Act, an appeal to the Division may be taken in respect of decisions made by the Minister of Customs and the Collector of Customs. We believe that the appeal procedure provided for in the High Court (Administrative Division) Rules 1969 is not wholly appropriate as neither the Minister nor the Collector are obliged to maintain a "record" nor does either hear argument and receive evidence on the matter under consideration. The decision maker is probably not a "tribunal" as defined by R.3 and does not appear to be the independent statutory tribunal envisaged by Rules 36 and 37. He is an adversary who may even become a witness against the appellant.

36. We have recommended to the Rules Committee that the rules of the Division be amended. Other appellate provisions with similar features are the Immigration Act 1964, S.22G (as enacted in 1978) and the International Departure Tax Act 1979, s.18.

The Rules Committee is considering the recommendation.

AUSTRALIAN ADMINISTRATIVE REVIEW COUNCIL

37. During the year we had the pleasure of meeting with Mr Justice Brennan, who was at the time President of the Administrative Review Council and of the Administrative Appeals Tribunal and Dr G.D.S. Taylor, Director of Research for the Administrative Review Council. It was agreed that there are considerable advantages in maintaining close co-operation between ourselves and the Council. The value of co-operation and a ready exchange of information have been affirmed by the Minister of Justice and the Attorney-General of Australia.

JUDICATURE AMENDMENT ACT 1972 : INTERIM ORDERS

38. We became aware of a possible defect in the provisions of s.8 of the Judicature Amendment Act 1972 (as substituted by the Amending Act 1977) relating to interim orders obtained on ex parte applications. We were informed of an instance where an order had been obtained under the s.8 procedure without service on the other party.

39. Our study of the procedure and the other instances in which it was used revealed that the granting of such an application without service being effected or required by the Court on the other party is unusual. We will however keep the procedure under review with the view to considering whether we should recommend that the Judicature Act be amended to provide for such applications being made on notice to the other party to the application for review, subject to a discretion in the Court to dispense with such notice.

DELEGATION OF DISCRETIONARY POWERS

40. We have assembled data from Government Departments as to the powers of delegation exercised within those Departments. We have also been informed about departmental guidelines and instructions relating to the exercise of these discretions.

In the meantime we have classified the power of delegation into six categories:

(a) Delegation by a Minister;

(b) Delegation by a Permanent Head to subordinate officials;

(c) Delegation by Administrative Tribunals;

(d) Delegation by other statutory authorities;

(e) Delegation by a Court, or Judge;

(f) Delegation of law making powers, otherwise than to Governor-General in Council.

41. We are grateful to Ms J.M.C. Bouchier of the Auckland Law School for the collation and categorisation of the powers of delegation conferred by statute. The information thus gathered will form the starting point for our report on this subject.

STATUTORY POWERS OF ENTRY AND SEARCH

42. In excess of 150 statutes grant powers of entry and search and other related powers on public officials. To aid our study of the topic we have received a paper by an Auckland law student Ms E.M. Jamieson listing and classifying the powers.

A summary of Ms Jamieson's paper was circulated to the Government Departments concerned. We have now received replies from them. We have begun our examination of whether the powers are required and, if so, the controls that should be placed on their exercise.

For and on behalf of the Committee

Chairman

June 1980

APPENDIX I

APPLICATIONS FOR REVIEW

APPENDIX II

LEGISLATION CONFERRING JURISDICTION ON THE ADMINISTRATIVE DIVISION

Soil Conservation and Rivers Control Act 1941, s.103
Land Valuation Proceedings Amendment Act 1968, s.2
War Pensions Amendment Act 1968, s.4
Sale of Liquor Amendment Act 1968, s.3
Cinematograph Films Amendment Act 1969, s.4
Animal Remedies Amendment Act 1969, s.8
Land Amendment Act 1970, s.12
Medical Practitioners Amendment Act 1970, s.2
Pharmacy Act 1970, s.40
Mining Act 1971, s.239
Town and Country Planning Amendment Act 1971, s.11
Distillation Act 1971, ss.11 and 20
Nurses Act 1971, ss.46 and 47
Clean Air Act 1972, s.35
Broadcasting Act 1973, s.85
Coal Mines Amendment Act 1972, ss.42 and 49
Accident Compensation Act 1972, s.168
Social Security Amendment Act 1973, s.4
Plant Varieties Act 1973, s.30
Private Investigators and Security Guards Act 1974, s.64
Tobacco Growing Industry Act 1974, s.38
Local Government Act 1974, s.23
Commerce Act 1975, ss.42 and 122
Fishing Industry Board Act 1963, s.35A
Motor Vehicle Dealers Act 1975, ss.130 and 131
Meat Amendment Act 1976, s.78A
Real Estate Agents Act 1976, s.112
Citizenship Act 1977, s.19
Beer Duty Act 1977, s.10
Fisheries Amendment Act 1977, s.2 (inserting new s.138)
Human Rights Commission Act 1977, ss.42 and 43
Nurses Act 1977, s.49
Contraception, Sterilisation and Abortion Act 1977, s.26
Gaming and Lotteries Act 1977, s.65
Local Government Amendment (No. 2) Act 1977, s.37
Immigration Act 1964, ss.22F and 22G (as enacted in 1978)
Massage Parlours Act 1978, s.33
Milk Amendment Act 1978, s.57G
Co-operative Dairy Companies Act 1949, ss.18A and 19 (as enacted in 1978)
International Departure Tax Act 1979, s.18
Coal Mines Act 1979, s.77
Pesticides Act 1979, s.70
Toxic Substances Act 1979, s.67
Customs Acts Amendment Act (No. 2) 1979, s.20
Electrical Registration Act 1979, s.44
Dietiticians Act 1950, s.26 (as amended in 1979).