

Judicial Review

Types Decisions Reviewable

PUBLIC DECISIONS:

- Exec (CLO 7); Statute (CLO 6); Delegated Legi (CLO 7); Suffic Public Nature (Phipps surgeons); Prerog Power (CCSU v Minister Civil Services)

Not-Reviewable:

- Decisions in Statute (CLO); **Relative competency** – (CCSU 13/24; Curtis airforce – no legal yardstick [27]); Commercial Decisions of Public Bodies (Hesitant) (Lab Tests); Parliamentary Proceedings (NZMC v AG [83])

Material Error of Law

- Decision didn't have power to make: ultra vires: (Carter Holt Harvey NSCC Paperwaste).
- Under impression law different to what it was – (Peters v Davison Comments re: tax evasion)
- Require aspects law fulfilled but not: M v Syms.

Relevancy

- **Must consider MRC** – M v Syms (PNBHS) (must look at all circumstances, did not)
- **Must not consider** irrelevant consideration.
- **May consider** permissible considerations.
- Weighting up to decisionmaker – NZ Fishing Industry Association v Minis of Ag + Fisheries.

Improper Purpose

- Purpose for decision “thwarts or runs counter to” purpose granted for – Unison Networks Ltd; Roncarelli v Duplessis (Jehovahs Restaurant)

Error of Fact

An **objective/absolute** mistake of fact, **essential** to the decision – Oggi Advertising (YES - Billboard Dates); Moxon (NO - Casino)

Fettering of Discretion: Predetermined Policy

Cannot be blind to situation – M v Syms (“may”)

Procedural Impropriety

Anyone decides anything listen fairly both sides.
Trigger – person affected personally.

Hearing Rule

What degree of hearing/involvement should the individual have? (CREEDNZ)

Benchmark: prior notice; reasoning; fair opp for written subs; genuine consideration (CLO 43)

respond to prejudicial info (Daganayasi)

Factors to Consider

Statutory Considerations:

- Mustn't frustrate statut purpos (CREEDNZ : delegated to Cabin for efficiency)
- Infer extent from the statute (Daganayasi : statute specified writing deadlines)

Nature of Decision Maker:

- Process must be compatible w/ Decision Making

body (CREEDNZ – cabinet; confidentiality; not suited to extensive sub).

- More political = less engagement.

- Purpose of body in this situation – Daganayasi
- Administrative Efficiency – “enable the machinery of government to work effectively” – Daganayasi (lots of applications).

Nature of Decision/Affected Home

- High policy concern (many people) : more
- Human/Fundamental Rights (Daganayasi – health of child/residency)

Legitimate Expectations

- Any established / promised process– (CCSU – how it always been before)

Consultation

Trigger: something akin to statutory decision:

Requires: notice; chance comment; information; open-minded cons (Wngtn Int Airport)

Bias

Types: pecuniary; familiar/relations; prejudice

“A reasonably informed layobserver would **reasonably apprehend that the decisionmaker might not bring an impartial mind to the resolution of the decision**” – Saxmere (No 1 – passive business; equal; friendship = fine)(No 2) (debt = unacceptable; active business = maybe?)

Ebner

1: what exactly – decide other than merits?
2: articulate connect how influences decision?

Unreasonableness

Traditional – Wednesbury – “no reasonable authority could ever have come to it” (87)

“Firing a red-haired teacher for having red hair” – “Not allowing children into cinema with or without parent on Sunday”

Woolworths Perverse, outrageous, or in the defiance of logic: no sensible person in right mind
Modern - Woolf: “cannot survive a hard look”
When? Decision maker – no other options; less political – **Rigour of Process** – more rigorous is self-correcting – **Subject Matter** – more political, less look – **Importance** – more scrutiny – **Human rights** – more look.

International Law

Dualist: only if incorporated into law.

If Incorpor: consider them to extent they are.

If not: no legal obligation to consider (AG Canada v AG Ontario).

CAN: use to resolve ambiguity – Brind (HoL)

Mandatory Relevant Considerations – NZ

- All are MRC (Tavita - daughter; humanitarian)
- “Ignoring is neither necessary nor desirable” –

(Tavita 124).

- “Weighting for decision maker” Ashby/Tavita

- “Overwhelming/manifest importance, MRCs”: (Ashby 118 Springbok– Gleneagles)

Presumption of Consistency – not yet.

- Statutes/powers read as consistent with treaty obligations as far as possible – Puli'uvea; Zaoui.

- Statutes can limit open discretions – Zaoui (no deport b/c danger, despite discretion).

- Don't need reference, jst comply: Puli'uvea.

Alternatives:

Ombudsmen – Ombudsman Act 1975

What – s 13: Decisions, Acts, Omissions, Recommendations, (22); any person. **NOT:** local body; Minists, WholeHouse; other recurs (13(7))

When: S 13: complaints or investigations.

Powers: reports back (s22(1)) if issue.

Grounds: broad; overlap with JR + more.

Force Recommendations:

Extensive/Broad/Flexible to make things right – not bound by strict legality.

Refer to HoR or PM if not complied with.

Regulations Review Committee – SO 318

General controls: careful delegation; JR; requires consultation + tabling in Parliament.

Role: exams regulations; offers advice; investigates/reports on complaints (SO320)

Complaints: Free

Grounds: not in accordance w/ delegation; trespass on rights; beyond scope; excludes courts jurisdiction; better matter of Parl; retrospective; any form or content concern.

Disallowance: self-actions- 21 days if not dealt with in Parliament.

OIA - Presumption of Openness

Who: any citizen anywhere; or anyone in NZ.

Who subject: Ombudsmen Act – NOT Local Authorities, MPs as MPs, Courts.

Limitations: “good reason to withhold”.

S6 Conclusive: endangering safety; economy; security; S7 Special: Tokelau etc; S9 Other: balancing; privacy, commercial sensitivity, breach other rulings; S18 Administrative: available soon; no exist; cannot find; substantial effort needed; frivolous, vexatious, trivial.

Appeal: to Ombudsmen – must comply.

Treaty of Waitangi – Te Tiriti o Waitangi

General Stuff

“Document intended to provide a direction for future growth” “a developing social contract” - Tribunal
“Interpreted as a living document” – Cooke P

Declaration of Independence 1835

What does it do? – Declares NZ independence and Māori Sovereignty; Establishes relationship.

Interaction with Treaty – United Tribes of NZ; acknowledges chief sovereignty to cede (art 1).

Normanby's Instructions: Colonial Sec > Hob.

Why Treaty – 1 lots of settlers + humanitarian; 3 resources; 5 stop land accumulation; 3 influence in Pacific; 10 property speculation for Empire.

Difficulties – many groups/decisionmakers; reluctance to cede authority (6).

Desired Approach – good faith, sincerity, justice (11); Māori must understand (11); allow them to preserve self-sufficiency, comfort, subsistence (11); acknowledged their right to sovereignty (4)

European Motivations: increasing settler activity; Empire goals; less costly than conquest

Māori Motivations: control settlers; guarantee resource access; better relationship/economic; inevitable.

Ceded Sovereignty: full/exclusive	Ceded Kawanatanga: some kind governance
Guaranteed full undisturbed possession	Guaranteed te tino rangatiratanga: more extensive control.
“Other Properties”	“Taonga” – broader.
Pre-emption	“Right first refusal”
These are irreconcilable differences.	

How is it used? *What position contemp. Legal?*

Huakina Development Trust

- Not part of law–(in)direct recogn in statute (210)

When do we read in?

- Other statutory contexts: similar statutes, similar content areas, often used together (210) (Planning + Water Act) No need expres link (211)

- Can compare statutes when no related (212)

- Significant: “Fabric of NZ Society” + “Treaty was essential to the foundation of NZ” (210)

State Owned Enterprises Case:

Establishes interpretation principles.

Generosity and Purposiveness:

“What matters is the spirit” – Cooke P (663)

“Not be approached with austerity of tabulated legalism – a broad, unquibbling and practical interpretation is demanded” – Cooke P (655)

“Rational positive dialogue and a generosity of spirit” – Richardson J (673)

Look to: WT Reports; Texts; Historical Context.

When?

See Huakina: Statutory Contexts.

- Sufficiently related to taonga (Radio 133, Ngai Tahu 560 (analogous, linked, tribal))

Partnership:

Reasonableness, good faith, honour – SOE

Richardson J: no unreasonable restrictions on Crown's right to govern/actions by Crown.

- Analogue to Fiduciary Duties – *Cooke P* (664)

- "The duty is not a light one" – *Cooke P* (667)

Reciprocal – "reasonable and utmost goodfaith is not

onesided" *Cooke P* (664)

Consultation:

- No limitless duty to consult – *Ricahrdson J* SOE

- Informed may require some consultation.

- Must not be hollow or procedural – *Ngai Tahu*.

Adequately Informed – to be reasonable.

- Means balancing inconvenience against benefit of

information – *Radio Freq* (139)(Waiting for report vs

some commercial/time inconvenience)

- No obligation to agree, just know – *MRP* [87]

Active Protection

- Flipside of mutual obligation from British

Governance – *Broadcasting* 517

- Constant obligation, but not absolute/unqualified

Broadcasting 517 – steps required by reasonably

partner will change (how well placed is crown to act;

what state is taonga; how responsible is Crown, are

protections substitutable?)

Right to Redress - MRP

"A fair, reasonable, recognition of and recompense

for the wrong that has occurred" *Somers J* SOE

"Decision impair to material extent Crown's ability to

take reasonable action it's obliged to?" [90]

Material Impairment: compare ability before/after

action; compare substitutability.

Hesitant to impair clear policy direction [136].

Tribunal – Treaty of Waitangi Act 1975

Powers: largely non-binding; not used binding.

Jurisdiction: Māori claimant; Crown act/om;

inconsistency w/ Principles; result/likel to prejudicial

effect to Māori.

Not: historical (pre Sep 1992) lodged b4 (Sep 2008)

Recommendations: 6(3) compensation, remove

prejudice, prevent others from similar effects; 6(4)

general or specific terms.

Content of Settlement:

Historical Account

Commercial + Cultural Redress: (Te Awa Tupua, Te

Urewera, Taranaki Maunga)

McNair's Principles of Interpretation:

"Meaning in light of surrounding circs/express intent"

/ overall aim is significant / neither is superior /

weight most signed / as understood by Māori

(indulgent) / ambiguities again drafter / account

declared purposes.

Partnership:

"Compact between two groups w/ overriding

obligation of good faith" (180) + reciprocal

partnership of mutual concessions (191) (OCR)

Reasonable and meaningful communication w/

groups – (TMSR); must be fully informed; especially

w/ overlapping interests.

Active Protection

- "Guarantee" connotes an active sense rather than

permissive – (looked to conversations to see what

rangatira had thought – re: mana preserved) (OCR)

- Must avoid doing anything prejudicial to taonga, to

relationships w/between tangata when (TMSR)

Redress - TMSR

- Must preserve ability for redress: cannot exclude

overlapping interests because it does this re:

historical accounts, commercial redress,

exclusive/non-exclusive rights.

Ngati Whatua v Attorney-General – able to litigate

for rights+statuses(ahi kai + manawhenua); cannot

litigate Parliament Process; litigate recognises

tikanga;

NZBORA

Source of Rights:

Deontological: good within themselves; and good

for people so seek them.

Teleological: they advance society, good for

everyone because allow us to advance society.

Liberal Rights: further individual aspirations + allow

fullest moral autonomy.

Social Rights: allows us to live constructively.

Religious: historical roots.

Natural Rights: human nature leaves us in conflict;

these constrain (opp Kant/Rousseau)

Positivist: written into legal framework.

Interpretation Principles:

GENEROSITY/PURPOSIVE:

- "Not austerity of tabulated legalism" *Minister of*

Home Affairs v Fisher – BUT not overshoot targ.

- When applies + ambit of the Rights.

1 - Language of Provision

2 – BORA as a Scheme:

- Rights read in light of other coverage

- Nature/intent of rights read carried through – (*Kira*,

common purpose re: expedient trials)

- If right confirmed elsewhere, probably not there –

AG v Otahuhu District Court.

3 – Common Law/Statute: "meant to affirm what

was in place" *Jeffries* - no hard/fast rule.

4 – ICCPR: affirms commitment to; can sometimes

fill in gaps (*Baigent's Case*); (unless purpose)

ICCPR Jurisprudence.

5 – Comparative International Law: universality of

HR means well placed; esp. Canada; India;

European Court; South Africa

6 – White Paper – more extensive than most.

Section 3 – Application

Purpose: when BORA applies; defines that focus is

between the state and the Crown.

WHY: private litigated elsewh; imbalance power.

S 3(a): **Legis** (Statute; Speaker Ruling; SC) **Exec**

(regulat; police/military; inner department) **Judic**

(where people excluded; Court rules)

S 3(b): **Any public function/power/duty exercised**

pursuant to law – *Ransfield* [69]

Asked of specific function exercised by decision.

i – publicly owned or private for private profit?

ii – source of power statutory?

iii – to what extent does govt have control? What is

the nature of that control?

Pv – entity "standing in shoes of govt"?

vi – exercised in broader public interest or

incidentally/merely of benefit to public?

vii – are coercive powers analogous to state?

viii– function affect the rights/liabilities of others?

ix – are they extensive/monopolistic powers?

x – are they democratically accountable?

Operative Provisions

Section 4 – if inconsistent – enforced nonetheless.

Section 6 – If can be interpreted consistently with

NZBORA then that will be preferred – we will stretch

meanings to do this.

Tension S4: maintain sovereign/stretch meaning

Section 5 – Accepts that some limitations are

necessary but must be "demonstrable justified in

free and democratic society".

Section 7 – Reporting responsibility.

When required – when AG believes a limitation isn't

demonstrably justified (not prima facie).

Justiciability – non-justiciable because goes to

centre of parliament's process; role is legislative.

Limitations: no amend/cont; no-justi; no-prim fac

Ambit of Rights

Generosity Principle – *Noort*.

Justification Balancing (New Health) (expansive

right + justified limitations = more flexible;

reasonable; logical) vs **Definitional Balancing** (limit

what engaged rights by definitions/distinctions).

Moonen

When – a range of possible meanings are

available/discretion conferred on decision maker

1 – what is the scope of the right and is it

engaged by the situation? as far as possible.

2 - what are the range of possible meanings?

3 – which is the least possible infringement

reasonably held? – S 6 (by s 5)

Consider purpose of act and availability of meaning

– *AMM and KPO*

4 – Identify the extent to which that limits?

5 – Are they demonstrably justified? – s 5

a – object of provision

b – is it sufficient importance?

c – is limit in reasonable proportion to objective?

(Sledgehammer nut)

i – rational connection?

ii – as little interference as possible.

iii – justifiable in light of objective.

6 – What remedies?

a – Primary – **S 4** – apply anyway.

b – Not Parliament – struck down.

Hansen

When – a few discrete meanings; no discretion.

1 – Define scope of right. **2** – Is it engaged?

3 – What is Parliament's intended meaning?

4 – Is this inconsistent with the right?

5 – If so, is it demonstrable justified? – S 5

a – is the object sufficiently important?

b – i – rational connection

ii – no more than **reasonably necessary**.

iii – reasonably proportional.

6 – Are any other meanings available?

7 – Adopt it OR Remedies as above.

Comparison

Parliamentary Sovereignty Underpins

Why Moonen? – assume parliament couldn't

confront all possible interpretations; intended power

exercised with minimal infringement.

Why Hansen? – able to confront the possibilities &

we defer to that judgment.

Bullseye Hansen – deference to Parliament

approach. **Bullseye**: perfect solution minimal

infringement; **Target**: "reasonably necessary" –

discretion larger if more policy than law; **Off-Target**:

not reasonably necessary.

Remedies

Importance: must have teeth to be meaningfully

enforceable + vindication given if breached.

Examples: ordinary range (*Baigent's*); *Hansen*

indication in reasons; DOI (*Taylor*).

Source of Authority DOI:

Within NZBORA: **EF + G**: purpose (give effect to

rights + affirm ICCPR); other aids (white paper, not

excluded remedies); **CJ**: scheme (interaction of s

3(a) and 4 + need for remedy).

Inherent to Judicial Function: **CJ**: declaration of law /

rights + giving effect to law is inherently function; not

inconsistent (all others).

Dissent: **WY, O'R**: no authority b/c not effective b/c

no course of action resulting.