Judicial review of state-owned enterprises at the crossroads

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This article determines the impact of the recent Court of Appeal decision Auckland Electric Power Board *v* Electricity Corporation of New Zealand *on the scope of judicial review under the Judicature Amendment Act 1972, and specifically, on judicial review of the commercial decisions of State-owned enterprises. It asks why these judges differ in their approach to the scope of judicial review from those in other cases. The article then compares the approach under judicial review in this case with that under the New Zealand Bill of Rights Act 1990 in* Federated Farmers of NZ (Inc) *v* NZ Post Ltd, *and concludes that the New Zealand Bill of Rights Act can be used to subject the decisions of corporatised, and maybe also privatised, bodies to substantive review akin to economic regulation. It determines whether this is appropriate. The article concludes by asking whether the appeal of the ECNZ decision to the Privy Council in early 1994 could be made under section 27(1) of the New Zealand Bill of Rights Act for failure to grant "natural justice", and determines the extent to which remedies for breaches of the New Zealand Bill of Rights Act may go beyond those under judicial review.*

I INTRODUCTION

Corporatisation of state trading functions has formed a central plank of the economic policy of successive New Zealand governments over the last ten years. It aims to improve the performance of state trading functions by harnessing the benefits of the private sector company model.[1] While Government retained ownership, the State-Owned Enterprises Act 1986 ("SOE Act") authorised the transformation of some government departments into companies, under the Companies Act 1955, to perform the Government's trading functions. Day to day decisions were transferred from Ministers and public servants to Boards of Directors and Chief Executives selected for their commercial expertise.

Courts have been divided over whether to subject SOE decisions to judicial review under the Judicature Amendment Act 1972 ("JAA"). On the one hand, the reality of the "public" power that SOEs exercise and the rule of law demand that SOEs be subjected to judicial review. On the other hand, many of the commercial decisions SOE Boards make concern matters the courts lack expertise in. Constant judicial review, which has

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1 See the long title to the SOE Act 1986 and *New Zealand Parliamentary Debates* vol 474, 4723, 30 September 1976.

sometimes been difficult to distinguish from a determination of the substantive merits of the decision under appeal, may undermine the whole purpose of creating SOEs in the first place. That purpose is to improve the performance of Government trading functions, by letting SOE Boards with commercial expertise make decisions consistent with the Statement of Corporate Intent. Furthermore, there are non-judicial accountability mechanisms to protect the public interest established by the SOE Act, such as ministerial oversight and complaints to the Ombudsman.

The issue of whether courts should be subjecting corporatised enterprise action to judicial review is linked to the larger issue of the appropriate role of administrative law in a deregulated economy.[2] In response to a statement by the Chief Justice of Australia, Sir Anthony Mason, which described administrative law as "a body of public law having at its premise the need to control the exercise of power in a welfare state with a largely regulated economy," Sir Ivor Richardson commented that:[3]

> It is an overstatement to describe the New Zealand of 1991 as a welfare state with a largely regulated economy. Over the last six years, we have had a sharp reduction in the degree of direct governmental involvement in the economy. That reduction in governmental involvement is also reflected in the corporatising and privatising of trading activities of the State, in new and increased emphasis on market forces rather than regulation, and in the conversion of a depleted public service to a largely private sector organisation model. Should the philosophical approach underpinning administrative law and its doctrines now be modified to reflect the less expansive role of government in the more market-oriented State? For example, should the exercise of statutory powers by the Housing Corporation be reviewable by the courts when the Corporation is only a minor player in the provision and funding of housing and is accountable in other ways, notably through recourse to the Ombudsman, as well as through the political processes?

This thinking can be detected behind the Court of Appeal's recent decision in *Auckland Electric Power Board* v *Electricity Corporation of New Zealand*[4] ("*ECNZ*") that Electricorp's exercise of contractual powers to terminate interim agreements was *not* judicially reviewable. The Court comprised Richardson, McKay and Robertson JJ. Courts have always been reluctant to subject commercial decisions to judicial review. However, the decision of *ECNZ* reverses the approach in earlier High Court precedents subjecting the exercise of contractual powers by SOEs such as Telecom (as it then was)

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2 *NZFP Pulp and Paper Ltd and Anchor Products Ltd* v *Thames Valley Electric Power Board* Unreported, 1 November 1993, High Court, Hamilton Registry, CP 35/93, 24: "One view is that judicial review should not be allowed to impede the lawful implementation of Government policy; the other holds, in broad terms, that judicial review has a difficult but necessary role even in a deregulated economy in safeguarding private interests."

3 Rt Hon Sir Ivor Richardson "Changing the Needs for Judicial Decision-Making" (1991) 1 Journal of Judicial Administration 61, 63-64. See also, Rt Hon Sir Ivor Richardson "The Law and Economics: Commentary on paper by Professor Michael Trebilcock" in *The Law and Politics*, 1993 New Zealand Law Conference, Wellington, 2-5 March 1993, 351.

4 Unreported, 8 September 1993, Court of Appeal, CA 45/93.

to judicial review by reason of the continued public ownership of SOEs and the social responsibility provision in section 4(1)(c) of the SOE Act.

The *ECNZ* decision has implications not only for all SOEs under the SOE Act, but also for other Crown companies, and for the scope of judicial review under the JAA in general. In determining whether or not an action was the "exercise of a statutory power" under section 4 of the JAA, recent cases have indicated a move away from a focus on *source* of power (or proximity with statute). Instead, the courts have focussed on the nature of the body and the *public effect* of the decision, which expands the scope of judicial review. The decision in *ECNZ* brings the determination of "statutory power" firmly back to the moorings of statutory source of power.

The New Zealand Bill of Rights Act 1990 ("BORA") may, however, place a potentially potent tool for substantive as well as judicial review in the hands of those judges, who, like commentators such as Professor Michael Taggart, may see a need for increased accountability of SOEs through the courts. As Taggart states:[5]

> With politicians abdicating responsibility to the market, it may be that the judges will be asked to become the conservators of the hitherto accepted norms of the welfare state - ensuring equality of treatment and the provision of the necessities of modern life.

Unlike judicial review, the aim of the BORA is not to ensure legality, but to protect fundamental rights and freedoms. The decision of McGechan J in *Federated Farmers of NZ (Inc)* v *NZ Post Ltd* [6] (*"NZ Post"*) suggests that there is ample scope for judicial scrutiny of SOE decisions under section 3 and Part II of the BORA. To the extent that legislation authorising the actions of any person or body performing a public function can be interpreted consistently with the BORA, the rights and freedoms in the Bill are *decisive* under section 6 of the BORA. Thus, the courts can effectively subject SOEs to economic regulation in determining whether a limit placed on rights and freedoms by an SOE decision is a "reasonable" one, prescribed by law as can be demonstrably justified by a free and democratic society under section 5 of the BORA.

With the marked split in our Court of Appeal between judges who adhere to differing concepts of the appropriate scope of judicial review, the directions given in legislation like the SOE Act and the BORA have the potential to become contradictory. The result may be that, despite a refusal by the court to subject a drastic price increase by an SOE like ECNZ to judicial review under the JAA, that increase may nevertheless be subject to a challenge under the BORA for unlawfully restricting the right to life under section 8. The *NZ Post* case suggests that possibility. Recent Court of Appeal decisions have

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5 M Taggart "Corporatisation, Privatisation and Public Law" (1991) 2 Public L Rev 77. Professor Taggart has confirmed that he was referring to freedom from discrimination and the right not to be deprived of life under sections 19 and 8 of the BORA when he referred to "equality of treatment and the provision of the necessities of modern life" in this quote.

6 Unreported, 1 December 1992, High Court, Wellington Registry, CP 661/92.

even suggested that private bodies may be in performance of a "public function, power or duty ... pursuant to law" under section 3(b) of the BORA and thus also be capable of being subjected to such scrutiny.

This article determines the impact of the *ECNZ* decision on the scope of judicial review under the JAA, and specifically, on judicial review of the commercial decisions of SOEs. It asks why judges differ in their approach to the scope of judicial review. The article then compares the approach under judicial review in *ECNZ* with that under the BORA in the *NZ Post* case, and concludes that the BORA can be used to subject the decisions of corporatised, and maybe also privatised, bodies to substantive review akin to economic regulation. It determines whether this is appropriate. The article concludes by asking whether the appeal of the *ECNZ* decision to the Privy Council in early 1994 could be made under section 27(1) of the BORA for failure to grant "natural justice,"[7] and determines the extent to which remedies for breaches of the BORA may go beyond those under judicial review.

II THE SCOPE OF JUDICIAL REVIEW UNDER THE JUDICATURE AMENDMENT ACT 1972

A *Actions Not Subject To Judicial Review*

The courts have insisted that actions have sufficient *proximity* with, or dependence on, statute to be exercises of "statutory power" under section 4 of the JAA.[8] Section 4(1) provides:

> On an application by motion which may be called an application for review, the High Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition or certiorari or for a declaration or injunction, against that person in any such proceedings.

The term "statutory power" is defined in section 3 of the JAA as:

> a power or right conferred by or under any Act [or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate] -
> (a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or
> (b) To exercise a statutory power of decision; or

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7 The Court of Appeal has granted leave to appeal to the Privy Council in *Auckland Electric Power Board* v *ECNZ* Unreported, 4 October 1993, Court of Appeal, CA 45/93.

8 GDS Taylor *Judicial Review* (Butterworths, Wellington, 1991) para 2.06, p 35.

(c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or

(d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or

(e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

"Statutory power of decision" is also defined as:

> a power or right conferred by or under any Act [, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting] -
>
> (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> (b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

The aim of judicial review is determining the *legality* of an action, not substituting the courts' judgment for that of the decisionmaker who has been granted the statutory discretion. The courts are particularly reluctant to subject commercial decisions to review. As the Court of Appeal stated in *New Zealand Stock Exchange* v *Listed Companies Association Inc:*[9]

> Parliament could never have intended that any corporate body recognised by statute or owing its existence to a specific or general statute such as the Companies Act could have all its commercial operations subject to constant judicial review.

Greig J also stated in *Wellington Regional Council* v *Post Office Bank Ltd* that:[10]

> This Court has no jurisdiction, nor ought it to have jurisdiction to inquire into or to adjudicate on the wisdom or the foolishness of the [actions] challenged, nor does it have any authority to inquire into and adjudicate on the efficiency, the effectiveness or the economic good sense or otherwise of the decisions that might be made.

His Honour then cited the distinction made in *Inland Revenue Commissioners* v *National Federation of the Self-Employed and Small Businesses Ltd* that:[11]

> They are accountable to Parliament for what they do so far as efficiency and policy is concerned, and of that Parliament is the only Judge; they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only Judge.

Thus, the courts are less likely to find that commercial decisions by statutory or incorporated bodies have the requisite proximity with statute for subjection to judicial review.

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9 [1984] 1 NZLR 699, 707.

10 Unreported, 22 December 1987, High Court, Wellington Registry, CP 720/87, 11.

11 [1981] 2 All ER 93, 107.

There are generally three instances when decisions lack sufficient proximity with statute to be a "statutory power" under section 4 of the JAA. First, where the statute merely confers a statutory *function* on an area of operation as opposed to a statutory *power*. For example, in *Pacer Kerridge Cinemas Ltd* v *Hutt City Council*, Williams J stated that, "[l]ocal authorities are not liable to have their day to day decisions - even contentious ones - subject to constant judicial review."[12] And specifically on the facts of that case, "the decision to pursue the lease with Endeavour involved prolonged negotiations and judgments on matters of fact which are part of the Council's day to day discharge of its statutory functions." Thus, the day to day discharge of statutory functions generally lacks sufficient proximity with statute to be a statutory power.

The second instance when decisions lack sufficient proximity with statute to be a "statutory power" is where the statute merely *recognises* a power which may arise and be enforceable at contract, as opposed to *conferring* the power written into statute. For example, in *New Zealand Stock Exchange* v *Listed Companies Association Inc*[13] ("NZSE") Woodhouse P agreed with counsel's submission that "it was fallacious to equate the actual conduct of the statutory body *within its statutory sphere* with the exercise of a statutory power in terms of the Judicature Amendment Act 1972."[14] Thus, although entering into a listing contract was clearly a statutory function under section 4(1) of the Sharebrokers Amendment Act 1981, that did not automatically make it a "statutory power" under the JAA. "It turns upon the character of the act involved when the Exchange enters into a listing agreement." Although section 4(2) of the Sharebrokers Amendment Act 1981 states that "The New Zealand Stock Exchange shall have all such powers as are reasonably necessary or expedient to carry out its functions," the Court must have found that the New Zealand Stock Exchange was not exercising a power under this provision when it entered the listing contract. Rather, that power came from the ability of the NZSE, an incorporated body under the Companies Act, to enter a contract and to enforce the contract's terms.

Finally, conduct will not be subject to judicial review where it is pursuant to a general statutory power and there are no statutory criteria. In *Webster* v *Auckland Harbour Board*,[15] Cooke J, as he then was, held on preliminary questions of law concerning the reviewability of the decisions under attack that "[t]here can be no doubt that all the Board's acts were done directly or indirectly in purported pursuance of statutory powers" even though a contractual licence was involved. However, he went on to state that "[i]t is common ground that this alone would *not be enough* in the

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12 Unreported, 18 December 1992, High Court, Auckland Registry M 896/92, 12. He then cited *Van Duyn* v *Helensville Borough* (1984) 5 NZAR 55, 62; and *Ruddlesden and Gibb* v *Kapiti Borough* (1986) 6 NZAR 20, 24. Cf English courts who appear to be quite prepared to subject "day to day" operational decisions to judicial review. See *West Glamorgan County Council* v *Rafferty* [1987] 1 All ER 1003, discussed in P Walker "Irrationality and Proportionality" in M Supperstone and J Goudie (eds) *Judicial Review* (Butterworths, London 1992) Ch. 5, 122.

13 Above n 9.

14 Above n 9, 706-707.

15 [1983] NZLR 646, 649.

circumstances of the case to enable the [judicial] review sought by the applicants."[16] Consequently, conduct will have sufficient proximity with statute to be a statutory power under section 4 of the JAA only if it is conduct pursuant to a general statutory power that is subject to statutory criteria or, if the statute confers a specific power which is seen directly in the contractual provision.

B Actions Subject To Judicial Review

In the later 1987 case of *Webster* v *Auckland Harbour Board*[17] where the applicants were seeking judicial review of allegedly excessive fee increases for a foreshore licence, Cooke P stated that:[18]

> I have no doubt that in connection with the exercise of contractual rights a statutory body can be in a different position from a private citizen. For instance, as to the entering into or cancellation of a contract, *the statute expressly or implicitly may require certain considerations to be taken into account or may exclude others. If so, statutory powers of decision will be involved.* (Emphasis added)

Cooke P went on to find, on the facts of the case, that "[t]here are various *express restrictions* on the exercise of these powers,"[19] stating that "I mention it only to illustrate the *essentially statutory character* of the Board's licensing function." He concluded that as the "whole dispute turns on whether the Board has acted in accordance with the express or implied requirements of the Act in arriving at the fee," the Board's decisions were statutory powers of decision under the JAA which the courts could review.[20]

In *Clutha Leathers Ltd (in rec)* v *Telecom Corporation of New Zealand Ltd*,[21] clause 3 of the State-Owned Enterprises (Telecom Corporation of New Zealand) Goods and Services Order 1987 specifically provided that contracts between Telecom and third parties "shall be deemed to include a condition permitting variation or terminating at any time by [Telecom] on giving to the third party 1 month's notice in such manner (including newspaper advertising) as [Telecom] thinks fit." As the Order conferred a power which was seen directly in the contractual provision, this was the reason why the court concluded that Telecom's exercise of that power to disconnect the applicant's services was the exercise of a statutory power which was subject to judicial review. It was not because Telecom was an SOE. Holland J expressly stated that "[t]he mere fact that the respondent is a Government-owned corporation conducting a monopoly is not a ground for requiring it to make special inquiries before it terminates a service for non-payment."[22]

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16 Above n 15. Emphasis added.
17 [1987] 2 NZLR 129.
18 Above n 17, 131.
19 Above n 17. Emphasis added.
20 Above n 17. See further, *Pacer Kerridge*, above n 12, 12.
21 (1988-1989) 4 NZCLC 64, 249.

C Recent Expansion of the Scope of Judicial Review

1 Actions in breach of section 4 of the State Owned Enterprises Act 1986

In *New Zealand Optical Ltd (in receivership)* v *Telecom Corporation of New Zealand Ltd*,[23] whose facts were almost identical with those in the *Clutha Leathers* case, Eichelbaum CJ did not rely on clause 3 of the State-Owned Enterprises (Telecom Corporation of New Zealand) Goods and Services Order 1987, which provided a specific power to terminate such contracts as the basis for finding the action a "statutory power." Rather, he stated that "it appears strongly arguable that [the *NZSE* case] does not govern" SOEs because section 4 of the SOE Act rendered the exercise of contractual powers a statutory power under the JAA. *Webster* was the governing precedent:[24]

> The intrusion of section 4 of the State-Owned Enterprises Act, in my opinion, distinguishes the case from the situation where the nexus between statute and the decision sought to be challenged is simply that it is a decision of a body corporate recognised by statute, or owing its existence to a specific or general enactment. Nor were the respondents merely exercising a contractual power. Unless the provisions of sec 4 are to be perceived as no more than precatory (an unlikely concept) the decision has to have regard to their requirements. In my view it is strongly arguable that the decision sought to be challenged in fact involved the exercise of a statutory power.

Section 4(1) of the SOE Act provides:

> The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be -
> (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
> (b) A good employer; and
> (c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

2 *General statutory power* without *statutory criteria*

In the recent cases of *Mirelle Pty Ltd* v *Attorney-General*[25] and *Pacer Kerridge Cinemas Ltd* v *Hutt City Council*[26] concerning the use of the power to tender under a general statutory power by the Ministry of Commerce and a local council, the courts subjected to review exercises of general statutory power which lacked the restrictions of statutory criteria necessary to give the actions a "statutory flavour." Mirelle sought review of the Ministry of Commerce decision to decline its tender bid for licences of radio frequencies on the basis of a minor and correctable defect in its tender document, which was nevertheless in breach of clause 31(d) of the tender document. Section 48 of

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22 Above n 21, 64 253.
23 (1990) 5 NZCLC 66, 457.
24 Above n 23, 64, 463.
25 Unreported, 27 November 1992, High Court, Wellington Registry CP 969/91.
26 Above n 12.

the Radiocommunications Act 1989 granted a power to execute licences, but the exercise of this power was not subject to any statutory restrictions.

Instead of focussing on statutory criteria to determine "statutory power" under the JAA, Heron J stressed that the tenders concerned the sale of public assets and "significant governmental considerations."[27] He also stressed the courts' willingness in cases such as *Webster* and *Ritchie* [28] to oversee the proper disposal of public assets by the judicial review process. However, the general authorising provision in these cases was limited by clear statutory criteria.[29] The broader approach that Heron J took in *Mirelle* is revealed by his statement that "this case has to be decided not by taking it away at an early stage because it does not fit within the strait-jacket of statutory power of decision."[30]

In *Pacer Kerridge*, the applicants challenged the validity of the tendering decision for the redevelopment of a building owned by the Hutt City Council since they wanted to secure this right to redevelop for themselves. Williams J tentatively followed the lead in *Mirelle*, stating that "I accept Heron J's observation as to the role of the Courts in reviewing the tendering and disposal of state assets although, with respect, I would not state the principle *so widely*,"[31] stressing that cases like *Mirelle* "may have had a stronger statutory overlay than the present [case] which is more closely aligned to the day to day operations of local authorities."[32] Nevertheless, he stated that "for the purposes of this judgment, I will assume that all of the impugned actions did amount to a statutory power of decision" even though the actions were pursuant to a general statutory power with no statutory criteria.[33]

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27 Above n 25, 16 and 21.

28 *Ritchies Transport Holdings Ltd* v *The Otago Regional Council & Ors*, Unreported, 12 July 1991, Court of Appeal, CA 152/91.

29 The exception is *Jim Harris Ltd* v *Minister of Energy* [1980] 2 NZLR 294, 296-297 where Casey J specifically found a statutory power despite counsel for the Minister of Energy's attempt to distinguish this case for lack of specific statutory criteria which the authority had to observe in making a decision. Note, however, Williams J stated in *Pacer Kerridge*, above n 12, 14, that "a contrary view was taken in *Jim Harris* ... although the later Court of Appeal decision in the *Stock Exchange* case (supra) may make the reasoning in *Jim Harris Ltd* (supra) less persuasive than it would be otherwise."

30 Above n 25, 18. Note that the orders granted in Mirelle were reversed when the case went before the Court of Appeal, but as the Crown's challenge of the orders were not contested by Mirelle, the judgment of the Court, written by Richardson J, stressed that "we have not considered nor accordingly do we express any view as to the reasoning of the High Court in determining the judicial review application." *Attorney-General* v *Mirelle Pty Ltd*, Unreported, 13 October 1993, Court of Appeal, CA 391/92, 2-3.

31 Above n 12, 15. Emphasis added.

32 Above n 12, 15, 16. He also cited *Ritchies* case, above n 28, but there were clear statutory criteria in that case.

33 Above n 12, 16.

The question arising in future cases is *how strong* does the statutory overlay have to be before it is sufficient to establish the exercise of a statutory power? If cases with similar facts to *Pacer Kerridge* can be subject to review as exercises of statutory power, did Williams J really state the principle less "widely" than Heron J in Mirelle, or *more* "widely"?

3 Similarities with the "public effect" test in English courts?

Mirelle and *Pacer Kerridge* arguably moved the New Zealand courts a step closer to the "public effect" test for actions subject to review being adopted in some English cases. There is a well documented line of cases, of which *R* v *Panel on Takeovers and Mergers ex parte Datafin Plc*[34] is probably the best example, which have determined subjection to judicial review on the *nature* of the power exercised by the body who acted and the *public effect* of the action rather than the *source* of power.[35] Although *Mirelle* and *Pacer Kerridge* concerned statutory bodies dealing with state assets, the focus of the inquiry into statutory power did not focus on the source of power, but on the *nature* of the power exercised by the body who acted and the *public effect* of the action.

On this basis, could it further be argued that non-statutory bodies, like the Takeover Panel in *ex parte Datafin*, would have a sufficient "statutory overlay" to establish the exercise of a statutory power under the JAA? Even though the Takeover Panel was a non-statutory self-regulatory body, Sir John Donaldson MR stated that[36] "it is supported and sustained by a periphery of statutory powers and penalties, wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions."[37]

Mirelle and *Pacer Kerridge* may thus be more significant than *Finnigan* v *New Zealand Rugby Football Union Inc*[38] in expanding the boundaries of judicial review since the latter case was an interim injunction application, not an application under section 4 of the JAA, and it was very unusual on its facts. In *Finnigan* Casey J granted an interim injunction preventing the All-Blacks from leaving for a tour of South Africa until the legality of the New Zealand Rugby Football Union ("NZRFU") Council's decision to accept the invitation of the South African Rugby Board had been determined. The conclusion that the courts could determine the legality of the Council's decision

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34 [1987] QB 815.

35 For further discussion of this line of cases concerning "public effect," see Professor Sir William Wade "New Horizons in Administrative Law" in 9th Commonwealth Law Conference *Conference Papers* (Commonwealth Law Conference (1990) Ltd, Auckland, 1990) 437.

36 Above n 34, 835.

37 Specifically, he was referring to the Stock Exchange (Listing) Regulations 1984 (SI 1984 No 716) enacted in implementation of EEC Directives and the Prevention of Fraud (Investments) Act 1958.

38 [1985] 2 NZLR 159; 175; 181; 190.

was extraordinary since the NZRFU was technically a private sporting body controlling an amateur game. Casey J justified his decision by saying:[39]

> I feel I must have regard to the unique *importance of this decision in the public domain and the effect* it could have on New Zealand's relationships with the outside world and on our community at large. This was noted by the Court of Appeal and is amply borne out in correspondence from the Prime Minister and the letter from his Deputy which the Union itself requested. I am satisfied that such a situation requires that body (or any other in a similar position) to exercise more than good faith in reaching its decision; it must also exercise that degree of care which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectation of the public.

In the Court of Appeal, on the initial issue of whether the applicants had standing, Cooke P stated that:[40]

> The decision affects the New Zealand community as a whole and so relations between the community and those, like the plaintiffs, specifically and legally associated with the sport. Indeed judicial notice can be taken of the fact that in the view of a significant number of people, but no doubt contrary to the view of another significant number, the decision affects the international relations or standing of New Zealand. While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. ... [I]t falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot be realistically drawn.

III THE IMPACT OF *AUCKLAND ELECTRICITY POWER BOARD* v *ELECTRICITY CORPORATION OF NEW ZEALAND* ON THE SCOPE OF JUDICIAL REVIEW

The impact of the recent decision of *Auckland Electric Power Board* v *Electricity Corporation of New Zealand*[41] ("*ECNZ*") on the scope of judicial review outlined above is that the case reverses the approach taken by Eichelbaum CJ in *NZ Optical*[42] and brings the determination of what is the exercise of a "statutory power" firmly back to the moorings of statutory *source* of power.

A Facts

The Auckland Electric Power Board ("AEPB") pleaded seven causes of action, and this case concerned Electricorp's attempt to strike out the three non-contractual causes of action, which allege:

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39 [1985] 2 NZLR 181, 186. Emphasis added.
40 [1985] 2 NZLR 175, 179.
41 Above n 4.
42 Above n 23.

- that Electricorp had breached its statutory duty under section 4(1)(c) of the SOE Act;
- that Electricorp had abused its dominant position as a monopoly supplier of an essential commodity by seeking to charge unreasonably for such supply; and
- that Electricorp's decision to terminate should be subject to judicial review under the JAA since it was an unreasonable and improper exercise of a statutory power of decision.

The key issue under the judicial review cause of action was whether Electricorp's commercial decision to terminate the interim agreements entered into with the AEPB between 1988-1991 was the exercise of a "statutory power" under the JAA. The AEPB wanted to maintain the transitional arrangements set out in this agreement until a new contract had been negotiated suitable for the new deregulated environment the industry was now operating in. Thus, the issue concerned the price and related terms of the supply arrangements, and not ECNZ's continuation of supply.

B The Decision

The Court of Appeal, comprising Sir Ivor Richardson, McKay and Robertson JJ, unanimously held that SOEs derive their powers to terminate contracts from the Companies Act 1955 and thus such decisions cannot be judicially reviewed. Section 4(1) of the SOE Act did "not confer a power in any true sense."[43] Thus, terminating the interim agreements was a commercial decision covered by the *NZSE* precedent, and not *Webster* [44] as Barker J had concluded at first instance.[45] Furthermore, "particular acts in the conduct of the business of SOEs cannot be isolated and characterised as the exercise of a statutory power of decision in terms of section 4(1)(c)"[46] since.[47]

> There is nothing in the section to suggest a statutory intention that particular acts or transactions of an SOE may be isolated and subjected to judicial scrutiny. On the contrary in considering whether an SOE is achieving its objective it is necessary to assess its performance overall and over a period of time.... Read as a whole section 4(1) contemplates a *large picture approach* to the determination of whether the SOE is operating as a successful business. There is nothing to suggest that Parliament ever contemplated that someone affected by a particular act or omission of an SOE, eg. a charity whose application for a donation was refused or an employee refused

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43 Above n 4, 15. The Court also focussed on the general and guarded terms in which s 4(1)'s objectives were expressed in paragraphs (a), (b) and (c) and concluded, at p 12, that they are not expressed in the conventional language of obligation. Section 4(1)(c) states: "An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by *endeavouring* to accommodate or *encourage* these *when able to do so*." Emphasis added.

44 Above n 15

45 *Auckland Electric Power Board* v *ECNZ* [1993] 3 NZLR 53, 60.

46 Above n 4, 14.

47 Above n 4, 11-12. Emphasis added.

permission to attend a work related educational seminar, could claim a duty to it in respect of a *single* transaction.

Furthermore, Richardson J, writing the judgment of the Court, stated that the large picture analysis "is supported by the comparison which para (a) requires with the profitability and efficiency of other businesses. Again whether or not an SOE is a good employer under para (b) can only be assessed over time."[48] "[P]aras (a),(b) and (c) are not independent of one another."[49] Thus,"*[s]ection 4(1)* of the SOE legislation [as a whole] does not provide an additional public law challenge of particular decisions through the court processes."[50]

Instead, "the legislature intended a *broader* approach to accountability rather than the *transaction focus of the courts.*"[51] The balancing of social responsibility and profitability and that broad overall balancing in section 4(1) of the SOE Act "are inherently unsuitable for judicial decision. [Rather] the assessment is appropriately made periodically through the accountability provided for in the statute. SOEs are accountable to Ministers and through them to Parliament for meeting responsibilities reposed in them under the statute".[52] Richardson J also described in detail the other accountability mechanisms in the SOE Act.[53]

C *Impact of Auckland Electric Power Board v Electricity Corporation of New Zealand*

Whether or not *ECNZ* has limited application to its specific facts, or will apply to other Crown companies not created under the SOE Act, requires individual analysis of each statute creating the Crown company. Is there an empowering provision within the statute for the exercise of contractual powers? Is Parliament's intention clear from the statute as to how the Crown company is to be accountable for its actions? Does the provision setting out the Crown company's objectives contemplate a "large picture"

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48 Above n 4, 12. In determining the scope of judicial review of SOE action, Richardson J drew heavily on his analysis of whether or not there was a tortious remedy for breach of a statutory duty under s 4(1)(c) of the SOE Act.

49 Above n 4, 15.

50 Above n 4, 16. Emphasis added.

51 Above n 4, 12.

52 Above n 4, 15-16.

53 Above n 4, 13-14. This article was completed prior to the decision of the Privy Council in *NZ Maori Council & Ors* v *HM's Attorney-General & Ors* Unreported, 13 December 1993, PC14/93 (*"NZMC"*). However, the author notes that the statements made by Lord Woolf, writing on behalf of the Privy Council, about s 4 of the SOE Act do not necessarily undermine the Court of Appeal analysis in *ECNZ*. The *NZMC* case does not concern the exercise of contractual powers and statements by Lord Woolf concerning the equal importance of objectives concerning social responsibility and profitability under s 4(1) of the SOE Act do not affect the fundamental premise of the Court of Appeal decision in *ECNZ*; s 4 of the SOE Act did not confer power in any true sense. Rather ECNZ's power to terminate contracts derived from the Companies Act and thus could not be subject to judicial review.

approach to the determination of whether the company is operating as a "successful business"? On this basis, the actions of Housing New Zealand, Crown Research Institutes and Crown Health Enterprises, for example, would all be difficult to subject to judicial review.[54]

Furthermore, it is arguable that *ECNZ* has ramifications for the scope of judicial review under the JAA. The Court of Appeal stated that:[55]

> The commercial operations of an organisation do not become subject to judicial review simply because the organisation is recognised by statute or owes its existence to a specific statute or a general statute such as the Companies Act (*New Zealand Stock Exchange* ...). To attract judicial review the impugned decision must amount to the exercise of a *particular* statutory power.

The Court of Appeal at no time mentions that SOEs continue to be different from private companies in that all shares are held by shareholding ministers, and that SOEs are still wholly owned by the public.[56] They do not speak about the *public effect* of terminating the interim agreements by ECNZ as a monopoly provider of electricity, and they state that paragraphs (a), (b) and (c) of section 4 are "what would be generally expected of any major corporate intending to carry on business in this country over the long term."[57] The argument by counsel for the applicants was not framed in these terms and the Court did not see these matters as relevant to their determination of "statutory power." This reaffirms that the basis for determining whether an action is subject to judicial review is the source of the power, and implicitly rejects the shifting emphasis

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54 See the Housing Restructuring Act 1992, the Crown Research Institutes Act 1992 and the Health and Disability Services Act 1993 respectively. See further M Chen "Judicial Review and the Health and Disability Services Act 1993" in *Public Sector*, December 1993. The issue does not arise with Local Authority Trading Enterprises (LATEs) since their principal objective under s 594Q of the Local Government Act 1974 "shall be to operate as a successful business." "Successful business" is not defined at all.

55 Above n 4, 15. Emphasis added.

56 Cf *Report of the State-Owned Enterprises (Ombudsman and Official Information Acts) Select Committee* (1990), where the select committee reaffirmed the appropriateness of continued accountability under the Official Information Act and Ombudsman Act, stating: "Parliament sees the SOEs as being of a different nature to private sector commercial companies. Had that not been so there would have been no need for the Act, it would have been sufficient that the Companies Act applied to the enterprises."

57 Above n 4, 11. It is arguable that private enterprise have taken public responsibility on themselves in the voluntary creation of the Banking Ombudsman and the current moves to establish an Insurance Ombudsman. Cf McGechan J, who stated in *NZ Post*, pp 52-53, that s 4(1) was enacted as "the notorious fear was that SOEs, directed to operate as successful businesses comparable to private enterprises and under competitive ethic with a profit motive, would simply trample the needs of smaller communities underfoot."

in cases like *Mirelle* and *Pacer Kerridge* away from this basis towards the nature of the body and the public impact of the relevant decision.[58]

D *The Approach of a Differently Composed Court of Appeal Bench?*

In granting the AEPB's application for leave to appeal to the Privy Council from the decision of the Court of Appeal, Cooke P, giving the judgment orally, showed that he would have taken quite a different approach to the *ECNZ* case.[59] He stated that "there having been no application for a Court of five, it was naturally dealt with by a Court of three. It may also be unfortunate that an issue possibly of considerable moment to the New Zealand community should go to the Privy Council without the benefit of consideration by a Court of five ...".[60] Even though it was merely an application for leave, Cooke P stated that:[61]

> although the question may well ultimately be one of statutory interpretation, in determining whether the issue is justiciable it is conceivable that the Court would be assisted by evidence relating to the motivation of the Corporation which could bear on the way it approached its responsibilities and which might throw light on whether such an issue is capable of judicial consideration.

In contrast, Richardson J, writing the judgment of the Court of Appeal in *ECNZ*, neither mentioned the need for such evidence, nor considered the motivation of Electricorp, and the Privy Council has tended to support Richardson J's approach to the appropriate scope of judicial review and to questions of justiciability, which may explain Cooke P's statement about the Privy Council above.[62]

E *Academic Criticism of Auckland Electric Power v Electricity Corporation of New Zealand (ECNZ)*

In a recent case note on *ECNZ*, Professor Taggart argued that "not only are there serious flaws in the Court's interpretation of the SOE Act, but the result reached is

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58 An even stricter interpretation of the Court's approach is that only the exercise of a specific statutory power which is seen *directly* in the contractual provision is a "statutory power" under the JAA, and that even general statutory empowerments limited by statutory criteria fall outside the JAA. Although the Court pointed out that its decision in this case was contrary to a number of High Court decisions holding that decisions in terms of section 4(1)(c) were exercises of statutory power, they stated that "none of the [High Court] judgments concerned contains an extended analysis of s 4 in its statutory setting. And some were disconnection cases *where a power to disconnect was contained in regulations*." Above n 4, 16. Emphasis added.

59 Apart from Cooke P, the other judges on the Court of Appeal bench that day were Justices Casey, Hardie Boys, Gault and Gallen.

60 *Auckland Electric Power Board* v *ECNZ* Unreported, 4 October 1993, Court of Appeal, CA 45/93, 3.

61 Above n 60, 2.

62 See, for example, *Petrocorp* v *Minister of Energy* [1991] 1 NZLR 641 (PC) discussed in Part IV, A below.

contrary to principle."[63] He argues that section 4(1)(c) of the SOE Act contemplates a two-step process:[64]

> First, it directs the SOE to have regard to the interests of the community (and by doing so it exhibits a sense of social responsibility). Once "regard" has been had to these interests, paragraph (c) says that the SOE should endeavour to accommodate or encourage those interests "when able to do so" ... consistently with the "overriding" objective of operating as a successful business. ...
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> In other words, these paragraphs establish *mandatory relevant considerations*, and failure to have proper regard to any of them will lay the decision open to challenge by way of judicial review.

There is, however, another way of interpreting section 4(1)(c) which is arguably equally valid on the wording of this provision, and that was the approach adopted by the Court of Appeal in *ECNZ*. SOEs are not *compelled* to take account of the objectives in paragraphs (a)-(c), but are to pursue them to the extent that is consistent with the SOE's operation as a successful business. After all, section 4(1)(c) only requires SOEs to "*endeavour* to accommodate or *encourage* " "a sense of social responsibility" "*when able to do so*." The broad and subjective wording in section 4(1)(c) show a parliamentary intention to give the SOE unfettered discretion to determine when they are "able to do so."[65] Analogies can be drawn with section 36 of the Petroleum Act 1937 in *Petrocorp*, where the Privy Council affirmed Richardson J's conclusion that the discretion granted was so broad that it left the Minister to determine what factors to take into account in granting mining licences in the public interest.[66] Section 4(1)(c) of the SOE Act can thus be interpreted as a *permissive*, rather than a *mandatory* relevant consideration.[67] This is what the Court of Appeal meant when it stated in *ECNZ* that "[t]he expectation of an SOE in that regard is qualified but in *indicative* rather than *peremptory* terms."[68]

Furthermore, Taggart arguably underestimates what court supervision of section 4(1)(c) would entail. He states that:[69]

> On review the SOE would have to show that social responsibility concerns were *properly considered*, no more and no less. ... If this *minimal supervision* of the statutory requirement that SOEs are to have regard to the interests of the relevant communities is considered too intrusive then I suggest the objection has less to do with *non-justiciability* and more to do with *ideological preference*.

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63 M Taggart "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Rec LR 343, 348.

64 Above n 63, 350. Emphasis added.

65 See similar provisions in sections 8 and 19 of the Health and Disability Act 1993, for example.

66 See below, Part IV, A.

67 See *Ashby* v *Minister of Immigration* [1981] 1 NZLR 222 (CA) and *CREEDNZ Inc* v *Governor-General* [1981] 1 NZLR 172.

68 Above n 4, 12.

69 Above n 63, 355. Emphasis added.

In contrast, the Court of Appeal in *ECNZ* stated that "[s]ocial responsibility is not readily susceptible of judicial assessment and determination in the round." Moreover it is arguable that courts could only determine whether an SOE had given "proper consideration" to a sense of social responsibility under section 4(1)(c) of the SOE Act by weighing that consideration with those in section 4(1)(a) and (b) concerning profitability, efficiency, and acting as a good employer to determine consistency with the "overriding" objective of operating as a successful business. That is a very difficult determination and arguably one which the courts do not have the expertise or authorisation to undertake. This casts doubts on Taggart's allegation of "ideological preference" driving the Court of Appeal's approach to section 4(1)(c) in *ECNZ*, cited above. It further explains why Taggart's arguments for consistency of the Court of Appeal's approach to section 9 of the SOE Act with section 4 of the SOE Act is also questionable. As Taggart himself states: "there are significant differences in the wording and structure of sections 4 and 9."[70]

IV A CLASH OF IDEOLOGIES?: DIFFERENT APPROACHES TO THE SCOPE OF JUDICIAL REVIEW

A *How Do Judges Differ?*

Petrocorp v *Minister of Energy* provides a good example of the two main approaches to judicial review.[71] There, Richardson J, with whom the Privy Council agreed, accepted that the Minister had been granted unfettered discretion under section 36 of the Petroleum Act to determine what lay in the national interest in granting mining licences partly because "there are limits to the democratic acceptability of judicial review. It reflects concerns about the constitutional and democratic implications of judicial involvement in wide issues of public policy and public interest."[72] Richardson J then quoted from his statement in *CREEDNZ* v *Governor-General*[73] that "the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene."[74] He also referred to *Ashby* v *Minister of Immigration*,[75] where he held that the content of the national interest in relation to immigration policy and the granting of temporary visas, and in particular the isolation of specific aspects of foreign and domestic policies and their elevation into obligatory considerations which must be weighed by the Minister, was not a proper subject for determination by the Court.

On appeal, in *Petrocorp*, the Privy Council endorsed Richardson J's judgment and concluded their own by quoting from Lord Scarman in *Nottinghamshire County Council* v *Secretary of State for the Environment*: "Judicial review is a great weapon in

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70 Above n 63, 349.
71 Above n 62.
72 [1991] 1 NZLR 1, 46 (CA).
73 Above n 67.
74 Above n 72.
75 [1981] 1 NZLR 222.

the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power."[76]

In contrast, Cooke P, writing for the majority in the Court of Appeal in *Petrocorp,* stated that:[77]

> In administrative law it is of first importance that the Courts keep within the proper limits of their functions and competence, recognising that there are wide areas of decision where a political judgment of the national interest must prevail. But it is no less important that the Courts should not abdicate responsibility for ensuring that Acts of Parliament conferring Ministerial powers are complied with both in the letter and the spirit. A Minister's claim to be the sole judge of the national interest must at least be open to scrutiny as to the grounds on which it is based. When, in a case under an Act such as this, his grounds turn out to be essentially commercial or pecuniary, it would be to deny the rule of law and the existence of constitutional government if the Courts were unwilling to hold that his actions must be consistent with his commercial obligations and the elementary principles of fair play.

B Why Do Judges Differ?

1 The reasons for an expansive approach to judicial review

Viewpoint on the appropriate scope of judicial review ultimately depends on conceptions about the *role* of judicial review. Judges who support a wider scope for judicial review see the courts as the arbiters between the governed and the governors, and the protectors of individual liberties. Thus, where the decision has significant public effect, or where the accountability mechanisms established by Parliament are deemed to be *inadequate*, the courts must subject decisions to judicial review to fulfil New Zealanders' growing expectations of accountability, and to prevent the erosion of rights.[78] As Hammond J stated in *Hamilton City Council* v *Waikato Electricity Authority*:[79]

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76 1986] AC 240, 250-251.

77 Above n 72, 38.

78 See further, A R Galbraith QC "Deregulation, Privatisation and Corporatisation of Crown Activity: How will the Law Respond?" 1993 New Zealand Law Conference, Wellington, 2-5 March, 1993, p 226, 234. See further, RE Harrison "Deregulation, Privatisation and Corporatisation of Crown Activity: How Will the Law Respond?" 1993 New Zealand Law Conference, p 102, 104. Galbraith also stated at p 234 that "It would be unfortunate if the Judicature Amendment Act which was progressive legislation in its time should now become an impediment to judicial review being applied to these public character decisions. In my opinion the jurisdictional definitions of the Judicature Amendment Act need to be revisited." See further, Sir H Woolf *Protection of the Public - A New Challenge* (Stevens, London, 1990) 28, that reform of the equivalent provision in English law might be necessary.

79 Unreported, 7 July 1993, High Court, Hamilton Registry, CP 21/93, 71-72. Emphasis added. In *NZFP Pulp and Paper Ltd,* above n 2, 24, Hammond J expressed these sentiments much more colourfully, stating that "this Court will not allow the dripping heads of individuals or institutions - whether of high or low station - to be

> I am not prepared to hold non-justiciable a decision of a Minister having *this kind of significance*. ... These were essentially community assets of an extensive variety, operating in the day to day lives of citizens in this part of New Zealand. To say that they can be put forever beyond the reach of judicial review in a Ministerial decision, even in a matter of *such compelling moment* as national energy policy, in my view is not a tenable proposition.

In *Burt* v *Governor-General*,[80] Cooke P held that the Governor-General's refusal to exercise the Royal Prerogative of mercy for full pardon of a conviction for a crime punished by life imprisonment was non-justiciable, but only because other existing safeguards were adequate for the small scope of the problem:[81]

> If there were good reason to believe that injustices as revealed by some English cases are occurring or likely to occur in New Zealand under our present system, we would be disposed to favour any form of increased judicial review that could help prevent this. But we are not satisfied that there is good reason. The existing safeguards are considerable and there is no real evidence that they are not working. ...
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> In our view the existence of various safeguards just outlined is of importance in determining the present appeal. Bearing in mind the safeguards there appears to be no reason to think that the balance currently struck in New Zealand is wrong. In particular no pressing reason has been made out for altering the practice regarding the Royal prerogative of mercy. *While accepting that it is inevitably the duty of the Court to extend the scope of common law review if justice so requires, we are not satisfied that in this field justice does so require, at any rate at present.*

Finally, Thomas J stated extra-judicially in *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy*[82] that judicial autonomy is "[i]n essence ... the process by which a judge translates the standards, needs and expectations of the community into legal principles, and it incorporates the freedom, independence, and capacity for judges to consciously undertake that task." Thomas J argues that judges must do this since law in general exists to "serve the community and meet the function which society has ascribed to it." That is undoubtedly true, but it presupposes that judges *can* accurately assess such community standards, needs and expectations and that there are *common* community standards, needs and expectations which are capable of being determined. That has become increasingly doubtful with the growing diversity of New Zealand society. Moreover, the November 1993 election results showed, to some extent, the deep divisions in New Zealand society over the appropriate role of the

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handed to the executive of other governmental authority on a platter of unlawfulness." Note that this expansive approach to judicial review was applied not only to the question of whose actions can be attacked but also to the question of on what grounds. Hammond J found that there was a breach of substantive fairness in the case (p 37).

80 [1992] 3 NZLR 672.

81 Above n 80 682-683. Emphasis added.

82 (1993) 23 VUWLR No I, Monograph 5, 2.

state.[83] What happens when judges disagree as to the standards, needs and expectations of the community?

Furthermore, although it is undoubtedly true that "judges cannot abdicate their responsibility to keep abreast of the times,"[84] adaptation in judicial review must be to *factual* changes in the role of the government and the bureaucracy, which is different from judges' perceptions of how society's standards, needs and expectations are changing.[85] As Professor Saunders states: "Administrative law is inseparable from the broader context of the system of government, including its institutional structure, political culture and constitutional framework."[86] Thus, although it is "inevitable" that value judgments do affect judges' decisions and their approach to the appropriate scope of judicial review, is it really "desirable" as Thomas J argues?[87]

2 *The reasons for a restrictive approach to judicial review*

(a) *Justiciability concerns*

In contrast, other judges like Richardson J do not see the scope of judicial review being determined by the *adequacy* of the accountability mechanisms Parliament has enacted. Rather, his focus is, first, on whether the issues raise real and substantial questions in a form appropriate for judicial determination,[88] or on whether the issue is "justiciable," and Richardson J gives greater scope for the operation of justiciability concerns than Cooke P.[89] Justiciability also concerns whether the courts have the requisite expertise;[90] whether adversarial proceedings are suitable to resolve the matter;[91]

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83 The voters delivered the National Government with the slimmest majority possible, one seat, and the Alliance and NZ First, whose policies supported greater state intervention, won considerable support. The National Government was elected with only 35.05 per cent of the vote. The percentage of votes received by the *losing* parties were Labour (34.68 %) Alliance (18.21 %) and NZ First (8%). Final results from the Chief Electoral Office. Cf Thomas J's arguments on this issue, above n 82, 56-58.

84 Above n 82, 28.

85 See Sir Ivor Richardson's quote above, text accompanying note 3.

86 C Saunders "Lessons and Insights from Other Common Law Countries" (1991) 27-28 Admin Rev 2, 3.

87 Above n 82, 3.

88 *Re Saskatoon Criminal Defence Lawyers Association and Government of Saskatchewan* (1984) 11 DLR (4th) 239, 244 per Wimmer J

89 See the quotes from *Petrocorp* contrasting Cooke P's views on justiciability with Richardson J's views in Part IV, A above. See further, Hammond J, *NZFP Pulp and Paper Ltd,* above n 2, 22.

90 Above n 4, 15-16.

91 As Richardson J stated in *ECNZ* above n 4, "the legislature intended a broader approach to accountability rather than the *transaction focus* of the courts." Emphasis added.

and the impact of protracted litigation and consequential delays on executive decisionmaking.[92] As Taylor states:[93]

> The key to determining the limits of judicial review is the question inherent in the rational allocation of functions: for what is judicial review of administrative action the most apt institutional design? There are four sides to the question: the procedures used, the personnel involved, the rules governing decision-making and what is to be achieved by the decision.

More judicial review is not necessarily better. If the courts do not have the expertise to scrutinise such decisions, then intervention via judicial review may be more harmful than helpful. As Wade states, "judicial review has been devised and developed for controlling government, and, much as I value it for that purpose, I am sceptical about treating it as a universal good for all manner of human activities."[94]

Furthermore, what would the impact have been if the Court of Appeal had intervened to subject decisions such as the termination of the interim agreement in *ECNZ* to judicial review? Apart from the question of whether the courts would have the necessary expertise to supervise compliance with section 4(1)(c) of the SOE Act, would SOEs ever be free to fulfil the aim set out in the SOE Act Long Title of improving the economic performance of trading functions? Would "the imposition of judicial review on the commercial and industrial world...create a formalistic, civil service mentality in which caution would be the watchword"? Would that not "work seriously against enterprise and efficiency"?[95]

(b) Other non-judicial accountability mechanisms

In *ECNZ*, Richardson J stressed that "shareholder and political accountability is the statutory means for assessing whether or not the SOE is meeting its principal objective under section 4(1)."[96] Thus, there is no room for "judicial supplementation" of a role

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92 See D G T Williams "Justiciability and the Control of Discretionary Power" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland 1986) 103, 116-117.

93 GDS Taylor "May Judicial Review Become a Backwater?" in M Taggart, above n 92, 152, 155.

94 Sir William Wade, above n 35, 442.

95 Above n 94, 442.

96 Above n 4, 14. He also stated (pp 13-14) that: "there is no role for the court in the accountability provisions of the legislation. The immediate responsibility rests on the directors. They are persons 'who, in the opinion of those appointing them, will assist the State enterprise to achieve its principal objective' (s 5(1)). In terms of s 5(3) the board of the SOE is 'accountable to the shareholding Ministers in the manner set out in Part III of this Act or the rules of the State enterprise'. Importantly all decisions relating to the operation of an SOE are required to be made by or pursuant to the authority of the board in accordance with its statement of corporate intent (s 5(2)). The statement of corporate intent which the board is required to deliver to shareholding Ministers lists information appropriate for a corporate organisation conducting a major commercial business. The statement has to identify separately

for the courts via judicial review in commercial decisions since this would frustrate the apparent intention of Parliament.[97] The SOE Act established something akin to "a code" of accountability mechanisms for commercial decisions which leaves no scope for the imputation of the right to judicial review, whether under the JAA or in common law.

The fact that Parliament may not be carrying out its scrutiny function very successfully is not a quid pro quo for extending the scope of judicial review. Rather Parliament needs to be reformed to ensure that it carries out its scrutiny function adequately. Furthermore, it is arguable that one of most significant impacts of moving to a Mixed Member Proportional representation system of electing members of Parliament will be to improve Parliament's performance of its executive scrutiny function. Increasing the number of MPs from 99 to 120 under MMP will ameliorate the major obstacle to effective scrutiny - inadequate numbers of MPs to staff select committees combined with the large amount of legislation. The changed balance of power in Parliament may also render it more difficult for Governments to close down inquiries initiated by select committees.[98]

(c) No higher law Bill of Rights

The court cannot just step in because it thinks Parliament has failed to enact adequate accountability mechanisms in the SOE Act. Such an approach would presuppose the co-ordinate model of the constitution which has been used to justify the application of Bills of Rights to private action. This model "lays stress on the equal responsibilities of the various branches of government to carry out the [constitution's] mandate and the reciprocal nature of their roles."[99] Thus, where there is no appropriate or adequate statutory, or administrative, or common law action or remedy for a litigant, the court should accept the validity of the constitutional action and grant the remedy.[100] Similarly, the model requires courts to create remedies if the legislature fails to adequately protect rights and freedoms. However, the coordinate model of the

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any activities for which the board of the SOE seeks compensation from the Crown whether or not the Crown has agreed to provide such compensation (s 14(2)(i)). That latter provision complements s 7 which provides that where the Crown wishes an SOE to provide goods or services to any persons, the Crown and the SOE shall enter into an agreement under which the SOE will provide the goods and services in return for the payment by the Crown of the whole or part of the price thereof."

97 In *Daganayasi* v *Minister of Immigration* [1980] 2 NZLR 130, 141, Cooke P stated that the applicability and extent of the requirements of natural justice "depend either on what is to be inferred or presumed in interpreting the particular Act ... or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation. ..." See further *Hamilton City Council*, above n 79, 67.

98 See further M Chen "The Implications of MMP for Lawyers" *Lawtalk*, December 1993, No 404.

99 B Slattery "A Theory of the Charter" (1987) 25 Osgoode Hall LJ 701, 707.

100 See AS Butler "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1993) 22 Anglo-Am L R 1, 12-13.

constitution is formulated by Slattery in the context of a higher law Bill of Rights. In New Zealand, we still have parliamentary sovereignty, an ordinary statute Bill of Rights, and a limited scope of judicial review. Thus, it cannot be said that the three branches of government have "reciprocal roles."

C *Ideological Differences?*

Although the author would dispute the allegation that ideological preference is the *major* factor behind the different judicial approaches to the appropriate scope of judicial review, it inevitably does play a part for the reasons set out below. However, ideological preferences are not just limited to those who support a more limited scope of judicial review as Hammond J seemed to suggest in the recent case of *Hamilton City Council*:[101]

> I am well aware that there is a school of thought in New Zealand which holds that judicial review has gone too far, and that it is now functionally rather like a general appeal. For myself, that grossly over-simplifies the problem. And the values of that school of thought rest rather too uncomfortably on an (inarticulated) economic basis to hold durable value.

By that, he appears to be referring to Public Choice Theory and new right thinking.[102] However, ideological preferences also underlie the approach of those in favour of greater judicial review.[103] Hammond J's statement quoted above, for example, assumes that the supply of electricity is part of the appropriate role of the state and that the courts have the expertise to scrutinise national energy policy. Furthermore, are politicians really abdicating their responsibilities to the market place, as Taggart argues, thus requiring the courts to intervene, or is the government merely withdrawing from interfering in trading functions it had no business to be performing in the first place? Viewpoints on the appropriate scope of judicial review thus depend on different conceptions of the appropriate role of the state, and the perceived costs and benefits of court scrutiny, government performance of trading functions and government regulation.[104]

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101 Above n 79, 71.

102 Above n 79, 69. See further, Part II, E above, and above n 5, 83-84, where Taggart argues that an approach to judicial review, like that adopted by the Court of Appeal in *ECNZ* is consistent with an adherence to Public Choice Theory which he claims denies that there is any such thing as the "public interest." Adherents of Public Choice, Taggart argues, thus reject that public enterprises are any different from private enterprises despite having to exercise delegated powers in the public interest.

103 See further J Kelsey *Rolling Back the State* (Bridget Williams Books, Wellington, 1993).

104 See P McAuslan "Public Law and Public Choice" (1988) 51 MLR 681, 687 where he contrasts Public Choice theorists' sceptical perspective about the benefits of government with that of the Welfare Statists who assume that there is something called the public interest which politicians and public servants can be instrumental in advancing.

For example, opponents of expansive judicial scrutiny of the decisions of corporatised enterprises would argue that the costs of judicial intervention outweigh the benefits, while the proponents of expansive review would dispute the bad side effects of court intervention. The latter would argue that without judicial review, there is no-one to protect the public interest. Even if such costs were incurred, they would argue that the benefits of ensuring equality of treatment and the provision of the necessities of modern life outweigh it. How much do these different cost/benefit analyses depend on giving paramount weight to different values and on different conceptions of the sort of society that a majority of New Zealanders want?

It is important that the influence of ideology on both sides of the debate is acknowledged since these are matters on which there can be legitimate disagreements. These are often based on assumptions that are difficult to prove one way or the other. Thus, is it difficult to assert that there is a right or wrong ideological approach to judicial scrutiny of SOE decisions?[105]

D Future Directions?

Future directions concerning the scope of judicial review will depend on the composition of the Court of Appeal bench. Whether the right of final appeal to the Privy Council is retained will also affect the approach to judicial review.[106] In *Petrocorp*, Richardson J's more restrictive approach to judicial review prevailed, despite being the sole dissenter in the Court of Appeal, because he was upheld by the Privy Council on appeal. Thus, recent statements by the Attorney-General predicting the demise of the Privy Council as New Zealand's final court of appeal by the end of the century could have a significant impact on the scope of judicial review.[107]

The adoption of MMP may also render Parliament more effective in its scrutiny of the executive to the extent that courts may find less need to intervene via judicial review. Finally, the development of public law challenges under the Bill of Rights Act may undermine the restrictive approach to judicial review adopted in cases like *ECNZ*. The actions covered by section 3 of the BORA are wider than under section 4 of the JAA, and sections 5 and 6 of the BORA arguably allow courts not only to determine the legality of an action, but to determine the substantive correctness of the decision. Thus, as McLean et al stated, the BORA "will in some cases invalidate exercises of discretionary power which would survive administrative law scrutiny".[108]

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105 See M Chen "Law and Economics and the Case for Discrimination Law", forthcoming.

106 See M Chen "Should New Zealand Retain A Right of Final Appeal to the Privy Council?", forthcoming.

107 Media release by the Attorney-General, 1/10/93 reported in (1993) 16 TCL 38/1-2.

108 J McLean, P Rishworth, M Taggart "The Impact of the New Zealand Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 97.

V CHALLENGES TO CORPORATISED ENTERPRISE ACTION UNDER THE BILL OF RIGHTS ACT 1990

A The Court's Approach to the BORA

The long title to the BORA states that it aims to "affirm, protect and promote human rights and fundamental freedoms in New Zealand; and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights" ("ICCPR"). The Court of Appeal has adopted a broad, purposive approach to the Bill,[109] most often citing the approach of Lord Wilberforce in *Minister of Home Affairs* v *Fisher*[110] as the appropriate one to adopt in interpreting New Zealand's BORA: "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[111]

B The Actions Covered by the BORA.

Unlike judicial review under the JAA, which determines the legality of "statutory power," the BORA aims to protect fundamental rights and freedoms from unreasonable encroachment, under section 3,

(a) By the legislative, executive or judicial branches of the government of New Zealand; or
(b) By any person or body in the *performance of any public function*, power, or duty conferred or imposed on that person or body by or *pursuant* to law. (Emphasis added)

The focus of section 3(b) is specifically on the nature of the body, and the effect of their action, in comparison with the focus of "statutory power" under section 4 of the JAA, as interpreted by the Court of Appeal in *ECNZ*, on the *source* of the power exercised. Section 3(b) also refers to "functions" and "duties," as well as powers, and these need only be imposed "by or *pursuant* to law." Thus, in general, the scope of actions that can be challenged under the BORA will be broader than under section 4 of the JAA.

1 Corporatised bodies

In *Federated Farmers of NZ (Inc)* v *NZ Post Ltd*[112] the applicants alleged that a $40 increase doubling the Rural Delivery Service Fee ("RDS") by the SOE, New Zealand

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109 *MOT* v *Noort* (1992) 8 CRNZ 114, 153 per Richardson J.
110 [1980] AC 319, 328.
111 See further M Chen and GWR Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland. 1993) Part III "The New Zealand Bill of Rights Act 1990."
112 Above n 6.

Post ("NZP"), under contract, breached section 14 of the BORA. McGechan J held that a[113]

> case can be made that NZP is merely a private company, which carries out postal functions under contracts with private users, ... It was indeed submitted that there is a distinction between core "public" functions (within the Bill of Rights Act), and "additional" functions (such as RDS) which are not. I do not accept such narrow interpretations. The Bill of Rights is to be interpreted in a suitably generous and purposive way, consistent with its aims: Cf. *MOT* v *Noort* (1992) 8 CRNZ 114, 141 per Hardie Boys J. It would not be in that spirit to shut a major vehicle of communication out from obligations under s14 as to freedom of expression. I have no difficulty regarding mail handling as a "public function". *It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the Crown: a "State Owned Enterprise".* For Bill of Rights purposes and as an ordinary use of language NZP can and should be regarded as exercising "public functions". I do not encourage fine distinctions amongst those functions. Its public functions - mail handling, in the broad sense - are both conferred and imposed by law. The genesis found within the statutory assembly of the State-Owned Enterprises Act 1986, Companies Act 1955, and Postal Services Act 1987, plus on-flow of private contracts. NZP activity does not have its genesis in whim, or voluntary decision.

If mail handling is considered to be "performance of a public function ... pursuant to law," surely many of the other trading activities SOEs undertake would also be considered to be "public functions, powers or duties," thus falling within the coverage of the BORA. McGechan J specifically stated that fees for electricity, which are "these days almost part of the right to life" under section 8 of the BORA, and fees for services such as railways could have implications for freedom of movement under section 18 of the BORA.[114] One can extrapolate from this fees for health services set by Crown Health Enterprises under the Health and Disability Services Act 1993, for example, could also be argued to have implications for the right not to be deprived of life.[115]

2 *Private bodies and privatised enterprises?*

In the recent case of *TV3 Network Ltd* v *Eveready New Zealand Ltd,*[116] Cooke P stated that TV3 Network Ltd fell within the scope of section 3(b) even though it is a privately owned company since it was a duly licensed television broadcaster under the Broadcasting Act 1989, and had "[c]ertain responsibilities, including some relating to balance in controversial issues of public importance, ... under section 4 of that Act." In *Sharma* v *ANZ Banking Group (New Zealand) Ltd,* Cooke P even stated, albeit obiter, and in a tentative fashion, that banks acting under section 19(1)(d) of the Insolvency Act 1967 might be covered by section 3(b) of the BORA:[117]

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113 Above n 6, 54-55. Emphasis added.

114 Above n 6, 57.

115 See M Chen "Public Law Liabilities under the Health and Disabilities Services Act 1993" forthcoming, [1994] NZLJ.

116 [1993] 3 NZLR 435, 441.

117 Unreported, 18 August 1992, Court of Appeal, CA 211/92, 8.

> It is perhaps not inconceivable - we say no more - that if the appellant and his wife were to consolidate their proceedings and jointly to sue the bank and others on an allegation of unreasonable search or seizure within the meaning of the Bill of Rights (New Zealand Bill of Rights Act 1990, section 21) or an infringement of their or their family's rights to privacy under the common law, some case of action might be established. That is a grey and perhaps developing area into which we do not venture further for the purposes of the present judgment. Certainly the case has not been pleaded in that way and if anything is to be done to improve it the pleadings would require much attention.

The possible application of the BORA to banks is not surprising since some who support a "public effect" test for judicial review also support the extension of judicial review to commercial institutions, like banks. For example, Lord Justice Woolf has stated that he would like to give the courts "a much wider power of intervention" extending to large corporations and associations whose decisions are at present free from legal scrutiny but which, because of their economic muscle, may be unfair or may be against the public interest.[118]

The approach of the New Zealand courts appears to be broader than that of overseas jurisdictions. In the United States, arguments that government regulation of a private activity transforms the actions of the regulated entity into those of the government and thus makes it subject to the fourteenth amendment of the United States Constitution consistent with the "State Action" doctrine have been rejected by the Supreme Court.[119] The Canadian Supreme Court has also defined "state action" narrowly.[120] However, most privatised state trading enterprises, such as Telecom and Railways, would not be covered by the New Zealand BORA since any duties these companies are subject to - to retain a kiwi share, and to meet certain conditions prior to rail line closure, for example - are "by or pursuant to" contract, and not statute.

The New Zealand courts have not, however, gone as far as stating that the BORA applies to purely private actions between citizen and citizen. In *R* v *Goodwin (No. 1)* Cooke P stated that "the scope of the New Zealand Bill of Rights Act ... is limited by

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118 [1986] Public Law 220, 224-225. Cf Sir Patrick Neill "A Reply to Professor Sir William Wade's, 'New Horizons in Administrative Law'" in 9th Commonwealth Law Conference *Conference Papers* (Commonwealth Law Conference (1990) Ltd, Auckland, 1990) 443, who, although supporting the public effect test, did not think that review should extend to private commercial bodies.

119 See *Moose Lodge No 107* v *Irvis* 407 US 163 (1972) where the court held that a private club which held a state issued liquor licence was not amenable to constitutional action even if its membership rules discriminated on the basis of race; and *Jackson* v *Metropolitan Edison Co* 419 US 345 (1974).

120 See *Stoffman* v *Vancouver General Hospital* (1990) 76 DLR (4th) 700 ; *Re McKinney & The Board of Governors of the University of Guelph* (1990) 76 DLR (4th) 545; and *Harrison* v *University of British Columbia* (1990) 77 DLR (4th) 55 where the Canadian Supreme Court held that universities and hospitals are not government actors even though they exercise statutory powers and are state subsidised.

section 3 to the public field," and that "The Bill of Rights does not apply in the field of purely private law."[121] This approach is supported by most commentators.[122]

C *The Nature of the BORA Challenges that can be Brought*

1 *Rights and freedoms "decisive" under section 6 BORA*

If corporatised enterprises are subject to the BORA, then the rights and freedoms in the Bill will not merely be mandatory relevant considerations which the decision maker must take into account in exercising a discretion, but they are decisive,[123] section 6 of the BORA stating that "[w]herever an enactment can be *given a meaning that is consistent* with the rights and freedoms contained in this Bill of Rights, that meaning *shall be* preferred to any other meaning." (Emphasis added.) Discretion cannot be exercised inconsistently with the BORA, unless it is a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" under section 5 of the BORA.

2 *"Reasonable limit" under section 5 of BORA*

The key issue in *NZ Post* was not that fees were charged by the SOE since McGechan J stated that "I have no doubt it can be proper for persons or bodies providing services which assist - or indeed provide - freedoms such as the freedom of expression to charge fees as an incident. ... [But] [t]he fees must be 'reasonable' limits 'prescribed by law as can be demonstrably justified in a free and democratic society' under section 5 of the BORA."[124]

In determining whether the RDSF was "reasonable," McGechan J effectively undertook substantive review of the decision's merits.[125] His definition of reasonableness was more akin to Cooke P's "ordinary sense" "in accordance with or within the limits of reason" definition of reasonableness,[126] rather than the high threshold, "gross" "*Wednesbury* unreasonableness" standard.[127] And although McGechan J stated that "[i]t was not envisaged this Court becomes a tribunal determining the cost of living" and that "Bill of Rights cases should not turn on a few debatable percentage

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121 (1993) 9 CRNZ 1, 17. See the much more ambiguous comments of Holland J in *Police* v *Geiringer* (1990-92) 1 NZBORR 342-343.

122 See P Rishworth "The Potential of the New Zealand Bill of Rights" [1990] NZLJ 68, 70 and DM Paciocco "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent LR 353, 360.

123 DM Paciocco, above n 122, 363.

124 Above n 6, 57.

125 Note that the onus of proving that the limit is reasonable under s 5 of the BORA is on the *Crown*, instead of being on the applicant to prove that the decision was unreasonable in judicial review.

126 *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, 664. This is difficult to discern conclusively since the RDSF in this case was so "moderate".

127 See *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223.

points,"[128] he was effectively determining whether the RDSF which NZP set was a "fair" price in all the circumstances.[129] This highlights the need for courts to be fully informed of all the relevant commercial and economic considerations if they are to undertake this sort of review.[130]

That section 5 of the BORA requires a substantive review of an action is reinforced by the further requirement that the reasonable limit must be "demonstrably justified in a free and democratic society." McGechan J states that this will require the court "to make difficult assessments, involving value judgments and social balances."[131] Richardson J further stated in *Noort* that:[132]

> in principle an abridging enquiry under section 5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing (1) the significance in the particular case of the values underlying the Bill of Rights; (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights; (3) the limits sought to be placed on the application of the Bill provision in the particular case; and (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

In contrast, under the judicial review application in *ECNZ*, Richardson J stated that "[t]he balancing of social responsibility and profitability and that broad overall balancing [required by section 4(1) of the SOE Act] are inherently unsuitable for judicial decision."[133] This shows how differently justiciability concerns are treated in the BORA context, from the judicial review context.

3 What was a "reasonable" fee in NZ Post?

In concluding that the RDSF "is necessary and appropriate, and does not in practical terms impede the freedom of expression,"[134] McGechan J stated that:

(a) Reasonableness was an "an elastic concept" which must be "looked at very broadly"[135] and applied in society in a realistic way;[136]

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128 Above n 6, 57.
129 Above n 6, 58.
130 A R Galbraith QC, above n 78, 238.
131 Above n 6, 57.
132 Above n 109, 160. If justiciability concerns raised by the high policy content of the subject matter will not prevent the courts from scrutinising decisions under the BORA, would Richardson J have approached cases like *Ashby*, above n 75, differently, interpreting the Immigration Act consistently with s 19 of the BORA concerning freedom from, inter alia, race discrimination even though immigration is, par excellence, a non-justiciable matter?
133 Above n 4, 16.
134 Above n 6, 58.
135 Above n 6, 57.
136 Above n 6, 58.

(b) Although McGechan J stated that "[t]he user pays principle is well established, and not inherently unreasonable,"[137] and that "[t]here is no undying democratic principle all such [essential services] must be provided free of charge,"[138] he also stated that "[i]t is reasonable, and within the parameters of the justifiable in a free and democratic society to impose *a degree* of "user pays" even upon essential services";[139] "to require rural dwellers to pay a *moderate* fee to have the convenience of delivery to the rural gate; at least when the alternative is to require cross-subsidisation by other mail users."[140]

(c) Contrary to *ECNZ*, McGechan J did find a privately enforceable statutory duty under section 4(1)(c) of the SOE Act on NZP to convey and deliver mail within monopoly areas; he stressed that "[t]he duty is limited to a rural delivery service which is *economic*."[141] Will a fee still be reasonable then, if it is greater than that needed to make the service economic? What if the monopoly SOE increases prices to make an inflated profit, or decides to increase prices instead of making their business more efficient?

(d) McGechan J suggested that the imposition of a fee which reflects "full cost recovery" may be unreasonable, especially if it "foreclosed availability of rural mail."[142] McGechan J also stated that "I am prepared to accept an increase of $40 per annum is unlikely to *work ruin or hardship*, even on a 'last straw' basis."[143] But what if NZP had charged a fee that is likely "to work ruin or hardship" ? McGechan J does not elaborate on *how much* ruin or hardship. Nor does he address whether such hardship is sufficient if suffered by just the applicant, or if a significant proportion of the population must be affected, and if the latter, how significant a proportion?

D Is Such Judicial Scrutiny Appropriate?

The case against judicial scrutiny of the sort undertaken in *NZ Post* is that it could result in applicants' using challenges under the BORA to secure economic advantage. It may also result in courts' using the protection of civil and political rights as a justification for subjecting corporatised enterprises to economic regulation, when the BORA was never intended for this purpose, and the courts are arguably not equipped to make the economic assessments and commercial judgments needed to replace enterprise decisions with their own. Furthermore, such economic regulation would be piecemeal, since only decisions of enterprises which abrogate rights and freedoms protected by the BORA can be regulated.

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137 Above n 6, 57.
138 Above n 6, 56.
139 Above n 6, 56. Emphasis added.
140 Above n 6, 57.
141 Above n 6, 28-29. Emphasis added.
142 Above n 6, 57-58.
143 Above n 6, 57. Emphasis added.

Economic regulation by the courts may subvert the government's economic policy by preventing such enterprises from exercising the very economic freedom for which corporatisation and privatisation was instigated. If the courts can second guess an SOEs' price setting for their trading service, as *NZ Post* demonstrates, for example, and invalidate unreasonable fees which unlawfully restrict rights and freedoms under the Act, then there may be little scope for SOE Boards to manage any other aspect of their operations. All other decisions depend on price.

Arguments in favour of judicial scrutiny refer to the need for the courts to intervene in the public interest, particularly where the other accountability mechanisms these enterprises are subject to are inadequate. Furthermore, it is arguable that such scrutiny of enterprise decisions is no more than what the court undertakes in enforcing the common law duty on *monopoly* suppliers of essential commodities to supply such commodities to everyone who wants them for a fair and reasonable price, on reasonable terms and in an impartial manner.[144]

E Comparison with Common Law Duties on Essential Commodity Monopoly Suppliers

Although McGechan J stated in *New Zealand Rail Ltd* v *Port of Marlborough Ltd*[145] that these common law duties were "arcane," and James Farmer QC questioned "whether common law doctrine of this kind can be regarded as having survived the enactment of the Commerce Act and the particular competition regime which it introduced,"[146] the Court of Appeal decision in *ECNZ* leaves little doubt that such duties exist and continue to operate. As Richardson J stated in *ECNZ*, "[t]he applicability of the common law principles is not in dispute. It is common ground that, contract or no contract, Electricorp as a monopoly supplier is obliged to supply and will supply the electricity by the Board at fair and reasonable prices."[147] However, as Richardson J went on to state:[148]

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144 R E Harrison, above n 78, 107, further points to a line of cases which, while acknowledging the right of local authorities who licence land or facilities to make a profit, requires them nevertheless to "act in a commercially reasonable fashion" in fixing their charges. See Casey J in *Webster* v *Auckland Harbour Board* [1987] 2 NZLR 129, 135, and *Mount Cook National Park Board* v *Mount Cook Motels Ltd* [1972] NZLR 481 (CA) and the cases discussed therein. Harrison also states that where a supplier of public utility services has already granted access to those services and then seeks unreasonably to change the conditions of access or to raise charges, a further strand of authority is the principle of "non-derogation from a grant." This principle was applied to reduce an excessive licence fee increase in the *Mount Cook National Park Board* case cited above.

145 Unreported, 1 April 1993, High Court, Blenheim Registry, CP 8/91.

146 J Farmer "Transition from Protected Monopoly to Competition: The New Zealand Experiment" in the New Zealand Institute of Policy Studies Symposium - The Governing Environment for Public Utilities, Wellington, 6 October 1993, p 39.

147 Above n 4, 9.

148 Above n 4, 9-10.

> It is common ground, too, that in the absence of the particular contractual regime provided by the 1988 contract a fair and reasonable price would ultimately be fixed at law - and in the *South Taranaki Electric Power Board* case the court envisaged appointing a referee to perform that task.

What is a fair price is not fixed by the courts, but by tribunals with special expertise.

A further distinction between judicial scrutiny under the BORA and these common law duties is that the BORA applies to a far wider range of bodies than the common law duties which are limited to bodies which have a "practical monopoly" over essential commodities, or are suppliers in a position of great and special advantage over other suppliers, as Hutchison J stated in *South Taranaki Electric Power Board* v *Patea Borough*.[149] It could potentially apply to all corporatised enterprises, whether or not they provide monopoly services, if their actions unlawfully restrict rights and freedoms under the BORA.[150] In *NZ Post*, for example, McGechan J found that "mail handling, in the broad sense",[151] including handling of those articles *outside of NZP's monopoly area* of 45 cent 200 gram standard letters, was a "public function" under section 3(b) of the BORA.

Finally, the BORA may go beyond the requirements of the common law duties on monopoly suppliers of essential commodities by requiring minimum procedural standards to be met under section 27(1) of the BORA before, for example, a monopoly supplier terminates supply, or an agreement setting out the terms of supply is terminated. This may be a way of challenging Electricorp's decision to terminate the interim agreements in *ECNZ* before the Privy Council.

F The Right to Natural Justice under section 27(1) Bill of Rights Act 1990

Section 27(1) of the BORA provides that:

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

1 Potential Auckland Electric Power Board ("AEPB") argument

AEPB could argue that they should have been given natural justice before Electricorp terminated the interim agreements under section 27(1) of the BORA, since, in terminating the interim agreements, Electricorp was acting as a "tribunal or public

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149 [1955] NZLR 954, 962.

150 Their status as an absolute or partial monopoly would obviously be a relevant factor, however, in determining whether the decision limiting the right under the BORA was reasonable.

151 Above n 4, 55.

authority ... [making] a determination in respect of"[152] AEPB's rights, or at least their interests (including legitimate expectations)[153] which would be recognised by law. Although the AEPB is a legal person, and not a natural person, section 29 of the BORA provides that, "[e]xcept where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons." The provisions of this Bill of Rights do not "otherwise provide," and there appears to be no reason why it is not "practicable" for rights of natural justice to be given to companies whose rights have been affected by a public authority determination.

A tribunal does have judicial overtones, as does a "determination,"[154] but the inclusion of "public authority," as the Bill of Rights White Paper stated,[155]

> is a deliberately vague term. It will have to be interpreted by the courts, just as they have had to decide over the centuries which bodies - essentially public rather than private - are subject to the common law principles of natural justice. ... The word "determination" will be subject to the same process.

The Bill of Rights White Paper stated that section 27(1) "recognises the pervasive nature of the powers of public authorities and the central importance of the principles of natural justice in helping to ensure that they are exercised in a fair way."[156] Thus, taking account of the mischief for which section 27(1) was created, AEPB could argue

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152 This phrase was specifically included to make it clear that the determination had to relate to the individual, rather than being a general one affecting persons as a class, or one indirectly affecting an individual. See *A Bill of Rights for New Zealand: A White Paper*, (1985) para 10.169, p 110. Although this would be an issue of degree, it would probably not be difficult to show that a decision to terminate supply of a public utility to a person was "a determination in respect of that person's rights, obligations, or interests." However, an increase in fees or rates, for example, would apply too generally to be "in respect of" that person's rights.

153 See *Kiao* v *West* (1985) 150 CLR 550, 616-617. This case suggests the application of natural justice to "the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy."

154 A determination would probably be interpreted as a decision, whether preliminary or final, as compared with a recommendation. See J Hay, "Section 27 of the New Zealand Bill of Rights Act 1990, The Right to Justice: Something Old, Something New" (Unpublished LLM Research Paper, Victoria University of Wellington, 1991) 13. Liddell stated in "Administrative Law" [1990] NZ Recent LR 279, 288 that "the courts should not prefer a confined focus on what constitutes a determination of a person's rights, interests or obligations if to do so reduces the court's willingness to insist on fairness in situations where the decision was preliminary or provisional (and thus perhaps not determinative)".

155 Above n 152, para 10.170-10.171, p 110.

156 Above n 152, para 10.168, pp 109-110.

that the phrase "tribunals or public authorities" could include statutory bodies such as SOEs,[157] if not all section 3 bodies.

2 *Potential Electricorp rebuttal*

In rebuttal, Electricorp could argue that the reference to tribunals and public authorities in section 27(1) is a subset of section 3(b) of the BORA. And, although neither tribunals nor public authorities have a particular fixed meaning in law, they appear in certiorari and prohibition cases, and those remedies are used primarily to control inferior courts and administrative authorities. Even if section 27(1) did extend to all section 3 bodies, Electricorp's decision to terminate the agreement was not the "performance of a public function," but the exercise of contractual powers like any private company. Nor was its termination the exercise of a "power to make a determination" in respect of AEPB's rights. Section 27(1) was not intended to cover the *ECNZ* situation.

3 *Content of "natural justice"*

Under section 27(1), the *amount* of natural justice which "any tribunal or other public authority" has to give is still likely to depend on the nature of the person's rights, the nature of the decision maker's powers over them and the adverse impact of the "determination," as in common law.[158] There is unlikely to be an *absolute right* to all the contents of the right to natural justice, in every case.[159] However, AEPB could argue for an expanded concept of natural justice, extending beyond present common law requirements, in two ways.

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157 There is support for this conclusion by commentators such as Taggart, above n 5, 83 and Hay, above n 154, 12.

158 See *Durayappah* v *Fernando* [1967] 2 AC 337. Note that this was the approach taken by the Department of Justice in their advice to the Attorney-General as to whether the Kumeu District Agricultural and Horticultural Society Bill 1991 breached s 27(1) of the BORA. This advice was given to enable the Attorney-General to perform his function under s 7 of the BORA, to report to Parliament where a bill appears to be inconsistent with the Act. See Secretary of Justice "Memorandum: Kumeu District Agricultural and Horticultural Society Bill (1991)" in M Chen and GWR Palmer *Public Law in New Zealand* above n 111, 557-558. This is also confirmed by the approach taken by Williams J in *Re V* [1993] NZFLR 369, 380, that the ex parte procedure provided by Rule 239 of the High Court Rules under which the Court could proceed to make an order on an urgent basis without giving natural justice, did not breach s 27(1) of the BORA. "If I am wrong about that then the breach involved in my view was not such, in the circumstances of this case, which would have the consequences of rendering the orders made invalid."

159 Or as Lord Denning MR stated in *R* v *Gaming Board, Ex parte Benaim* [1970] 2 QB 417, 430, a right to "chapter and verse" quoted to them in every instance where s 27(1) came into operation.

(a) Substantive remedy for breach of legitimate expectation

First, AEPB could argue that their contractual relationship with Electricorp gave rise to a legitimate expectation that the interim agreements entered into between 1988-1991 would remain in place until a new contract had been negotiated with Electricorp, and that breach of this expectation should invalidate the termination. At the very least, they should have been consulted prior to the decision to terminate.

Under judicial review, breach of legitimate expectation usually only results in a procedural remedy,[160] and in *Petrocorp* v *Minister of Energy*[161], the Privy Council rejected the argument that the contractual relationship between the Crown and the other joint venture partners gave rise to a legitimate expectation of being consulted prior to the Minister granting the mining licence to himself, and not to the Joint Venture.[162] However, the courts may be more amenable to these arguments under section 27 of the BORA for the following reasons.

"Natural justice" under this section must be *at least* as broad in content as under common law,[163] and there have been cases, even under common law, suggesting that natural justice or fairness has a substantive component.[164] Indeed, Hammond J recently found that there was a breach of substantive fairness in *NZFP Pulp and Paper Ltd and Anchor Products Ltd* v *Thames Valley Electric Power Board.*[165] Furthermore, Cooke P stated in *Noort* v *Ministry of Transport,*[166]

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160 See, for example, Greig J in *Wainuiomata District Council* v *Local Government Commission and Ors* Unreported, 20 September 1989, High Court, Wellington Registry, 30-31, who stated, after surveying the relevant cases, that: "With the greatest respect I can find nothing in those cases which will support any contention that the doctrine of legitimate expectation extends beyond the procedure or conduct of the tribunal or administrative body leading to the making of a decision. No doubt there is, in the end, an expectation that the decision will be in favour of the applicant in accordance with his understanding of the procedure which has been adopted or represented to be binding on the administrative body. But that does not create any substantive right in the applicant for which the right of review will restore or maintain that right." The aberrations are *Fairmont Holdings (No 2) Ltd* v *Christchurch City Council*, Unreported, 15 September 1989, High Court, Christchurch Registry, CP 3261/89, 32; and *Mirelle*, above n 25.

161 Above n 62.

162 Cf *Petrocorp* v *Minister of Energy,* above n 62, 653, per Lord Bridge; and Richardson J (in dissent in the Court of Appeal) above n 72, 48 with Cooke P at *Petrocorp* v *Minister of Energy* above n 72, 37.

163 See *Byers & Ors* v *Auckland Area Health Board* Unreported, 16 February 1993, High Court, Auckland Registry, CP 57/93, 10.

164 See Cooke P in *Daganayasi* above n 97, 149. "Fairness need not be confined to procedural matters." Substantive fairness is well summarised in DJ Mullan "Substantive Fairness Review: Heed the Amber Light" (1988) 18 VUWLR 293.

165 Above n 2, 37.

166 *Noort*, above n 109, 142. See further *R* v *Goodwin (No 1)* 9 CRNZ 1, 10, per Cooke P: "Collectively these rights now affirmed by Parliament appear to be at least as wide as

> the long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires *developments* of the law where necessary. Such a measure is not to be approached as if it did *no more* than preserve the status quo. ... In approaching the Bill of Rights, it must be of cardinal importance to bear in mind the antecedents. The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally, there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them. ... Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights.
>
> What is practical effect can only be a question of fact dependent on the particular circumstances. As in innumerable situations with which the law has to deal, a test of reasonableness naturally falls to be applied.

Hammond J also stated in *Simpson* v *Police*,[167] "a narrow view of the meaning of the term 'natural justice' in a Bill of Rights statute would be hopelessly wrong." Although the central objective of common law principles of natural justice is the protection of individuals against public authorities exercising judicial or quasi-judicial power, this objective can be overridden by parliamentary intention for expeditious decision making and administrative expediency considerations. In contrast, the very nature of a Bill of Rights - the rights-centered approach adopted by the Court of Appeal and section 6 of the BORA, requiring courts to interpret legislation consistently with the BORA when able to do so - arguably changes the balance of factors to give more weight to protecting individual rights.

The right to natural justice under section 27(1) can be subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 5 of the BORA. Factors such as the scheme of the Act and administrative efficacy have been taken into account under section 5.[168] However, Cooke P stated in *Noort*, that[169] "[i]nevitably there comes a point at which basic human rights have to be seen as transcending administrative efficiency."

Concerning remedies, Richardson J stated in *R* v *Goodwin* that:[170]

> The Bill of Rights does not contain any express enforcement provisions. A statement of fundamental human rights would be a hollow shell and the enactment of a Bill of Rights an elaborate charade if remedies were not available for breach. On the contrary

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the comparable common law rights. They may be wider, but it would be very surprising if they are narrower."

167 Unreported, 17 June 1993, High Court, Hamilton Registry, AP 58/91, 13.

168 See *Noort*, above n 109, where the Court of Appeal was trying to determine whether the scheme of the breath alcohol legislation warranted the imposition of the right to consult and instruct a lawyer at various points in the breath screening process.

169 Above n 109, 143.

170 Above n 121, 43.

> the premise underlying the Bill is that the Courts will affirmatively protect those fundamental rights and freedoms by recourse to appropriate remedies.

The scope of the remedies the courts will be prepared to grant for breaches of the BORA is already canvassed in some depth in a recent article by Professor Paciocco,[171] and public law remedies in particular await further development by the courts on:

(a) Whether the BORA is construed as granting independent remedial authority, or whether that must be derived from existing jurisdiction so that there is little scope for modifying existing remedies, or for developing new ones to meet the needs under the BORA;
(b) The "remedial objectives" the courts will adopt to guide their selection of remedy when the BORA has been breached; and
(c) The constraints imposed on remedies by existing statutory provisions relating to actions against the state, or Crown entities, such as the Crown Proceedings Act 1950.

AEPB will be arguing for a restrictive interpretation of any statutory limitations on proceedings against SOEs; paramountcy for the "rights" objective, over the enforcement or public interest objective in the court's selection of a remedy for breach of section 27(1);[172] and an independent remedial authority emanating from the BORA, as supported by cases like *Palmer* v *Superintendent of Auckland Maximum Security Prison*, where Wylie J stated that "[i]t may well be that the Bill of Rights Act *itself* impliedly empowers the Courts to grant whatever remedies may be appropriate to safeguard the rights therein."[173] The AEPB may then apply for the grant of a substantive remedy for breach of legitimate expectation, or, if the courts are not prepared to invalidate Electricorp's termination of the interim agreements, a right to make out the case against termination to Electricorp before they make their decision again, and damages for any detrimental reliance.[174]

In rebuttal, Electricorp could argue for a narrower meaning to be given to "natural justice" so that the remedies issue is never reached due to lack of an established breach. Setting *NZFP Pulp and Paper* to one side as an aberrant case, since most other cases accept that natural justice is limited to "procedural impropriety",[175] section 27(1) specifically uses the term "natural justice" as opposed to "the principles of fundamental

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171 DM Paciocco "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in DM Paciocco and PT Rishworth (eds) *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Pub No 32, Auckland 1992) 40.

172 Above n 171, 41-42.

173 (1990-92) 1 NZBORR 185, 190.

174 This is the optimum solution some commentators have suggested to overcome the problems of allowing public decisionmakers to raise legitimate expectations without risk of any sanctions when these are breached. See, for example, P Finn and KJ Smith "The Citizen, the Government and 'Reasonable Expectations'" (1992) 66 ALJ 139.

175 In *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, 411, this was one of Lord Diplock's three-fold categorisation of errors subject to judicial review.

justice," which is used in section 8 of the BORA. "Fundamental justice" is used in section 7 of the Canadian Charter on Rights and Freedoms, and the Canadian Supreme Court, in latterly interpreting those words as substantive fairness, has expressly stated that it has adopted this interpretation only because the legislators could easily have used the expression "natural justice," but they chose not to do so. Lamar J concluded that "we must, as a general rule, be loathe to exchange the terms actually used with the terms so obviously avoided."[176] Similarly, the use in section 8 of the NZ BORA of consistency with "the principles of fundamental justice," but not in section 27(1), signals that natural justice is to be limited to procedural matters.[177]

Furthermore, as Richardson J concluded in *Petrocorp*, "I cannot discern *any basis under the statutory scheme* for an argument that the appellants had a legitimate expectation that the Minister would not deliberately withhold from them any indication that he was proposing to exercise his powers under section 36 in that way and would give them an opportunity to be heard before doing so."[178] Since the breadth of section 36 of the Petroleum Act made the Minister the sole determinant of the national interest, it was difficult to argue, consistent with parliamentary intention, that he had to give notice of his intention to act in that way in respect of an unlicensed area. Richardson J also stated that "[t]here is no evidence to support a conclusion that as a matter of Government policy or practice the Minister would follow a consultative process before exercising his powers under section 36 (or section 20 or section 5)."[179] Similarly, it could be argued here that Electricorp was not required to follow any process of consultation prior to terminating the agreement.

(b) A right to negotiate a price on a particular basis?

AEPB could further argue that natural justice under section 27(1) can be interpreted to include the right to negotiate a price based on the regime provided under the 1988 agreement.[180] In response, Electricorp could argue that such an interpretation of section 27(1) would go beyond the BORA's purpose to protect fundamental civil and political rights. The courts are being asked to undertake economic regulation for the applicant's economic advantage. It could draw on the court's reasoning given in *Wellington International Airport Ltd* v *Air New Zealand*,[181] for rejecting a very similar argument made by the applicants for "the opportunity to negotiate a level of charges that ensured

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176 *Reference re Section 94(2) of the Motor Vehicle Act (BC)* [1985] 2 SCR 486, 503.

177 It is difficult to obtain guidance in interpreting natural justice from international sources due to the unique wording of s 27(1) of the BORA. Cf s 27(1) with article 14(1) of the ICCPR: "fair and public hearing;" article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "fair hearing."

178 Above n 72, 48.

179 Above n 72, 48.

180 Above n 4, 10.

181 [1993] 1 NZLR 671, 676. See further R Fardell and M Scholtens "Administrative Law in a Deregulated Economy: Commercial Interests and Governmental Powers" New Zealand Law Society Seminar, November 1993, 2-12.

that the monopoly position which the [Crown] company occupied was not being abused."

This case concerned a dispute over landing fees for aircraft set by the Wellington Airport company, a Crown company, which is a natural monopoly airport authority. The company was empowered to set the fees under section 4(2) of this Act "after consultation with airlines which use the airport." At first instance, McGechan J accepted that the company had failed on the facts to consult adequately with the airlines before fixing the charges, but this decision was reversed on appeal. The Court of Appeal accepted a submission that one of the purposes of consultation was to place "some restraint" on the exercise of monopoly power, and that to enable the airlines to "make intelligent and useful responses," they must be given sufficient information to be adequately informed. However, this process was *conceptually different* from the negotiation of an agreement.[182]

How the Privy Council will respond to these arguments, or any others brought on the basis of the BORA, is difficult to determine since it has yet to pronounce on a BORA case, and we cannot presume that it will adopt a narrow approach to judicial scrutiny under the BORA, as it has to judicial review under the JAA. The purpose of a Bill of Rights is completely different, and even New Zealand judges who have adopted a restrictive approach to judicial review have espoused a much broader approach to the BORA.

VI CONCLUSION

The *ECNZ* decision brought the determination of "statutory power" firmly back to the basis of statutory *source* of power. It also limited the ability to subject the commercial decisions of SOEs to judicial review. However the potential for the courts to use the BORA to subject the decisions of corporatised, and maybe, privatised enterprises to judicial scrutiny akin to economic regulation has redrawn the battle lines in the debate over the appropriate scope of judicial review of SOE decisions. Those who have argued for expansive judicial review of the decisions of such enterprises due to the reality of the public power they exercise, regardless of the status of the body, could use the BORA to redress what they see as the abdication of responsibility by politicians implementing an economic policy of minimalist government. Others would argue that the reconfiguration of the state, of which corporatisation is a part, and the new emphasis on individual responsibility, should be reflected in a reduced role for courts. The BORA was enacted to protect fundamental rights and freedoms, not to subject such enterprises to economic regulation.

Parliament's clear intention in the BORA is for the courts to champion the protection of individual liberties. This requires the courts to walk a difficult middle line concerning the decisions of corporatised enterprises. Although it is appropriate for the courts to subject such decisions to review where they unduly restrict rights and freedoms

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182 *Wellington International Airport Ltd* case, 676. See further R Fardell and M Scholtens, above n 181, 13-22.

under the BORA, it will be necessary to ensure that such scrutiny does not become broad-ranging economic regulation. This was not the intention of the framers of the BORA, and it is arguable that the courts are not well suited to performing such a regulatory function given the commercial judgment and economic assessments of efficiency and profit margins that would have to be made. Furthermore, any regulation imposed by the court would be piecemeal, being confined to those enterprises whose decisions breach rights under the BORA.

Judicial scrutiny under the BORA would extend beyond the scope of common law duties on monopoly suppliers of essential commodities, since the BORA applies to all bodies unlawfully restricting rights under the Act, even if they are not monopoly suppliers. Section 5 of the BORA may allow the courts to determine what is a fair price for a commodity, and the BORA may require such enterprises to grant natural justice before making decisions under section 27(1) of the BORA. This is not required under the common law duties on monopoly suppliers of essential commodities. It is on this basis that the decision in *ECNZ* may be able to be challenged under the BORA, and this reflects the greater potential for subjecting the decisions of SOEs to judicial scrutiny under the BORA.

The Court of Appeal may have sought (subject to appeal) to close a door to the judicial review of SOE decisions in the decision of *ECNZ*, but the BORA has opened a bigger one. These developments render the issues of accountability and the appropriate scope of judicial review more important than ever before.