

# **The Judicial Approach to Privative Provisions in New Zealand**

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## ***Introduction***

The capacity of individuals to scrutinise governmental action and challenge abuses of executive power has been described as a non-negotiable pre-requisite of a civilised and democratic society.<sup>1</sup> Judicial review is the conventional means by which this pre-requisite is satisfied. Yet ever since the principles of review began to develop in the seventeenth century, the legislature has attempted to prevent their application through privative legislative provisions designed to oust the courts' supervisory jurisdiction.<sup>2</sup> Such attempts have, historically, been met with judicial wariness. The judiciary has traditionally restricted the effect of legislation that, on its face, appeared to limit or exclude judicial review. However, recent decisions might be taken as suggesting that this restrictive approach is easing.<sup>3</sup> It has been suggested that the courts are increasingly willing to give literal effect to privative provisions, especially those enacted in the past thirty years.<sup>4</sup>

This paper examines the extent to which this claim is true, and gives an account of the reasons why. An examination of the past is necessary if a clear picture is to be given of the ways in which the judicial approach is shifting. Given this, the first third of the paper presents an analysis of the historical judicial approach to privative provisions. From the beginning of the twentieth century, the efficacy or otherwise of such provisions was shaped by the judiciary's rule of law concerns, rather than being determined by either statutory wording or exogenously determined common law principles. Chapter I shows that in the first half of the twentieth century privative provisions were denied most, if not all, practical effect. Chapter II demonstrates that when judicial review evolved in such a way that privative provisions might have begun to have more effect, the judiciary responded by reworking their common law structures to prevent this from happening.

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<sup>1</sup> Mark Elliot *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001) at 2.

<sup>2</sup> Paul Craig *Administrative Law* (6<sup>th</sup> ed, Sweet & Maxwell, London, 2008) at [27-001].

<sup>3</sup> See, for instance, *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

<sup>4</sup> Graham Taylor *Judicial Review: A New Zealand Perspective* (3<sup>rd</sup> ed, LexisNexis NZ, Wellington, 2014) at [2.61].

The same judicial values are evident in contemporary reasoning. However, it is true that, generally speaking, privative provisions have increasingly been taken to mean what they say. This apparent contradiction is explained by the fact that, compared to their historical counterparts, modern provisions say very different things and speak in a very different context. Administrative reform and the increasing provision of appeal routes by which decision-making can be challenged have diminished the role that judicial review is required to play in ensuring the legality of administrative decision-making. Chapter III shows that this underpins the judicial willingness to interpret modern privative provisions literally. However, a reluctance to accept appeal rights as a complete substitute for review is evident in judicial reasoning. Chapter III explores this idea.

Chapter IV examines the conceptual basis of the contemporary approach. The acceptance of modern privative provisions entails a movement away from nullity-based reasoning - the common law approach that was historically used to justify denying privative provisions effect. Despite this, and although the concepts it was premised on are now outdated, nullity-based reasoning persists. The contemporary approach therefore lacks theoretical coherence. As Chapter V shows, this creates problematic uncertainty. The nature of the present approach makes it impossible to state the exact extent to which the legislature is presently able to exclude the superior courts' oversight of administrative action. Chapter V also considers whether a more certain conceptual basis might be posited, and some observations are offered on the prevailing judicial approach to those provisions that purport to exclude the courts' supervision of administrative decision-making entirely.

## *I The Historical Approach to Privative Provisions*

### *A. Common Law Concepts*

In the first half of the twentieth century the judiciary approached privative provisions equipped with a conceptual structure derived from the common law of decision-making. At the forefront of this was a strong theory of jurisdiction. At issue in *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* was s 96(2) of the Industrial Conciliation and Arbitration Act 1908, which provided that:<sup>5</sup>

Proceedings in the Court [of Arbitration] shall not... be removable to any Court by certiorari or otherwise... and no order... shall be liable to be challenged, appealed against, reviewed, quashed, or called into question by any Court of judicature on any account whatsoever.

Salmond J considered it to be settled law that the taking-away of certiorari did not extend to certiorari to quash on the ground of want or excess of jurisdiction.<sup>6</sup> The relevant legislation conferred upon the Court of Arbitration the jurisdiction to settle and determine industrial disputes. Thus, the effectiveness of s 96(2) turned on whether the Court's award that was in question could properly be considered as relating to industrial matters.<sup>7</sup> It could, and therefore review was precluded. The opposite outcome was reached in *Re Otago Clerical Workers' Award: Otago and Southland Stock and Station Agents' Clerical Employees' Trade Union v Otago Clerical Workers' Industrial Union of Workers*.<sup>8</sup> In that case the Court of Arbitration had misconstrued the term "industry" and as such, purported to make an award to an "industry" which did not exist. In doing so it had acted without jurisdiction, and a

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<sup>5</sup> *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC).

<sup>6</sup> At 702.

<sup>7</sup> At 710.

<sup>8</sup> *Re Otago Clerical Workers' Award: Otago and Southland Stock and Station Agents' Clerical Employees' Trade Union v Otago Clerical Workers' Industrial Union of Workers* [1937] NZLR 578 (CA).

provision identical to s 96(2) did not prevent a writ of certiorari issuing to quash the award.<sup>9</sup>

There were logical extensions of the jurisdictional-focused approach. Provisions seeking to exclude review of non-jurisdictional errors only were not subjected to restrictive interpretations, and were instead given literal effect.<sup>10</sup> In addition, the judiciary asserted that privative provisions would not protect decisions vitiated by bias.<sup>11</sup> This, too, makes sense in terms of jurisdictional theory: a biased judge would not be a judge at all, and thus proceedings would be *coram non iudice*.

However, jurisdiction was not the exclusive principle applied by the judiciary. At issue in *Re Taraire Block No 1 J No 2* was a succession order of the Native Land Court that had been obtained by fraud on the part of the party who had applied for it.<sup>12</sup> Hosking J considered that “notwithstanding the conclusiveness which the general law attributes to the judgments of all Courts, fraud has always been regarded as an invalidating fact”.<sup>13</sup> The privative provision forbidding proceedings of the Native Land Court from being removed into the Supreme Court was, given the fraud, of no effect.

Furthermore, as parts B and C will show, the jurisdictional approach was deceptive in two ways. First, it allowed the judiciary to suggest – falsely - that there might be a clause that would entirely oust the superior courts supervision of administrative decision-making. Secondly, it gave the misleading impression that there were occasions where, but for a privative provision, the courts would review. As will be shown, the effective area of operation of such provisions was overstated.

## ***B. The Judiciary and Statutory Specifics***

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<sup>9</sup> The relevant provision was s 97 of the Industrial Conciliation and Arbitration Act 1925. For further application of the jurisdictional approach, see *Re Taraire Block No 1 J No 2* [1916] NZLR 46 (SC); *Butt v Frazer* [1929] NZLR 636 (SC); *Wright v New Zealand Woolpack and Textiles Ltd* [1948] NZLR 130 (SC).

<sup>10</sup> See *Tonga Awhikau v Werder* [1949] NZLR 590 (SC), *Manawatu-Oroua River Board v Barber* [1953] NZLR 1010 (CA).

<sup>11</sup> *Re Te Akau Block, Manu Paekau v Mair* (1907) 27 NZLR 1 (SC) at 16.

<sup>12</sup> *Re Taraire Block No 1 J No 2*, above n 9.

<sup>13</sup> *Re Taraire Block No 1 J No 2*, above n 9, at 48.



The judiciary professed that the legislature could entirely oust review if it used language “so clear and coercive as to be incapable of any other interpretation”.<sup>14</sup> In reality, this was less a requirement of clarity than a judicial device that, regardless of the actual statutory wording, could always be invoked to justify reading down the clause in question. For instance, review was not entirely excluded by seemingly unambiguous legislative phrases such as “no order... of the Native Land Court... shall be removed by certiorari or otherwise into the Supreme Court”,<sup>15</sup> and “the Appellate Court... shall be free from the interference or control of any other Court whatsoever, nor shall any proceeding... be removed... into any other Court by writ of certiorari or otherwise”.<sup>16</sup> The possibility of completely excluding review was, therefore, permanently relegated to the domain of the hypothetical.

This lack of regard for the specifics of statutory wording is evident in the way in which the judiciary reasoned from precedent during this period. Previous decisions in which courts had preferred restrictive interpretations of privative clauses were readily invoked to justify more of the same, regardless of legislative differences. In *Waterside Workers’ Federation* Herdman J relied on the Privy Council’s decision in *Colonial Bank of Australasia v Willan* for the proposition that privative clauses limited, but did not entirely oust, the supervisory jurisdiction of superior courts.<sup>17</sup> It might have been thought that the privative provision in *Waterside Workers’ Federation* and its counterpart in *Willan* differed to the extent that the relevance of the *Willan* principle might require re-examination: for instance, the provision in *Willan* used far less specific language in its purported ousting of review and, unlike the *Waterside Workers’ Federation* clause, provided for an alternative appeal process. Yet Herdman J was not concerned to examine, or even note, these differences in statutory wording. Rather, the *Willan* principle was implicitly considered to transcend legislative

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<sup>14</sup> *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer*, above n 5, at 702 per Salmond J. See also *Re Taraire Block No 1 J No 2*, above n 9, at 49 where Hosking J said of decisions vitiated by fraud: “unmistakable language would be requisite to render conclusive what the common law treats so emphatically as the mere semblance of a judgment”.

<sup>15</sup> Native Land Act 1909, s 37(1). See *Re Taraire Block No 1 J No 2*, above n 9.

<sup>16</sup> Native Land Laws Amendment Act 1895, s 59. See *Re Te Akau Block, Manu Paekau v Mair*, above n 11.

<sup>17</sup> *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer*, above n 5, at 696-697; *The Colonial Bank of Australasia v Willan* (1874) 5 LR PC 417 (PC). The legislation at issue in *Willan* was the Mining Statute 1865 (Vic). See ss 71 and 127.

specifics. This approach was not anomalous. In the same case Salmond J cited observations from the Australian High Court to the effect that the specific words used in a privative provision were unimportant, because regardless of their form they would simply be read as protecting only those matters within the decision-maker's jurisdiction.<sup>18</sup>

Even when differences in legislative context were noted, they were accorded little significance. The privative provision in *Cameron v Auckland Licensing Board* stated:<sup>19</sup>

No proceeding or decision... shall be liable to be challenged, reviewed, quashed or called into question in any Court, *but there shall be a right of appeal of the decision* to the Licensing Appeal Authority as hereinafter provided.

It might have been considered that careful analysis of the applicability or otherwise of *Waterside Workers' Federation* was required. Unlike the provision in that case, here Parliament had clearly turned its mind to the question of the Authority's accountability, and decided that the appropriate way to ensure this was not through review but instead through a specialised statutory mechanism. However, Turner J considered this to be a mere "factual distinction" which was of no importance to the application of the "settled principle of law" that he understood *Waterside Workers' Federation* to have laid down.<sup>20</sup>

### ***C. The Privative Provision's Effective Area of Operation***

The jurisdictional approach gave the impression that the privative provision had an effective area of operation. The fact that privative provisions would be of no effect when decision-makers exceeded their jurisdiction implied that such provisions *would* be given effect when the alleged error *did not* go to jurisdiction. The respective decision-makers in *Tucker v The Inhabitants of Kaiti Road District* and *Thomas v*

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<sup>18</sup> *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, above n 5, at 703. The Judge cited *Clancy v Butchers' Shop Employees' Union* (1901) 1 CLR 181 (HCA).

<sup>19</sup> *Cameron v Auckland Transport Board* [1959] NZLR 941 (SC). The provision was s 93A of the Transport Act 1949.

<sup>20</sup> At 944-945.

*Moore* had each committed procedural errors that were not considered to go to jurisdiction.<sup>21</sup> The judge in each case appeared to conclude that because the error was not jurisdictional, the privative provision applied to preclude review. The same approach was taken in *Holloway v Judge of Arbitration Court* and *Cornford and Greenwood*.<sup>22</sup> The Judges considered that if the decision-makers in question - Arbitration Court and the Adjustment Commission, respectively - had misconstrued statutory provisions as alleged, none of the errors would have gone to jurisdiction and, therefore, the relevant privative provisions would preclude the Supreme Court's interference. Indeed the judiciary asserted that so long as a decision-maker remained within jurisdiction, a privative provision would protect scrutiny of alleged errors even such they led to anomalies and results that the superior court considered "difficult to justify".<sup>23</sup>

However, the fact that privative provisions were present in these cases and review was refused does not, in itself, establish a causal nexus. Privative provisions can be described as effective only when we can accurately attribute the failure to review to them: otherwise, the possibility that the provision and inability to review were merely coincidental remains. In the cases above the judiciary clearly professed causation. Yet upon closer examination, it appears that coincidence may be the more accurate description. In *Newman Bros Ltd v Allum* the plaintiff alleged that the Transport Licensing Authority had misconstrued the legislation by which it was empowered and, as a result, erred in law in the process of issuing passenger-service licenses.<sup>24</sup> The legislation did not in any way purport to exclude judicial review. However, Myers CJ held that even if the plaintiff's allegation were accepted, certiorari would not lie. The Authority had jurisdiction to consider and grant licenses. The Judge considered that because of this, it had the authority to decide matters of fact and law for itself, and given this, the plaintiff had no remedy - even if the decision appeared to the superior court to be wrong.<sup>25</sup>

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<sup>21</sup> *Tucker v The Inhabitants of the Kaiti Road District* (1901) 20 NZLR 607 (CA); *Thomas v Moore* (1905) 26 NZLR 65 (SC).

<sup>22</sup> *Holloway v Judge of Arbitration Court* [1925] NZLR 551 (SC); *Cornford v Greenwood* [1938] NZLR 291 (SC).

<sup>23</sup> *Wilson and Horton Ltd v Hurle* [1951] NZLR 368 (CA) at 371.

<sup>24</sup> *Newman Bros Ltd v Allum* [1934] NZLR 694 (SC).

<sup>25</sup> *Newman Bros Ltd v Allum* [1934] NZLR 694 (SC) at 703.

Given that it appeared that the Judges in *Tucker*, *Thomas v Moore*, *Holloway* and *Cornford v Greenwood* would have interfered had it not been for the privative provision in each case, it seems surprising that Myers CJ considered himself unable to review the Authority's decision in *Newman Bros*. However, the *Newman Bros* approach is in fact entirely orthodox, given the narrow scope of judicial review in the first half of the twentieth century. In this period the concept of jurisdiction did not just determine whether a privative provision would be effective: it also, according to Joseph, defined the scope of judicial review generally.<sup>26</sup> The defects alleged in each of the cases considered on the previous page were errors of law that did not go to the decision-makers' jurisdiction. Since as far back as the beginning of the eighteenth century, the Court of King's Bench had been possessed of the power to scrutinise the record of proceedings in inferior tribunals for errors appearing on their face, whether or not they went to jurisdiction.<sup>27</sup> However this doctrine fell into disuse, and by the middle of twentieth century had lain dormant for the best part of a century.<sup>28</sup> It was not revived until the English Court of Appeal's decision in *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw*.<sup>29</sup> Therefore whether a privative provision was present or not, we would not necessarily have expected certiorari to issue in cases that decisions before *ex parte Shaw*: including *Tucker*, *Thomas v Moore*, *Holloway*, *Cornford v Greenwood* and *Newman Bros*. This suggests that in the first four of those cases, privative provisions appear to have been coincidental to, rather than truly causative of, the unwillingness to review.

To establish the conceptual space within which privative provisions might accurately be described as precluding review prior to *ex parte Shaw* requires the identification of types of errors that were reviewable, but capable of being protected by privative

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<sup>26</sup> Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> ed, Brookers, Wellington, 2014) at [23.4.4].

<sup>27</sup> Lord Denning recounts a history of the doctrine in *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw*, above n 27, at 346-353. See also DE Paterson *An Introduction to Administrative Law in New Zealand* (Sweet & Maxwell, Wellington, 1967) at 151-155; Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington, 2007) at [22.2.4]; HWR Wade and CF Forsyth *Administrative Law* (10<sup>th</sup> ed, Oxford University Press, Oxford, 2009) at 226-229.

<sup>28</sup> For instance in *Re Roche* (1888) 7 NZLR 206 (CA) the Court of Appeal considered itself unable to hold a decision of the Licensing Authority invalid on the basis that it was erroneous in law.

<sup>29</sup> *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw*, above n 27.

provisions. Because privative provisions did not protect jurisdictional errors, this sort of error would have had to be both reviewable and non-jurisdictional. Joseph's suggestion that only jurisdictional errors were reviewable prior to *ex parte Shaw* would appear to rule this out, but we ought to be cautious: to impose such a neat conceptual framework retrospectively risks oversimplification. Fraud on the part of a party other than the decision-maker, for instance, did not go to jurisdiction. But as has been seen, privative provisions did not protect decisions vitiated by this sort of error from judicial scrutiny.<sup>30</sup>

Paterson considered breaches of natural justice to be a ground of review separate to lack of jurisdiction (or "lack of authorisation") in his 1967 account of New Zealand administrative law. This could suggest that the errors relating to natural justice, or at least some of the principles within it, might have been considered non-jurisdictional.<sup>31</sup> However, this line of examination is less promising than it initially appears. The author's two principal subcategories of natural justice were bias and the *audi alteram partem* principle. It has already been seen that the former related to jurisdiction and would not be protected by a privative provision.<sup>32</sup> As for the latter, the author himself noted that the courts were increasingly conceiving of the latter principle as going to "authorisation" rather than constituting a conceptually separate ground of invalidity.<sup>33</sup> Regardless, empirical evidence is difficult to locate. In England, no reported cases decided whether privative provisions could effectively protect breaches of natural justice in this period.<sup>34</sup> The same appears to have been true in New Zealand.

De Smith considered an additional possibility: that privative provisions might restrict certiorari where jurisdictional defects or fraud were not manifest, or where the defect alleged was merely formal. However, he considered that in such instances, it would be difficult to make out an action regardless of the privative clause.<sup>35</sup> After all, the first half of the twentieth century lay within what Lord Denning described to as the

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<sup>30</sup> See *Re Taraire Block No 1 J No 2*, above n 9.

<sup>31</sup> Paterson, above n 27.

<sup>32</sup> *Re Te Akau Block, Manu Paekau v Mair*, above n 11.

<sup>33</sup> Paterson, above n 27, at 116, n 1. At 144-148 the author noted two other possible subcategories of natural justice: that justice must be manifestly be seen to be done, and that account must be taken only of matters of probative value. However, neither was not a certain principle but rather a possibility whose status in New Zealand, even a decade and a half after the end of the period this chapter is concerned with, was far from certain.

<sup>34</sup> SA de Smith *Judicial Review of Administrative Action* (Stevens, London, 1959) at 228.

<sup>35</sup> SA de Smith *Judicial Review of Administrative Action* (Stevens, London, 1959) at 228.

“black-out” in administrative law, during which the certiorari “did not give a remedy when inferior tribunals went wrong, but only when they went outside their jurisdiction altogether”.<sup>36</sup> We therefore ought to be sceptical as to whether privative provisions were really causative of the inability to review for non-jurisdictional procedural errors in *Tucker* and *Thomas v Moore*.<sup>37</sup>

Another possibility is that the effect of *ex parte Shaw* has been overstated. After all, the decision did not create a new ground of review but simply revived an existing jurisdiction. The judiciary had not entirely forgotten the doctrine prior to the decision.<sup>38</sup> There may have been infrequent instances where (i) a particularly careful judge recalled the existence of the disused jurisdiction; (ii) the original decision-maker had produced a speaking record; (iii) an error appeared on the face of that record and (iv) a privative provision was present. In such circumstances, a failure to review could genuinely have been attributed to the privative provision, although this author has been unable to locate any such reported case.

Furthermore, at this point, a note of caution ought to be sounded. The purpose of the analysis of this historical period is to provide a background against which the contemporary judicial approach to privative provisions can be understood. As such, this analysis is necessarily constrained, and we should refrain from drawing definitive conclusions. What can be said, however, is that it is at least difficult to identify the conceptual space within which privative provisions could have been truly effective prior to *ex parte Shaw*. Furthermore, it is even harder to locate reported cases in which we can confidently conclude that the error in question would have been reviewable but for a privative provision.

#### ***D. Normative Judicial Concerns***

If the argument advanced above is correct, it would appear that the judiciary was overstating the efficacy of privative provisions in the era prior to *ex parte Shaw*. A

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<sup>36</sup> *O'Reilly v Mackman* [1983] 2 AC 237 (HL) at 253.

<sup>37</sup> *Tucker v The Inhabitants of the Kaiti Road District*, above n 21; *Thomas v Moore*, above n 21.

<sup>38</sup> For instance in *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, above n 5, at 702 Salmond J noted that “the writ of certiorari... is used... for examining the proceedings of inferior Courts in respect of errors appearing on the face of them”.

possible explanation for this might be that doing so allowed the judiciary to maintain the appearance of constitutional legitimacy in their reasoning. Confining privative provisions to protecting non-jurisdictional errors required the courts to give away little, if any, oversight of decision-making, without making manifest the constitutional impropriety that would come with refusing to apply such provisions entirely. Often, the concept of jurisdiction veiled the normative concerns motivating this approach, but these ideas occasionally found direct expression in judgments. In *McCarthy v Grant* Gresson J referred to the “stout protection of the liberty of the subject” that the ancient writs provided.<sup>39</sup> In *Waterside Workers’ Federation* Salmond J emphasised the civil freedom and public policy implications at stake with the Supreme Court’s supervisory role.<sup>40</sup> He considered that a literal interpretation of the privative provision in question would produce a “judicial autocracy”, and produce:<sup>41</sup>

... the extraordinary result that the Arbitration Court possesses uncontrolled authority to make in any matter whatever such orders and awards as it thinks fit, in disregard of the limits of its jurisdiction, in infringement of the jurisdiction of other Courts, and in violation of the law of the land.

In some cases, these sorts of concerns could supplant jurisdictional reasoning and shape outcomes explicitly. The legislation before the Court in *Grigg v Auckland Electric-power Board* provided that one month’s notice of any action against the Board had to be provided, and further, that any such action had to commence within six months of its cause arising.<sup>42</sup> Stringer J considered that notice would not be necessary where requiring it to be given would result in an irreparable injury, such would happen if an illegally made rate were collected during the notice period.<sup>43</sup> The plaintiff in *McCarthy v Grant* had been convicted of an offence in the Magistrates’ Court after being compelled to give evidence against himself. Before the Supreme Court it was argued that provision of appeal rights implicitly ousted review of the conviction. Gresson J rejected this, concluding that certiorari and prohibition would

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<sup>39</sup> *McCarthy v Grant* [1959] NZLR 1014 (SC) at 1019.

<sup>40</sup> *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer*, above n 5, at 703.

<sup>41</sup> *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer*, above n 5, at 701.

<sup>42</sup> Auckland Electric-power Board Act 1921, s 95.

<sup>43</sup> *Grigg v Auckland Electric-power Board* [1925] NZLR 184 (SC), following *Mason v Borough of Pukekohe* [1923] NZLR 521 (SC).

lie to quash the magistrate's decision, because the error in question was so vicious and contrary to the general laws of the land that it violated fundamental principles of justice.<sup>44</sup> In each of these cases, the surmountability of statutory obstacles to accessing the courts depended not upon jurisdictional theory, but upon the type of effect that the decision would have on the individual it affected.

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<sup>44</sup> *McCarthy v Grant*, above n 39.



## ***II The Anisminic Revolution and Administrative Reform***

### ***A. Conceptual Space Within Which Privative Provisions Could Work***

Following *ex parte Shaw*, errors of law appearing on the face of the record were reviewable whether or not they went to jurisdiction.<sup>45</sup> Based on the approach to privative provisions observed in the previous chapter we would predict that when such an error did not go to jurisdiction, it could be subject to the effective protection of a privative provision. There was now clearer conceptual space in which privative provisions might prove effective, and this space expanded as the concept of the record broadened.<sup>46</sup>

The existence of this space was hinted at in *Hami Paihana v Tokerau District Maori Land Board and Others*.<sup>47</sup> The plaintiff in that case sought to quash an order of the Maori Land Court on the basis that the Court had exceeded its empowering legislation, by vesting land in a person who, it was argued, was not in fact Maori. The relevant legislation provided that no order of the Maori Land Court could be removed into the Supreme Court unless it had been made in excess of jurisdiction.<sup>48</sup> Adams J opined that no matter how wrong the Maori Land Court might have been, the Supreme Court could not interfere. Determining whether the defendant was Maori was a matter within the Maori Land Court's jurisdiction, and therefore the Supreme Court could not intervene merely on the basis that the Maori Land Court had arrived at a wrong decision.<sup>49</sup> The reasoning in *Strongman Electric Supply Co. Ltd. v Thames Valley Electric Power Board* was similar.<sup>50</sup> The relevant legislation limited review of the Land Valuation Court's decisions to jurisdictional grounds.<sup>51</sup> North P considered that "if the most the board could show was that the Valuation Court was wrong in the conclusions it reached – whether on fact or in law – but neither of the questions

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<sup>45</sup> *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw*, above n 27.

<sup>46</sup> The expansion of the concept is evident in, for instance, *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 (CA) and *Straven Services Limited v Waimari County and Another* [1966] NZLR 996 (SC). See also Wade and Forsyth, above n 27, at 228.

<sup>47</sup> *Hami Paihana v Tokerau District Maori Land Board* [1955] NZLR 314 (SC).

<sup>48</sup> Maori Land Act 1931, s 50.

<sup>49</sup> *Hami Paihana v Tokerau District Maori Land Board*, above n 47.

<sup>50</sup> *Strongman Electric Supply Co Ltd v Thames Valley Electric Power Board* [1964] NZLR 592 (CA).

<sup>51</sup> Land Valuation Court Act 1948, s 17.

touched the matter of jurisdiction, then the board was without remedy”.<sup>52</sup> In both cases, review that would otherwise have occurred seemed to be genuinely precluded by the privative provision.

### **B. *Anisminic Ltd v Foreign Compensation Commission***

However, the category of clearly reviewable-but-protectable errors was soon collapsed by the House of Lords’ decision in *Anisminic Ltd v Foreign Compensation Commission*.<sup>53</sup> Section 4(4) of the Foreign Compensation Act 1950 provided that “the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law”.<sup>54</sup> A majority of their Lordships considered that if the Commission had committed a material error of law, it would have exceeded its jurisdiction. Therefore its decision was not a “determination” within the meaning of the term in s 4(4) at all; rather, it was a nullity, to which the protection of s 4(4) would not extend.

The underlying conceptual basis of this approach – what we might term nullity-based reasoning – had commonly appeared in the earlier period. In *Re Taraira Block Hosking J* considered that “the effect of fraud upon a judgment... is that it is competent for every Court... to treat it as a nullity. It is not a judgment, but a mere semblance”.<sup>55</sup> In *Waterside Workers’ Federation* Salmond J described acts done in excess of jurisdiction as “invalid”.<sup>56</sup> *Anisminic* made this reasoning more explicit and, most significantly, expanded the category of errors that went to jurisdiction. Based on the outcome of the case, this category would now include any material error of law; and for some of their Lordships, it extended to material errors of any sort. Lord Reid thought that a purported determination would be a nullity not only when the decision-maker was not entitled to enter into the inquiry in question, had given its decision in

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<sup>52</sup> At 597. In the early 1970s it was thought that the main, and possibly only, effect of privative provisions was to exclude the court’s power to review errors of law which did not go to jurisdiction: see Public and Administrative Law Reform Committee of New Zealand *Administrative Tribunals Constitution, Procedure and Appeals (Sixth Report)* (1973) at 14.

<sup>53</sup> *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

<sup>54</sup> Foreign Compensation Act 1950, s 4(4).

<sup>55</sup> *Re Taraira Block No 1 J No 2*, above n 9, at 49.

<sup>56</sup> *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer*, above n 5, at 709.

bad faith, or had made a decision it had no power to make; but also when the decision-maker had failed to comply with the requirements of natural justice, had refused to take into account something it was required to, or had based its decision on some matter it had no right to take into account.<sup>57</sup>

The New Zealand Court of Appeal addressed *Anisminic* in *Bulk Gas Users Group v Attorney-General*.<sup>58</sup> Before exercising certain statutory powers the Secretary of Energy was required by statute to provide those with a “direct interest in the matter” an opportunity to be heard. The Users Group contended that the Secretary had misconstrued the meaning of “direct interest” in refusing their application to be heard. The Court held that the Secretary had not misconstrued the phrase. However if he had, there would have been a lack of jurisdiction in the sense recognised in *Anisminic*, and, therefore, privative legislation would not have prevented the Court from declaring his decision invalid.<sup>59</sup> This approach was followed in the High Court and confirmed in the Court of Appeal in the years that followed.<sup>60</sup> By the mid-1980s, counsel opposing an application for review would simply concede that privative provisions could not protect decisions from scrutiny for error of law, breach of the principles of natural justice, the failure to take into account irrelevant considerations, or the taking into account those that were irrelevant.<sup>61</sup> At the end of that decade, a High Court Judge went so far as to state that the proposition that a privative clause would not prevent scrutiny of an otherwise “reviewable error” hardly seemed to need authority.<sup>62</sup>

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<sup>57</sup> *Anisminic v Foreign Compensation Commission*, above n 53, at 171.

<sup>58</sup> *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA). The scope of the *Anisminic* principle had been the subject of much disagreement among the judiciary and commentators in the first decade after it was decided. For an overview, see John Smillie “Judicial Review of Administrative Action – A Pragmatic Approach” (1980) 4 Otago LR 417. For contrasting judicial takes on the decision in New Zealand, compare the restrictive approach to the *Anisminic* doctrine favoured in *Eastern (Auckland) Rugby Football Club Inc v Licensing Control Commission* [1979] 1 NZLR 367 (SC) with the expansive approach in *Paterson v Dunedin City Council* [1981] 2 NZLR 619 (HC).

<sup>59</sup> *Bulk Gas Users Group v Attorney-General*, above n 58.

<sup>60</sup> See *Mobil Oil New Zealand Ltd v Motor Spirits Licensing Appeal Authority* [1985] 5 NZAR 368 (CA); *New Zealand Railways Corporation v Deputy Transport Licensing Appeal Authority* [1983] 4 NZAR 187 (HC).

<sup>61</sup> *Martin v Attorney-General* HC Christchurch AS370/83, 12 February 1986 at 8; *Malcolm v Thompson* HC Wellington A412/85, 12 June 1986 at 14.

<sup>62</sup> *National Hydatids Council v Ward* HC Tauranga M55/88, 7 June 1989 at 1 per Thorp J.

To summarise thus far, in Chapter I it was argued that the way in which the judiciary approached privative provisions in the first half of the twentieth century meant that such provisions appear to have guarded from scrutiny very few of the sorts of errors with which the judiciary would otherwise have been concerned. As the scope of judicial review expanded, the concept of jurisdiction upon which the approach to privative provisions was based had initially remained static. For a decade and a half from *ex parte Shaw*, there had been a clearer difference between the general scope of review and types of errors that privative provisions would not protect. *Anisminic*, *Bulk Gas* and the cases that followed them erased this difference by expanding the concept of jurisdiction to cover virtually any material error.

As in the first half of the twentieth century, however, the judiciary continued to profess deference to the legislature. In *Re Racal Communications* Lord Diplock framed the application of *Anisminic* as an inquiry as to whether the decision-maker in question had been empowered by parliament to conclusively determine questions of law.<sup>63</sup> He considered that there was a presumption that administrative tribunals and authorities, as opposed to courts of law, were not so empowered.<sup>64</sup> In *Bulk Gas* Cooke J followed this approach, framing the question before the Court as whether the legislative scheme exhibited any intention on the part of the legislature to give the Secretary power to determine material errors of law conclusively.<sup>65</sup> In *Mobil Oil* the same Judge considered the Court of Appeal to be addressing “a pure question of statutory interpretation” when determining the relevant privative provision’s effect.<sup>66</sup> However in New Zealand, at least so far as administrative tribunals were concerned, this inquiry appeared largely notional: less a genuine exploration of whether the tribunal might be empowered in such a way than a justification for concluding that it

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<sup>63</sup> *Re Racal Communications Ltd* [1981] AC 374 (HL).

<sup>64</sup> At 383.

<sup>65</sup> *Bulk Gas Users Group v Attorney-General*, above n 58, at 136.

<sup>66</sup> *Mobil Oil New Zealand Ltd v Motor Spirits Licensing Appeal Authority*, above n 60, at 10. See also *O’Regan v Lousich* [1995] 2 NZLR 620 (HC) at 627: “Parliament must indicate clearly that even if a decision is ultra vires, whether for error of law, unfairness or unreasonableness it must stand because it is incapable of review. It is unlikely that Parliament will wish to give such absolute protection to a decision in spite of its being ultra vires and thus outside the decision maker’s jurisdiction; but nevertheless Parliament is sovereign and may do so if it chooses and says so clearly”.

was not.<sup>67</sup> In *Mobil Oil* neither legislative reference to the Motor Spirits Licensing Appeal Authority as a “judicial” body, nor the fact that the legal pre-requisite for membership was similar to that required to become a judge of the High Court, persuaded the Court of Appeal that Lord Diplock’s presumption had been rebutted.<sup>68</sup> The bar, if attainable at all, was certainly high: Cooke J pointed out that in *Animsinic* the Foreign Compensation Commission had not been considered empowered to determine questions of law conclusively, despite its membership being comprised of ten lawyers and a Queen’s Counsel.<sup>69</sup>

### ***C. Administrative Reform***

However, the actual and perceived role of administrative tribunals and their formal relationship with the courts would undergo significant change in the final third of the twentieth century. In 1966, the Public and Administrative Law Reform Committee of New Zealand was established to undertake the first systematic review of the subject matter for which it was named.<sup>70</sup> The Committee noted that the “modern surge of governmental activity”<sup>71</sup> had given rise to new and more frequent disputes involving both individuals and the state.<sup>72</sup> Resolving these in the ordinary courts was impractical and, as a result, the jurisdiction to adjudicate such disputes was increasingly vested in a diverse range of specialised courts and tribunals.

The Committee considered these bodies to be advantageous insofar as they offered cheap and expeditious resolution of disputes. However, it harboured serious concerns as to their constitution, procedure, and the quality of their decision-making.<sup>73</sup> There

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<sup>67</sup> It should be noted that the Privy Council did consider that a privative provision excluded the jurisdiction of the Malaysian High Court to scrutinise errors of law made by the Industrial Court within jurisdiction: *South East Asia Fire Bricks Sdn Bhd v Non Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 (PC).

<sup>68</sup> *Mobil Oil New Zealand Ltd v Motor Spirits Licensing Appeal Authority*, above n 60, at 10.  
<sup>69</sup> At 10.

<sup>70</sup> BJ Cameron “The Law Reform Committees 1966-86” (1988) 13 NZULR 123 at 129. The Committee’s initial terms of reference are set out in Public and Administrative Law Reform Committee of New Zealand *Appeals from Administrative Tribunals (First Report)* (1968) at 1.

<sup>71</sup> Public and Administrative Law Reform Committee of New Zealand, above n 70, at [5].

<sup>72</sup> At [3].

<sup>73</sup> At [13]. See also Robin Cooke “The Public and Administrative Law Reform Committee: the Early Years” (1988) 13 NZULR 150 at 152, where the author notes that the prevailing

was believed to be a deep-rooted feeling in the wider community that the justice administered by administrative tribunals was an “inferior brand of justice”.<sup>74</sup> Yet the procedures of ordinary courts were not attuned to administrative issues,<sup>75</sup> and the Committee noted that the legal profession and judges had traditionally been reluctant to engage in administrative process.<sup>76</sup>

Over the next decade the Committee made a range of recommendations to improve the membership and functioning of such administrative tribunals.<sup>77</sup> Some were general, such as the recommendation that chairmen of all appellate tribunals and, where possible, first-instance tribunals, be legally qualified.<sup>78</sup> Others were more specific: for instance, the Committee recommended that the Transport Licensing Authority ought to be given general powers to compel the attendance of witnesses and order the production of documents, in order to improve its quasi-judicial proceedings.<sup>79</sup> Many such recommendations were adopted, and the Committee’s reports released over the next decade chronicle the gradual imposition of legal order on a previously fragmented system.<sup>80</sup> In 1982 the Committee found itself re-evaluating the advantages and disadvantages of tribunals and appellate bodies.<sup>81</sup> Such bodies were no longer considered advantageous just because they were cheap, fast and accessible. They were now considered to possess advantages relating to the actual resolution of issues. They had members who possessed experience and expertise. They had the ability to develop and adopt consistent policies, as well as to respond to changing circumstances.<sup>82</sup> Furthermore, it could no longer be said that the legal profession was uninterested in the administrative process. One of the original Committee members now sat on the Court of Appeal, had given the leading judgment

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concern was that “there was an important area of adjudication that was not assigned to those who in theory should be the best judges”.

<sup>74</sup> Public and Administrative Law Reform Committee of New Zealand, above n 70, at [19].

<sup>75</sup> Cooke, above n 73, at 151.

<sup>76</sup> Public and Administrative Law Reform Committee of New Zealand, above n 70, at [11].

<sup>77</sup> See attached bibliography for the relevant Reports.

<sup>78</sup> Public and Administrative Law Reform Committee of New Zealand, above n 70, at [42].

<sup>79</sup> At [65].

<sup>80</sup> Half a decade after its establishment the Committee reported increasing acceptance on the part of most departments of state of their principles regarding constitution and procedures of administrative tribunals. Public and Administrative Law Reform Committee of New Zealand *Administrative Tribunals: Constitution, Procedure and Appeals (Fifth Report)* (1972) at [14].

<sup>81</sup> Public and Administrative Law Reform Committee of New Zealand *Appeals on Questions of Law (Sixteenth Report)* (1982).

<sup>82</sup> At 3-4.

in *Bulk Gas*, and would contribute significantly to the development of administrative law in New Zealand throughout his career.<sup>83</sup>

But despite improvements to the quality of the administrative process, the Committee considered that the principle that questions of law should be able to be taken to the High Court, as opposed to being finally determined by tribunals, remained “one of the basic assumptions of our legal system”.<sup>84</sup> As such, the Committee recommended the provision of rights to appeal on questions of law from all administrative tribunals to the Supreme Court.<sup>85</sup> This recommendation was widely implemented. In 1965, the Supreme Court had jurisdiction to hear appeals on points of law from nine first instance or appellate tribunals,<sup>86</sup> by 1980, this number had grown to 46.<sup>87</sup> The Committee also considered that judicial review of administrative action should remain generally available. It recommended abolishing almost all privative provisions,<sup>88</sup> and the creation of a procedurally simple legislative route of attaining judicial review.<sup>89</sup> From the latter recommendation came the Judicature Amendment Act 1972. In keeping with the Committee’s recommendations,<sup>90</sup> the Act provided that review would remain available notwithstanding the provision of statutory appeal rights.<sup>91</sup>

#### ***D. The Implications of Administrative Reform for Judicial Review***

Generally speaking, the Committee had advocated for three things: better administrative decision-making, the provision of statutory rights of appeal from administrative tribunals to the superior courts on questions of law, and the blanket

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<sup>83</sup> Robin Cooke, as he then was, had been a member of the Committee from 1966 until his resignation in 1972 upon being appointed to the Supreme Court bench. See Public and Administrative Law Reform Committee of New Zealand, above n 52, at [13].

<sup>84</sup> Public and Administrative Law Reform Committee of New Zealand, above n 81, at [1].

<sup>85</sup> At [20] and [31].

<sup>86</sup> Department of Justice *The Citizen and Power: Administrative Tribunals – A Survey* (Wellington, 1965) at 43-47.

<sup>87</sup> Public and Administrative Law Reform Committee of New Zealand *Fifteenth Report* (1980) at 55.

<sup>88</sup> Public and Administrative Law Reform Committee of New Zealand, above n 52, at [43].

<sup>89</sup> Public and Administrative Law Reform Committee of New Zealand *Administrative Tribunals: Constitution, Procedure and Appeals (Fourth Report)* (1971). A draft Bill of such a legislative route was set out at as an appendix to the Fifth Report: See Public and Administrative Law Reform Committee of New Zealand, above n 80.

<sup>90</sup> Public and Administrative Law Reform Committee of New Zealand, above n 89, at [27].

<sup>91</sup> Judicature Amendment Act 1972, s 4(1).

availability of judicial review of administrative action. In the abstract, none of these recommendations competed. But in practice, achieving either the first or the second might lessen the importance of the third. First, the more court-like a quasi-judicial body became or was perceived to be, the less strongly Lord Diplock's presumption would be raised. In New Zealand the Magistrates' Courts were replaced by the District Courts in the 1980s, and the change was more than nominal. In *Attorney-General v Coghill* McGechan J considered that the Magistrates Court had been "much inferior in status" and that with the transition to District Courts there had been "a considerable improvement not only in... formal jurisdiction, but in perceptions".<sup>92</sup> This was evident the following year in *Single v District Court*.<sup>93</sup> In that case the respondent sought to strike out proceedings seeking judicial review of a District Court judge's decision in relation to a local government election inquiry. The relevant legislation provided that "every determination or order... shall be final and conclusive, and no such determination or order shall be removed by certiorari or otherwise into the [High Court]".<sup>94</sup> Neazor J rejected an analogy with *Bulk Gas* on the basis that that case had concerned the decision of an administrative tribunal, rather than an inferior Court. On the strength of this distinction and the evident legislative policy of resolving electoral complaints speedily, Neazor J concluded that the statute barred review proceedings from being brought to scrutinise the District Court judge's decisions on questions of law.<sup>95</sup>

Secondly, the availability of routes by which to appeal decisions might lessen the importance of being able to review them. In the historical era statutory appeal routes to the superior courts had been provided only infrequently. Judicial review – as an exercise of the courts' inherent jurisdiction, rather than a creature of statute – was the default means by which the superior courts would supervise administrative decision-making. In that era, Lord Diplock's presumption against decision-makers being entitled to answer questions of law conclusively had been a sort of shorthand for a presumption of the availability of review. But if the judiciary viewed appeal as a substitute for review then, as appeal routes were increasingly provided for, then Lord

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<sup>92</sup> *Attorney-General v Coghill* HC Wellington CP484/93, 15 April 1994 at 52.

<sup>93</sup> *Single v District Court of New Zealand* HC Napier CP 22-93, 23 August 1993.

<sup>94</sup> Local Elections and Polls Act 1976, s 108.

<sup>95</sup> *Single v District Court of New Zealand*, above n 93, at 9.



Diplock's presumption would cease to have the de facto meaning described above. Whether it would do so or not would depend on whether the judiciary valued oversight of administrative decision-making as a general end, or judicial review as a more specific means of achieving this.

### ***III Restricted Review: Modern Privative Provisions***

In Chapter II it was proposed that although the effect of *Anisminic* was to deny privative provisions any practical effect, administrative reform and the increasing provision of appeal routes created conditions in which the relative utility of judicial review might be diminished. This Chapter examines contemporary judicial reasoning and concludes that this is indeed what has happened. The nature of modern privative provisions is such that, at least in the contexts considered, the role judicial review needs to play in ensuring oversight of administrative decision-making has waned. As such, there is less need to read down these modern provisions.

This Chapter begins with a case study of the provisions that purported to protect decisions of New Zealand's specialist labour courts across the twentieth century. Generally speaking, the judiciary became more willing to interpret those provisions literally as time passed. As the sorts of changes that the Public and Administrative Law Reform Committee were implemented, interpreting modern provisions literally posed less of a threat to the rule of law values that continue to orient the judiciary. An analysis of judicial reasoning suggests that this reason - rather than increasing deference to the legislature or a weakening of the values by which the judiciary is motivated - explains the trend toward literal interpretations.

The focus then turns to the judicial approach to modern privative provisions in other contemporary decision-making contexts: accident compensation, immigration, and taxation. The same rule of law concerns are evident in each. Those clauses that purport to exclude judicial oversight of administrative decision-making entirely are comparatively rare, and will be considered in Chapter IV. The focus of this Chapter, however, is to consider the question that more commonly arises with modern provisions: whether judicial review might remain available despite the applicant having statutory rights of some sort. For the most part, the judiciary is willing to accept appeal as a substitute for review. It is suggested, however, that review retains a residual value that the judiciary are reluctant to relinquish.

#### ***A. The Specialist Labour Courts: a Case Study***

## 1. Evolution over the twentieth century

The specialist labour courts have taken on a distinctly more legal appearance over time. The Court of Arbitration historically consisted of a judge and two lay-members.<sup>96</sup> From the 1970s the number of legally-qualified judges required increased to three.<sup>97</sup> In the following decade lay-members ceased to be fulltime members of the Court,<sup>98</sup> and in the 1990s they were removed entirely from the Employment Court, as it was now named.<sup>99</sup> Over the same period, appeal rights were increasingly provided for and the legislative restrictions on judicial review were eased. From 1894, the legislature had purported to entirely exclude review of the Court of Arbitration.<sup>100</sup> As has been seen, this was ineffective in preventing review for jurisdictional errors.<sup>101</sup> From 1954, a judge from the Court of Arbitration was able to state questions of law for the Court of Appeal, although parties themselves had no general right of appeal.<sup>102</sup> In 1973 the provisions restricting review were updated to reflect the reality of the prevailing judicial approach. The legislation now precluded review of decisions of the Industrial Court, as it now was, except on the ground of lack of jurisdiction.<sup>103</sup>

In 1976 the Court of Appeal, when considering the 1954 Act, indicated that the effect of *Anisminic* would be to considerably restrict the protection of decisions afforded by privative provisions.<sup>104</sup> The legislative response was to pass legislation in 1977 that defined precisely the scope of the jurisdictional exception to the provision restricting review. The Arbitration Court, as it was now called, would suffer from a lack of jurisdiction only in three circumstances: when it was not entitled to enter into the

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<sup>96</sup> See Industrial Conciliation and Arbitration Act 1894, s 48; Industrial Relations Act 1908, s 64(2); Industrial Relations Act 1954, s 18(1) and Industrial Relations Act 1973, s 37.

<sup>97</sup> Industrial Relations Amendment Act 1977, s 33.

<sup>98</sup> Labour Relations Act 1987, s 285.

<sup>99</sup> Employment Contracts Act 1991, s 110. See also Employment Relations Act 2000, s 197.

<sup>100</sup> Industrial Conciliation and Arbitration Act 1894, s 72; Industrial Conciliation and Arbitration Act 1908, s 96(2).

<sup>101</sup> *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, above n 5; *Re: Otago Clerical Workers' Award*, above n 8.

<sup>102</sup> *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, above n 5.

<sup>103</sup> Industrial Relations Act 1973, s 26(4).

<sup>104</sup> *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] NZLR 283, per Richmond J at 295 and Cooke P at 301.

inquiry in question; when its decision, award or order was outside the class of decisions, awards or orders that it could make; or when it acted in bad faith.<sup>105</sup> This was counterbalanced by a newly created statutory right of appeal. Parties could appeal to the Court of Appeal on questions of law, other than decisions on the construction of an award or collective contract.<sup>106</sup> This restriction on review has remained materially equivalent in the modern successors to this legislation, although there has been a narrow expansion in the scope of appeal rights.<sup>107</sup>

## 2. Modern provisions in the Court of Appeal

The equivalent privative provision came before the Court of Appeal in *New Zealand Rail Ltd v Employment Court*.<sup>108</sup> The plaintiff sought to rely on *Willan* and *Waterside Workers' Federation* to read down the privative effect of the legislation.<sup>109</sup> Cooke P, for the Court, rejected this, and instead construed the privative sections literally. He held that the legislature had clearly considered Lord Reid's speech from *Anisminic* and enacted the provision in question specifically to ensure that review was to be available for some, but not all, of the grounds that his Lordship had canvassed.<sup>110</sup>

This approach seems surprising given the lack of regard for statutory wording observed in the historical period in Chapter I. If Cooke P's approach was forced by the specificity of the statute, then perhaps the possibility of a statutory provision "so clear and coercive as to be incapable of any other interpretation" had not in fact been permanently hypothetical.<sup>111</sup> Perhaps through reference to the judiciary's own structures, legislative drafting had attained a level of undeniable specificity where the ambiguity required by the judiciary to read down privative language had been erased.

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<sup>105</sup> Industrial Relations Amendment Act 1977, s 48(7).

<sup>106</sup> Section 62A.

<sup>107</sup> The current legislation - The Employment Relations Act 2000 - provides for appeals on questions of law (s 214), against convictions or orders or sentences in respect of contempt of court (s 217), and in respect of orders made by the Employment Court on applications for review before it (s 218).

<sup>108</sup> *New Zealand Rail Ltd v Employment Court* [1995] 3 NZLR 179 (CA). The provision at issue was s 104 of the Employment Contracts Act 1991.

<sup>109</sup> *The Colonial Bank of Australasia v Willan*, above n 17; *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, above n 5.

<sup>110</sup> *New Zealand Rail Ltd v Employment Court*, above n 108 at 5.

<sup>111</sup> *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer*, above n 5, at 702 per Salmond J.

However, this account appears too simplistic. Section 193 of the Employment Relations Act 2000 - the contemporary equivalent of the privative provision that had been at issue in *New Zealand Rail Ltd* - came before the Court of Appeal in *Parker v Silver Fern Farms*.<sup>112</sup> Chambers J interpreted the restriction on review literally, as Cooke P had, and held that review for an alleged breach of natural justice was barred. However, his reasoning differed to that of Cooke P. Chambers J considered that privative provisions would normally be construed strictly. The need to do so would be lessened, he considered, when – as here – appeal rights were provided for.<sup>113</sup> He had “no doubt” that when Parliament had excluded the courts’ ability to review for breaches of natural justice, it had intended that such breaches would be picked up in the appeal right provided for in statute.<sup>114</sup> The Judge appeared to consider the scope of the appeal right to neatly offset the restrictions on judicial review. It seemed that, by one route or another, any of the errors Lord Reid had contemplated could still be judicially scrutinised.<sup>115</sup> Section 193 was interpreted literally not just because of the specificity of its wording, but because doing so would not threaten the courts’ supervisory jurisdiction.

The softening of the judicial approach to modern privative provisions is underscored by the way in which Chambers J declined to seize upon what a perfectly plausible justification for denying s 193 any effect. Section 193(1) provided:

- (1) Except on the ground of lack of jurisdiction or as provided in sections 213, 214, 217 and 218, no decision, order, or proceedings of the court are removable to any court by certiorari or otherwise, or are liable to be challenged, appealed against, review, quashed, or called in question in any court.

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<sup>112</sup> *Parker v Silver Fern Farms* [2011] NZCA 564, [2012] 1 NZLR 256.

<sup>113</sup> At [33].

<sup>114</sup> At [33].

<sup>115</sup> The one exception would be questions of law in relation to the construction of employment contracts. This exception, which is specific to the context of the employment courts and reflects a long tradition of confining such matters to the specialist court, has been treated restrictively. In *NZ University Technicians Union v Canterbury University* [1988] NZILR 1682 (CA) the Court of Appeal considered that general principles and implied terms of employment contracts were questions of law, as distinct from questions relating to the construction of the individual contracts, and were therefore proper subject matter for an appeal. See also *Bryson v Three Foot Six* [2005] NZSC 34, [2005] ERNZ 461.

Sections 214, 217 and 218 listed the grounds upon which decisions could be appealed. Section 213, however, simply provided that any person wishing to bring review proceedings had to do so in the Court of Appeal, and set out procedures for that Court to follow. As counsel for the applicant argued, on a literal reading, there was no restriction on judicial review - provided that review proceedings were brought in the Court of Appeal. Yet rather than reading down the provision, Chambers J preferred to forgive what appeared to have been a drafter's error, and held that review was excluded.<sup>116</sup> It will be recalled that the judiciary were, historically, willing to find strained ambiguities in privative provisions and to attribute intentions to parliament that were at odds with the plain wording of statutory provisions. Given this, there is an irony in the way in which Chambers J pointed out that this literal interpretation would make a nonsense of the limits Parliament had clearly intended to place on review.<sup>117</sup> The provision of appeal rights to a statutory body in the pre-administrative reform had been a mere "factual distinction" that made no difference to the interpretation of a privative provision sixty years ago.<sup>118</sup> By contrast, having the ability to appeal a decision to the superior courts now appears to make a wholly material difference to how such provisions are interpreted.

### ***B. Accident Compensation, Immigration and Taxation Decisions***

The legislature has sought to restrict judicial review of accident compensation, immigration and taxation decisions, and provided statutory procedures for challenging decisions in its place.<sup>119</sup> This part considers the way in which judges approach these provisions. Generally speaking, as with decisions of the labour court, the provision of statutory procedures has mitigated the need to read down privative provisions. These statutory rights are, for the most part, accepted as an adequate substitute for judicial review. However in some contexts, as will be seen, the judiciary considers this substitutability to be less than perfect.

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<sup>116</sup> At [41]-[47].

<sup>117</sup> At [44].

<sup>118</sup> *Cameron v Auckland Transport Board*, above n 19.

<sup>119</sup> The legislature has purported to exclude all judicial oversight of some decision making powers in the immigration context. Such provisions are considered in Chapter V.

## 1. The exclusion of judicial review

The normative judicial concerns remain constant in these contexts. The “essential constitutional requirement”, Fogarty J opined in *Liu v Immigration New Zealand*, “is that decisions of executive government should be lawful and that their lawfulness should always be subject to examination and judgment by Judges of inherent jurisdiction”. Similar sentiments are expressed in the taxation and accident compensation contexts.<sup>120</sup> However, as in the context of the labour courts, some restrictions on review do not necessarily infringe these values.

### (a) Accident compensation decisions

The Accident Compensation Act 2001 provides that claimants can apply to the Corporation for a review of decisions relating to claims.<sup>121</sup> Reviewers are appointed by the Corporation but are required by statute to act independently and to observe the principles of natural justice.<sup>122</sup> Reviewers’ decisions may be appealed on the merits to the District Court.<sup>123</sup> Decisions of the District Court may be appealed to the High Court on questions of law and, likewise, High Court decisions can be appealed on the same basis to the Court of Appeal.<sup>124</sup> All these review and appeal rights are time-restricted. Section 133(5) provides that where a person with a claim under the Act has a right to review or appeal under the statutory process, then other courts are barred from granting remedies.

Judges have been wary of allowing judicial review to circumvent s 133(5) and its predecessors. Applications for review will be denied where the applicant has not yet made use of the statutory review process, let alone brought an appeal.<sup>125</sup> Likewise, review will be unavailable when the issues the applicant seeks to raise are being

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<sup>120</sup> See *Ramsay v Wellington District Court* [2006] NZAR 135 (CA) at [29]-[30], *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 3, at [68] per Blanchard, Tipping and Gault JJ where access to the High Court to ensure the legality of decision-making was described as the “normal concern”.

<sup>121</sup> Section 134(1)(c).

<sup>122</sup> Sections 138 and 140.

<sup>123</sup> Sections 149(1)(a) and 151(3)(a).

<sup>124</sup> Sections 162 and 163.

<sup>125</sup> *Denzel v Accident Compensation Corporation* HC Wellington CP135/02, 29 October 2002.

concurrently addressed in an appeal.<sup>126</sup> Where review is sought on grounds that, but for the applicants' tardiness, could have been framed as questions of law and brought to the courts through appeal, review will also be statute-barred.<sup>127</sup>

The normative concern that access to the superior courts remains does not extend so far as to ensuring that the means by which access is attained is the most beneficial to the person seeking to challenge a decision. In *Accident Compensation Corporation v Wellington District Court* Goddard J took a dim view of the applicant seeking review in order to adduce new evidence when it would have been prevented from doing so on appeal.<sup>128</sup> Similarly in *Works Civil Construction v Accident Rehabilitation and Compensation Insurance Corporation* and *Denzel v Accident Compensation Corporation* the fact that appeal could not provide the sorts of remedies sought - a declaration of unlawfulness and injunctive relief, respectively - was not considered a reason to permit judicial review.<sup>129</sup> Thus in these cases judges were willing to consider appeal a complete substitute for review even though, from the applicant's point of view, a present appeal right was less advantageous.

### **(b) Immigration decisions**

The courts have been willing to accept procedural restrictions on judicial review. The plaintiffs in *Wang v Minister of Immigration* sought to challenge the Minister of Immigration's determination that they were liable to be deported.<sup>130</sup> The Immigration Act 2009 provided that the issuing of deportation notices could be appealed to the Immigration Protection Tribunal on the facts or humanitarian grounds.<sup>131</sup> Section 249(1) provided that:

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<sup>126</sup> *Accident Compensation Corporation v Wellington District Court* [2001] NZAR 265 (HC).

<sup>127</sup> *Works Civil Construction v Accident Rehabilitation and Compensation Insurance Corporation* [2001] 1 NZLR 721; *Spencer v Wellington District Court* HC Wellington CIV-2006-486-1601, 5 October 2007.

<sup>128</sup> *Accident Compensation Corporation v Wellington District Court*, above n 126 at [25].

<sup>129</sup> *Works Civil Construction v Accident Rehabilitation and Compensation Insurance Corporation*, above n 127; *Denzel v Accident Compensation Corporation* above n 125.

<sup>130</sup> *Wang v Minister of Immigration* [2013] NZHC 2059.

<sup>131</sup> Sections 201-208.



No review proceedings may be brought in any court in respect of a decision if the decision, or the effect of the decision, may be subject to an appeal to the Tribunal under this Act.

The plaintiffs had lodged such appeals, and also sought judicial review. Brown J noted that s 249(1) did not exclude review, but merely delayed it until the statutory process had been exhausted.<sup>132</sup> Given that this was the kind of challenge that the Tribunal could hear on appeal, s 249(1) would exclude review until such an appeal had occurred. An amended, but materially similar, version of s 249 came before the High Court in *Liu v Immigration New Zealand*.<sup>133</sup> The sort of decision triggered narrower statutory rights than in *Wang*, with appeal available only on humanitarian grounds. Liu had failed to exercise this right, believing that it would not have been effective. Instead she sought judicial review. For the same reasons as in *Wang*, review was precluded.

A more serious threat to the “essential constitutional requirement” was presented by the legislation at issue in *Phan v Minister of Immigration*.<sup>134</sup> Section 10(3) of the Immigration Act 1987 provided that:

(3) No review proceedings may be brought in any court in respect of –

...

(b) any decision by the Residence Review Board in relation to a refusal or failure to issue a visa

The legislation did provide, however, that such decisions could be appealed to the High Court on questions of law.<sup>135</sup> The applicant had sought judicial review of a decision of the Board without having exercised his appeal right. Brewer J held that the review proceedings were statute barred. The Judge gave the specificity of the statutory provision as a reason for doing so, implying that this was perhaps a case where the statutory wording was clear enough to preclude review.<sup>136</sup> Because of this,

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<sup>132</sup> At [44].

<sup>133</sup> *Liu v Immigration New Zealand* [2014] NZHC 195.

<sup>134</sup> *Phan v Minister of Immigration* [2010] NZAR 607 (HC).

<sup>135</sup> Section 115.

<sup>136</sup> At [40].

the decision has been cited as evidence of the courts giving effect to privative clauses according to the clear meaning of their words.<sup>137</sup> This emphasis on legislative specificity is surprising, insofar as the clause was generally worded and appears to be more compelling than the sorts of provisions that have always been read down. However, Brewer J's reasoning highlighted not only the legislative wording but also the normative concern about judicial supervision of administrative decision-making. The Judge cited *Anisminic* and *Bulk Gas* as "the leading authorities" for the presumption against privative provisions being interpreted to exclude the superior courts' supervisory jurisdiction.<sup>138</sup> Brewer J considered that:<sup>139</sup>

...where a statute creates appeal rights the presumption against the exclusion of review rights [will be] displaced, *at least insofar as the matters in question can be addressed through the statutory appeal process.*

The judgment dealt only with the threshold issue of the availability of review, and did not disclose the grounds on which the Board's decision was challenged. Presumably, however, the review proceedings related to the "sticking-point" on which the initial decision was disputed: namely, whether the applicant came within the criteria of a given policy regarding grants of residency.<sup>140</sup> The inference most consistent with the passage quoted above is that Brewer J considered this to be a matter that could be framed as a question of law and addressed through the statutory appeal process. Thus, it appears that review was not simply excluded by the force of statutory wording. Rather, the availability of appeal rights removed the need to construe the privative provision restrictively.

### **(c) Income tax assessments**

The Tax Administration Act 1994 provides that taxpayers may object to assessments of their income tax liability, and have such assessments reconsidered by the Commissioner of Inland Revenue.<sup>141</sup> A taxpayer who remains dissatisfied may

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<sup>137</sup> Taylor, above n 4, at [2.61].

<sup>138</sup> At [32].

<sup>139</sup> At [37], emphasis added.

<sup>140</sup> At [5].

<sup>141</sup> See Part 8.

challenge an assessment in de novo proceedings in the High Court or Taxation Review Authority.<sup>142</sup> Section 109(a) provides that other than through these two routes, “no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever”.

The Supreme Court considered these provisions in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*.<sup>143</sup> The appellant, who had failed to invoke the statutory appeal procedure, sought judicial review of the Commissioner’s assessment of its liability to income tax. The bench was divided as to how far s 109 would extend, and this split in reasoning will be returned to in Chapter III. What is important for present purposes is that the Court was unanimous in considering that the error in question was amenable to resolution via the statutory procedure, and that s 109 precluded review of it.

## **2. When judicial review remains available**

The preceding analysis has considered the circumstances in which judicial review has been excluded in the decision-making contexts concerned. Generally speaking, the judiciary has accepted exclusion of their review oversight where challenges to the decision in question can be brought within the statutory process. The flipside is that review will not be precluded where a decision is not amenable to the statutory process. The appellant in *Ramsay v Wellington District Council* had sought judicial review of an accident compensation decision.<sup>144</sup> McGrath J, for the Court of Appeal, stated that “if the perceived error or invalidity cannot be fitted within [the statutory] procedure, then the exclusion of other remedies will not apply”.<sup>145</sup> This reasoning was applied in *Re Willson*.<sup>146</sup> The applicant in that case alleged that the Corporation had failed to comply with the legislative provisions governing the statutory review process, in failing to appoint an independent reviewer and in that reviewer failing to comply with the legislatively prescribed principles by which a review was to be

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<sup>142</sup> Sections 134, 136.

<sup>143</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 3.

<sup>144</sup> *Ramsay v Wellington District Council*, above n 120.

<sup>145</sup> At [33]. See also *Accident Compensation Corporation v Wellington District Court*, above n 126, at [16]; *Liu v Immigration New Zealand*, above n 133, at [16].

<sup>146</sup> *Re Willson* HC Wellington CIV-2005-4885-1974, 22 March 2006.

conducted. Mackenzie J considered that the appeal rights created by statute were essentially a right of appeal against the merits of a decision, not a challenge to the process adopted by the reviewer. He was not satisfied, to the extent required on a strike-out application, that the legislative ouster in s 133(5) precluded review.<sup>147</sup> Judicial review of accident compensation decisions will also not be excluded when public misfeasance,<sup>148</sup> abuses of power or serious misconduct is alleged.<sup>149</sup>

Later cases have added a nuance to the *Ramsay* principle: the availability of judicial review will turn on not just whether the statutory rights are *available* but whether those rights are *effective* in the circumstances. In *Dean v Chief Executive of the Accident Compensation Corporation* the Court of Appeal held that judicial review would not be ousted when the statutory processes - despite being available in a strict sense - had “failed to deliver”.<sup>150</sup> As a result of the statutory process having “gone off the rails”, it was unclear what effective decisions had been made about Dean, what statutory review or appeal rights he had in the circumstances, and whether it was in his best interests to exercise any such rights.<sup>151</sup> The Court of Appeal concluded that in these unusual circumstances, the legislation would not bar judicial review because no effective step within the statutory process had been available. The *Dean* reasoning was employed in *Buis v Accident Compensation Corporation*.<sup>152</sup> The applicant sought judicial review of a decision of the sort that was capable of being reviewed or appealed. The statutory procedure had not been invoked within the prescribed time limits, but unlike in the cases noted above, this was not simply because of the applicant’s tardiness.<sup>153</sup> Rather, the Corporation had failed to notify Buis of the fact that it had made a decision about him, and Buis had not learned that it had done so until after the time limit on statutory review had expired. Andrews J considered that

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<sup>147</sup> At [12]-[15].

<sup>148</sup> *Accident Compensation Corporation v Wellington District Court*, above n 126, at [16].

<sup>149</sup> *Works Civil Construction Ltd v Accident Rehabilitation and Compensation Insurance Corporation*, above n 127, at [42].

<sup>150</sup> *Dean v Chief Executive of the Accident Compensation Corporation* [2007] NZCA 462, [2008] NZAR 318 at [42].

<sup>151</sup> At [40]-[42].

<sup>152</sup> *Buis v Accident Compensation Corporation* HC Auckland CIV-2007-404-4703, 2 April 2008.

<sup>153</sup> See *Works Civil Construction v Accident Rehabilitation and Compensation Insurance Corporation*, above n 127; *Spencer v Wellington District Court*, above n 127.

Buis's right of review and appeal had not been "effective and accessible", and the statutory ouster therefore did not apply.<sup>154</sup>

It will be recalled that the Judges in *Liu* and *Wang* had been unwilling to review until the prescribed statutory procedures had run their course.<sup>155</sup> However, where there are strong policy reasons for judicial intervention, the judiciary is willing to scrutinise decisions by review before statutory appeal rights even become ripe. The applicant in *McGrath v Accident Compensation Corporation* sought judicial review of a preliminary step taken en route to a substantive decision about her claim: namely, the Corporation's referral of her for a vocational independence assessment.<sup>156</sup> Miller J noted that such assessments were intrusive and carried with them potentially adverse consequences for claimants. The fact that the final decision could be challenged via the statutory procedure did not, therefore, oust the Court's jurisdiction to review the decision to refer.<sup>157</sup>

Similar reasoning was employed in the immigration context by the Court of Appeal in *Attorney-General v Zaoui*.<sup>158</sup> The respondent sought judicial review of a sort of interlocutory decision that the Inspector-General of Intelligence and Security had made, as to how he would conduct a review of a risk certificate issued in relation to Zaoui. The legislation made provision for appeal from the Inspector-General's confirmation of a risk security certificate to the Court of Appeal on points of law.<sup>159</sup> It also provided that "except on the ground of jurisdiction, no proceeding, report or finding of the Inspector-General shall be challenged, reviewed, quashed or called into question in any court".<sup>160</sup> However, the Court of Appeal rejected the Attorney-General's submission that this precluded review of the Inspector-General's steps leading to an appealable decision.

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<sup>154</sup> At [46]-[47].

<sup>155</sup> *Liu v Immigration New Zealand*, above n 133; *Wang v Minister of Immigration*, above n 130.

<sup>156</sup> *McGrath v Accident Compensation Corporation* HC Wellington CIV-2008-485-2436, 1 May 2009.

<sup>157</sup> At [23].

<sup>158</sup> *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA).

<sup>159</sup> Immigration Act 1987, s 114P.

<sup>160</sup> Inspector-General of Intelligence and Security Act 1996, s 19(9). This section was imported by s 114I(6)(b) of the Immigration Act 1987.

### *C. Appeal as an Imperfect Substitute for Review*

Earlier in this Chapter, a general judicial willingness to accept appeal as a substitute for review was observed. *McGrath* and *Zaoui* demonstrate that, in certain circumstances at least, this substitutability is less than absolute. Judicial review has a flexibility that appeal prescribed by statute lacks, and the circumstances in *Zaoui* were such that this flexibility mattered. *Zaoui*'s personal liberty and rights under international conventions were at stake,<sup>161</sup> and appeal would provide the superior courts with supervision of the Inspector-General's decision-making only once his review was complete. However, there was a risk that the whole process could miscarry en route to the appealable decision, with grave consequences, unless judicial guidance as to how the Inspector-General was to conduct his review was obtained.<sup>162</sup> As in *McGrath*, there were compelling policy reasons to intervene, and review was the means by which this could be done. *Dean* and *Buis* show that even absent such compelling policy reasons, the fact that a person affected by a decision can nominally invoke the statutory procedure to dispute it is not enough.<sup>163</sup> Rather, the practicality of making a challenge is important.

The split in the Supreme Court bench in *Tannadyce* reveals differing views on the bench to the extent to which the appeal ought to be accepted as a substitute for review.<sup>164</sup> The minority is perhaps at one end of the spectrum of judicial views that have been examined. They considered that an appeal right being available was necessary, but not sufficient, for the exclusion of review. A further question had to be asked: namely, which process better served the interests of justice.<sup>165</sup> In circumstances where the statutory procedure was not the more appropriate mechanism by which a complaint might be heard,<sup>166</sup> or would not provide superior remedies to review, the minority considered that review ought to remain available.<sup>167</sup> This approach is particularly permissive of review, and is at odds with the general judicial reluctance -

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<sup>161</sup> At [19] per Anderson P.

<sup>162</sup> *Attorney-General v Zaoui*, above n 158. At [19] per Anderson P.

<sup>163</sup> *Dean v Chief Executive of the Accident Compensation Corporation*, above n 150; *Buis v Accident Compensation Corporation*, above n 152.

<sup>164</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 3.

<sup>165</sup> At [39].

<sup>166</sup> At [15], [30] and [44].

<sup>167</sup> At [15].

as earlier observed - to allow review simply on the basis that it was the more advantageous procedure for an applicant.<sup>168</sup>

By contrast, the majority considered that so long as the statutory procedure could be practically invoked, then s 109 would operate to exclude review. Review would remain available only when a taxpayer was unable to bring a grievance within the statutory procedure.<sup>169</sup> This particularly restrictive view appears to be a product of the strong policy concerns that arise in the taxation context. The majority noted that “requiring the use of the statutory procedures removes the opportunity which the availability of judicial review would present, and has presented, for gaming the system”.<sup>170</sup> Such concerns differ across decision-making contexts. For instance, in *McGrath* Miller J noted that decisions in the accident compensation context engaged personal privacy interests in a way that taxation assessments did not.<sup>171</sup>

In addition to the factors considered in this Chapter, the willingness to accept appeal as a substitute for review might also depend on the first instance decision-maker being of a certain calibre. At issue in *Interpharma (NZ) Ltd v Commissioner of Patents* was the defendant Commissioner’s decision to approve a patent amendment.<sup>172</sup> The relevant legislation purported to exclude review except on the ground of fraud, and provided that the Commissioner’s decisions could be appealed to the High Court. This time-limited appeal right had gone unused. However, Courtney J concluded that the legislation did not empower the Commissioner to determine questions of law conclusively, and the decision was quashed.<sup>173</sup> The Commissioner’s role is somewhat anachronistic: despite fulfilling a quasi-judicial function, the Commissioner is not

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<sup>168</sup> See *Works Civil Construction v Accident Rehabilitation and Compensation Insurance Corporation*, above n 127; *Denzel v Accident Compensation Corporation*, above n 125.

<sup>169</sup> At [58]-[59].

<sup>170</sup> At [71]. For more on the way in which these concerns influence judicial reasoning in the taxation context, see Shelley Griffiths “Tax as public law” in Andrew J. Maples and Adrian J. Sawyer (eds) *Taxation Issues: Existing and Emerging* (Centre for Commercial & Corporate Law, Christchurch, 2011) 215.

<sup>171</sup> *McGrath v Accident Compensation Corporation*, above n 156, at [24].

<sup>172</sup> *Interpharma (NZ) Ltd v Commissioner of Patents* HC Auckland CIV-2010-485-506, 11 November 2011.

<sup>173</sup> At [70].

required to be legally qualified.<sup>174</sup> It may have been for this reason, therefore, that the ability to appeal was not, therefore, determinative.

This Chapter has recounted a judicial wariness to accept appeal as a complete substitute for review. However, the nature of supervision of decision-making that the two routes provide differs in ways that may still require further judicial consideration. For instance, it is unclear exactly what Chambers J's assertion that breaches of natural justice were capable of being addressed as points of law on appeal in *Parker* really entailed.<sup>175</sup> Where a decision maker is obliged to act in accordance with the principles of natural justice by statute, a failure to comply with this requirement may well constitute an error of law.<sup>176</sup> However, the Employment Court is not so obliged. Absent a statutory obligation, such breaches, if they do not lead to some other substantive error, have not traditionally been considered to amount to errors of law.<sup>177</sup> In recent times, there have been suggestions that they might.<sup>178</sup> Yet exactly how a judge would deal with a breach of natural justice that does give rise to a subsequent error as a point of law on appeal remains to be seen. Furthermore, even a de novo hearing, as is provided for in the taxation context, will not necessarily put the applicant in the same position as if review had been available. In some circumstances, at least, it has been considered that a rehearing at the ultimate decision making level is no substitute for a fair original hearing plus a fair appeal.<sup>179</sup>

#### **D. Taking Stock**

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<sup>174</sup> See Patents Act 1953, s 3.

<sup>175</sup> *Parker v Silver Fern Farms*, above n 112, at [33].

<sup>176</sup> See *Eden v Rutherford* [2010] NZCA 399.

<sup>177</sup> See, for instance, the "well established" categories of error of law set out in *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [17] and *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

<sup>178</sup> In *Accident Compensation Corporation v Wellington District Court*, above n 126, Goddard J considered at [21] that a profound procedural error such as a failure to observe the principles of natural justice would in itself amount to an error of law that was in itself capable of being addressed under the statutory process. In *Ancare New Zealand Ltd v Wyeth (NZ) Ltd* [2009] NZCA 211 the Court of Appeal considered that not all procedural errors were errors of law in themselves, but left open the possibility that *Accident Compensation Corporation v Wellington District Court* had raised.

<sup>179</sup> Compare *Leary v National Union of Vehicle Builders* [1971] Ch 34 (Ch) with *Calvin v Carr* [1980] AC 574. See also Mark Aronson, Bruce Dyer and Matthew Groves *Judicial Review of Administrative Action* (4<sup>th</sup> ed, Lawbook Company, Sydney, 2009) at 496.



The judicial reasoning considered in this chapter has certain degree of coherence to it. As the quality of administrative decision-making improved and appeal routes to the High Court were increasingly provided for, the need to read down legislation ousting review became less compelling. The judicial reasoning in each context considered suggests strongly that judicial acceptance of restrictions on review has been contingent upon the provision of alternative means by which the legality of administrative decision-making is ensured. The judiciary's strong normative concerns translate to a residual reluctance to accept appeal as a complete substitute for judicial review.

Notably absent from this account of the modern judicial approach has been an explanation of its underlying conceptual basis. The fact that statutory specifics do not necessarily compel outcomes means that the judicial approach cannot be explained simply in terms of parliamentary sovereignty. It is clear that the judiciary still interpret privative provisions in such a way as to give effect to the same rule of law values by which they continue to be motivated. However, the underlying principles which might justify this approach have not yet been considered. It was observed in Chapter II that at the time of *Anisminic* and *Bulk Gas*, the judicial reading down of privative provisions was made conceptually coherent by nullity-based reasoning.<sup>180</sup> In the next Chapter it will be shown that the explanatory power and conceptual coherence of nullity-based reasoning have waned. Yet it continues to influence judicial reasoning, making it difficult to posit a cogent theory that adequately explains the modern judicial approach.

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<sup>180</sup> *Anisminic v Foreign Compensation Commission*, above n 53; *Bulk Gas Users Group v Attorney-General*, above n 58.

## ***IV Invalid theories***

### ***A. Challenges to Nullity-based Reasoning***

Under the nullity-based reasoning observed in Chapter II, decisions vitiated by jurisdictional errors were considered nullities that fell outside the protection of privative provisions. This approach has a particular bluntness to it. According to this reasoning, review will be available whenever a jurisdictional error occurs, regardless of what the statute in question says. Yet the outcomes observed in Chapter III were not homogenous in this way. In Chapter III judges often refused to judicially review decisions affected by the very sorts of errors that, under *Anisminic* and *Bulk Gas* reasoning, would render those decisions nullities that fall outside the protection of the statute.<sup>181</sup> Furthermore, it was seen that the provision of appeal routes was a crucial factor in the judicial interpretation of privative provisions. Yet under nullity-based reasoning talk of appeals would be nonsensical. If an initial decision was in fact a nullity, then there would be nothing to appeal from. So while nullity-based reasoning and the concept of jurisdiction may have been the wedge which the judiciary initially drove through privative provisions,<sup>182</sup> they cannot account for the contemporary judicial approach to privative provisions.

#### **1. Explanatory power**

Three further pieces of evidence reinforce the claim that nullity-based reasoning has lost explanatory power. The first is that it cannot account for the judiciary interpreting literally those provisions which, as opposed to excluding review entirely, limit the time within which challenges to decisions can be brought. The respondent in *Wylie v Clutha District Council* conceded that it had erred in making planning maps that did not comply with the relevant District Plan.<sup>183</sup> However, the statutorily-prescribed time limit for challenging the Council's actions had passed. John Hansen J rejected the appellants' analogy with *Anisminic*. The Judge pointed out that here, the legislation

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<sup>181</sup> *Anisminic v Foreign Compensation Commission*, above n 53; *Bulk Gas Users Group v Attorney-General*, above n 58.

<sup>182</sup> Joseph, above n 26, at 910.

<sup>183</sup> *Wylie v Clutha District Council* HC Dunedin CIV-2004-485-1839, 29 September 2005.

provided an opportunity, albeit limited by time, within which challenges could be made. By contrast, the statute in *Anisminic* had purported to exclude challenges whatsoever.<sup>184</sup> On the basis of this distinction, the provision was instead interpreted literally and review precluded. The same approach has been taken at High Court and Court of Appeal level to similar provisions protecting decisions relating to Maori land,<sup>185</sup> fishing quota,<sup>186</sup> and immigration.<sup>187</sup>

Decisions such as *Wylie* cannot be explained by nullity-based reasoning. A purported decision which is inherently flawed in such a way that it is a legal nothing is not transformed to a legally effective decision simply by a failure to challenge it within a specified time. The judicial approach to these provisions is more readily reconciled to the account of the judicial approach given in Chapter III. As John Hansen J's reasoning emphasises, limiting the time within which review can be brought is not the same thing as excluding review entirely. Time-limited provisions pose less of a threat to the principle that the lawfulness of administrative action should always be subject to examination and judgment by the superior courts. In certain circumstances, time-limited review might represent an appropriate balance between the general judicial concern with access to the courts, and the reasons for ensuring finality of decision-making. Curiously, the *Wylie* approach is not a strictly modern development but can be traced back to the House of Lords' decision in *Smith v East Elloe Rural District Council*.<sup>188</sup> That case pre-dated, but was not overruled by, *Anisminic*.<sup>189</sup> The fact that this approach pre-dated and withstood *Anisminic*, strengthens the view that the judiciary's concern has, and continues to be, with oversight of administrative decision-making, rather than abstract theories of validity. Nullity-based reasoning is not employed with these clauses because it is not necessary to ensure judicial oversight when a statute already provided for a reasonable time in which decisions could be challenged.<sup>190</sup>

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<sup>184</sup> At [40]. This approach was confirmed in 2013 in *Protect Pauanui Inc v The Thames Coromandel District Council* [2013] NZHC 1944, [2014] NZRMA 91.

<sup>185</sup> *Coles v Miller* CA25/01, 8 November 2001.

<sup>186</sup> *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC).

<sup>187</sup> *Rajan v Minister of Immigration* [2004] NZAR 615 (CA).

<sup>188</sup> *Smith v East Elloe Rural District Council* [1956] AC 736 (HL).

<sup>189</sup> *Anisminic v Foreign Compensation Commission*, above n 53.

<sup>190</sup> It is difficult to discern a clear trend with respect to time-limited clauses in the historical era. The Supreme Court had indicated in *Tucker v The Inhabitants of the Kaiti Road District*,

Secondly, nullity-based reasoning is unable to account for the fact that the judicial discretion as to review remedies is taken seriously in the modern context.<sup>191</sup> Even absent explicit privative provisions, the provision of appeal rights is relevant to the judicial exercise of discretion. In *DFS New Zealand Ltd v New Zealand Customs Service*, Kós J considered that relief might be refused where appeal rights were “available, adequate, and more appropriate” than judicial review.<sup>192</sup> In *Wilkins v District Court at Auckland* Elias J considered that the availability of other remedies would be relevant to the exercise of the discretion, as would be the seriousness of the alleged error and “the judge’s assessment of the overall justice of the case”.<sup>193</sup> Yet according to nullity-based reasoning, decisions made in error are inherently void. The judge does not have the power to decide whether or not to put a decision to death, because the decision that is vitiated by a material error was in fact stillborn. Therefore, nullity-based reasoning cannot account for judges refusing to quash decisions made in error. Nor, because of the absence of explicit privative provisions, can deference to the legislature. There is a certain irony here. Historically, parliament’s supremacy was insisted upon by the judiciary who, in the same breath, subverted it through restrictive interpretations of privative provisions. In cases such as those discussed earlier in this paragraph, the judges would have been able, had they so wished, to uncontroversially rely on parliamentary intent to justify the availability of review by reference to s 4(1) of the Judicature Amendment Act 1972. Yet they do not because, once again, the availability of judicial review is not the end goal. Judges are, as when they interpret privative provisions, concerned with ensuring what they deem to be an appropriate level of access to the courts. Even absent privative provisions appeal will, in the right circumstances, be an adequate substitute for review.

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above n 21, at 613 that such provisions would not bar challenge of a decision made in excess of jurisdiction. However, in *Mayor, Etc of Napier v McDougall* (1912) 31 NZLR 1081 (SC) Stout CJ considered such a provision would prevent objections to the validity of the rate in question from being made out of time. English decisions took the latter approach: see, for instance, *Tutin v Northallerton Rural District Council* [1947] WN 189 (CA); *Uttoxeter Urban District Council v Clarke* [1952] 1 All ER 1318 (Ch).

<sup>191</sup> Joseph, above n 26, at [27.4.1]

<sup>192</sup> *DFS New Zealand Ltd v New Zealand Customs Service* [2012] NZHC 3279 at [56].

<sup>193</sup> *Wilkins v District Court at Auckland* (1997) 10 PRNZ 395 (HC) at 404. The failure to exercise appeal rights was a factor leading to relief being declined in *Heenan v Gore* HC Invercargill CP6/00, 1 December 2000.

Thirdly, in the taxation context the move away from nullity-based reasoning has been made explicit, if only recently. In *Westpac Banking Corp v Commissioner of Inland Revenue* and *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd*,<sup>194</sup> the Court of Appeal had considered that judicial review would remain available where what purported to be an assessment was not, in fact, an assessment. In *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* the same Court mixed and matched its theories of validity to justify maintaining both appeal routes and the availability of judicial review.<sup>195</sup> It held that the statutory bar on reviewing an “assessment” did not extend to merely purported assessments made without proper power,<sup>196</sup> yet the right to object to assessments did include these sorts of invalid assessments which had a “de facto validity” for the purposes of the objection procedure.<sup>197</sup> The majority in *Tannadyce* put an end to this approach, holding that assessments challenged as “legal nullities” would remain subject to protection by relevant privative provisions.<sup>198</sup>

## 2. Conceptual coherence

Nullity-based reasoning has lost not only explanatory power but also conceptual coherence. It depended on the “absolute” theory of invalidity, by which a jurisdictional error in a decision rendered it void *ab initio*.<sup>199</sup> Judicial review was not about judges setting aside a previously valid decision; rather, it was the process by which recognition was given to the voidness that had been there all along.<sup>200</sup> In the modern era the absolute theory has lost ground in favour of a “relative” approach that, for the most part, recognises decisions as being valid until set aside.<sup>201</sup> The conceptual supports with which the absolute theory historically cohered have, too, been eroded. If a decision affected by an error was a nullity then it followed that acts consequential to

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<sup>194</sup> *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99; *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA).

<sup>195</sup> *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA).

<sup>196</sup> At 670.

<sup>197</sup> At 671.

<sup>198</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, above n 3, at [63].

<sup>199</sup> Joseph, above n 26, at [22.10.2].

<sup>200</sup> See, for example, *Director of Public Prosecutions v Head* [1959] AC 83 (HL); *Ridge v Baldwin* [1964] AC 40 (HL); *Anisminic v Foreign Compensation Commission*, above n 53.

<sup>201</sup> See, for instance, *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) and *Martin v Ryan* [1990] 2 NZLR 209 (HC).

that initial nullity should themselves also be considered invalid.<sup>202</sup> hence why, under an absolute theory, it made sense that administrative action ought to remain open to indirect challenge in collateral proceedings.<sup>203</sup> However, the shift in the theory of validity has called into question the availability of collateral challenge.<sup>204</sup> Similarly, if a decision made in error was a legal nullity, then the decision-maker might face liability in private law for their actions. For instance, in the *Case of the Marshalsea* it was held that tortious action for trespass and false imprisonment would lie against a judge who had acted in excess of jurisdiction.<sup>205</sup> However, this liability of decision-makers has, too, been eroded over time.<sup>206</sup> Both of these shifts are indicative of a move away from thinking about decisions made in error as legal nothings. Reading down privative provisions on the basis that they do not protect nullities is unconvincing when, in judicial review more broadly, decisions made in error are no longer treated as nullities.

### ***B. The Persistence of Nullity-based Reasoning***

It might be tempting, therefore, to conclude that one way or another, nullity-based reasoning has had its day. What has been observed so far suggests that the courts have moved to an outcomes-based approach, mediated through parliamentary intention, which the judiciary suppose is to always maintain the superior courts' supervision of administrative decision-making.

However, nullity-based reasoning persists, and is employed to justify getting around restrictions on review or other proceedings when egregious errors have occurred. The defendant in *Whangarei District Council v Northern Regional Council* had purported

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<sup>202</sup> William Wade and Christopher Forsyth *Administrative Law* (9<sup>th</sup> ed, Oxford University Press, Oxford, 2004) at 281.

<sup>203</sup> See, for instance, *Director of Public Prosecutions v Head*, above n 200.

<sup>204</sup> See *Air New Zealand v Wellington International Airport* [2008] 3 NZLR 87 (HC).

<sup>205</sup> *Case of the Marshalsea* (1612) 10 Co Rep 68b, 77 ER 1027 (KB).

<sup>206</sup> Following the Court of Appeal's decision in *Harvey v Derrick* [1995] 1 NZLR 314 (CA), the total immunity from personal liability afforded to judges of superior courts at the common law has been extended to Associate Judges and District Court judges in legislation: see Judicature Amendment Act 2004, s 11; District Courts Amendment Act 2004, s 7. For an overview of judicial immunities, see Law Commission *Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick* (NZLC R37, 1990).

to create a bylaw enabling it to levy certain charges against the plaintiff.<sup>207</sup> Baragwanath J determined that the Regional Council was not in fact possessed of the statutory power it had ostensibly exercised. The relevant privative provision provided that special orders making bylaws could only be quashed if proceedings were commenced within six months, and this time period had been exceeded.<sup>208</sup> However, the Judge held that review was not ousted: the clause did not protect orders that were made under statutory powers that the Regional Council had no legal basis to exercise.<sup>209</sup> Goddard J's reasoning in *Withers v Accident Compensation Corporation* was similar.<sup>210</sup> There, the Judge accepted the submission that the privative provision protecting accident compensation decisions would not exclude review of a purported "decision" which, as a result of jurisdictional error, was in fact a nullity.<sup>211</sup>

Nullity-based reasoning was employed to take a purported decision of the same decision maker outside statutory protection in *Accident Compensation Corporation v Hawea*.<sup>212</sup> The respondent in that case had previously been convicted of fraud against the Corporation. The Corporation wrote to her, demanding repayment and advising of her right to seek statutory review. When the Corporation later commenced proceedings in the District Court seeking judgment for the balance, Hawea filed a notice of defence denying liability. The Corporation argued that she was precluded from doing by the provision barring other remedies when statutory review or appeal had not been sought. Gendall J determined that no decision relating to a claim had been made, and therefore the statutory processes had not been triggered. The Corporation could not simply purport to have made a decision that was protected by the privative provision, as the effect of the letter was nothing more than to advise Hawea of the debt.

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<sup>207</sup> *Whangarei District Council v Northern Regional Council* [1996] NZRMA 445 (HC).

<sup>208</sup> Local Government Act 1974, s 716D.

<sup>209</sup> *Whangarei District Council v Northern Regional Council*, above n 207, at 70.

<sup>210</sup> *Withers v Accident Compensation Corporation* HC Wellington CIV-2002-485-820, 9 September 2003.

<sup>211</sup> At [24]. The decision was appealed, the Court of Appeal was not required to address the effect of the privative provision: see *Withers v Accident Compensation Corporation* CA129/03, 8 June 2004 at [29].

<sup>212</sup> *Accident Compensation Corporation v Hawea* [2004] NZAR 673 (HC).

*Griffin v Gisborne District Council* is another example of nullity-base reasoning in action.<sup>213</sup> The plaintiff had been convicted under the Dog Control Act 1996 by Justices of the Peace. On appeal in the High Court it was accepted that the Justices did not have any power to either hear the charges or enter a conviction. However, it was argued that the conviction remained in effect until challenged and, given that the plaintiff had filed an appeal by way of rehearing, the High Court ought to rehear the matter on the basis of a transcript of evidence. Andrews J concluded that on the basis that the original conviction had been entered in excess of the Justices' jurisdiction, the hearing and conviction were nullities. The conviction could, therefore, simply be quashed, in what appeared to be an exercise of the Court's inherent jurisdiction.

### ***C. Conclusions***

In Chapter III it was observed that the judicial willingness to accept review as a substitute for appeal was less than absolute. The judiciary are reluctant to relinquish their review jurisdiction when the statutorily prescribed processes are not effective in the circumstances, and when strong rights concerns arise. The cases considered in this Chapter demonstrate that the nature of the error in question is also relevant to this judicial assessment of substitutability. When a particularly flagrant breach is alleged, the judiciary are unwilling to consider their review jurisdiction to be ousted.

It seems eminently sensible that privative provisions should not shield decision-makers who exercise powers that they fundamentally are not entitled to or. However, the conceptual basis for reaching these outcomes is far from robust. As has been seen, nullity-based reasoning is beset by conceptual problems and does not explain the mainstream judicial approach. What *Hawea*, *Northern Regional Council*, *Griffin*, and *Spencer* have in common is that the decision-maker in each lacked jurisdiction in the narrow, old fashioned sense. Yet the effect of *Anisminic* and *Bulk Gas* was to remove the distinction between flawed exercises of power and purported exercises of a power that did not exist.<sup>214</sup> A decision vitiated by the sort of error of law committed in *Anisminic* and contemplated in *Bulk Gas* was just as void as a decision that had

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<sup>213</sup> *Griffin v Gisborne District Council* HC Gisborne CIV-2006-416-21, 16 February 2007.

<sup>214</sup> *Anisminic v Foreign Compensation Commission*, above n 53; *Bulk Gas Users Group v Attorney-General*, above n 58.



purportedly been made a person who had never had the power to do so: as Lord Reid had opined in *Anisminic*, “there are no degrees of nullity”.<sup>215</sup> The difficulty with the cases recounted above is not just that there are no such things as nullities any more, it is also that if there were, there is no conceptual basis for distinguishing between the sorts of errors in *Northern Regional Council* and *Hawea* to those in, say, *Wylie* and *Ramsay*.<sup>216</sup> In reaching these decisions, the judges are effectively turning the conceptual clock back by half a century to the pre-*Anisminic* era.

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<sup>215</sup> *Anisminic v Foreign Compensation Commission*, above n 53, at 170.

<sup>216</sup> *Wylie v Clutha District Council*, above n 183; *Ramsay v Wellington District Council*, above n 120.

## *V      Uncertainty in the contemporary judicial approach*

### *A. Blanket Privative Provisions*

The contemporary provisions that have been considered so far purport to limit review and provide for some form of access to the courts, as opposed to ousting their supervisory jurisdiction entirely. Clauses that fall into the latter category - what we might term blanket provisions - were mostly repealed in the 1970s,<sup>217</sup> although they are still occasionally enacted.<sup>218</sup> Such provisions test the judicial reasoning observed in Chapter III. If it is true that the willingness to accept restrictions on review is conditional on the provision of appeal rights, we would expect blanket provisions to be interpreted restrictively.

Such provisions come before the courts infrequently. The applicant in *Kingsland Institute of New Zealand Ltd v Secretary of Labour* sought interim relief with respect to the decision to suspend processing applications for student visas to attend the Institute.<sup>219</sup> No right of appeal was provided, and the relevant legislation provided no review proceedings could be brought in any court.<sup>220</sup> The applicant contended that the relevant statutory power did not extend to authorising an institution-wide ban of the sort that had been imposed. Given the nature of the proceedings, Mackenzie J was not required to proffer a definitive view on the privative provision's scope. However, observing that "this Court will carefully examine the scope of a privative provision, and [such] provisions will generally be strictly construed," he did not consider the privative provision fatal to the application for interim relief.<sup>221</sup> A similar provision was considered by Duffy J in *Kaur v Ministry of Business, Innovation and Employment*, another application for interim relief.<sup>222</sup> The decision in question could

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<sup>217</sup> Taylor, above n 4, at 70.

<sup>218</sup> For example, the Canterbury Earthquake Recovery Act 2011 empowers the Minister for Canterbury Earthquake Recovery to make recommendations to the Governor-General to make Orders in Council for a range of purposes (s 71). Section 74(2) provides that such recommendations "may not be challenged, reviewed, quashed, or called into question in any court".

<sup>219</sup> *Kingsland Institute of NZ Ltd v Secretary of Labour* HC Auckland CIV-2010-404-6186, 1 October 2010.

<sup>220</sup> Immigration Act 1987, s 13BA(7).

<sup>221</sup> At [15]-[16].

<sup>222</sup> *Kaur v Ministry of Business, Innovation and Employment* [2012] NZHC 3563.

not be appealed, and the legislation provided that review proceedings could not be brought outside narrow exceptions, which were not relevant in the present case.<sup>223</sup> However, Duffy J considered that review would not be excluded in the case of fraud, corruption, bad faith, misconduct, or irrationality. This was because in such a case, “as was recognised in *Bulk Gas*, what has occurred is not a true exercise of the statutory power but is instead an act that lacks jurisdiction in the *Anisminic* sense”.<sup>224</sup>

*Kingsland* and *Kaur* indicate clearly a general judicial attitude: they suggest that blanket privative provisions will be read down. However, the extent to which this will occur is unclear. The cases might be taken as suggesting that blanket provisions will be ineffective in precluding review of only flagrant defects. The alleged error for which Mackenzie J refused to strike out review related to the scope of the power conferred, while Duffy J evidently had in mind serious impropriety on the part of the decision-maker. Based on this interpretation, these sorts of provisions might insulate from judicial scrutiny less serious errors: such as *Anisminic*-type errors of law, or breaches of the principles of natural justice. If this were true, the judicial approach to privative provisions has receded to something like that which prevailed at the time of *Hami Paihana* and *Strongman Electric Supply Co.*<sup>225</sup>

The Judges in *Northern Regional Council* and *Withers* were willing to allow review when a flagrant breach of power was alleged, even though the statute purported to oust it.<sup>226</sup> That the seriousness of the error mattered in those cases might be seen as lending support to the interpretation of *Kingsland* and *Kaur* suggested above. *Northern Regional Council* and *Withers* might suggest that nullity-based reasoning will only be invoked to read down a blanket provisions where the error in question is particularly egregious.

However, it could be argued that *Kingsland* and *Kaur* are not necessarily indicative of so conservative an approach. In the former case, Mackenzie J refused to comment on

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<sup>223</sup> Immigration Act 2009, s 97(4).

<sup>224</sup> At [71].

<sup>225</sup> *Hami Paihana v Tokerau District Maori Land Board*, above n 47; *Strongman Electric Supply Co Ltd v Thames Valley Electric Power Board* above n 50.

<sup>226</sup> *Whangarei District Council v Northern Regional Council*, above n 207; *Withers v Accident Compensation Corporation*, above n 210.

the precise scope of the provision before him or the relevance, if any, of the type of error alleged. Furthermore, the proceedings in *Kaur* were conducted in urgency, with Duffy J stressing that her views were to be taken as tentative only before an upcoming substantive fixture that, ultimately, did not transpire.<sup>227</sup> Perhaps it is because of these circumstances that the Judge's statements of principle are less than entirely clear. *Anisminic* and *Bulk Gas* were her sources for the proposition that fraud, corruption, bad faith, misconduct, or irrationality would take a decision-maker outside jurisdiction and, therefore, the protection of the privative provision. Yet the significance of those decisions was, of course, that they established that the effect of a material error of law had the same effect.<sup>228</sup>

Furthermore, if the judiciary continues to be most concerned with oversight of administrative decision-making, it might be that *Northern Regional Council* and *Withers* provide limited assistance in predicting a judicial approach to blanket provisions. In both those cases, less serious errors could be scrutinised by the superior courts without the privative provisions having to be read down: either through judicial review proceedings if brought in time (*Northern Regional Council*) or statutory review and appeal procedures (*Withers*). The fact that judges were willing to allow judicial review for flagrant breaches, in addition to the procedures already available for less serious errors, does not compel the conclusion that when no oversight at all is provided, the judicial concern will be only with flagrant breaches.

In summary, there is no singular convincing interpretation of *Kaur* and *Kingsland*. We cannot confidently state the precise extent to which the legislature is presently able to exclude the superior courts' supervision of administrative action. This is indicative of the problem at the heart of the contemporary judicial approach: the uncertainty that a lack of conceptual clarity creates.

### ***B. NZBORA as an Alternative for Structuring the Judicial Approach***

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<sup>227</sup> *Kaur v Ministry of Business, Innovation and Employment*, above n 222, at [3].

<sup>228</sup> *Anisminic v Foreign Compensation Commission*, above n 53; *Bulk Gas Users Group v Attorney-General*, above n 58.

Given this uncertainty, it is worth considering whether the contemporary judicial approach might be framed in a more conceptually coherent way. The New Zealand Bill of Rights Act 1990 (NZBORA) is a potential candidate for restructuring the judicial approach. Section 27(2) provides that “every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination”. There are indications that suggest that NZBORA might fulfill this role. For instance, in *Zaoui* the Court of Appeal considered s 27(2) a justification for a review-preserving interpretation of the relevant provision.<sup>229</sup> Additionally, recent commentary suggests that the Act might provide a robust basis for reading down privative provisions. It has been said that by virtue of s 6, which provides that legislative meanings consistent with NZBORA-affirmed rights are to be preferred, “the Courts must interpret privative provisions consistently with the s 27(2) guarantee, and preserve judicial review for manifest error of law”;<sup>230</sup> and further, that “application of s 6 means that a privative clause is to be construed so as to permit judicial review unless the only meaning the provision can be given excludes judicial review”.<sup>231</sup>

However, these statements appear to be overly simplistic. The Supreme Court set out the methodology for resolving conflict between NZBORA-affirmed rights and other enactments in *Hansen v R*, a case decided more recently than *Zaoui*.<sup>232</sup> When applying the *Hansen* approach to a privative provision, the first step is to consider whether Parliament’s intended meaning is apparently inconsistent with the right to apply for judicial review. If so, the court is required to ascertain whether that inconsistency can be demonstrably justified in terms of s 5. If it can be, the inconsistency is legitimised and Parliament’s intended meaning prevails. If it cannot be, then under s 6 the court must consider whether it is reasonably possible to find meaning more consistent with s 27(2). If so, that meaning will be adopted. If a more

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<sup>229</sup> *Attorney-General v Zaoui*, above n 158, at [105] per Glazebrook J and [181] per William Young J.

<sup>230</sup> Joseph, above n 26, at 910.

<sup>231</sup> Taylor, above n 4, at [2.63].

<sup>232</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

NZBORA-consistent meaning is not reasonably possible, s 4 mandates that Parliament's intended meaning prevails.<sup>233</sup>

Although grounding the judicial approach to privative provisions in NZBORA would provide conceptual tidiness, it would not necessarily increase certainty. In determining whether limitations on the s 27(2) right are justified in terms of s 5, the judiciary would likely consider the same sorts of factors that they already consider when determining the efficacy or otherwise of a privative provision: for instance, the seriousness of the alleged breach, alternative means of challenging the decision, and so on. At the next stage, considering whether a meaning more consistent with s 27(2) is reasonably possible would likely see the judiciary entertaining the sorts of distinctions that they currently draw and that are, it has been argued, problematic. For instance, judges might have to engage in the exercise of considering how reasonably possible it is for a legislative bar on reviewing "decisions" to be given the meaning of "decisions made within jurisdiction in the pre-*Anisminic* sense".

Furthermore, and irrespective of the above assessment, it is likely that the judiciary would consider there to be disadvantages in adopting NZBORA as the basis of their approach to privative provisions. It has been seen that over the past century the judiciary have treated the availability of judicial review as a matter that they determine through their own structures, rather than something that is prescribed to them by statute. This statement is not merely euphemistic for the disregard that specific wording of privative provisions has at times been shown. For instance, as was seen, the judiciary chose not to rely on s 4(1) of the Judicature Amendment Act when it would have justified holding that, absent privative provisions, appeal rights did not oust review.<sup>234</sup> In addition, it could well be that the s 5 step of the *Hansen* test would prove more restrictive than the current judicial approach. In *Mangawhai Ratepayers' and Residents Association v Kaipara District Council (No 3)* Heath J considered that although legislation retrospectively validating the Council's unlawful rating decisions

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<sup>233</sup> See the approach set out at [92] per Tipping J.

<sup>234</sup> See the discussion of *DFS New Zealand Ltd v New Zealand Customs Service*, above n 192 and *Wilkins v District Court at Auckland*, above n 193.

was inconsistent with s 27(2), the inconsistency was not unjustified in terms of s 5.<sup>235</sup> Section 5 is not necessarily insurmountable.<sup>236</sup> However, it provides a less compelling justification for reading down privative provisions than the optimistic commentary referred to above assumes. Finally, the judiciary do not create legislation. Tying their approach to NZBORA would leave it vulnerable to being changed at the legislature's behest. However unlikely an imminent change to s 27(2) might be, the future would be out of the judiciary's hands. For these reasons, the judiciary would be unlikely to want to tie their approach to NZBORA, leaving the point moot.

In some instances, the judiciary refer to s 27(2) without engaging in the *Hansen* analysis. In *Young v Police* Randerson J considered that s 27(2) strengthened the status of the courts' judicial review powers and enhanced their constitutional standing<sup>237</sup>. In *Turners & Growers Ltd v Zespri Group Ltd (No. 2)* White J considered s 27(2) affirmed the fundamental importance of access to justice and reinforced the availability of judicial review generally<sup>238</sup>. In these cases NZBORA was not being applied to mandate certain outcomes. Section 27(2) instead assumed a sort of symbolic role. Until such a time as the courts directly address the lack of conceptual coherence in the current approach, this is likely the role that NZBORA will continue to have.

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<sup>235</sup> *Mangawhai Ratepayers' and Residents Association v Kaipara District Council (No 3)* [2014] NZHC 1147, [2014] 3 NZLR 85.

<sup>236</sup> For instance in *Spencer v Attorney-General* [2013] NZHC 2580 at [196] Winkelmann J considered if the legislation before her had the meaning contended for by the defendant – an argument that she rejected – it would have unjustifiably limited s 27(2) in terms of s 5.

<sup>237</sup> *Young v Police* [2007] 2 NZLR 382 (HC).

<sup>238</sup> *Turners & Growers Ltd v Zespri Group Ltd (No. 2)* [2010] 9 HRNZ 365 (HC)

## *Conclusion*

Judges were, and continue to be, oriented by normative rule of law concerns when approaching privative provisions. However a century's worth of case law demonstrates that constancy in judicial sentiment does not result in an unvarying approach to privative provisions. In the middle of the twentieth century, the expanding scope of judicial review put pressure on the courts to approach privative provisions more restrictively: and so they did, by expanding the concept of jurisdiction. At the beginning of the twenty-first century, administrative reform and the provision of alternative routes by which the superior courts can oversee administrative decision-making have, at least in some circumstances, rendered the role that judicial review must play in ensuring legality in the exercise of public power less crucial. Accordingly, the judicial approach to privative provisions faces pressure of the opposite sort to sixty years ago.

In the high-volume areas of accident compensation, taxation, labour and immigration, judicial review has become something of a backup to appeal, reserved for serious cases and unusual circumstances. Even when legislation does not expressly preclude the superior courts' review jurisdiction, the seriousness of alleged errors and presence of unused appeal routes are considered relevant to the judicial discretion to grant relief.<sup>239</sup> It could be, therefore, that the "normal" of judicial review has begun to shift. In the less frequent instances that *Anisminic* and *Bulk Gas* are applied directly, the judiciary are less certain and confident in applying the principles that those cases established.<sup>240</sup>

It appears likely that *Anisminic* and *Bulk Gas* represent a sort of high-water mark of the judiciary's willingness to read down privative provisions. However, the lack of conceptual clarity in the contemporary approach makes it difficult to establish just how far the tide has receded. Recent case law makes it clear that the judiciary continue to consider that some forms of errors remain further from dry ground than others, regardless of the conceptual difficulties this creates. However, a consideration

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<sup>239</sup> *Wilkins v District Court at Auckland*, above n 193.

<sup>240</sup> See the discussion of *Kaur v Ministry of Business, Innovation and Employment*, above n 222 and *Kingsland Institute of NZ Ltd v Secretary of Labour*, above n 219.



of the last century of the judicial interpretation of privative provisions suggests that if the values the judiciary hold dear are threatened too strongly, then valid conceptual basis or not, the tide of review may come flooding back in.

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