

ADMINISTRATIVE LAW

Administrative Law determines the organisation, powers and duties of administrative authorities.

Judicial Review

Definition: determination of validity by judge of HC of use of public decision making powers

Purpose 1. Safeguard rights of citizens, 2. Maintain rule of law

Process/Merits: courts do not have mandate to consider substance of decisions (*Moxon*)

1. SCOPE - issue must be amenable to JR: *must be sufficiently public in nature (actions of executive, powers derived from statute (regulations), prerogative powers)

Wide/general scope as application is contextual and this better develops with society changes

*Not amenable: national security (*CCSU*), government policy (*Curtis*), commercial decisions except fraud (*LabTest*), tied to parliamentary process (*NZMC*)

2. GROUNDS

a. Illegality decision must be made in accordance with law

Error of law: executive must act within Parliament's intention – *CHH* decision maker must get law correct (purpose > ordinary), *Peters* EL grounds for review, *Syms* occurs where stat. test incorrectly applied

Relevancy: DM required to consult all mandatory considerations (*NZFishery*), can permissible considerations (provided statutory language allows) (*Syms*), must not consider irrelevant considerations – weight for DM (*NZFishery*) + Waitangi/International obligations /BORA increasingly mandatory (*CLO*)

Error of fact: *Oggi*: an incontrovertible fact + serious + central to decision

Improper purpose: *Unison Networks*: decision invalid if application thwarts or runs counter to objective – 'but for' improper purpose, would the decision maker have made the same decision?

Failure to exercise discretion: decision of decision maker + *Syms* must not be a rigid application of predetermined policies, must not blindly follow guidelines or advice = consistency in public system

b. Procedural Impropriety/fairness decision must be fair

i. Fairness threshold: is a particular right/interest at stake = entitled look to?

Hearing rule/natural justice: those affected should have opportunity to challenge decision ↑trust system – notice, chance, oral/written, evidence of case, cross examination, merits, representation, right to appeal

1. Statutory scheme: may outline hearing rights: *CREEDNZ* must avoid purpose of scheme frustrated

2. Nature of interest: *Dag*. ↑hearing rights if affects HR, *Fraser* prejudicial inf: available+chance respond

3. Nature of decision/DM: ↑elected, ↓rights + *Dag* certain hearing rights inconsistent w admin efficiency

Legitimate expectation: consistency + consultation [*LabTest*: statutory] (notice, comment, open mind)

Bias: mindset of decision maker, degree of relationship, temporal factor [indicator: financial, relationship]

1. *Saxmere*: where fair-minded, R informed observer would R apprehend DM might not bring an impartial mind 2. *Ebner a.* outline the relationship that leads to suspicion of bias, *b.* articulate logical connection: matter and the fair deviation [degree of relationship, temporal factor etc]

c. Unreasonableness decision must be made reasonably

High threshold: *Woolworths* perverse, absurd, outrageous in defiance of logic, *Wednesbury* so UR no R authority could have ever come to it (preferable to have high threshold as can cross the P/M distinction)

Lower threshold: *Wolf* (NZHC not cited at higher court) simple UR might be okay depending on context:

↑ likely to apply when HR issue, appointed DM, decision individualised, DM process not transparent

Dependent on context: decision, decision maker, process, subject matter, importance

3. REMEDY/PROCEDURE

Common law/HC rules: extraordinary remedies, prerogative writs, applicability: publicness

Judicial Review Procedure Act 2016: streamlined + wide definition of publicness (s 5)

Relief: quash > returned (P/M), must not be author of own misfortune, relevant currently

Constitutional underpinnings

Legislative intent: JR maintained to police PS: Parliament intends for natural justice- have not leg out JR

Common law: courts role is to interpret law – fundamental principles that apply (rule of law/natural justice) courts must protect rule of law and parliamentary sovereignty by restricting executive

Themes: JR limited/2nd, P/M distinction, efficiency of public system, RoL/PS

International Law

Dualism: distinct systems, AG CA: orthodox: international obligations irrelevant > incorporated domestic

→ *Brind*: International law may act as statutory interpretation clarification

→ **Relevancy Principle:** where there is a statutory ambiguity use international law

→ **Presumption of consistency:** international obligations wording allows (*Puli'uvea*, *Zaoui*)

→ **Monism:** domestic and international law connected and integrated

**Ashby* weight given to international obligations at discretion of DM + obiter Cooke P: factor may be of

**Ashby*: weight given to int. obligations at discretion of DM + obiter Cooke P: factor may be of overwhelming importance that held Parl. could not have meant to allow it to be ignored [springbok]

**Tavita*: unincorporated international obligations are mandatory considerations some circumstances + obiter Cooke P adherence to international law more than 'window dressing' [overstayer]

International law trends: dualism>monism, weight DM, deference to PS, influence of Cooke + Keith

Non JR accountability mechanisms political v legal accountability

Methods: JR, O, OIA, RRA, Systems of Inquiry, Tribunals, IndepPoliceComplaintsA, Auditor General

Ombudsmen: Officer of Parliament, investigates any administrative decision and makes non-binding recommendation (wrong, contrary law, UR, based on mistake of fact) → referred to appropriate authority: broad jurisdiction, investigatory power (rectify, cancel, reconsider, give reasons) – if recommendation not implemented, O advise PM/House (convention: MP unanimous agreement)

Official Information Act 1982: availability unless good reason (s 5), can request citizen-person in NZ (s12) official info held by Department, Minister, Organisation (s 2): must give reasonable assistance, provide as soon as reasonably possible, refusal: good reasons – s 6 national security, s 7 special, s 9 trade secrets, s 10 confirm/deny or administrative reasons s 18 [reviewed by O – compliance]

Delegated legislation

Purpose: expertise + time + flexibility, **Risks:** asymmetry of expertise, official pursuing goal, officials view public interest differently, power private parties non democratic, delegation as political 'punt'

Control: structuring grant of discretion, JR, process requirements, legislative scrutiny, RRC

Regulations Review Committee: purpose: independent body to reign in executive power (pushing policy): examine draft/regulations, advise Bills or any matter related to regulations and report to House=investigatory power

Jurisdiction: trespass on rights, unusual use of state powers, makes rights dependent on decision≠review, excludes court, matters more appropriate for Parliamentary enactment, retrospective where not authorised by statute, not made in compliance (struck down ≠House approval)

TI TIRITI O WAITANGI

Treaty: 1. Kāwanatanga v Sovereignty, 2. Taonga v land/estates/forests + pre-emption + ti tirorangatiranga v possession, 3. Maori granted all rights/priv of British citizens, 4. Oral promises

Status for legal application: *Huakina* HC: Treaty is part of NZ society, applies where issues are covered by the Treaty, *Radio f.* Treaty part of fabric of NZ

Treaty Principles

Partnership: 1. Reasonably, 2. Good faith (*Radio f.* requires informed decision), 3. Consultation (*SOE*: no general right, may be duty in some case, should be genuine, *Forests*: must extend to truly major issues, *Radio f.* before decision, *MRP*: WT method ignored not basis for it being empty/predetermined)

Active Protection: [art 2] 1. Ascertain whether or not there is a taonga to be protected, 2. *Broadcasting* consider state of toanga and how responsible the Crown is for this, more vulnerable the greater the obligation on the Crown, consider if 'substitutable'

Redress: Crown must protect its ability to give redress (*SOE*) + 7(1)(c) existing adequate?

→ must not "materially impair" its ability to provide (*MRP*):

- assurances given by Crown,
- extent options are substantially in prospect,
- capacity Crown to provide redress,
- willingness Crown to provide redress

Caselaw = Judicial approach to principles

Huakina: Treaty relevant w/o express, ascertain principles: WT reports, Treaty text, historical context

SOE CA Cooke P: "broad/practical" interpretation, spirit matters, shackle gvt unreasonably ≠ good faith

Forests CA Cooke P: 2nd CA = GVT cannot proceed in this way, greater protection of CFLL

Broadcasting PC: Crown fulfilling Treaty obligations not a matter of policy, 'substitutable'

MRP: specific loss but success: Crown bound to comply with principles of Treaty, s 9 can be imported bringing with history/generous approach

COURTS

1. Issue statement

2. Nature of the obligation

a. Direct: + (effect)/ - (not incon)

b. Indirect: *Huakina*

3. Principle

a. requirement

b. breach

c. prejudicial effect

5. Court intervene?

a. Policy considerations

b. Crown's right govern

Judicial approach to remedies: *SOE/Forests*: ↑protection, generous

Legislative response: *SOE* WT inquiry responded with ss 9, 27, *ToW (SE)* Act 1988: binding power SE, *CFAA* 1989: binding power + CFLL cannot be disposed of unless WT made recom. under s 8HB/E

Waitangi Tribunal approach: *Restoration*: not restitution, economic/cultural wellbeing, honour Crown, relationship **Remedies**: deed > legislation: historical account, commercial, cultural redress + innovation **Advantages**: mediator, inquisitorial (fuller account), better platform to take to Crown, can issue binding rm. **Disadvantages**: cost time/resources, less options than Crown wider jurisdiction

Mangatu Forest Waitangi Tribunal *Turanga Inquiry* (new method) breach = Maori mislead (erosion control/compulsory) + historical local breaches → application for remedies hearing: existing recommendation included return of land, negotiations not broken, would not be denied remedy
Judge Clark review: negotiations ongoing, benefit → *H v WT: NZHC JR:* upheld: negotiations ongoing, circuit breaker, no recommendation under s 6(3) thus s 8HB not engaged → *H v WT: NZCA:* upheld: circuit breaker should not be inflexible → *H v WT: NZSC:* urgent remedies granted: error of law: when claim WF, WT must decide whether recommendation appropriate, when remedy sought CFLL controlling provision s 8HB (which other courts had not appreciated) [3] → *WT Mangatu RR:* binding can only be made: WF, CFLL, remedy ought to include, group identified [return to MI disproportionation /unsustainable/punishment/hard] **Critique:** restorative, deferral to C settlement, assessing interests
H v WT: NZHC 2015 appeal: 'should include' = position to make binding, 4th option, did not exercise discretion to make binding properly = error in law [irrelevant considerations]
AG v H: NZCA appeal: WF, CFL, "should", identified = s 8HB limited [3/4: can't avoid decision]

1. Issue statement

2. Jurisdiction to be heard by WT
a. s 6(1): Maori, challenge a Crown action/omission, allege Treaty inconsistency
b. WT will not inquire: historical (s6AA), not well founded (s7: vexatious, trivial), issue before House (s6(6)), claim already settled
3. Prove WF: Breach of principles = prejudice
a. requirement, **b.** breach, **c.** prejudice
4. Urgent hearing?
a. Threshold: risk of imminent "significant and irreversible" prejudice to warrant [SC]
b. Consider: size of group, if claim relates to land, if applicants have made reasonable attempts to settle, any impediments, if claimants have contributed to Crown conduct, if relates to other applications also seeking remedies hearings, if likely to make positive contribution to settlement

5. Type of recommendation [must establish WF] CFLL/WF = s 8HB

a. s 8HB: binding v non binding –become controlling
 1. Well founded
 2. Relates to CFLL + nexus [claim, prejudice, claimants, land]
 3. Remedy "should include" return → [2.5][2.6]
 4. Standing (identified, appropriate, ready)
b. 3 SC options + 4th HC option: if claim WF but no land – recommend other relief (money, other land, apology)
c. irrelevant circumstances in CFLL(SC): WT already made recommendation, multiple applicants, Crown ongoing negotiations, too hard (not function WT) **not CFLL/ WF = s 6(3)**
b. s 6(4): general v specific – specific likely where claim for specific land to remove specific prejudice
c. s 6(3): look to the 'circumstances' → [2.5][2.6]
MRR [2.5: multiple app., seriousness breach/prej, characteristics land, value, other lands might be subject to binding, terms of district settlement negotiation, circumstances: social.cultural] + [2.6: legalistic not monetary, restorative, practical, proportionate, honour]

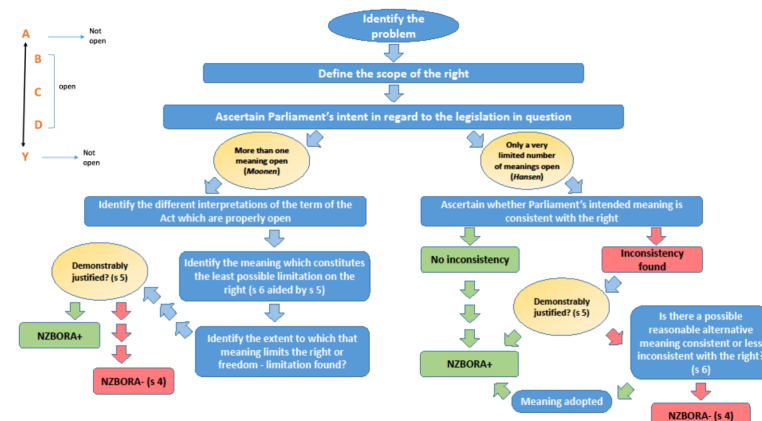
NEW ZEALAND BILL OF RIGHTS ACT 1990 (political≠social)

1. ISSUE STATEMENT

2. SECTION 3: S 3(A): EX: 'agent' (*M v PN*), LG: removal of official, SC, Sovereign/GG in legislative capacity, but *BORA 1688 speech/proceedings*, JD: rules, manner of proceedings, orders made, CJ *Lange* common law developed in light BORA → **S 3(B):** prevent gvt outsourcing, circumventing obligations: tribunals adjudicative acts, Com. Of Inquiry, HR Com., local gvt, ACC, NZPost, Housing NZ * *Ransfield*: [47] BORA applies **1. In the performance of a F/P/D by any person/body 2. Which is conferred/imposed pursuant to law, 3. Which is public** [69]: ownership/profit, statutory, gvt control, public funding, shoes gvt, public interest, analogous to state power, affecting rights of another, exercising monopolistic powers, democratically accountable → *YL v BCC*: nature/extent public function/stat duty, regulation, pay, amenable to JR irrelevant

3. RIGHTS STATEMENT: **A)** Identify BORA section, **B)** Define **Ambit** [ordinary usage/dictionary meaning + *generous (Noort)* < *purposive* (IA, language, scheme, context, ICCPR), BORA as a scheme, existing statutory/common law, ICCPR, comparative law, White Paper **C)** Subsume **facts**

4. ASCERTAIN PARLIAMENTARY INTENT TO CLAUSE: *Moonen* or *Hansen*
Moonen v FLBR 2000 NZCA Tipping J: "promotes/supports" should impinge as little as possible on FO expression = actively promote/support [spectrum = discretion] **FO expression:** wide as human thought/imagination **Difference to Hansen:** s 5 test before s 6 test, considers if Parliaments unjustified intended meaning has reasonably possible alternative that can be favoured (activist)
R v Hansen 2007 NZSC Tipping J: "proved" traditional onus v evidentiary onus: despite unjustified limitation words cannot bear alternative meaning [distinct = PS]



a. Is the limiting measure rationally connected with its purpose? (actually achieve (1.))
b. Does the limiting measure impair the right/freedom **no more than reasonably necessary** (*H Parliament intention explicit: margin of appreciation*)/ **as little interference as possible** (*M wide discretion, DM compliance*) for sufficient achievement of its purpose?

c. Is the limit in due proportion to the importance of the objective? (sledgehammer/nut)

5. SECTION 5: *prescribed by law: un/written, domestic, accessible, clearly defined ***justified in F/D society: Oakes Test** CAN: "sufficient importance to warrant overriding"

1. What is the **objective** of the provision? **2.** Does the limiting measure serve a purpose sufficiently important to **justify** curtailment of the right/freedom? (pressing societal concern) → **GO TO ABC above**
Margin of Appreciation: benefits to society > harm to individual right? *Hansen:* Courts must not sub their view – used as 'concealed leg. tool', Parliament must be entitled to have come to decision made, closer to legal end (*H*) of spectrum than political/economic the greater intensity of court review
Taylor 2017 NZCA: unjustified limit electoral– Court has jurisdiction beyond *Hansen* indication

1. Jurisdiction: constitutional to make DOI (*Hansen* courts safeguard minority rights – must indicate, Declaratory JA, effective remedy) **2. Source:** common law + BORA + ICCPR 'effective remedy' HRA s 92, HRR Tribunal can make determination (≠ floodgates, only 4) **3. Ambit:** DOI discretionary and must be exercised with restraint (ex attention, force, vindication, ICCPR)

6. SECTION 6: 1. Textual difficulty, **2.** Purpose **3.** Consequences [size of group/class affected] **4.** Tenable **5.** Legislative history **6.** Wider context

AMM and KJO 2010 NZHC: "spouses" s 3(2) Adoption Act: limit on freedom from discrim., AG claimed Parliaments intention → s 5: not justified → s 6: alternative meaning: **must be able to bear load** (⊗ intention, dictionary, scheme, post 2005 usage, chose not to reform) (⊗ definition of **purpose**, textual difficulty, marriage-like rights extension, floodgates, historic examples) → ultimate decision: child interests, even AG agrees unjustified, no respondent, AAct → no ratio on civil /same sex despite opportunity+ practical inconsistency

Section 6: danger: Court taking Parliament role s 5: interpretation ≠ right consistent, but reasonably justified (*H*), **1. 'if possible':** (*H*) properly/fairly open, **tenable 2.** Limited by s 5(1) IA * *AMM* shows you must construct something from what Parliament gives you - creative * UK version stronger "where it can" = moment of opportunity to choose to protect rights

7. IMPORT SECTION 4: cannot strike down legislation but can strike down regulations as void
Section 7: from decision not to be entrenched/supreme, ↑visibility: "appears to be" = actually "inconsistent with" = rights infringed/unjustified (↓use = ↑power), amendment conundrum (in light of existing – new)
Deficiencies: introduction, no requirement issues raised SC, no specialised SC, s 7 report not justiciable
Improvements: 2013 disclosure statement material policy changes, 2014 relevant SC considers s 7 report
Boscawen: s7 reports on parl. process = **contrary to comity** for court to review legislative process (1688)
Parliamentary Sovereignty: **Tipping J:** s 5 purpose of BORA is to prevent minority rights being overridden by oppressive majority but courts must remain true to parliamentary intention → **Cooke P:** fundamentals → **S 5 and PS: ok** – BORA not supreme, **not** – Court risk subverting intention (meanings/considerations)

Remedies: *Baigent:* Parliament must have left to courts to develop (Irish) = **compensatory, common law, modern** (including DOI: granting have regard to comity and deference + *Hansen* indication) → **UK** remedies included, NZ weaker (courts)

Judicial Review: relationship: UK JR ≠ HR reviewability > NZ disagree BORA wider scope than JR